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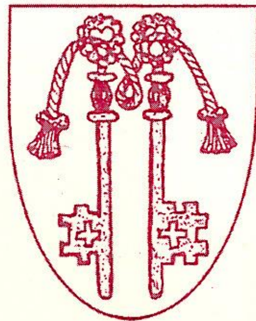
NEW SERIES 2018 VOLUME 35

AN ANNUAL REVIEW



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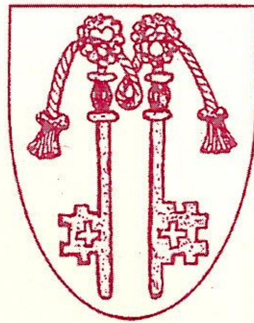

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Abbreviations

The following sigla are used without further explanation:

ACA	*Archivo de la Corona d'Aragon/Arxiu de la Corona d'Arago*
AHC	*Annuarium historiae conciliorum*
AHDE	*Anuario de Historia del Derecho español*
AHP	*Archivum historiae pontificiae*
AJLH	*American Journal of Legal History*
AKKR	*Archiv für katholisches Kirchenrecht*
ASD	*Annali di storia del diritto*
BAV	Biblioteca Apostolica Vaticana
BDHI	*Bibliothek des Deutschen Historischen Instituts in Rom*
BC	Bibliotheca/Archivio capitolare, capitular, chapter, kapitoly etc.
BEC	*Bibliothèque de l'Ecole des Chartes*
BIDR	*Bullettino dell'Istituto di Diritto Romano*
BISM	*Bullettino dell'Istituto Storico Italiano per il Medio Evo e Archivio Muratoriano*
BL	British Library
BM	Bibliothèque municipale, Stadtbibliothek, Biblioteca comune, Landesbibliothek, civica, etc.
BMCL	*Bulletin of Medieval Canon Law, New series*
BNF/BN	Bibliothèque nationale de France / Biblioteca nazionale
BSB	Bayerische Staatsbibliothek
BU	Bibliothèque universitaire, Universitätsbibliothek, Biblioteca di Università, etc.
Cat. gén.	*Catalogue général des manuscrits des bibliothèques publiques de France* (*Départements*, octavo series, unless otherwise indicated)
CC/CCL	*Corpus Christianorum/Corpus Christianorum, Series latina*
CCCM	*Corpus Christianorum, Continuatio mediaevalis*
CHR	*Catholic Historical Review*
Clavis	E. Dekkers, *Clavis patrum latinorum*, ed. 2
Clm	Codices latini monacenses-Bayerische Staatsbibliothek Munich
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, Antonello Mattone, Marco Nicola Miletti (2 vols. Bologna: Mulino, 2013)
DHEE	*Diccionario de historia eclesiástica de España*
DHGE	*Dictionnaire d'histoire et de géographie ecclésiastiques*
DMA	*Dictionary of the Middle Ages*
Du Cange	Du Cange, Favre, Henschel, *Glossarium mediae et infimae latinitatis*
EHR	*English Historical Review*
GC	*Gallia christiana*
HLF	*Histoire littéraire de la France*
HMCL 2	*The History of Medieval Canon Law in the Classical Period, 1140-1234*: *From Gratian to the Decretals of Pope Greogry IX*, edd. Wilfried Hartmann and Kenneth Pennington (Washington DC 2008)
HMCL 3	*The History of Courts and Procedure in Medieval Canon Law*, edd. Wilfried Hartmann and Kenneth Pennington (Washington DC 2016)
HQLR 1-2	*Handbuch der Quellen und Literatur der Neueren Europäische Rechtsgeschichte*, 1: *Mittelalter (1100-1500)*: *Die Gelehrten Rechte und die Gesetzgebung*, ed. Helmut Coing (Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte, München 1973-1977)
HRG	*Handwörterbuch zur deutschen Rechtsgeschichte*
HZ	*Historische Zeitschrift*
IRMAe	*Ius romanum medii aevi*
JEH	*Journal of Ecclesiastical History*
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
• Auct. ant.	Auctores antiquissimi
• Capit.	Capitularia
• Conc.	Concilia
• Const.	Constitutiones
• Epp.	Epistolae (in Quart)
• Epp. saec. XIII	Epistolae saeculi XIII
• Epp. sel.	Epistolae selectae
• Fontes iuris	Fontes iuris Germanici antiqui, Nova series
• Ldl	Libelli de lite imperatorum et pontificum
• LL	Leges (in Folio)
• LL nat. Germ.	Leges nationum Germanicarum
• SS	Scriptores
MIC	Monumenta iuris canonici
• Ser. A	Series A: Corpus Glossatorum
• Ser. B	Series B: Corpus Collectionum
• Ser. C	Series C: Subsidia
MIÖG	*Mitteilungen des Instituts für österreichische Geschichtsforschung*
ML	Monastic Library, Stiftsbibliothek, etc.
NA	*Neues Archiv der Gesellschaft für ältere deutsche Geschichtskunde*
NCE	*The New Catholic Encyclopedia*
ÖNB	Österreichische Nationalbibliothek
PG	Migne, *Patrologia graeca*
PL	Migne, *Patrologia latina*
Potth.	Potthast, *Regesta pontificum romanorum*
QF	*Quellen und Forschungen aus italienischen Archiven und Bibliotheken*
QL	Schulte, *Quellen und Literatur*
RB	*Revue bénédictine*
RDC	*Revue de droit canonique*
REDC	*Revista español de derecho canónico*
RHD	*Revue historique de droit français et étranger* (4e série unless otherwise indicated)

RHE *Revue d'histoire ecclésiastique*
RHM *Römische historische Mitteilungen*
RIDC *Rivista internazionale di diritto comune*
RIS[2] Muratori, *Rerum italicarum scriptores: Raccolta degli storici italiani*, nuova edizione…
RQ *Römische Quartalschrift für christliche Altertumskunde und Kirchengeschichte*
RS Rolls Series (Rerum Britannicarum medii aevi scriptores)
RSCI *Rivista di storia della Chiesa in Italia*
RSDI *Rivista di storia del diritto italiano*
SB Staatsbibliothek/Stiftsbibliothek
SCH *Studies in Church History*
SDHI *Studia et documenta historiae et iuris*
Settimane *Settimane di studio del Centro italiano di studi Spoleto sull'Alto Medioevo*
SG *Studia Gratiana*
SMCL *Studies in Medieval and Early Modern Canon Law*
TRG *Tijdschrift voor Rechtsgeschiedenis*
TUI *Tractatus universi iuris* (18 vols. Venice 1584-1586)
Vat. Biblioteca Apostolica Vaticana
ZKG *Zeitschrift für Kirchengeschichte*
ZRG Kan. Abt. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Kanonistische Abteilung
ZRG Rom. Abt. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Romanistische Abteilung

The Proceedings of the International Congresses of Medieval Canon Law will be referred to as (e.g.): *Proceedings Boston 1965*. Older standard works will be cited only as short titles, e.g. Maassen, *Quellen*, Schulte, *Quellen*, Savigny, *Geschichte*, Kuttner, *Repertorium*.
For the serial publications of the great academies:

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

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

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

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I criteri di idoneità al sacerdozio nei primi secoli del medioevo[1]

Péter Erdő

Sulla formazione al ministero ordinato nella Chiesa, sui singoli criteri d'idoneità al diaconato e al presbiterato sono stati pubblicati dei lavori preziosi nel quadro della storia delle istituzioni ecclesiali. Alcuni criteri d'idoneità hanno perso la loro attualità ai nostri giorni, altri invece appaiono proprio nelle norme canoniche più recenti sia per l'amplificazione delle nostre conoscenze sull'essere umano, sia per il cambiamento dell'ambiente sociale.[2] Anche in vista degli sviluppi culturali della nostra epoca merita però attenzione speciale quel cambiamento comprensivo avvenuto nella Chiesa occidentale nei primi secoli del medioevo che ha introdotto nuovi accenti e nuove forme riguardo ai criteri di tale idoneità nonché alla loro messa in pratica. In questo saggio cerchiamo di identificare questi nuovi elementi.

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[1] Una parte del presente articolo risale al contributo dell'autore 'I criteri di idoneità nei regni barbarici', *Discernimento vocazionale e idoneità al presbiterato nella tradizione canonica latina*, edd. Nicolás Álvarez de las Asturias, Giuliano Brugnotto, Simona Paolini (Pontificio Comitato di Scienze Storiche, Atti e Documenti 50; Città del Vaticano 2018) 17-33.

[2] Per il quadro generale vedi Pierantonio Pavanello, 'Irregolarità e impedimenti a ricevere l 'ordine sacro', *Quaderni di diritto ecclesiale* 12 (1999) 279-296; Marino Mosconi, 'L'idoneità al sacramento dell 'ordine (requisiti e verifica) e gli atti relativi al suo conferimento', *Quaderni di diritto ecclesiale* 25 (2012) 75-105; Andrea Migliavacchа, 'Idoneidad para oficios y ministerios', DGDC 4.361-365, specialmente 364; idem, 'Irregolarità e impedimenti: vie di conoscenza e di verifica al servizio del discernimento', *Quaderni di diritto ecclesiale* 28 (2015) 423-443; Fabio Franchetto, 'Alcune considerazioni sulla disciplina circa le irregolarità e gli impedimenti relativi all'ordine sacro', ibid. 393-422.

Il quadro generale

Dalla fine del V secolo fino ai primi decenni dell'VIII secolo la vita della Chiesa d'Occidente si inserì organicamente nel quadro politico, sociale e culturale dei 'regni barbarici'. Dopo il crollo dell'Impero Romano d'Occidente (476) rimase però una notevole popolazione romanizzata soprattutto in Italia, in Francia (nelle Gallie) e nella penisola Iberica. Le circostanze politiche e culturali resero possibile una vita ecclesiale assai intensa anche nelle isole Britanniche, dove il contesto culturale era tuttavia più distante dalla tradizione romana. I popoli germanici e celtici, che si erano convertiti alla religione cristiana, la accettarono non di rado in una forma eterodossa, particolarmente i visigoti che seguirono ufficialmente l'arianesimo fino al 589. In Italia invece, dove gli Ostrogoti, ugualmente ariani, fondarono il loro regno, Papa Gelasio I (492-496) stabilì buoni rapporti con il loro re, Teodorico il Grande. Il battesimo di Clodoveo alla fine del V secolo inaugurò l'epoca del cristianesimo cattolico nelle Gallie e stabilì una stretta collaborazione tra la Chiesa e la monarchia merovingia. Tale collaborazione comportò anche la conferma delle decisioni conciliari con l'autorità del re. In tal modo esse acquisirono anche la forza di legge secolare. Il Concilio di Orléans del 511, per esempio, nella sua lettera indirizzata al re Clodoveo, che precede il testo dei canoni, riconosce la sollecitudine del re verso la religione cattolica, facendo inoltre menzione del fatto che il concilio stesso è stato convocato dal re e che la sua tematica è stata da lui fissata, inoltre richiede l'approvazione reale delle decisioni. In questo caso i padri sinodali sono convinti che il consenso del re confermi e rinforzi l'autorità delle loro disposizioni.[3] Simile era il ruolo del re nei concili della Spagna visigotica del periodo cattolico. A questi concili—diversamente dalla maggioranza dei concili della Gallia— a volte i re erano personalmente presenti

[3] Conc.Aurelianense (a.511), *Epistola ad regem*, CCL 148A.4. Cfr. Odette Pontal, *Die Synoden im Merowingerreich* (Konziliengeschichte, Reihe A; Paderborn-München-Wien-Zürich 1986) 272-273.

insieme ai loro nobili collaboratori.[4] La convocazione reale, la determinazione dei temi da trattare in un documento speciale (tomus regius) e la conferma delle decisioni tramite una legge furono caratteristici di questi concili in maniera più chiara che nei concili della Gallia. Anzi, nei concili della Spagna partecipavano regolarmente anche dei notabili laici.[5] È in questo contesto che bisogna leggere le disposizioni conciliari dell'epoca anche riguardo i criteri di idoneità all'ordine sacro.

Nei regni barbarici si diffonde il sistema delle chiese proprie, per le quali i grandi proprietari laici nominavano o 'costituivano' i chierici talvolta senza alcun intervento del vescovo. Tali chierici venivano trovati non di rado 'indegni'.[6] Dal VI secolo in poi si riscontrano diverse norme canoniche contro questo modo di agire dei chierici e degli aristocratici.[7] Nel quadro di questa lotta, i concili ripetono diversi criteri di idoneità al diaconato e al presbiterato. Alcuni di essi risalgono alla Sacra Scrittura del Nuovo e del Vecchio Testamento. Specialmente il capitolo 21 del Levitico, dedicato alla vita e alla disciplina dei sacerdoti viene spiegato e applicato in modo allegorico e spirituale anche da autori

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[4] Ai concili della Gallia, il re e i magnati generalmente non hanno pertecipato, tranne se essi dovevano giudicare come tribunali. In tali casi era presente anche il re, ibid. 273.

[5] Per es. Conc.Toletanum III (a.589), *La Colección Canónica Hispana*, edd. Gonzalo Martínez Díez, Félix Rodríguez (6 vols.; Monumenta Hispaniae sacra Serie 3ª subsidia 1-6; Madrid 1966-2002) 5.98-103; Conc.Toletanum IV (a.633) Prologus, Ibid. 178-181; Conc.Toletanum V (a.636), Prologus, ibid. 276-277. Cfr. José Orlandis, Domingo Ramos-Lissón, *Die Synoden auf der Iberischen Halbinsel bis zum Einbruch des Islam (711)* (Konziliengeschichte, Reihe A; Paderborn-München-Wien-Zürich 1981) 335-341 (partecipazione di diverse categorie di laici di riguardo) 343-346 (lex in confirmatione concilii); Gerd Kampers, 'Das Prooemium des 4. Toletanum von 633', ZRG Kan. Abt. 98 (2012) 1-18.

[6] Cfr. Antonio García y García, *Historia del Derecho Canónico*, 1: *El Primer Milenio* (Instituto de Historia de la Teologia Española, Subsidia, 1; Salamanca 1967) 385; Pontal, *Die Synoden* 235.

[7] Cfr. García y García, *Historia* 383. Vedi per es. Conc.Aurelianense (a.511) c.7, CCL 148A.7.

prestigiosi come S. Gregorio Magno[8] o S. Isidoro di Siviglia.[9] Ma—come vedremo più avanti—non si decideva sempre con chiarezza, quali criteri veterotestamentari siano da applicare in senso letterale, quali soltanto in senso spirituale e quali in tutti i due sensi.

Altri concili dell'epoca esaminata trasmettono la tradizione biblica già nella forma in cui essa è stata formulata nei testi canonici (canoni conciliari, decretali di papi, lettere episcopali o altri documenti disciplinari) dell'Antichità o ripetono regole stabilite dalla Chiesa dei primi cinque secoli. Alcuni testi disciplinari del periodo anteriore all'anno 500 infatti si occupano in modo speciale dell'idoneità agli ordini sacri, come per esempio la lettera di Papa Siricio (384-399) ad Imerio, vescovo di Tarragona,[10] la lettera di Innocenzo I a Victricio, vescovo di Rouen, la quale ripete le disposizioni del Sinodo di Papa Siricio del 6 gennaio 386,[11] il decreto generale di Papa Gelasio (492-496) indirizzato ai vescovi della Lucania, del Brutium e della Sicilia[12] o gli *Statuta Ecclesiae Antiqua* (verso 476-485).[13] Ma i legislatori e i redattori delle collezioni canoniche del VI-VII secolo comprendono l'eredità antica spesso a modo loro o cercano di attenuarla o adattarla alle circostanze della loro epoca. Malgrado la forte dipendenza delle opere disciplinari dall'eredità antica si

[8] *Regula pastoralis*, I, 10-11, Grégoire Le Grand, *Règle pastorale,* edd. Bruno Judic, Floribert Rommel, Charles Morel (2 vols.; Sources Chrétiennes 381-382; Paris 1992) 1.160-173, D.49 c.1.

[9] *Mysticorum expositiones sacramentorum seu quaestiones in Vetus Testamentum*, Leviticus c.13, PL 83.332-333.

[10] JK 255(a.385), PL 13.1131-1143; Klaus Zechiel-Eckes, *Die erste Dekretale: Der Brief Papst Siricius' an Bischof Himerius von Tarragona vom Jahr 385 (JK 255),* aus dem Nachlass mit Ergänzungen hrsg. von Detlev Jasper (MGH Studien und Texte 55; Hannover 2013).

[11] JK 285 (15 febbraio 404), PL 20.468-481 (Etsi tibi frater).

[12] JK 636 (11 marzo 494), *Epistolae Romanorum Pontificum genuinae et quae ad eos scripta sunt,* ed. Andreas Thiel (Brunsbergae 1868) 360-379 ('Necessaria rerum'). Per il riassunto dei criteri di idoneità vedi il c.5 della lettera—D.50 c.59. Nel *Decreto di Graziano* figurano 23 frammenti di questa lettera.

[13] CCL 148.162-188; specialmente il Prologo, ibid. 164-166, D.23 c.2.

riscontrano anche chiari segni di una legislazione creativa propria.[14]

Nelle isole Britanniche, ma anche altrove, il monachesimo gioca un ruolo prevalente nella vita ecclesiale. Mentre nelle regioni più romanizzate dell'Occidente ci sono norme canoniche che mettono in rilievo la dipendenza degli abati dalla 'potestà' dei vescovi,[15] nel mondo insulare i grandi monasteri—specialmente in Irlanda—sostituiscono praticamente la gerarchia diocesana. Sotto la giurisdizione di un abate presbitero vivono nel monastero a volte persino più vescovi che hanno funzioni liturgiche, ma non di governo.[16] La questione dell'idoneità al sacramento dell'ordine diventa in tale contesto un problema di educazione monastica. Durante il VI secolo, con l'estensione delle 'tenebre della barbarie', le regole monastiche richiesero con insistenza che tutti i monaci e tutte le monache sappiano leggere per essere idonei alla 'lettura sacra'.[17] In particolare la Regola di S. Benedetto, che avrà la più grande autorità in Occidente, si occupa dettagliatamente della lettura sacra, dell'ammissione dei giovani al monastero e della loro formazione.[18]

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[14] Cfr. Roy Flechner, 'The Problem of Originality in Early Medieval Canon Law: Legislating by Means of Considerations in the *Collectio Hibernensis*', *Viator* 43 (2012) 1-28.

[15] Cfr. per es. Conc.Aurelianense (a.511) c.19, CCL 148A.10.

[16] Cfr. per es. Hermann Wasserschleben, *Die irische Kanonensammlung* ([2]Leipzig 1885; rist. Aalen 1966) XXXVII.

[17] Henri-Irénée Marrou, *Storia dell'educazione nell'antichità*, II ed. italiana sulla VI francese, trad. Umberto Massi (Roma 1984) 435.

[18] *Reg.* 70, *La Règle de Saint Benoît*, edd. Adalbert de Vogüé, Jean Neufville (6 vols.; Sources Chrétiennes, 181-186; Paris 1971-1972) 2.666: 'Vitetur in monasterio omnis praesumptionis occasio; atque constituimus, ut nulli liceat quemquam fratrum suorum excommunicare aut caedere, nisi cui potestas ab abbate data fuerit. *Peccantes autem coram omnibus arguantur ut ceteri metum habeant*. Infantum uero usque quindecim annorum aetates disciplinae diligentia ab omnibus et custodia sit; sed et hoc cum omni mensura et ratione. Nam in fortiori aetate qui praesumit aliquatenus sine praecepto abbatis uel in ipsis infantibus sine discretione exarserit, disciplinae regulari subiaceat, quia sciptum est: *Quod tibi non uis fieri, alio ne feceris*'; si veda anche *Reg.* 30.37. 38.45. 48.59. 63, ibid. 2.554, 572, 572, 574, 576, 594, 598, 600, 602, 604, 632, 634, 642. 644, 646; cfr. Marrou, *Storia dell'educazione* 436.

> Per evitare in monastero ogni forma di arbitrarietà, stabiliamo che nessun monaco si permetta di scomunicare o di percuotere un fratello, senza averne ricevuta l'autorizzazione dall'abate. Chi si rende colpevole di questo, sia ammonito alla presenza di tutti, in modo che anche gli altri ne abbiano timore. I ragazzi fino all'età di quindici anni siano custoditi nella disciplina, con premurosa cura, da parte di tutti. Anche verso di loro si usino grande discernimento e moderazione. Se qualcuno, senza esplicita autorizzazione dell'abate, osa intervenire contro un fratello già adulto, o, sotto l'impeto dell'ira, correggere senza discrezione i ragazzi, sia sottoposto alla punizione stabilita dalla Regola. Sta scritto infatti: 'Non fare agli altri ciò che non vuoi che sia fatto a te'.

I grandi vescovi che influirono maggiormente sulla vita e la disciplina della loro Chiesa e della loro regione, provengono spesso da monasteri e organizzano monasteri accanto o vicino alle loro sedi episcopali, dove vivono e pregano monaci colti che possono aiutare il ministero del vescovo e assumersi la responsabilità della formazione dei chierici.[19] Così già S. Martino di Tours, 'iniziatore del monachesimo in Gallia' fonda il monastero di Marmoutier, dove i monaci copiano anche dei libri manoscritti.[20]

Durante il VI secolo scompaiono gradualmente le scuole tipiche dell'antichità, dove i cristiani, laici e chierici hanno potuto ottenere una formazione classica soprattutto letteraria e oratoria. Da una parte appare il desiderio di mettere la cultura classica al servizio della teologia,[21] d'altra parte i giovani destinati ad entrare nel clero sono sempre più spesso carenti anche di formazione elementare. I vescovi, seguendo l'esempio delle scuole monastiche,[22] sin dall'inizio del VI secolo cominciano a fondare

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[19] Cfr. Pierre Riché, *Le scuole e l'insegnamento nell'Occidente cristiano dalla fine del V secolo alla metà dell'XI secolo* (Storia 16; Roma 1984) 38.

[20] Sulpicius Severus, *Vita Martini*, 10.6, Sulpice Sévère, *Vie de Saint Martin*, ed. Jacques Fontaine (3 vols. Sources Chrétiennes 133-135; Paris 1968-1969) 1.274. Cfr. Marrou, *Storia dell'educazione* 435.

[21] Riché, *Le scuole* 34-36.

[22] La scuola episcopale che serviva alla formazione dei chierici ha seguito intenzionalmente l'esempio delle scuole monastiche anche all'inizio dell'epoca carolingia. Ciò ha influenzato anche la forma organizzativa dei capitoli cattedrali. Di Crodegango, vescovo di Metz per es. si legge in Paulus diaconus, *Liber de Episcopis Mettensibus*, MGH SS 2.268: 'Hic clerum educavit, et ad

delle scuole episcopali per formare i chierici,[23] trasmettendo loro a volte anche le conoscenze elementari.[24] Tale situazione emerge in una lettera di S. Gregorio Magno, indirizzata a Desiderio, vescovo in Gallia, in cui il pontefice disapprova seriamente il fatto che un vescovo eserciti personalmente il mestiere di professore[25] insegnando la grammatica.[26] Tale insegnamento, che comportava spesso la presentazione delle opere degli autori antichi pagani, i vescovi dovevano affidarlo ad altri. Nella seconda metà del VI secolo, in Gallia, nelle scuole episcopali l'arcidiacono o un presbitero istruiva i giovani.[27] Nella Spagna visigotica, secondo il canone 1 del II Concilio di Toledo del 527,[28] i giovani destinati ad entrare nel clero—cioè offerti dai loro genitori in tenera età[29]—dopo la tonsura o il lettorato dovevano essere educati in un edificio appartenente alla Chiesa da un 'preposito' sotto gli occhi del vescovo. Una volta compiuti i 18 anni di età, il vescovo doveva domandar loro se volessero sposarsi.[30] Se promettevano la castità,

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instar coenobii intra claustrorum septa conversari fecit, normamque eis instituit'.

[23] Cfr. Javier Belda Iniesta, 'Del *Monasterium Clericorum* a los *Studia Generalia*: La educación católica en el *Ius Antiquum'*, *Vergentis* 5 (2017) 36-43.

[24] Marrou, *Storia dell'educazione* 436.

[25] Nell'antichità la professione di maestro di scuola era assai sospetta per i cristiani che la consideravano impedimento al battesimo. Solo chi non aveva altro lavoro per sopravvivere, poteva continuare quest'attività; cfr. *Traditio Apostolica* 16, Bernard Botte, *Hippolyte de Rome, La Tradition Apostolique d'après les anciennes versions* (Sources Chrétiennes, 11bis; [2]Paris 1968) 70-71; Alistair Stewart-Sykes, *Hippolytus, On the Apostolic Tradition: An English Version with Introduction and Commentary* (Second Edition; Popular Patristic Series 54; Yonkers, New York 2015) 118 e 121, per testi mitologici nell'insegnamento.

[26] Ep.9.34, JE 1824(a.601), MGH Epist. 2. 303. Cfr. Riché, *Le scuole* 37.

[27] S. Gregorius Turonensis, *Vitae Patrum,* 8.2, MGH SS rer. Merov. 1/2. 242; cfr. idem, *Historia Francorum* 5.44: MGH SS rer. Merov. 1/1. 254.

[28] Ed. Martínez Díez 4.347-349. Il testo è stato assunto nel Decreto di Graziano: D.28 c.5.

[29] Cfr. Adalbert de Vogüé, *L'oblation des enfants (RB 59)*, in *La Règle de Saint Benoît* 6.1355-1368 (sui religiosi).

[30] Tale libera scelta non sembra invece che sia stata possibile per quelli che sono stati offerti ad un monastero. San Benedetto, infatti cercava di regolare una

potevano essere ordinati subdiaconi a 20 anni, per poi, dopo aver compiuto i 25 anni di età, diventare diaconi. Se invece dichiaravano di voler sposarsi, potevano farlo secondo l'Apostolo (1Cor 7.2.9). In questo caso però potevano essere ordinati solo in età avanzata, con il consenso della loro moglie, prestando un voto di continenza. Un quadro assai vivo della formazione dei futuri chierici nella scuola episcopale si delinea nel canone 24 del IV Concilio di Toledo del 633.[31] I chierici più giovani dovevano abitare insieme 'nell'atrio', vicino alla chiesa, ed erano affidati ad un chierico più anziano di vita provata che era per loro maestro della dottrina e testimone del loro comportamento.[32] Lo stesso ordine di formazione si rispecchia nella biografia di S. Gregorio di Tours (538-594) che venne affidato al vescovo di Lione, suo zio, e fu indirizzato, all'età di sette anni, allo studio delle lettere e poi dei salmi.[33] Venne ordinato diacono a circa 25 anni. Più di un secolo dopo, S. Beda il Venerabile (ca.673-735) fu affidato dai suoi genitori, all'età di sette anni, al monastero di Yarrow, in Inghilterra per la sua educazione. A 19 anni ricevette il diaconato e a 30 il sacerdozio in base alla decisione del suo abbate.[34]

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usanza già esistente nel monachesimo occidentale, mentre i vescovi latini dell'epoca sembra che abbiano richiesto il libero consenso degli interessati, Ibid. 1358.

[31] Ed. Martínez Díez 5.214-215, C.12 q.1 c.1.

[32] Ibid. Cfr. Bernabé Bartolomé Martínez, *La educación en la Hispania antigua y medieval* (Madrid 1992) 140; Belda Iniesta, 'Del *Monasterium Clericorum*' 40.

[33] S. Gregorius Turonensis, *Vitae Patrum,* 8.2, MGH SS rer. Merov. 1/2.242. Cfr. Marrou, *Storia dell'educazione* 437.

[34] Beda, *Historia Ecclesiastica,* 5.24, Bède le Vénérable, *Histoire ecclésiastique du peuple anglais*, edd. André Crépin, Michael Lapidge, Pierre Monat, Philippe Robin (3 vols. Sources Chrétiennes 489-491; Paris 2005) 3.188: 'Qui natus in territorio eiusdem monasterii, cum essem annorum VII, cura propinquorum datus sum educandus reuerentissimo abbati Benedicto, ac deinde Ceolfrido, cunctumque ex eo tempus uitae in eiusdem monasterii habitatione peragens, omnem meditandis scripturis operam dedi, atque inter obseruantiam disciplinae regularis, et cotidianam cantandi in ecclesia curam, semper aut discere aut docere aut scribere dulce habui. Nono decimo autem uitae meae anno diaconatum, tricesimo gradum presbyteratus, utrumque per ministerium reuerentissimi episcopi Iohannis, iubente Ceolfrido abbate, suscepi'.

All'epoca di S. Gregorio Magno cominciò a funzionare anche a Roma una scuola di cantori (*schola cantorum*) dove ragazzi e giovani chierici (fino al subdiaconato) ricevevano un insegnamento di grammatica, di musica sacra e di conoscenze bibliche.[35] Dove la barbarie si estende e perciò le scuole di tipo antico non esistono più, tali scuole di cantori diventano indispensabili per la formazione dei futuri diaconi e sacerdoti. Questo significa che i chierici generalmente non si reclutano più tra gli adulti che hanno una formazione di base, bensì sono i giovanissimi a venire offerti dai loro genitori per questa vocazione (anche quando non si tratta di vita monacale). Tale cambiamento ebbe effetto anche sull'ideale della castità clericale. Se nell'antichità la questione tipica che ritornava nei canoni conciliari e nelle disposizioni pontificie era la continenza clericale che gli uomini sposati dovevano osservare dopo la loro ordinazione, dal VI secolo in poi più comune divenne l'assunzione dell'obbligo del celibato anche attraverso una professione da parte di giovani non ancora sposati. Persisteva tuttavia anche l'altra possibilità, cioè la promessa della continenza che cominciava ad essere collegata con l'ingresso della moglie in un monastero. Anche la promessa di continenza si effettuava spesso in un modo che assomigliava al voto monastico. Al tema ritorneremo ancora nel capitolo seguente.

I ragazzi offerti dai loro genitori ad un monastero per diventare monaci—diversamente da quelli offerti per la formazione clericale secolare—non potevano scegliere, una volta raggiunti l'età maggiore, né la vita secolare, né il matrimonio. Ciò risulta chiaro per esempio dal canone 49 del IV Concilio di Toledo (633) che afferma:[36]

> Uno diventa monaco o per la devozione dei genitori o per propria professione. Qualunque di queste due sia stata compiuta, essa ha forza obbligatoria per l'interessato. Per cui tagliamo per loro la via di ritorno nel mondo e proibiamo loro che ripassino al mondo.

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[35] Marrou, *Storia dell'educazione* 437.

[36] Ed. Martínez Díez 5.229-230: 'Monachum aut paterna deuotio aut propria professio facit. Quicquid horum fuerit, alligatum tenebit. Proinde eis ad mundum reuerti intercludimus aditum et omnem ad saeculum interdicimus regressum'.

Parallelamente alle scuole episcopali nascono anche le scuole presbiterali o parrocchiali nel senso più largo. Le parrocchie corrispondenti precisamente alla fisionomia attuale di questa istituzione non si trovano ancora dappertutto in quest'epoca.[37] In alcune regioni, per esempio in certe parti dell'Italia, funziona piuttosto la 'pieve', una forma istituzionale predecessore della parrocchia. In Gallia le chiese proprie di ricchi proprietari si trasformano nei secoli VI-VII in parrocchie che servono alla popolazione della regione.[38] La funzione principale delle scuole presbiterali era di insegnare ai giovani non ancora sposati ciò che era necessario per il ministero clericale. Si richiedeva infatti un'educazione cristiana (nella casa del parroco o del presbitero), l'alfabetizzazione per conoscere i salmi, le lezioni della Sacra Scrittura e 'tutta la legge del Signore'. Una volta raggiunta l'età maggiore (secondo alcuni testi 'l'età perfetta'[39]), i giovani potevano decidere di sposarsi.[40] Prima che in Gallia, tali scuole presbiterali o parrocchiali esistevano già in Italia. Nella Spagna visigotica lo stesso sistema venne adottato un secolo più tardi.[41]

Nei secoli VI-VII appaiono in Occidente alcune collezioni di canoni e di altri testi disciplinari che dispongono il proprio contenuto non in ordine cronologico o geografico, bensì in modo sistematico, secondo i temi trattati. Tra di esse ne spiccano alcune, come la *Breviatio canonum* di Fulgenzio (523-546),[42] la *Vetus Gallica* (Lione, intorno all'anno 600),[43] la *Excerpta Hispanae,*[44]

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[37] Cfr. per es. Richard Puza, 'Pfarrei: Pfarrorganisation', LMA 6.2021-2026.
[38] Cfr. Pontal, *Die Synoden* 235.
[39] L'età perfetta significava spesso in testi canonici 30 anni, ma la possibilità di decidere su sposarsi o meno è stata offerta secondo diversi canoni conciliari in età di 18 anni, cfr. Conc.Toletanum II (a.527) c.1, ed. Martínez Díez 4.348.
[40] Conc.Vasense II (a.529) c.1, CCL 148 A.78.
[41] Conc.Emeritense (a.666) c.18, PL 84.623. Cfr. Marrou, *Storia dell'educazione* 438.
[42] CCL 149.284-311.
[43] Edizione: Hubert Mordek, *Kirchenrecht und Reform im Frankenreich: Die Collectio Vetus Gallica, die älteste systematische Kanonessammlung des fränkischen Gallien*. *Studien und Edition* (Beiträge zur Geschichte und Quellenkunde des Mittelalters 1; Berlin-New York 1975).
[44] Edizione: Martínez Díez, *La Colección Canónica Hispana* 2/1. 43-214.

opera redatta tra il 656 e il 675 che raccoglie in 10 libri gli estratti dei canoni della *Collectio Hispana,* e la *Collectio Hispana sistematica*[45] (tra il 675 e il 681) che dedicano importanti sezioni (titoli) al problema dell'idoneità ai sacri ordini del diaconato e del presbiterato. Queste collezioni rappresentano i tentativi più significativi dell'epoca di riassumere tutta la disciplina precedente riguardo all'idoneità. Non va dimenticato però che queste opere sono dei testimoni piuttosto dell'interpretazione e dell'applicazione dei testi sinodali, mentre il testo originale delle decisioni viene conservato più precisamente e più completamente nelle collezioni di ordine cronologico.

I criteri di idoneità al diaconato e al presbiterato

Benché la maggior parte delle disposizioni canoniche sui criteri dell'idoneità agli ordini sacri, nell'epoca esaminata, ripeta le norme dei secoli precedenti, ci sono nuove formulazioni dovute a volte a fraintendimento del testo o al cambiamento della portata sociale della norma stessa.

Salute corporale

In dipendenza dal testo del capitolo 21 del Levitico, nella Chiesa dell'epoca si richiede che:[46]

> i sacerdoti non siano portatori di nessun difetto, né siano ciechi, né zoppi, non abbiano un naso (troppo) piccolo, grande o torto, non abbiano una gamba o una mano rotta, non siano gobbi, né abbiano gravi malattie agli occhi, non siano scabbiosi, né abbiano la pelle esantematica, né siano troppo pesanti.

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[45] Edizione sommaria: Martínez Díez, *La Colección Canónica Hispana* 2/1. 277-426.

[46] Isidorus Hispalensis, *Mysticorum expositiones,* Leviticus c.13, PL 83.332: 'Inter haec jubetur ipsis sacerdotibus ut nulla debilitate insignes sint, ne caecus, ne claudus, vel parvo, aut grandi, vel torto naso, ne fracto pede aut manu, ne gibbosus, nec lippus, nec albuginem habens in oculo, nec jugem scabiem, ne impetiginem in corpore, ne ponderosus'; si veda pure *Vetus Gallica,* 4.10, ed. Mordek 372; Conc.Aurelianense III (a.538) c.6, CCL 148A.116-117.

Tutto ciò poteva essere anche compreso – perlomeno per certi criteri – in senso spirituale e riferirsi alle manchevolezze dello spirito:[47]

> Tutto ciò si riferisce ai vizi dell'anima, si condannano infatti i costumi dell'uomo e non la natura . . . Quello che ha un naso grande e torto è il furibondo che minaccia con superba arroganza o con smisurato discernimento. Chi ha la gamba o la mano rotta è quello che insegna la via di Dio, ma non cerca di seguirla. Il sacerdote gobbo è quello che viene oppresso dal peso del desiderio terreno e lento nel prestare attenzione alle cose più alte.

In questo contesto S. Isidoro di Siviglia chiarisce che non la natura viene condannata, bensì i costumi degli uomini. Non sembra tuttavia, che si distinguesse sempre con precisione la pena o la condanna dalle mancanze che impediscono l'idoneità senza alcuna responsabilità morale della persona. Tale distinzione venne fatta tuttavia già nei punti 77 e 78 dei *Canoni Apostolici*, i quali, benché non siano stati inseriti nella *Collectio Dionysiana*, si trovano altrove in traduzione latina dell'epoca.[48] Non erano quindi del tutto sconosciuti in Occidente.

Diversa era la situazione degli eunuchi. Nel loro caso—diversamente dal Levitico 21.20, dove il divieto si riferiva semplicemente allo stato fisico, come mancanza di perfezione nel senso cultuale—era chiara la differenza tra quelli che si sono castrati per loro libera scelta e quelli che sono stati castrati dai loro proprietari, dai nemici ecc., senza propria responsabilità. I primi

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[47] Isidorus Hispalensis, *Mysticorum expositiones*, Leviticus c.13, PL 83.332-333: 'Quae omnia referuntur ad animae vitium; mores enim in homine, non natura damnatur . . . Grandi et torto naso est furibundus, et minax cum superbiae arrogantia vel immoderata discretione. Fracto autem pede vel manu est qui viam Dei quam docet pergere non studet. Gibbosus quoque sacerdos est quem terrenae cupiditatis pondus deprimit, et tardius ad superna intendit'; cfr. per es. *Vetus Gallica* 4.14, ed. Mordek 377-378.

[48] Antonio Spagnolo, ed. 'Fragmentum Veronense Codicis Bibliothecae Capitularis LI [49] foll. 139-156', *Ecclesiae Occidentalis Monumenta Iuris Antiquissima,* ed. Cuthbertus Hamilton Turner (2 vols. Oxonii 1899-1939) 1.32ee: 'Si quis fractus sit oculos uel crura, dignus uero in episcopatum, fiat, non enim lesio corporis ipsum poluet sed animae inquinatio: surdus autem constitutus et caecus minime fiat episcopus, non ut polutus sed ne res ecclesiasticae inpediantur'.

già per il divieto del canone 1 del Concilio di Nicea[49] (325) o del punto 22 dei *Canoni Apostolici*[50] erano esclusi dal sacerdozio (o dal clero in generale) come pure quelli che hanno prodotto deliberatamente una minorazione su qualsiasi altra parte del proprio corpo.[51] Quelli invece che sono stati castrati contro la loro libera volontà, potevano diventare chierici e persino vescovi.[52] Dalla distinzione fatta nei canoni risulta che in questo caso l'accento non viene messo sulla mancanza corporale ma sull'aspetto religioso e morale dell'autolesione.

Alcuni canoni proibivano l'ordinazione di persone andate in estasi (rapimento) in pubblico, fenomeno che si poteva attribuire ad una malattia mentale, ma anche alla possessione diabolica.[53] Dato che questo impedimento non metteva l'accento sulla condizione presente della persona, ma su un fatto pubblico passato, esso comportava anche un aspetto sociale che poteva diminuire la buona fama del candidato.

Condizione spirituale e morale

Quelli che entravano nel clero, dovevano possedere la fede ortodossa.[54] Tale questione aveva un accento speciale nel caso di

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[49] COD 6; *Vetus Gallica* 4.1, ed. Mordek 368. Il divieto si ripete in molti canoni del secolo IV.

[50] *Les Constitutions Apostoliques*, ed. Marcel Metzger (3 vols. Sources Chrétiennes 336; Paris 1987) 3.281. Cfr. *Vetus Gallica* 4.6, ed. Mordek 370.

[51] *Vetus Gallica* 4.13a, ed. Mordek 374-375. Cfr. Gennadius Massiliensis, *Liber ecclesiaticorum dogmatum,* c.38, Cuthbert Hamilton Turner, 'The *Liber ecclesiasticorum dogmatum* attributed to Gennadius', JTS 7 (1905-1906) 96. Per la sopravvivenza dell'idea vedi *Codex Iuris Canonici* (1983) c.1041 § 5.

[52] *Vetus Gallica* 4.5, ed. Mordek 370. Cfr. *Canones Apostolorum* 21, ed. Metzger 280-281; Conc.Nicaenum (a.325) c.1, COD 6. Vedi anche *Codex Iuris Canonici* (1983) c.1041 § 1.

[53] *Vetus Gallica* 4.10, ed. Mordek 372. Cfr. Gelasius, Ep.14 c.19, JK 636 (11 marzo 494), ed. Thiel 372-373; Conc.Aurelianense III (a.538) c.6, CCL 148A.116-117; Jan Frederik Niermeyer, *Mediae Latinitatis Lexikon Minus* (Leiden 1984) 61: arrepticius: 'possessed by an evil spirit, mad'.

[54] Cfr. per es. Conc.Toletanum XI (a.675) c.10, ed. Martínez Diez 6.117; si doveva confermarlo con promessa: 'promittat ut fidem catholicam sincera cordis deuotione custodiens'.

quanti si sono convertiti da un'eresia o non erano irreprensibili in materia di fede. Da una parte, un divieto ancestrale impediva l'assunzione nel clero di una persona che prima era stata eretica,[55] dall'altra nelle regioni che sono passate dal dominio dei Goti ariani a quello dei Franchi cattolici, i chierici che servivano nelle comunità eretiche, se avevano accettato la fede cattolica e avevano vissuto in modo degno, venivano assunti nel clero.[56] Simile era la procedura nella Spagna, quando il regno visigotico passò ufficialmente dall'arianesimo al cattolicesimo.[57]

Il candidato agli ordini sacri non doveva essere né invidioso, né fazioso, né vendicativo, né usuraio.[58] In quest'ultimo criterio si tratta da una parte di una proprietà morale, perché la questione va presentata a volte nel contesto dell'avidità di lucro (cfr. Tit 1.7; 1Tim 3.3.8), come già nel rispettivo canone del Concilio di Nicea:[59]

> Poiché molti chierici, trascinati da avarizia e da volgare desiderio di guadagno e dimenticata la divina Scrittura che dice: "Presta il denaro senza fare usura" (Sal 14.5), prestano con interesse, il santo e grande sinodo ha giustamente stabilito che se qualcuno, dopo la presente disposizione riscuoterà interessi, o farà questo mestiere d'usuraio in qualsiasi altra

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[55] Cfr. già Conc.Eliberitanum (a.306) c.51, ed. Martínez Díez 4.258: 'Ex omni haerese fidelis si uenerit, minime est ad clerum promouendus'. Cfr. *Codex Iuris Canonici* (1917) c.985 § 1-2.

[56] Cfr. per es. Conc.Aurelianense (a.511) c.10, CCL 148A.7; Pontal, *Die Synoden* 23.

[57] Cfr. Conc.Toletanum III (a.589) c.5, ed. Martínez Díez 5.112-114; Conc.Toletanum IV (a.633) c.19, Ibid. 207-208 (proibisce l'assunzione nel sacerdozio di quelli che prima sono caduti in eresia o sono stati battezzati dagli eretici); D.51 c.5; cfr. *Codex Iuris Canonici* (1983) c.1041 § 2.

[58] *Vetus Gallica* 4.17-18, ed. Mordek 381; *Statuta Ecclesiae Antiqua* c.42.55, CCL 184.173-175.

[59] Conc.Nicaenum (a.325) c.17, COD 14: 'Quoniam multi sub regula constituti avaritiam et turpia lucra sectantur, oblitique divinae scripturae, dicentis "qui pecuniam suam non dedit ad usuram" (Ps 14,5), cum mutuum dederint, centesimas exigunt: iuste constituit sancta et magna synodus, ut, si quis inventus fuerit post hanc definitionem usuras accipiens aut per adinventionem aliquam vel quolibet modo negotium transigens aut himolia, id est sescupla, exigens vel aliquid tale prorsus excogitans turpis lucri gratia: deiciatur a clero et alienus exsistat a regula'.

> maniera, o esigerà una volta e mezza tanto, o si darà a qualche altro guadagno scandaloso, sarà radiato e cancellato dal clero.

D'altra parte però se ne parla anche come di un fatto passato che impedisce l'ingresso nel clero. Si dice infatti che 'non dev'essere ordinato quello . . . che ha prestato ad usura, se questo fatto è stato provato'.[60]

All'inizio del secolo V, nella Chiesa africana si fecero le prime menzioni sinodali dell''infamia'. Con riferimento al diritto romano, il canone 129 del Concilio di Cartagine, celebrato il 30 maggio 419[61] considera come infami gli attori di teatro, quelli che si occupano di prostituzione, gli eretici e, analogamente, i pagani e gli ebrei.[62] Ma con un rinvio generale tratta così pure tutti quanti sono accusati di delitti pubblici secondo le leggi secolari.[63] Gli usurai illegali infatti vennero colpiti da infamia già da Diocleziano.[64] La nozione precisa e tecnica di 'infamia',

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[60] *Vetus Gallica* 4.13a, ed. Mordek 374-375: 'clericum non ordinandum neque eum . . . qui usuras accipisse convincitur'; cfr. Gennadius Massiliensis, *Liber* c.38, ed. Turner, 'The *Liber'* 96; Conc.Arelatense (a.314) c.13(12), CCL 148.11.

[61] CCL 149.231, C.4 q.1 c.1. Cfr. Conc.Hipponense (a.427) c.6, CCL 149.252.

[62] Per la punizione del sortilegio e della magia vedi per es. Cod. Theod. 9.16.7 (a.364), *Theodosiani Libri XVI cum Constitutionibus Sirmondianis et Leges Novellae ad Theodosianum pertinentes*, edd. Theodorus Momsen, Paulus M. Meyer (2 vols. Berolini 1905; rist. Dublin-Zürich 1971) 1/2. 462 (pena di morte); eresie gravi vengono colpite con infamia (Cod. Theod. 16.5.7 [a.381], Ibid. 857-858), anzi vengono punite con la pena di morte (Cod. Theod. 16.5.9 [a.382], Ibid. 858-859); cfr. Henry Chadwick, *Priscillian of Avila: The Occult and the Charismatic in the Early Church* (Oxford 1976) 128-148; Nicole Zeddies, *Religio et sacrilegium*: *Studien zur Inkriminierung von Magie, Häresie und Heidentum (4.-7. Jahrhundert)* (Europäische Hochschulschriften 3.964; Frankfurt am Main 2003).

[63] Vedi per es. Gai. 4.182, *Fontes Iuris Romani Anteiustiniani*, II, *Auctores*, ed. Johannes Baviera ([2]Florentiae 1968) 191; Dig. 3.2.1 (Iulianus). Cfr. Vincenzo Arangio-Ruiz, *Istituzioni di diritto romano* ([14]Napoli 1977) 59-63. Erano considerati 'ignominiosi' per es. i 'bigami', gli attori di teatro, i gladiatori e quelli che hanno sposato una donna che dopo la soluzione del suo matrimonio precedente non ha aspettato un anno intero per risposarsi, nonché i condannati per crimini pubblici o per certi delitti privati, ecc.

[64] Cod. 2.11[12].20 (a.290): 'Improbum fenus exercentibus et usuras usurarum illicite exigentibus infamiae macula inroganda est'.

conosciuta dal diritto romano, non gioca però alcun ruolo nella legislazione sinodale dei secoli VI-VII.[65] Il suo uso più tecnico nel diritto canonico appare poi nell'epoca carolingia.[66] Lo Stato romano tardivo e poi quello visigotico colpiva con 'infamia' anche certi delitti di tipo ecclesiale.[67] L'elaborazione della nozione specificamente canonica dell'infamia avviene molto più tardi.[68] La questione sarà poi strettamente collegata nella canonistica con l'istituto dell''irregolarità', la quale significherà un impedimento perpetuo di ricevere o di esercitare gli ordini sacri sia in vista di una condizione durevole, sia come effetto di un avvenimento passato.[69]

Emergono tuttavia nei testi disciplinari anche in modo esplicito dei criteri positivi d'idoneità spirituale ed intellettuale. Sulla scia della *Statuta Ecclesiae Antiqua* la *Collectio Hibernensis* sottolinea che per l'episcopato è necessario che il candidato sia prudente, docile, equilibrato, sobrio, misericordioso, affabile con la gente semplice, che abbia una vita casta, che sia un letterato, che conosca la legge del Signore, rispetti i sensi delle Sacre Scritture, e che soprattutto possa affermare con parole semplici la dottrina della fede.[70] Nelle norme sinodali dell'epoca ritorna pure l'antica

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[65] Ne fa menzione con riferimento al diritto statale per es. Conc.Toletanum IV (a.633) c.19, ed. Martínez Díez 5.207; cfr. Caelestinus I, Ep. ad episcopos Viennenses, JK 369, PL 84.688, D.51 c.5.

[66] Cfr. Rudolf Weigand, 'Infamie', LMA 5.412.

[67] Cfr. Georg May, 'Die Belegung kirchlicher Vergehen mit Infamie durch den Staat im römischen und westgotischen Reiche', *Österreichisches Archiv für Kirchenrecht* 15 (1964) 177-188.

[68] Cfr. C.6 q.1 c.17 (in base a Pseudo-Isidoro: Steph. c.2); Georg May, 'Die Anfänge der Infamie im kanonischen Recht', ZRG Kan. Abt. 47 (1961) 77-94; Peter Landau, *Die Entstehung des kanonischen Infamiebegriffs von Gratian bis zur Glossa Ordinaria* (Köln-Graz 1966); Francesco Migliorino, *Fama e infamia: Problemi della società medievale nel pensiero giuridico nei secoli XII e XIII* (Catania 1985).

[69] Cfr. per es. Franciscus Schmalzgrueber, *Ius Ecclesiasticum Universum* (5 vols. Neapoli 1738) 5.300, Lib. V Pars. IV tit. 38 nr.173; *Codex Iuris Canonici* (1983) c.1040-1041; Robert J. Kaslyn, 'Irregularidad', DGDC 4.795-799.

[70] 1.77, ed. Wasserschleben 6. Per fonti più remote cfr. 1Tim 3,2; *Didascalia* 2.1.2, Franciscus Xaverius Funk, *Didascalia et Constitutiones Apostolorum* (2 vols. Paderbornae 1905; rist. Torino 1970) 1.30-33; Alistair Stewart-Sykes, *The*

pretesa che i chierici devono conoscere la Sacra Scrittura e i canoni, ossia le regole della disciplina ecclesiastica.[71]

Un'altra proprietà personale, che aveva una forte incidenza sociale e poteva impedire l'assunzione di una persona nel clero, era il fatto di essere stato attore di teatro, se questo era notorio.[72] Tale professione, come abbiamo detto, rendeva infame la persona nel diritto romano, ma il problema non viene trattato in modo teorico e dettagliato nei canoni di quest'epoca.

Il candidato all'ordinazione non doveva essere stato penitente. Tale esigenza non si riferiva semplicemente alla condizione attuale di penitente, che impediva logicamente tutto il ministero clericale, poiché i penitenti non potevano accedere alle cose sacre e caso mai nemmeno entrare in chiesa. Si trattava, infatti, dell'effetto successivo di una penitenza pubblica passata già conclusasi con l'assoluzione. Siamo nell'epoca del cambiamento della disciplina penitenziale in Occidente. Anche il penitente già riconciliato doveva teoricamente osservare ancora certi divieti fino alla sua morte. Non poteva avere relazioni coniugali, né esercitare funzioni pubbliche o servizio militare,[73] e così non poteva diventare neanche diacono o sacerdote.[74] Quanto all'effetto

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Didascalia apostolorum: An English version with introduction and annotation (Turnhout 2009) 117-118; *Canones Ecclesiastici Sanctorum Apostolorum* 16.1-2, Alistair Stewart-Sykes, *The Apostolic Church Order: The Greek Text with Introduction, Translation and Annotation* (Early Christian Studies 10; Strathfield, NSW Australia 2006) 97-98 e 109.

[71] Per es. Conc.Toletanum IV (a.633) c.25, ed. Martínez Díez 5.261: 'Sciant igitur sacerdotes scripturas sanctas et canones ut omne opus eorum in praedicatione et doctrina consistat atque aedificent cunctos tam fidei scientia quam operum disciplina'. D.38 cc.1-2; cfr. già Coelestinus I, Ep. ad episcopos Apuliae et Calabriae c.1 JK 371 (21 luglio 429) PL 50.436 (Nulli sacerdotum) D.38 c.4.

[72] *Vetus Gallica* 4.13a, ed. Mordek 375; cfr. Gennadius Massiliensis, *Liber* c.38, ed. Turner, 'The *Liber'* 96.

[73] Cfr. Philippe Rouillard, *Histoire de la pénitence des origines à nos jours* (Paris 1996) 37-38; Rob Meens, *Penance in Medieval Europe, 600-1200* (Cambridge 2014) 12-100.

[74] *Vetus Gallica* 4.7.10.13a.19, ed. Mordek 370, 372, 375, 382; Conc.Epaonense (a.517) c.3, CCL 148A.25; Conc.Aurelianense III (a.538) c.6, CCL 148A.116-117; vedi già *Statuta Ecclesiae Antiqua* c.84, CCL 148.179.

disciplinare o sociale di una penitenza passata, già il Concilio di Nicea (c.9) pronunciò che non dovevano essere ordinati quelli che avevano confessato i loro peccati, perché il ministero ecclesiastico richiede persone irreprensibili (cfr. Tit 1.7; 1Tim 3.2). Tale criterio provocò discussioni già nel corso del V secolo. San Girolamo in una sua lettera indirizzata ad Oceano considerò l'integrità richiesta per il presbiterato o l'episcopato come un criterio pienamente morale. In tal senso però rappresenta una difficoltà il fatto che nessuno, che vive in questo mondo, è senza peccato.[75] All'epoca dei regni barbarici tale sensibilità morale non sembra abbia influenzato la prassi della scelta dei candidati al sacerdozio. Il II Concilio di Braga del 572 nel suo canone 23 ammette i penitenti solo agli ordini minori di ostiario o di lettore. Ma già sente il bisogno di spiegare che cosa significa essere penitenti. Precisa che sotto penitente si intendono quelli che dopo il battesimo per omicidio, per vari reati (crimini) o per peccati gravissimi subiscono una penitenza pubblica.[76] Ma proprio in quest'epoca si è realizzato un cambiamento nella disciplina penitenziale. L'estrema rigidità dell'antichità tardiva, che prevedeva la possibilità di una sola penitenza pubblica e comunitaria e che sembrava determinare ancora l'atteggiamento dei concili della Gallia almeno nella prima metà del VI secolo, cedette gradualmente il posto alla prassi dei monaci britannici e irlandesi che avevano introdotto la possibilità di penitenza ripetuta anche varie volte in modo personale e non necessariamente comunitario. L'atmosfera di questa nuova prassi era caratterizzata dall'esperienza monastica che comportava la confessione regolare dei peccati con la rispettiva correzione e magari anche con una

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[75] Ep.69 c.8, San Jerónimo, *Epistolario*, ed. Juan Bautista Valero (Biblioteca de Autores Cristianos 530; Madrid 1993) 724.

[76] PL 84.578. Già il I Concilio di Toledo (a.400), nel suo c.2, usa una formula simile, ma la parte che offre la definizione di penitente viene ritenuta una aggiunta più tardiva, cfr. Orlandis, Ramos-Lissón, *Die Synoden* 43. Secondo il Concilio di Gerona del 517 cc.9-10, ed. Martínez Díez 4.289, quelli che hanno ricevuto i sacramenti nella loro malattia e hanno ottenuto così la 'benedictio poenitentiae', ma non hanno assunto la penitenza pubblica, o che si confessavano pubblicamente come peccatori, ma non hanno riconosciuto pubblicamente nessun peccato grave, potevano diventare chierici.

certa direzione spirituale, ma inizialmente solo come atto di pietà e non necessariamente con l'assoluzione sacramentale che i monaci semplici non potevano dare, non possedendo il carattere presbiterale o episcopale. Tale prassi però era stata collegata con la redazione degli elenchi di tariffe penitenziali che vennero in seguito usati anche dal clero parrocchiale. In base a questa nuova prassi, che si era diffusa successivamente anche nel Continente, lo stato dei penitenti e il rispettivo impedimento di ordinazione cominciarono a perdere la loro importanza. Alcuni delitti o peccati gravi del passato di una persona rimasero nella Chiesa—secondo la terminologia consolidatasi molto più tardi, nel XIII secolo—come 'irregolarità' che impedivano l'ordinazione (irregularitates ex delicto)[77].

Secondo l'antico criterio biblico, il sacerdote non doveva essere neofita ossia recentemente battezzato (cfr. 1Tim 3.6)[78] specialmente non doveva ricevere l'ordinazione subito dopo il battesimo, ma—secondo i canoni—almeno un anno dopo la sua elezione[79] e un anno dopo la promessa di castità.[80] Il motivo dell'impedimento era—per esempio secondo il canone 9 del Concilio di Orléans del 549[81]—la necessità di una congrua formazione e l'importanza di comprovare la vita cristiana del candidato. La proibizione di ordinare neofiti appare spesso in quest'epoca nella forma di divieto di ordinare dei laici. Certamente tutti sono laici prima di entrare nel clero.[82] Eppure nel linguaggio dell'epoca il laico indicava uno che veniva direttamente dalla vita mondana, secolare. Già Papa Siricio in una lettera indirizzata ai vescovi ortodossi di diverse provincie usa la parola 'laico' come sinonimo del 'neofito' (neophytum sive laicum) indicando come

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[77] Cfr. per es. Innocentius I, Ep.37, ad Felicem episcopum Nucerinum, c.3, JK 314 (a.401-417), PL 20. 604 ('Mirari non possumus'); vedi infra II, 3, n.121.

[78] *Vetus Gallica* IV, 2, ed. Mordek 369; cfr. per es. Conc.Nicaenum (a.325) c.2, COD 6-7. Vedi anche Conc.Bracarense II (a.572) c.22, PL 84. 578, ecc.

[79] Cfr. per es. *Ferrandi Breviarium canonum* c.2, CCL 149. 287.

[80] Conc.Aurelianense III (a.538) c.6, CCL 148A.116-117.

[81] CCL 148A.151.

[82] Innocentius I, Ep.37 c.3, JK 314 (a.401-417) PL 20.604: 'Neque enim clerici nasci, et non fieri possunt'.

motivo del divieto di ordinare queste persone come diaconi o sacerdoti il fatto che essi devono ancora imparare molto ed esercitare le funzioni ecclesiastiche più modeste.[83]

A questo punto emerge la pretesa di arrivare agli ordini sacri attraverso i gradi inferiori del clero.[84] La motivazione di questa regola data da Papa Zosimo (417-418) era che anche negli uffici pubblici vale il criterio della promozione graduale.[85] Nel diritto romano, infatti, il *cursus honorum*,[86] ossia l'ordine di nomine nei diversi uffici pubblici, l'età necessaria dei candidati e l'intervallo tra i diversi gradi sono stati stabiliti dalle leggi sin dal secolo II a.C., ma erano richieste, anche solo per poter iniziare una carriera di funzionari, delle condizioni alle quali solo i membri dei ceti più ricchi ed elevati della società potevano corrispondere.[87]All'epoca imperiale, l'ordine delle funzioni si sviluppa ulteriormente, ma questi uffici rimangono possesso dei senatori e dei cavalieri.[88]

La necessità di promozione graduale dei chierici veniva ripetutamente sottolineata dalla legislazione conciliare per la presenza di una prassi contraria. La tentazione di saltare i gradi inferiori del clero era particolarmente grande quando il candidato era un uomo ricco, letterato, avvocato o altro personaggio influente.[89] Nei primi secoli del Medioevo gli intellettuali laici diventano piuttosto rari. Eppure, ci sono non pochi aristocratici o

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[83] JK 263 (aa.384-398) PL 13.1164-1166 (Cogitantibus nobis).
[84] Ibid. cfr. per es. Zosimus, Ep. ad Hesychium (21 febbraio 418) c.1, JK 339, PL 20.669-672 (Exigit dilectio) D.36 c.2.
[85] Ibid. c.1, PL 20.671.
[86] Cfr. per es. John St. H. Gibaut, *The Cursus Honorum: A Study of the Origins and Evolution of Sequential Ordination* (Patristic Studies 3; New York 2000).
[87] *Lex Villia annualis* (a.180 a.C.), *lex Cornelia de magistratibus* (a.82 a.C.); cfr. Pietro Bonfante, *Storia del diritto romano* (2 vols. ^{4}Milano 1958) 1.148, 322-323; Róbert Brósz, Elemér Pólay, András Földi, Gábor Hamza, *A római jog története és institúciói* (Budapest 1996) 33, nr. 93.
[88] Cfr. per es. Mario Bretone, *Storia del diritto romano* (Roma-Bari 1987) 247-256.
[89] *Vetus Gallica* 4.13, ed. Mordek 373-374; Conc.Sardicense (a.342-343) c.10, *Discipline générale antique (IVe-IXe s.)* 1/2, *Les canons des Synodes Particuliers,* ed. Périclès-Pierre Joannou (Pontificia Commissione per la Redazione del Codice di Diritto Canonico Orientale, Fonti 9; Grottaferrata 1962) 173-174.

personaggi importanti della vita civile che diventano vescovi.[90] S. Gregorio di Tours nella sua *Historia* parla di molti vescovi della Gallia che erano 'senatori' o 'referendari', cioè dignitari della corte, responsabili per la ricezione delle petizioni o capi della cancelleria. Più di una volta però, parlando della loro nomina episcopale, fa menzione del fatto che erano già presbiteri. Quindi: se non prima del diaconato, almeno prima dell'episcopato dovevano avere già esercitato qualche altro ordine.[91] Eppure si verificò anche in Gallia,[92] ma a volte—forse più raramente—anche nella Spagna,[93] che alcuni vescovi fossero completamente ignoranti riguardo ad ogni scrittura ecclesiastica o civile. Nei ceti più bassi del clero si osservano invece delle condizioni che caratterizzano più gli schiavi liberati o i 'conditionales'. Gli *Statuta Ecclesiae Antiqua* per esempio ribadisce che il chierico deve guadagnarsi il vitto con lavoro di artigiano.[94]

Alcuni concili collegano al divieto di ordinare laici il dovere di promettere castità o continenza come condizione della ricezione

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[90] Cfr. per es. Ralph W. Mathisen, *Roman Aristocrats in Barbarian Gaul: Strategies for Survival in an Age of Transition* (Austin, Texas 1993) 91-93.

[91] *Historia Francorum* 2.11, MGH SS rer. Merov. 1/1. 60-61 (Avitus, senatore poi vescovo di Piacenza); 2.13, Ibid. 62 (Venerandus, di rango senatoriale, vescovo di Clermont); 2.21, Ibid. 67 (Sidonio, prefetto, vescovo di Clermont); 5.42, Ibid. 249 (Ursicinus, referendario della regina); 5.45, Ibid. 256 (Flavus, referendario del re Gonthran); 5.46, Ibid. 256-257 (altre volte il successore del vescovo è un presbitero o un arcidiacono).

[92] Ibid. 4.12, MGH SS rer. Merov. 1/1.142 (vino ultra modum deditus . . . epylenticus . . . avaritiae . . . incumbens) 144 (De omnibus enim scripturis, tam ecclesiasticis quam saecularibus, adplene immunis fuit).

[93] Conc.Hispalense 2 (a.619) c.7, PL 84.596: viene condannato per la sua ignoranza Agapius, vescovo di Córdoba (virum ecclesiasticis disciplinis ignarum); cfr. Belda Iniesta, 'Del *Monasterium Clericorum'* 41.

[94] CCL 148. 179: 'Clericus, quamlibet uerbo Dei eruditus, artificio uictum quaerat' – D.91 c.4. Nella *Collectio Hispana* figura come c.52 del Conc.Carthaginense IV, ed. Martínez Díez 3. 364: 'Clericus uictum et uestimentum sibi ab artificio uel agricultura absque officii sui dumtaxat detrimento praeparet'. Secondo il c.4 del Conc.Toletanum II (a.527), ed. Martínez Díez 4. 351-352, il chierico ha ricevuto diritto di usufrutto su un pezzo di terra della Chiesa, per poter coltivarla 'sustentandae uitae causa'. Per la condizione degli schiavi liberati della Chiesa, tra i quali alcuni sono diventati chierici vedi per es. Conc.Caesaraugustanum III (a.691) c.4, PL 84. 320.

del diaconato e del presbiterato. Tale promessa viene chiamata 'conversio' nel canone 6 del III Concilio di Orléans del 538,[95] mentre il Concilio di Epao del 517 (c.37) parla di 'religio' in un senso simile.[96] Sembra delinearsi un modello speciale di preparazione al sacerdozio (e all'episcopato) seguito nel caso di candidati provenienti dalla corte reale o scelti tra gli alti funzionari pubblici. Si poteva usare, infatti, il breve percorso di un anno previsto da Papa Gelasio per monaci nel caso di scarsità del clero.[97] In tali casi di necessità il pontefice concedeva un percorso più breve anche per i candidati laici, la preparazione dei quali doveva essere comunque più lunga di quella dei monaci.[98] Si ribadiva tuttavia che questo provvedimento non modificava l'antica disciplina, ma costituiva soltanto una concessione per circostanze straordinarie.[99] Tale atto, secondo la terminologia del diritto canonico attuale, potrebbe chiamarsi dispensa. Se invece un laico aveva prestato una professione di castità, entrava quasi nella categoria dei monaci e poteva essere ordinato in un anno. Tale pensiero è presente nel canone 2 del Concilio di Arles del 524, il quale apre questa possibilità di preparazione più breve come novità che attenua la disciplina antica per motivo della scarsità del clero, cioè per la stessa ragione che figura anche nella lettera di Papa Gelasio. La differenza è che la lettera pontificia, concedendo un solo anno di preparazione, tiene presente dei candidati che sono già monaci, nel canone di Arles invece si tratta di laici che stanno appena prestando la professione (la conversio). La validità degli antichi canoni viene rispettata anche dal concilio, viene quindi

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[95] CCL 148A.116-117.
[96] Ibid. 34.
[97] Ep.14 c.2 JK 636, ed. Thiel 362-363, D.77 c.8-9.
[98] Ibid. c.3, ed. Thiel 363-364.
[99] Ibid. 'Quae tamen eatenus indulgenda credidimus, ut illis ecclesiis, quibus infestatione bellorum vel nulla penitus vel exigua remanserunt, ministeria renoventur: quatenus his Deo propitio restitutis, in ecclesiasticis gradibus subrogandis canonum paternorum vetus forma servetur; nec contra eos ulla ratione praevaleat, quod pro accidentis defectus remedio providetur, non adversus scita majorum nova lege proponitur'.

conservato il carattere eccezionale (di dispensa) del provvedimento:[100]

> Benché riguardo ai laici i padri antichi abbiano ordinato di osservare un tempo più lungo, tuttavia, poiché con la crescita del numero delle Chiese è necessario per noi ordinare più chierici, senza pregiudicare in alcun modo i canoni antichi, disponiamo che nessun metropolita conferisca la dignità episcopale a qualsiasi laico, e neanche gli altri vescovi conferiscano la dignità di presbiterato o di diaconato, se non ai candidati che abbiano prima prestato la *conversio* per un anno intero.

Il grandioso Concilio V di Orléans (549), che dietro l'iniziativa del re Childeberto ha raccolto i vescovi dei tre regni franchi, fa un ulteriore passo avanti, quando nel suo canone 9 dispone: [101]

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[100] CCL 148A.43-44: 'Et licet de laicis prolixiora tempora antiqui patres ordinauerint obseruanda, tamen quia crescente ecclesiarum numiro necesse est nobis plures clericos ordinare, hoc inter nos sine praeiudicio dumtaxat canonum constitit antiquorum, ut nullus metropolitanorum cuicumque laico dignitatem episcopatus tribuat, sed nec reliqui pontifices presbyterii uel diaconatus honorem conferre praesumant, nisi anno intigro fuerit ab eis praemissa conuersio'.

[101] CCL 148A.151: 'Vt nullus ex laicis absque anni conuersione praemissa episcopus ordinetur, ita ut intra anni ipsius spatium a doctis et probatis uiris et disciplinis et regolis spiritalibus plenius instruatur'. Contrariamente ad alcune interpretazioni, per es. Charles Joseph Hefele e Henri Leclercq, *Histoire des conciles d'après les documents originaux* (Paris 1909) 3/1.160: 'Aucun laïque ne doit être ordonné par un évêque, s'il ne s'est écoulé un an depuis sa conversion', il testo si riferisce all'ordinazione episcopale. Il canone seguente (10) del concilio proibisce che qualcuno acquistasse l'episcopato con regali o per compravendita.I sommari delle collezioni canoniche attestano che si tratta dell'ordinazione in vescovo e non solo fatta 'da un vescovo'. Cfr. *Breviatio canonum Ferrandi* c.2, CCL 149.287: 'quicumque laicus ad episcopatum eligitur prius annum in ministerio ecclesiastico per omnes gradus transeat'; *Excerpta Hispanae* Lib. I, tit. 34, 2, ed. Martínez Díez 2/1.75: 'Ex laico epicopus non ordinetur'; vedi già Conc.Sardicense (a.342-343) c.10(13), ed. Joannou 173-174; il 'summarium' di questo canone nella *Collectio Hispana,* ed. Martínez Díez 3.119: 'Vt ne ex laico quilibet episcopus ordinetur'. Cfr. Brigitte Basdevant-Gaudemet, 'Childebert et les évêques: Note sur une procédure de désignation épiscopale', eadem, *Église et Autorités: Études d'histoire de droit canonique médiéval* (Limoges 2006) 108 n.3: la parola 'conversio' si traduce con 'cambiamento di vita'.

> Nessuno dei laici venga ordinato vescovo, se non ha prestato la 'conversio' (almeno) un anno prima, affinché durante quest'anno possa ricevere da uomini dotti e conosciuti un'istruzione più completa sulla dottrina e sulle regole ecclesiastiche.

Qui non si tratta più del carattere eccezionale o provvisorio di questa norma, bensì essa pare piuttosto esprimere la disciplina generale. Logicamente, non si fa più alcun cenno nemmeno alla necessità di qualche motivo speciale (per es. la scarsità del clero). È da osservare però che questo canone non è stato assunto nelle collezioni sistematiche dell'epoca,[102] anche se esso è stato conservato attraverso le collezioni cronologiche.[103] Questo sembra essere un segno del fatto che questa disposizione che permette la preparazione breve senza alcuna condizione non è stata largamente recepita come norma generale. Ciò non esclude che nella prassi sia stata spesso applicata.[104]

Criteri intellettuali e sociali

Il candidato al diaconato e al presbiterato non dev'essere analfabeta. La conoscenza della scrittura è, infatti, una necessità che proviene dalla natura religiosa specifica di questi sacri ministeri. Poter leggere i testi liturgici, la Bibbia e i testi religiosi fondamentali era indispensabile. La *Didascalia* nel III secolo ammetteva ancora qualche eccezione a questa regola, permettendo—in assenza di altre possibilità—l'ordinazione episcopale di uomini anziani che non sanno leggere, ma conoscono bene le storie della Sacra Scrittura.[105] I *Canoni Ecclesiastici dei Santi Apostoli* riconoscono pure la possibilità di ordinare vescovi persone che non sanno leggere, ma non richiedono per tali candidati l'età avanzata bensì forse solo un atteggiamento mite e molto caritatevole verso tutti.[106] Nelle

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[102] Cfr. Pontal, *Die Synoden* 300.
[103] Ibid. 285.
[104] Non parla di situazione straordinaria, ma soltanto di preparazione per un anno per es. Conc.Bracarense I (a.561) c.20, PL 84.567-568.
[105] *Didascalia* 2.1.2, ed. Funk 30-33.
[106] *Canones Ecclesiastici Sanctorum Apostolorum* 16.2, *Doctrina duodecim Apostolorum, Canones Apostolorum ecclesiastici ac reliquae doctrinae de*

circostanze dei secoli VI e VII, quando la Chiesa era spesso l'unica depositaria delle conoscenze risalenti ad un'epoca più sviluppata e quando sia il canone della Bibbia che i testi liturgici e dogmatici principali, ma anche quelli della disciplina ecclesiale, erano già ufficialmente fissati, l'analfabetismo tra diaconi e sacerdoti non poteva più essere tollerato.[107] Malgrado le disposizioni conciliari però in quell'epoca funzionavano ancora pochissime scuole parrocchiali.[108] Nonostante il divieto continuo e categorico di ordinare degli analfabeti, nell'epoca merovingia si teneva presente la possibilità che vi fossero analfabeti tra i già ordinati. Costoro dovevano essere costretti a studiare, e se non lo facevano, bisognava sottrarre loro le entrate economiche, o in casi più gravi bisognava rinchiuderli in monastero.[109]

Il problema veniva considerato anche in Oriente, dove l'imperatore Giustiniano dispose chiaramente che gli analfabeti non potessero essere assunti in nessun caso nel clero, specialmente nell'ordine presbiterale e diaconale.[110] Tale disposizione imperiale è degna di attenzione anche perché contiene una notevole regolamentazione statale dei criteri di idoneità agli ordini sacri, pur facendo anche riferimento alle 'regole divine'. Da tutto ciò si vede che il motivo dell'insistenza sulla capacità di leggere (e scrivere) nella disciplina ecclesiale proviene da motivi religiosi. Nelle assemblee cristiane, infatti, la lettura dei testi sacri era una

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duabus viis expositiones veteres, ed. Franciscus Xaverius Funk (Tübingen 1887) 60-61. Altri, leggendo il testo in modo diverso, dicono che venga richiesto che i vescovi sappiano spiegare la Sacra Scrittura anche se non sanno leggere, criterio che sarebbe conforme a quello della Didascalia, vedi Stewart-Sykes, *The Apostolic Church Order* 109.

[107] Conc.Aurelianense (a.533) c.16, CCL 148A.101; Conc.Narbonense (a.589) c.11, CCL 148A.256.

[108] Cfr. Pontal, *Die Synoden* 235.

[109] Conc.Narbonense (a.589) c.11, CCL 148A.256: 'Amodo nulli liceat episcoporum ordinare diaconum aut presbiterum literas ignorantem; set si qui ordinati fuerint, cogantur discere. Qui uero diaconus aut presbiter fuerit literis inheruditus . . . ab stipendio reiciendum . . . Et si perseuerauerit desidiose, et non uult proficere, mittatur in monasterio, quia non potest nisi legendo edificare populum'.

[110] Nov. 6.4 (a.535).

prassi continua sin dal I secolo.[111] Anche se non tutti i giovani erano obbligati a leggere nella comunità come nell'ebraismo, almeno i chierici (i diaconi, i presbiteri, ma logicamente anche i lettori) dovevano essere versati nel leggere e scrivere. Da questo bisogno nacquero le scuole episcopali e parrocchiali che servivano poi come base alle disposizioni dei capitolari dell'epoca carolingia che stabilirono il sistema dell'istruzione pubblica occidentale obbligando i parroci all'insegnamento dei ragazzi delle loro 'parrocchie'.[112]

Gli schiavi non potevano essere ordinati. Se un vescovo in assenza o all'insaputa del proprietario del servo, ma conoscendo la condizione del candidato, aveva ordinato diacono o sacerdote uno schiavo, doveva pagare come ricompensa il doppio del prezzo dello schiavo al suo proprietario. Ma il nuovo ordinato poteva esercitare il proprio ministero nella Chiesa. Se invece il vescovo non sapeva che si trattava di uno schiavo, erano quelli che chiedevano l'ordinazione e davano testimonianza sulla condizione del candidato a dover pagare la ricompensa.[113] Anche in questo contesto è chiaro che i vescovi dovevano informarsi sull'idoneità dei candidati attraverso testimoni sia chierici che laici (*cives*).[114]

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[111] Cfr. Josef A. Jungmann, *Der Gottesdienst der Kirche auf dem Hintergrund seiner Geschichte* ([3]Innsbruck-Wien-München 1962) 14-15; Péter Erdő, 'Il valore teologico del diritto canonico: Una questione storica', *Ephemerides Iuris Canonici* 58 (2018) 146-147.

[112] Cfr. specialmente *Karoli Magni Capitularia, Capitula examinationis generalis* (a.802) c.12, MGH LL 1. 107: 'Ut unusquisque filium suum litteras ad discendum mittat, et ibi cum omni sollicitudine permaneat, usque dum bene instructus perveniat'; Theodulf von Orléans, *Capitula I* (a.798-817/818) c.20, MGH Capit. Episc.1.116: 'Presbyteri per villas et vicos scholas habeant. Et si quilibet fidelium suos parvulos ad discendas litteras ei commendare vult, eos suscipere et docere non rennuant, sed cum summa caritate eos doceant'.

[113] Conc.Aurelianense (a.511) c.8, CCL 148A.7. Cfr. Conc.Aurelianense (a.549) c.6, CCL 148A.150 (il vescovo deve dare due servi per ricompensare il padrone dello schiavo ordinato); Conc.Toletanum I (a.400) c.10, ed. Martínez Díez 4.332; cfr. Orlandis, Ramos-Lissón, *Die Synoden* 42. Per la preistoria della norma vedi per es. Conc.Eliberitanum (ca.306) c.80; *Canones Apostolorum* 82 (81) ecc.

[114] *Vetus Gallica* 4.10, ed. Mordek 372; cfr. Conc.Aurelianense III (a.538) c.6, CCL 148A.116-117; Conc.Bracarense II (a.572) c.3, PL 84.571: 'oportet ergo

Similmente agli schiavi, anche i liberati che erano onerati da gravi obbligazioni verso i loro patroni, potevano essere ordinati soltanto col permesso dei medesimi.[115] Se invece il vescovo assumeva nel clero uno dei servi della sua propria Chiesa, doveva contemporaneamente anche liberarlo. Se un tale chierico si comportava onestamente ed aveva dei meriti, poteva essere promosso a dignità più alte. Se invece viveva in modo indegno, poteva essere ridotto allo stato di schiavitù perpetua.[116]

Era ugualmente vietata l'ordinazione di quelli che amministravano dei beni secolari e dovevano rendere ragione su questa attività. Dopo aver reso conto e deposto la funzione, potevano essere ordinati.[117] Qui non si trattava, infatti, di una attività passata che comportava una specie di 'infamia', come nel caso dell'usura, bensì di mancanza della libertà necessaria.

Già nella *Breviatio canonum* di Ferrandus (c.3) appare, con riferimento ad un concilio del 416,[118] come principio importante il divieto di ordinare una persona che, dopo il battesimo, era entrata nel servizio militare.[119] L'*Excerpta Hispanae,* facendo riferimento

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non per gratiam munerum, sed per diligentem prius discussionem, deinde per multorum testimonium clericos ordinare'; cfr. Orlandis, Ramos-Lissón, *Die Synoden* 90.

[115] Conc.Aurelianense (a.549) c.6, CCL 148A.150; Conc.Bracarense II (a.572) c.46, PL 84.581: 'Si quis obligatus tributo servili vel aliqua condicione patrocinio cuiuslibet domus, non est ordinandus clericus, nisi probatae vitae fuerit, et patroni concessus accesserit'; cfr. Pontal, *Die Synoden* 255. Le persone di simile condizione giuridica vengono chiamate 'liberti' nei testi sinodali. Essi potevano essere ordinati se sono stati liberati senza alcuna condizione. Solo se avevano delle obbligazioni (obsequium) verso i loro padroni, ciò impediva l'ordinazione; cf. per es. Conc.Toletanum IV (a 633) c.73, ed. Martínez Díez 5.246.

[116] Conc.Toletanum IX (a.655) c.11, ed. Martínez Díez 5. 504-505, D.54 c.4.

[117] Cfr. Conc.Carthaginense I (a.345-348) c.8, CCL 149.7. I sommari delle collezioni precisano il senso: *Excerpta Hispanae* 1.1.36, ed. Martínez Díez 2/1. 51: 'Ut implicati negotiis alienis ante redditam rationem clerici non fiant'. Per la sopravvivenza della norma vedi D.54 c.3; *Codex Iuris Canonici* (1983) cc.285 § 4; 1042 § 2.

[118] Concilum Zelense; cfr. CCL 149.307.

[119] CCL 149.287: 'Vt qui post baptismum saeculari militiae nomen dederit ab ordinatione arceatur'. Cfr. Conc.Toletanum I (a.400) c.8, ed. Martínez Díez 4. 331-332; per l'influsso successivo vedi D.51 c.4.

ad una lettera di Papa Innocenzo I, formula questa regola in modo diverso. Afferma infatti che gli avvocati, i curiali e quelli che prestano servizio militare, non possono essere ammessi nel clero.[120] Tale formulazione generale può essere compresa anche come un criterio che si riferiva alla presente condizione dei candidati e non al loro passato. Qui si riscontra però una certa differenza rispetto al contenuto della lettera originale di Papa Innocenzo. La lettera dice infatti che quei gruppi di laici che non possono essere ordinati per il divieto dei canoni—così del canone 10(13) del Concilio di Serdica—sono:[121]

> quel fedele che ha prestato servizio militare, che ha iniziato dei processi cioè ha richiesto una pena (contro un imputato), quel fedele che è proceduto come giudice. Nel caso dei curiali invece è chiara la ragione, perché, anche se si trovano tra di loro alcuni che possono diventare chierici, essi vengono spesso richiamati al servizio della curia e così bisogna astenersi da loro.

Qui, anche nella struttura del testo, si vede la differenza tra i curiali che non possono diventare chierici per la loro condizione presente, e gli altri che hanno invece svolto nel passato, ma comunque già come cristiani, un'attività contraria alla mitezza, cioè erano soldati, hanno proposto una pena di morte (postulantes), o hanno ordinato come giudici (administrantes) il tormento delle persone o hanno condannato a morte qualcuno.

Il canone 4 del Concilio di Orléans del 511, vietando in modo generale, secondo l'usanza dei Visigoti, l'assunzione nel clero dei 'secolari', cioè dei laici[122]—non solo dei 'curiali' (uomini della corte reale o membri della curia municipale), ma di tutti gli uomini liberi—aggiunge che questo può comunque avvenire dietro

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[120] 1.1.43, ed. Martínez Díez 2/1.51: 'Causidici et curiales vel saeculari militiae dediti ad clerum non admittantur'.

[121] Ep.37 c.3 JK 314 (a.401-417) PL 20.604: 'genera de quibus ad clericatum pervenire non possunt, id est, si quis fidelis militaverit, si quis fidelis causas egerit, hoc est, postulaverit, si quis fidelis administraverit. De curialibus autem manifesta ratio est; quoniam etsi inveniantur huiusmodi viri, qui debeant clerici fieri, tamen, quoniam saepius ad curiam repetuntur, cavendum ab his est'. Per la sopravvivenza: D.51 c.2; *Codex Iuris Canonici* (1917) c.984 § 6-7.

[122] Niermeyer, *Mediae Latinitatis Lexicon* 951.

precetto del re o in base al consenso del conte (iudex).[123] I figli e gli altri discendenti dei chierici però possono essere assunti nel clero dal vescovo liberamente, perché essi stanno sotto la sua potestà.[124] Tale disposizione sinodale ha qualche precedente nel diritto romano del IV secolo. I curiali ossia l'‘ordo decurionum' nell'epoca imperiale tardiva, pur continuando ad avere la funzione di senato municipale, costituiva un'associazione forzata di appartenenza ereditaria con gravose obbligazioni pubbliche.[125] Per tale ragione furono significative le disposizioni di Costanzo II che garantivano esenzioni a simili obbligazioni per i chierici e i loro servi, e che prevedevano che i figli dei chierici, se non tenuti da obbligazioni curiali, fossero dipendenti della Chiesa.[126] La novità che si osserva nel canone conciliare citato è proprio l'estensione di questa regola dai curiali a tutti i laici. Qui si tratta ormai di un sistema di dipendenze sociali che caratterizzano l'alto medioevo e che hanno la loro incidenza anche sulla vita interna della Chiesa. Questo fatto spiega perché gli uomini di alta condizione sociale avessero difficoltà nell'intraprendere la vita clericale con i gradi

[123] Le nomine episcopali si effettuavano con il consenso, anzi dietro l'ordine del re. L'offerta di beni materiali e la promozione dei favoriti erano frequenti, cfr. Pontal, *Die Synoden* 232-233.
[124] CCL 148A.6. Un secolo e mezzo più tardi tale norma viene riferita ormai solo ai figli qualificati illegittimi dei subdiaconi e di altri chierici di grado più alto. Tali figli non soltanto non possono succedere nell'eredità dei padri, ma diventano servi perpetui di quella chiesa in cui sono stati impiegati i loro padri, Conc.Toletanum IX [a.655] c.10, ed. Martínez Díez 5.504: ‘non solum parentum hereditatem nusquam accipient, sed etiam in seruitute eius ecclesiae de cuius sacerdotis uel ministri ignominia nati sunt, iure perenni manebunt'. C.15 q.8 c.3.
[125] Sulla condizione dei curiali nei regni barbarici cfr. Michel Rouche, *L'Aquitaine des Wisigoth aux Arabes (418-732)* (Paris 1979) 327-331; Mathisen, *Roman Aristocrats* 27-32.
[126] Cod. Theod. 16.2.9 (a.349), edd. Mommsen, Meyer 1/2.837: ‘Curialibus muneribus adque omni inquietudine civilium functionum exsortes cunctos clericos esse oportet, filios tamen eorum, si curiis obnoxii non tenentur, in ecclesia perseverare'; cfr. Ibid. 16.2.8 (a.343).

più bassi e come potessero raggiungere rapidamente l'episcopato.[127]

Ci sono altri aspetti sociali emersi già nell'antichità e sviluppati all'inizio del Medioevo che incidono sull'idoneità dei candidati, ma gettano luce anche sul loro atteggiamento morale. Il candidato non può richiedere e usare l'appoggio del potere civile per ottenere una dignità ecclesiastica soprattutto se si tratta di un episcopato.[128] Ciononostante, per esempio nella Gallia merovingica, per le nomine episcopali era richiesta una decisione del re come si legge nella *Historia Francorum* di S. Gregorio di Tours.[129] Anche se i concili prevedano soltanto che i vescovi fossero eletti dal clero e dal popolo, il Concilio V di Orléans nel 549 (c.10) dice apertamente che è necessaria anche la volontà del re.[130] Anzi, condannando la prassi simoniaca e la compravendita dei vescovadi, e richiedendo che il vescovo venga eletto dal clero e dal popolo, fa un riferimento esplicito ai concili dell'antichità. Aggiunge pure (c.11) che non si deve costringere, per pressione di persone potenti, i 'cives' e i chierici a dare il consenso all'elezione di un vescovo. Eppure, persino il testo conciliare riconosce la necessità della volontà reale. La legislazione civile si esprime ancora più apertamente. L'Editto di Clotario II (18 ottobre 614) richiede che il nuovo vescovo venga consacrato sull'ordine del principe e tiene presente la possibilità che i vescovi vengano scelti tra il personale della corte (c.1).[131] Non è invece pienamente

[127] Conc.Aurelianense (a.549) c.9, CCL 148A.151, ecc. Cfr. supra note 98, 99, 100 e 101.

[128] *Vetus Gallica* 4.11, ed. Mordek 373; cfr. *Canones Apostolorum* 30, ed. Metzger 3.282-283.

[129] Per es. 4.26, MGH SS rer. Merov. 1/1.157-158; 5. 46, Ibid. 256-257 ecc.

[130] CCL 148A.151-152; cfr. Jean Gaudemet, *Storia del diritto canonico: Ecclesia et Civitas* (Cinisello Balsamo 1998) 183; idem, *Les élections dans l'église latine des origines au XVIe siècle*, avec la collab. de Jacques Dubois, André Duval, et Jacques Champagne (Institutions-Société-Histoire 2; Paris 1979) 50-62.

[131] MGH LL Capit. 1.14: 'Ideoque definitiones nostrae est, ut canonum statuta in omnibus conserventur et quod per tempora ex hoc praetermissum est, vel dehinc perpetualiter observetur, ita ut episcopo decedente, in loco ipsius, qui a metropolitano ordinari debet cum provincialibus, a clero et populo eligatur; et

chiaro, come si realizzava la partecipazione del re nella nomina dei vescovi. Egli decideva semplicemente chi dev'essere eletto? O era necessario il suo previo permesso per l'elezione dei singoli candidati o per la consacrazione della persona già eletta? Forse aveva l'intervento regio diverse forme secondo la diversità dei luoghi, la posizione politica o la personalità del re?[132] Nella Spagna visigotica, nel secolo VII, la nomina dei vescovi passò alla competenza del re. Tale situazione ha aggravato il problema delle ordinazioni simoniache.[133]

Come abbiamo sopra accennato, i referendari del 'Palatium' dei principi diventavano spesso vescovi. Questa funzione era già conosciuta nell'Impero Romano tardivo.[134] Dalla metà del secolo VI essa appare nella Gallia merovingica come un'alta dignità della corte reale. I referendari erano, fino all'epoca carolingia, generalmente dei laici ben formati.[135] Persino S. Crodegango di Metz (ca.712-766), uno dei personaggi chiavi del ramo ecclesiastico della riforma carolingia e parente vicino di Pippino il Piccolo, è stato referendario nella corte di Carlo Martello, ed è stato nominato vescovo nel 742.[136]

Un altro impedimento di ordinazione ossia un difetto di idoneità era la simonia, problema presente sin dall'inizio della Chiesa (cfr. Atti 8.18-24). I *Canoni Apostolici* (c.29)[137] vietano già espressamente l'ordinazione episcopale, presbiterale e diaconale fatta in cambio di denaro. Il Concilio di Calcedonia (a.451) nel suo canone 2 formula questa norma in modo ancor più largo vietando anche il conferimento degli ordini minori del clero e di altre

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si persona condigna fuerit, per ordinationem principis ordinetur; vel certe, si de palatio eligitur, per meritum personae et doctrinae ordinetur'.

[132] Cfr. Basdevant-Gaudemet, 'Childebert et les évêques' 110-113.

[133] Cfr. Orlandis, Ramos-Lissón, *Die Synoden* 89 n.75.

[134] Cfr. per es. Nov.10 (a.535) 'De referendariis Palatii'.

[135] Cfr. Peter Csendes, 'Referendar', LMA 7.541.

[136] Paulus diaconus, *Liber de Episcopis Mettensibus*, MGH SS 2.267: Chrodegangus 'Francorum ex genere primae nobilitatis progenitus. Hic in palatio maioris Caroli ab ipso enutritus, eiusdemque referendarius extitit, ac demum Pippini regis temporibus pontificale decus promeruit'.

[137] Ed. Metzger 3.282-283.

funzioni ecclesiastiche dietro pagamento.[138] Nelle collezioni canoniche del VI-VII secolo si ripete che non si deve acquistare la dignità di vescovo, di sacerdote o di diacono con denaro o con altri favori materiali.[139]

Età, matrimonio, continenza, celibato

Per quanto riguarda l'età degli ordinandi, già nella decretale di Papa Siricio indirizzata ad Imerio di Tarragona (cc.9-10[13-14])[140] emergono due modelli di preparazione agli ordini sacri. Questi modelli si trovano in quella parte della lettera che viene attribuita da certi autori al sinodo romano menzionato da Papa Siricio stesso, mentre i primi otto capitoli della decretale, formulati nello stile della legislazione imperiale, vengono considerati come composti personalmente da Siricio.[141] Altri ritengono possibile che questi brani della lettera provengano da altre fonti.[142]

Il primo modello tiene presente quelli che sono stati battezzati nella loro infanzia, prima della pubertà. Essi possono diventare lettori e se dall'età adolescenziale fino all'età di trenta anni vivono onestamente e si accontentano di una sola moglie che sposano vergine con la benedizione del sacerdote, possono diventare accoliti o suddiaconi. Successivamente possono accedere al grado del diaconato e devono dimostrarsi continenti. Se vivono in questa condizione per cinque anni, possono ricevere l'ordinazione sacerdotale. Passati altri dieci anni possono diventare vescovi. Il secondo modello riguarda gli uomini di maggiore età che si convertono alla fede e desiderano entrare nel clero. A loro si può amministrare il battesimo e subito assumerli nell'ordine dei lettori

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[138] COD 87-88.

[139] *Vetus Gallica* 4.12.13a.15, ed. Mordek 373, 375, 380; cfr. Conc.Toletanum VI (a.638) c.4, ed. Martínez Díez 5. 307-308 ecc.

[140] Ed. Zechiel-Eckes 104, 106, 108.

[141] Christian Hornung, *Directa ad decessorem: Ein kirchenhistorisch-philologischer Kommentar zur ersten Dekretale des Siricius von Rom* (Münster 2011) 55-57 ecc. Per il riassunto di questa teoria vedi Zechiel-Eckes, *Die erste Dekretale* 6-9.

[142] Eric Knibbs, 'Review on Zechiel-Eckes, Die erste Decretale', BMCL 34 (2017) 320.

o degli esorcisti, se hanno avuto soltanto una moglie sposata come vergine. Dopo due anni un tale candidato può diventare accolito o suddiacono e servire in questa funzione per un quinquennio, dopo di che può essere promosso al diaconato se il suo comportamento si è dimostrato degno. Infine può diventare presbitero o vescovo se il clero e il popolo lo eleggono. In entrambi i modelli si trattava di uomini sposati che dovevano vivere in continenza dopo l'ordinazione diaconale (c.7[10]).[143] Il Papa ha tenuto presente però anche una forma celibataria—e non soltanto continente—della vita clericale. Tale forma era collegata al monachesimo. Ma anche qui viene menzionata l'età di trent'anni per il diaconato o il presbiterato. Dopo di che anche i monaci dovevano osservare l'intervallo di dieci anni per l'episcopato e non saltare subito al supremo ordine del clero (c.13[17]).[144]

Il canone 1 del I Concilio di Toledo del 400 richiede nello stesso spirito che i diaconi e i presbiteri vivano in piena continenza.[145] A questo riguardo si fa riferimento ad un certo concilio della *Lusitania* che ha accettato una simile regola, ma non fa menzione della decretale di Siricio. Quei diaconi che malgrado la disposizione del concilio lusitano hanno vissuto una vita matrimoniale, non potevano essere promossi al presbiterato, e quei presbiteri che vivevano in tale condizione, non potevano diventare vescovi.[146] Il menzionato concilio lusitano, riguardo alla continenza clericale, era in sintonia con il canone 33[147] del concilio

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[143] Ed. Zechiel-Eckes 98, 100.
[144] Ibid. 110. Cfr. C.16 q.1 c.29.
[145] Ed. Martínez Díez 4. 328.
[146] Cfr. Orlandis, Ramos Lissón, *Die Synoden* 44.
[147] Ed. Martínez Díez 4.253: 'Placuit in totum prohiberi episcopis, presbyteris et diaconibus positis in ministerio abstinere se a coniugibus suis et non generare filios. Quicumque uero fecerit, ab honore clericatus exterminetur'. Per l'interpretazione del testo vedi Orlandis, Ramos Lissón, *Die Synoden* 21.

di Elvira[148] (ca.306), anzi ha promulgato, per alcuni, le disposizioni di quel concilio.[149]

Più di un secolo dopo Siricio, Papa Gelasio parla della mancanza del clero in diverse regioni. Per i monaci che nella loro vita secolare precedente non avevano commessi gravi crimini[150] né avevano sposato una seconda moglie, né una vedova o ripudiata, né avevano fatto una penitenza pubblica, né sono mutilati in nessuna parte del loro corpo,[151] né sono di condizione servile o dipendenti per la loro nascita, né sono 'curiali', e se conoscono le lettere, possono diventare lettori e tre mesi dopo il lettorato accoliti e, se hanno l'età necessaria, nel sesto mese suddiaconi, nel nono mese diaconi e alla fine dell'anno presbiteri.[152]

All'inizio del medioevo si insiste sul dovere di astenersi dalla vita matrimoniale dopo l'ordinazione diaconale. Il Concilio di Agde del 506 cerca di rinnovare l'antica disciplina che vietava l'ordinazione dei bigami (risposati) o dei mariti di donne risposate (c.1).[153] Richiede per il diaconato 25, per il sacerdozio 30 anni di età e piena continenza, nonché il consenso della moglie (cc.16-17).[154] Per confermare tale dovere di continenza riporta (c.9) il testo della decretale di Innocenzo I indirizzata ad Exuperio

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[148] Sull'età e sull'origine dei ricordi testuali del concilio vedi Ibid. 3-9; Miguel J. Lázaro Sánchez, 'L'état actuel de la recherche sur le concile d'Elvire', *Revue des Sciences Religieuses* 82/4 (2008) 517-546.

[149] Cfr. Orlandis, Ramos-Lissón, *Die Synoden* 44 n.77. Per la letteratura della storia del celibato vedi recentemente Stefania T. Salvi, *'Clericus recidivans ad concubinatum divinae misericordiae dicitur irrisor*: Brief Remarks on the 'Relapse' into Ecclesiastical Concubinage Leading up to the Council of Trent', *Vergentis* 5 (2017) 243-262, specialmente 244-245.

[150] L''infamia iuris' sarà considerata in epoche più tardive come 'irregularitas' che impedisce l'ordinazione; cfr. *Codex Iuris Canonici* (1917) c.984 § 5.

[151] In una forma tardiva, l'autolesione sopravvive come impedimento di ordinazione; cfr. *Codex Iuris Canonici* (1983) c.1041 § 5.

[152] JK 636 c.3, ed. Thiel 363-364.

[153] CCL 148.193; cfr. Conc.Valentinum (a.374) c.1, ibid. 38-39; vedi anche Conc.Epaonense (a.517) c.2, CCL 148A.24; Conc.Arelatense (a.524) c.3, ibid. 44; Conc.Aurelianense (a.541) c.10, ibid. 134, ecc.

[154] CCL 148.201. Cfr. D.77 c.6.

vescovo di Tolosa (a.405).[155] Questa lettera pontificia teneva presente la possibilità che molti degli interessati non conoscessero ancora tale seria obbligazione. Se la osservano per il futuro, possono rimanere nel loro ministero, ma non dovranno essere elevati ai gradi più alti. I concili successivi aggiungono ulteriori precisazioni a questa regola vietando l'ordinazione anche di quelli che hanno dei figli da concubine o dopo la morte del primo coniuge hanno stabilito pubblicamente una convivenza con una concubina.[156] Si proibiva pure l'ammissione al clero di quegli uomini sposati le cui mogli avevano commesso adulterio,[157] se questo fatto poteva essere pubblicamente provato. Questa regola è stata assunta nella Collezione *Vetus Gallica* dal canone 8 del Concilio di Neocesarea (a.314-319). Il testo venne però notevolmente abbreviato. Si cancellò la seconda parte del canone, dove era prescritto che il chierico, se la moglie aveva commesso l'adulterio, quando egli era già ordinato, doveva dimetterla. Se invece decideva di continuare a convivere con essa, non poteva conservare la sua funzione. Intorno all'anno 600, tale disposizione poteva sembrare superflua per il redattore della collezione, perché—almeno per i diaconi e i sacerdoti—era già comunque proibito di convivere con le loro mogli. La moglie o non poteva vivere nella stessa casa, dove abitava il chierico[158] o, secondo una regola meno severa, doveva abitare in un'altra stanza. In tal caso però il vescovo, il presbitero e il diacono, anzi per alcuni canoni anche il subdiacono doveva condividere la propria stanza con altri chierici.[159]

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[155] CCL 148.197-200; JK 293, PL 20.495-502 ('Consulenti tibi').
[156] Conc.Aurelianense (a.538) c.10, CCL 148A.118.
[157] *Vetus Gallica* 4.8, ed. Mordek 371; cfr. Conc.Neocaesariense (a.314-319) c.8, ed. Joannou 78-79.
[158] Per es. Conc.Lugdunense (a.583) c.1, CCL 148A.232. Si vieta soltanto al vescovo nel Conc.Turonense (a.567) c.14(13), CCL 148A.181.
[159] Conc.Aurelianense (a.541) c.17, CCL 148A.136; Conc.Turonense (a.567) c.20(19), CCL 148A.183-184. Cfr. Pontal, *Die Synoden* 238. Nella Spagna per es. Conc.Gerundense (a.517) c.6, ed. Martínez Díez 4. 287.

Conclusione

Dopo questo breve percorso attraverso i provvedimenti disciplinari dell'epoca dei regni barbarici risulta che i criteri dell'idoneità dei candidati al diaconato e al sacerdozio, ereditati in varie forme dall'antichità cristiana, sono stati determinati dagli ideali della Chiesa circa la vita e il ministero dei chierici. Si potrebbe dire che i criteri di idoneità dimostrano soltanto alcuni aspetti importanti di questo ideale. Ci sono, infatti, varie altre disposizioni e esortazioni che riguardano direttamente e in primo luogo la condotta dei chierici già ordinati e sono collegati non di rado anche con pene canoniche. Così emerge ripetutamente la condanna dell'ubriachezza, pure menzionata già nelle lettere paoline (Tit 1.7; 1Tim 3.3) nel contesto dell'idoneità all'episcopato,[160] ma anche come comportamento contrario all'ideale cristiano in generale (1Cor 5.11; 6.10; Gal 5.21; Rom 13.13; Ef 5.18; 1Pt 4.3). Ai chierici si proibisce pure la partecipazione a grandi banchetti con danza e musica, specialmente a banchetti nuziali.[161] S. Isidoro di Siviglia formula come principio generale: se un vescovo o un presbitero per un certo peccato mortale viene privato dal suo ufficio, tanto meno deve essere ordinato un candidato che viene trovato colpevole degli stessi peccati.[162]

All'ideale sacerdotale appartiene un buon grado di cultura ecclesiastica il cui significato attraversa una trasformazione notevole nell'epoca esaminata. Come dicevamo, l'educazione antica, come sistema, crolla in Occidente. Per conservare e trasmettere le conoscenze necessarie per la vita della Chiesa nascono nuove istituzioni di formazione. Nei monasteri occidentali si consolidano certe forme di trasmissione della vita liturgica, spirituale ed intellettuale. Per questo i monasteri diventano già alla fine dell'antichità e successivamente in modo

[160] Per la tradizione successiva vedi per es. *Didascalia* 2.2.1, ed. Stewart-Sykes, *The Didascalia* 119; *Canones Ecclesiastici Sanctorum Apostolorum* 16.1, ed. Stewart-Sykes, *The Apostolic Church Order* 97; *Constitutiones Apostolicae* 2.2.1, ed. Funk, *Didascalia* 1.33; Conc.Laodicenum c.24, ed. Joannou 140 ecc.
[161] Cfr. per es. Conc.Agathense (a.506) c.39, CCL 148.209-210.
[162] *De ecclesiasticis officiis* 2.5.15, CCL 113.61-62.

particolare nell'alto medioevo centri di formazione e anche di preparazione alla vita sacerdotale (o persino episcopale) e servono come esempi da seguire anche nelle scuole episcopali. Appare anche la regola che richiede la testimonianza dell'abate per l'ordinazione di un membro del suo monastero. Nei grandi monasteri, specialmente nelle isole Britanniche, l'abate decide sull'ordinazione come abbiamo visto nella biografia di Beda il Venerabile.[163]

Quelli che desiderano entrare nei gradi più alti del clero direttamente dalla vita secolare, possono ricevere gli ordini più bassi – che dall'inizio del secolo V si compongono in un chiaro ordine gerarchico—nel corso di un anno solo, possibilità concessa originalmente come eccezione per situazioni straordinarie. Tale 'modello di breve formazione', che era comunque connesso con una istruzione che ha trasmesso ai candidati le conoscenze ecclesiastiche, è stato applicato nei regni franchi quasi come norma generale. Eppure non risulta che la Chiesa lo abbia considerato come regola principale. Questo tipo di formazione breve sembra che sia stato accessibile solo per i membri dei ceti sociali più alti. Benché nel sistema delle nomine reali tale breve preparazione sia sembrata preferibile, la tradizione disciplinare della Chiesa continuava a richiedere la preparazione più lunga.

Riguardo alle norme sulla condizione matrimoniale dei candidati al diaconato, risulta chiara la distinzione tra gli impedimenti provenienti dal passato laicale del candidato, cioè la ripetizione quasi monotona della norma che proibisce l'ordinazione di uomini risposati o mariti di donne risposate, e l'insistenza sul divieto categorico di vita matrimoniale dopo l'ordinazione. A proposito di questo fatto Johann Adam Möhler ha parlato di effetti della barbarie di quest'epoca e della distensione dell'ideale ormai monastico e celibatario della vita sacerdotale.[164] Tra i motivi di

[163] Cfr. Conc.Agathense (a.506) c.27, CCL 148.205, C.16 q.1 c.33; Gregorius I, Ep.8.17 JE 1504 (a.598), MGH Epist. 2. 19-20 ('Quam sit necessarium'), C.18 q.2 c.5.

[164] Johann Adam Möhler, *Vom Geist des Zölibates*: *Beleuchtung der Denkschrift für die Aufhebung des den katholischen Geistlichen vorgeschriebenen Zölibates*, hrsg. erläutert und mit einem Nachwort versehen von Dieter Hattrup

questa situazione indica il naturalismo degli ariani che per la loro posizione cristologica avevano meno rispetto verso il celibato. Dalla formulazione categorica del prescritto della continenza clericale già nelle prime decretali trae la conclusione che il divieto della vita matrimoniale per i diaconi e per i sacerdoti non era una novità disciplinare nemmeno alla fine del IV secolo. Riguardo i secoli VI-VII dobbiamo aggiungere però che la visione delle proprietà dei candidati idonei al diaconato e al presbiterato—malgrado le mancanze diffuse nella prassi—si avvicina all'ideale monastico. Tale ideale tiene già presente dei giovani che si preparano agli ordini sacri sin dalla loro infanzia e che assumono il dovere della castità appena raggiungono l'età di 18 anni. Per loro la questione non è più quella della vita secolare precedente, ma piuttosto la forma di vita sacerdotale. L'educazione al sacerdozio e alla vita celibataria presuppone l'idea della vocazione divina che può essere considerata come precedente all'ordinazione e presente persino sin dalla nascita (cf. Ger 1.5) del futuro prete.[165] Questa idea è stata chiaramente formulata, non tanto riguardo all'ordine sacro ma rispetto alla vocazione monastica, nella Regola di S. Benedetto.[166]

Nell'epoca esaminata, i gradi del clero e le condizioni di idoneità o di preparazione rispecchiano la presenza di due categorie sociali fortemente diverse. Il basso clero—benché il suo sostentamento sia stato spesso coperto in base alla proprietà ecclesiale e alle prestazioni doverose[167]—si trovava più o meno in una posizione analoga a quella degli schiavi liberati (della Chiesa). Così, diversamente dal gruppo dei 'magistrati' dell'epoca romana che provenivano dallo stesso ceto sociale e potevano contare sulla

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(Paderborn 1992) 63-71. Cfr. Christian Cochini, *Origines apostoliques du célibat sacerdotal* (Paris-Namur 1981) 354-446.

[165] Cfr. Möhler, *Vom Geist* 72; Paul Deselaers, 'Berufung. II. Altes Testament; III. Neues Testament', *Lexikon für Theologie und Kirche*, edd. Walter Kasper et alii (10 vols. [3]Freiburg im Breisgau 1994 [2006]) 2.302-304.

[166] *Reg.* 58.1-2. 7, ed. Vogüé, Neufville 2.626, 628.

[167] Cfr. per es. Pontal, *Die Synoden* 30, 55, 83, 235-236, 251. Le decime sono state prescritte con forza giuridico-canonica vincolante per la prima volta dal Conc.Matisconense (a.585) c.5, CCL 148A.241, perché i chierici 'non siano impediti nel sacro ministero da nessun tipo di lavoro'.

stessa carriera in base al *cursus honorum*, tra lo strato alto e quello basso del clero del secolo VI la distanza sociale era grande. Perciò, anche riguardo la formazione e l'idoneità, malgrado l'unità relativa della regolamentazione canonica ereditata dall'antichità, si faceva valere una duplicità che si manifestava nell'interpretazione e nell'applicazione delle norme. A volte questa differenza si esprime anche negli stessi testi legislativi dell'epoca, per esempio nella formulazione del ruolo del re nella scelta dei vescovi.

Questa duplicità però sembra ridursi lungo i secoli esaminati. Il ceto superiore composto da laici ben formati scompare gradualmente. Così anche i membri delle classi più alte ricevono la loro formazione in scuole monastiche o simili (vescovili), specialmente se sono destinati dall'età giovanissima alla vita ecclesiastica. Se all'epoca merovingia i vescovi vengono scelti tra i referendari laici della corte reale, all'inizio dell'epoca carolingia è ormai il re che si sceglie dei referendari dal clero.[168]

I documenti normativi della Chiesa del VI-VII secolo, più volte cercano di raccogliere tutte le condizioni richieste per l'idoneità al diaconato, al presbiterato e all'episcopato. Non solo gli autori delle collezioni sistematiche si occupavano di questo tema, ma anche le norme canoniche stesse.[169] Tra queste norme spicca per la sua completezza il canone 19 del IV Concilio di Toledo del 633[170] il quale ebbe un forte influsso anche nel diritto canonico successivo. Le norme canoniche e gli autori dell'epoca esaminata non arrivano ancora all'elaborazione teorica e alla sistematizzazione delle esigenze di idoneità. Così, benché alcune disposizioni ecclesiali facciano menzione dell''infamia', questo accade con riferimento a tale istituto del diritto secolare. Non si parla ancora di infamia nel senso canonico speciale. Non emerge ancora neppure la nozione di 'irregolarità' e tanto meno la distinzione delle sue specie diverse, anche se, già da questi testi

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[168] Csendes, 'Referendar' 541.
[169] Vedi sopra n.11, 12 e 13.
[170] Ed. Martínez Díez 5.206-211, D.51 c.5.

disciplinari, si può venire a conoscenza della diversa natura e dei diversi effetti delle circostanze che escludono l'idoneità.

Budapest.

Die Glossierung und die Glossen in den frühesten Handschriften des *Decretum Gratiani**

Philipp Lenz

Fragestellung

Das in den ausgehenden 1990er-Jahren entfesselte Interesse am *Decretum Gratiani* hat sich im Wesentlichen auf den Text beschränkt und die Glossen nicht oder nur am Rand erfasst. Sowohl die bahnbrechende Entdeckung einer frühen Rezension des *Decretum Gratiani* durch Anders Winroth als auch die anschliessende wissenschaftliche Diskussion rund um die Stellung der St. Galler Handschrift 673 in der Textentwicklung konzentrierten sich auf den Vergleich von Textausschnitten und die Suche nach den unmittelbaren Quellen.[1] Die geplante Erstausgabe

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[1] Vgl. Anders Winroth, *The Making of Gratian's Decretum* (Cambridge Studies in Medieval Life and Thought, Fourth Series 49; Cambridge 2000); Regula Gujer, *Concordantia discordantium codicum manuscriptorum? Die Textentwicklung von 18 Handschriften anhand der D.16 des Decretum Gratiani* (Forschungen zur kirchlichen Rechtsgeschichte und zum Kirchenrecht 23; Köln etc. 2004); Travis R. Baker,'Gratian's "Tract on Monks and the Outside World" and Its Sources' und John C. Wei, 'The Later Development of Gratian's *Decretum*', *Proceedings Toronto 2012* 149-159. Vgl. auch die repräsentativen bzw. jüngsten Forschungsberichte von Carlos Larrainzar, 'La investigación actual sobre el Decreto de Graciano', ZRG Kan. Abt. 90 (2004) 27-59; Anders Winroth, 'Recent Work on the Making of Gratian's *Decretum*', BMCL 26 (2004-2006) 1-30; John C. Wei, *Gratian the Theologian* (Studies in Medieval and Early Modern Canon Law 13; Washington, D.C. 2016) 1-13; Atria A. Larson, *Gratian's Tractatus de penitentia: A New Latin Edition with English Translation* (Studies in Medieval and Early Modern Canon Law 14; Washington, D.C. 2016) xv-xxxiii. Wichtige methodische Grundlagen für solche Textvergleiche legte Titus Lenherr, *Die Exkommunikations- und Depositionsgewalt der Häretiker bei Gratian und den Dekretisten bis zur*

des *Decretum Gratiani* in der von Winroth nachgewiesenen frühen Textfassung und der Wunsch nach einer Neuausgabe der später verbreiteten Version haben dafür gesorgt, dass sich die Forschung weiterhin intensiv mit dem *Decretum*-Text beschäftigt hat.[2] Solche Textvergleiche bilden die Grundlage für die andauernde Suche nach zusätzlichen Zeugnissen und Spuren des frühen *Decretum Gratiani*.[3]

Ein weiterer wichtiger Grund für die Vernachlässigung der Glossen in den frühen *Decretum*-Handschriften in den letzten beiden Jahrzehnten dürfte darin liegen, dass Rudolf Weigand eine über tausend Seiten umfassende und in ihrer Art wohl definitive Untersuchung der Glossen zum *Decretum* vorgelegt hat. Der Umfang, der Materialreichtum und die computergestützte Auswertung erwecken den Eindruck eines nicht zu überbietenden und zu ergänzenden Werks.[4] Dabei wird freilich übersehen, dass sich diese Studie auf Notabilien und diskursive Glossen und ihre Gruppierung konzentrierte und die Allegationen, d.h. die Parallel- und Konträrstellenangaben, nicht berücksichtigte. Den Ausschluss der Allegationen und die Entkontextualisierung der edierten Glossen haben die Rezensenten entweder nicht bemerkt oder nicht für mitteilungs- oder kritikwürdig befunden. Einige Rezensenten übernahmen stillschweigend Weigands engen Glossenbegriff und hielten sogar ausdrücklich fest, der Autor habe für die sechs untersuchten Textstellen sämtliche Glossen in sämtlichen Handschriften ediert.[5]

Glossa ordinaria des Johannes Teutonicus (Münchener theologische Studien, 3. Kan. Abt. 42; St. Ottilien 1987) 12-189.

[2] Vgl. die beiden Websites von Anders Winroth, welche den Fortgang der Editionsarbeiten dokumentieren: https://sites.google.com/a/yale.edu/decretumgratiani/; http://www.gratian.org.

[3] Vgl. Atria A. Larson, ‘An *Abbreviatio* of the First Recension of Gratian’s *Decretum* in Munich?’, BMCL 29 (2011-2012) 51-118; John Burden, ‘Gratian North of the Alps: New Evidence of the First Recension in the Archidiocese of Salzburg’, BMCL 34 (2017) 89-112.

[4] Vgl. Rudolf Weigand, *Die Glossen zum Dekret Gratians: Studien zu den frühen Glossen und Glossenkompositionen* (SG 25-26; Rom 1991).

[5] Vgl. die Rezensionen von Gérard Fransen, RHE 88 (1993) 843-847, hier 843: ‘Pour ces passages choisis, on copia toutes les gloses conservées dans tous les mss accessibles’; Hans Peter Glöckner, *Ius commune* 20 (1993) 355-358;

Bereits in der zweiten Hälfte des 19. Jahrhunderts hoben Friedrich Maassen und Johann Friedrich von Schulte die wichtige Rolle und die hohe Anzahl der Allegationen in den ältesten *Decretum*-Handschriften hervor.[6] Spätestens seit Stephan Kuttners *Repertorium* aus dem Jahr 1937 ist die grosse inhaltliche Bedeutung der Allegationen in den Handschriften des *Decretum Gratiani* des 12. Jahrhunderts—wie in denjenigen der justinianischen Kodifikation aus derselben Zeit—unbestritten.[7] Die

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Martin Bertram, QF 73 (1993) 744-746, hier 745: 'Le glosse rinvenute in questi luoghi, che amontano a ca. 2100 complessivamente, vengono pubblicate integralmente e considerando tutta la tradizione manoscritta'; María J. Roca, *Ius canonicum* 34 (1994) 752-754; Ludwig Falkenstein, *Francia* 22 (1995) 306-308.

[6] Friedrich Maassen, 'Paucapalea: Ein Beitrag zur Literaturgeschichte des canonischen Rechts im Mittelalter', *Sb. Akad. Wien* 31 (1859) 449-516, hier 486-487; Johann Friedrich von Schulte, 'Die Glosse zum Decret Gratians von ihren Anfängen bis auf die jüngsten Ausgaben', *Denkschriften Akad. Wien* 21.2 (1872) 31.

[7] Gustav Pescatore, *Die Glossen des Irnerius* (Greifswald 1888) 21, 57-58: 'Schon in den ältesten Glossatorenhandschriften des Corpus iuris finden sich von den ältesten Händen höchst achtenswerte Sammlungen dieser Art [von Allegationen] eingetragen, welche den Vergleich mit dem von Accursius nach dieser Richtung hin gebotenen Materiale nicht zu scheuen brauchen; Hermann Kantorowicz, with the collaboration of William Warwick Buckland, *Studies in the Glossators of the Roman Law: Newly Discovered Writings of the Twelfth Century* (Cambridge 1938); Reprint with addenda et corrigenda by Peter Weimar (Aalen 1969) 73, Anm. 2: 'The whole important subject of the references needs further investigation'; Peter Weimar, 'Die legistische Literatur und Methode des Rechtsunterrichts der Glossatorenzeit', *Ius Commune* 2 (1969) 43-83, hier 57-58: 'Als ersten Glossentypus dieser höheren [über das reine Textverständnis hinausgehenden] Interpretationsstufe findet man unter voraccursischen Glossen Sammlungen von Parallel- und Konträrstellen zum Quellentext. Je älter die Glossierungen sind, desto mehr fallen die oft langen Allegationenreihen ins Auge'; Bruno Paradisi, 'Le glosse come espressione del pensiero giuridico medievale', *Fonti medioevali e problematica storiografica. Atti del congresso internazionale tenuto in occasione del 90° anniversario della fondazione dell'Istituto Storico Italiano (1883-1973), Roma 22-27 ottobre 1973* (Roma 1976) 1.191-252; Neudruck in Bruno Paradisi, *Studie sul medioevo giuridico* (Istituto storico italiano per il medio evo, Studi storico 163-173; Roma 1987) 711-773, hier 748-752; Stephan Kuttner, 'The Revival of Jurisprudence', *Renaissance and Renewal in the Twelfth Century*, edd. Robert L. Benson und Giles Constable (Boston 1982; Medieval Academy Reprints for Teaching 26;

Allegationen fallen im 12. Jahrhundert nicht nur zahlenmässig stark ins Gewicht, sondern sie stellen möglicherweise den frühesten schriftlichen Nachweis der genuin scholastischen Bearbeitung des *Decretum Gratiani* dar und enthalten häufig den dogmatischen Kern für die spätere Entwicklung der Glossierung.[8] Insofern besteht ein Widerspruch zwischen der unbestrittenen Bedeutung der Allegationen und ihrer Vernachlässigung durch die Forschung. Daran änderte auch die Entdeckung einer frühen Fassung des *Decretum* nichts, obgleich damit der Fokus auf den Beginn der Kirchenrechtswissenschaft gelegt wurde.

Die aktuelle Vernachlässigung der Allegationen betrifft freilich nicht nur das *Decretum Gratiani*, sondern auch das *Corpus iuris civilis*. In diesem Sinn widerspiegelt sie eine Entwicklung in der Rechtsgeschichtsforschung während der letzten Jahrzehnte. In den 1960er- bis 1980er-Jahren erschienen mehrere grundlegende Studien über die vorazonischen Glossen und die voraccursischen Apparate zu den justinianischen Rechtsbüchern, die sämtliche Glossen, einschliesslich der Allegationen, in Auszügen edierten, auswerteten oder mindestens ausführlich beschrieben.[9] Solche

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Toronto 1991) 299-323, hier 310-311: 'The apparently dull strings of references (*allegationes*) to parallel or adversative texts which make up a considerable part of the early glosses are actually an admirable record of the mastery of all parts of the Corpus achieved at an early time. They also gave occasional solutions for the conflicting references (*contraria*) and thus provided the first point of contact with the scholastic maxim, "diversa sunt, non adversa", which was to become one of the most powerful elements in the lawyer's mode of argumentation. One could indeed reduce many of the literary forms employed by glossators (of both laws) to *solutio contrariorum* as a common denominator'.

[8] Kuttner, *Repertorium* 3: 'Die grosse historische Bedeutung der reinen Zitatenglosse ist erst neuerdings gewürdigt worden; es handelt sich um die in unscheinbarste Form gekleidete Material- und Problemgrundlage fast aller späteren Arbeiten'; Stephan Kuttner, 'The Revival of Jurisprudence' 310-311, 313-314; Rudolf Weigand, 'Frühe Glossen zu D.12 cc.1-6 des Dekrets Gratians', BMCL 5 (1975) 35-51, hier 36; Christoph H. F. Meyer, *Die Distinktionstechnik in der Kanonistik des 12. Jahrhunderts: Ein Beitrag zur Wissenschaftsgeschichte des Hochmittelalters* (Mediaevalia Lovaniensia series 1; Studia 29; Leuven 2000) 187; Rudolf Weigand, 'The Development of the *Glossa ordinaria* to Gratian's *Decretum*', HMCL 2.55-97, hier 56-57.

[9] Vgl. Gero Dolezalek, 'Der Glossenapparat des Martinus Gosia zum Digestum Novum', ZRG Rom. Abt. 84 (1967) 245-349 (Allegationen nur beschrieben);

methodische Ansätze wurden in dieser Zeit manchmal auch auf die Glossen des *Decretum Gratiani* angewandt.[10] 1982 forderte Gérard Fransen in einer Übersichtsdarstellung zu den Glossen in der Rechtswissenschaft des 12. und 13. Jahrhunderts ausdrücklich deren integrale Edition.[11]

Der grosse Aufwand beim Erfassen der Allegationen, die Möglichkeit, dass die Allegationen aus anderen Vorlagen als die diskursiven Glossen stammen, die den Allegationen inhärenten Überlieferungsprobleme, das Interesse an einem Vergleich der Glossen mit Summen zur Ermittlung der Verfasser und der Fokus auf eine systematische Kollationierung möglichst vieler Hand-

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Gero Dolezalek, 'Azos verschollener Glossenapparat zu den Tres Partes', ZRG Rom. Abt. 85 (1968) 403-413; Gero Dolezalek, 'Azos Glossenapparat zum Infortiatum', *Ius commune* 3 (1970) 186-207; Hans van de Wouw, 'Zur Textgeschichte des Infortiatum und zu seiner Glossierung durch die frühen Bologneser Glossatoren', *Ius commune* 11 (1984) 231-280, hier 258-271; Gero Dolezalek, unter Mitarbeit von Laurent Mayali, *Repertorium manuscriptorum veterum Codicis Iustiniani* (Ius commune. Sonderhefte, Texte und Monographien 23; Repertorien zur Frühzeit der gelehrten Rechte; Frankfurt am Main 1985) 515-525, 689-769. Vgl. auch die Beispiele von Allegationen bei Philipp Lenz, 'Neu entdeckte voraccursische Glossen zu den Tres Libri in St. Gallen, Stiftsbibliothek, Cod. 749 (= Sg)', ZRG Rom. Abt. 128 (2011) 417-441, hier 426-431. Zur älteren Forschung vgl. Severino Caprioli, 'Per uno schedario di glosse preaccursiane: Struttura e tradizione della prima esegesi giuridica bolognese', *Per Francesco Calasso: Studi degli allievi* (Roma 1978) 73-166; Gero Dolezalek, 'Research on Manuscripts of the Corpus iuris With Glosses Written During the 12th and Early 13th Centuries: State of Affairs', *El dret comú i Catalunya: Actes del Ier Simposi Internacional, Barcelona, 25-26 de maig de 1990* (Barcelona 1991) 17-45.

[10] Vgl. Rudolf Weigand, 'Welcher Glossenapparat zum Dekret war der erste?', AKKR 139 (1970) 459-481; Neudruck in Rudolf Weigand, *Glossatoren des Dekrets Gratians* (Bibliotheca eruditorum 18; Goldbach 1997) 347*-369*; Weigand, 'Frühe Glossen zu D.12 cc.1-6 des Dekrets Gratians'; Beate Kann, 'Rufinglossen zu den Causae 27-30 des Decretum Gratiani', *Ius et historia: Festgabe für Rudolf Weigand zu seinem 60. Geburtstag von seinen Schülern, Mitarbeitern und Freunden*, ed. Norbert Höhl (Forschungen zur Kirchenrechtswissenschaft 6; Würzburg 1989) 121-142.

[11] Gérard Fransen, 'Les gloses des canonistes et des civilistes', *Les genres littéraires dans les sources théologiques et philosophiques médiévales: Définitions, critique et exploitation. Actes du Colloque international de Louvain-la-Neuve 25-27 mai 1981* (Publications de l'Institut d'Études médiévales, 2e série 5; Louvain-la-Neuve 1982) 133-149, hier 147-148.

schriften bzw. auf eine kumulative Edition haben dazu geführt, dass man nach den ersten Versuchen integraler Glosseneditionen wieder davon abliess. Als Folge davon werden seither meistens ausschliesslich die diskursiven Glossen und die Notabilien ediert und ausgewertet, ungeachtet ihres Überlieferungskontexts.[12]

Diese Arbeit zielt darauf ab, die Form, die Funktion und den rechtlichen Gehalt der Glossen und insbesondere der Allegationen in einigen frühen *Decretum*-Handschriften anhand ausgewählter Beispiele zu erschliessen und somit eine Forschungslücke zu füllen.

Eine weitere Fragestellung ergibt sich aus der diachronen Betrachtung der scholastischen Auseinandersetzung mit dem

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[12] Vgl. Rudolf Weigand, 'Das Gewohnheitsrecht in fruehen Glossen zum Dekret Gratians', *Ius populi Dei: Miscellanea in honorem Raymundi Bidagor* (Roma 1972) 1.91-101; Rudolf Weigand, 'Frühe Glossen zu D. 11 pr. - c. 6 des Dekrets Gratians', ZRG Kan. Abt. 64 (1978) 73-94, hier 73; Dolezalek, *Repertorium* 515-516; Placidus Kuhlkamp, 'Die erste Glossenkomposition zu C.16 des Decretum Gratiani', *Ius et historia*, ed. Höhl 102-120; Emanuele Conte, *Tres Libri Codicis: La ricomparsa del testo e l'esegesi scolastica prima di Accursio* (Ius commune. Sonderhefte, Studien zur Europäischen Rechtsgeschichte 46; Frankfurt am Main 1990) 153; Weigand, *Glossen zum Dekret Gratians* xii; *Glosse preaccursiane alle istituzioni: Strato azzoniano. Libro primo*, edd. Severino Caprioli, Victor Crescenzi, Giovanni Diurni, Paolo Mari, Piergiorgio Peruzzi (Fonti per la storia d'Italia 107; Roma 1984); *Glosse preaccursiane alle istituzioni: Strato azzoniano. Libro secondo*, ed. Severino Caprioli, Victor Crescenzi, Giovanni Diurni, Paolo Mari, Piergiorgio Peruzzi (Fonti per la storia dell'Italia medievale, Antiquitates 14; Roma 2004), jedoch ohne den Ausschluss der blossen Allegationen (vgl. zu denselben in Azos Glossenapparat zum *Codex* die Hinweise von Dolezalek, *Repertorium* 499-503) zu vermerken; eine mögliche Begründung dafür findet sich bei Caprioli, 'Per uno schedario di glosse preaccursiane' 100, Anm. 15: nur Konträrstellen, die eine *solutio* hervorrufen, verdienen es, ediert zu werden. Ausnahmen von diesem Trend, die blossen Allegationen nicht zu edieren, sind *La Glossa di Poppi alle istituzioni di Giustiniano*, ed. Victor Crescenzi (Fonti per la storia d'Italia 107; Roma 1990) xx, 602-632, wo die Allegationen separat in einem Appendix ediert wurden, sowie die Teiledition eines glossierten *Decretum*-Fragments bei Martin Bertram, Uta-Renate Blumenthal, 'Fragmente einer auffälligen Handschrift des *Decretum Gratiani* aus dem 12. Jahrhundert in Rieti (Latium)', *Sacri canones editandi: Studies on Medieval Canon Law in Memory of Jiří Kejř*, ed. Pavel Otmar Krafl (Ius canonicum medii aevi 1; Brno 2017) 81-134, hier 112-116.

Decretum Gratiani seit dessen Entstehung. Diejenigen Forscher, die die frühen Glossen im *Decretum Gratiani* oder im *Corpus iuris civilis* in Handschriften des 12. Jahrhunderts untersucht haben, betonen vorwiegend den Wert derselben als Ausgangspunkt für die Entfaltung der späteren, weiter ausgearbeiteten Lehrmeinungen und weiter entwickelten Literaturgattungen.[13] Dieser Ansatz birgt die Gefahr, sich auf die Kontinuitäten seit dem 12. Jahrhundert zu beschränken und die Brüche in der Entwicklung und eine mögliche Alterität der frühen juristischen Methode im 12. Jahrhundert auszublenden. Es stellt sich somit die Frage, ob die frühen Glossen zum *Decretum Gratiani* über eigene Qualitäten verfügten, ob sie vollumfänglich von der nachfolgenden Rechtswissenschaft rezipiert wurden, inwiefern sie gemäss ihrer Form und Funktion an ältere Traditionen der Glossierungspraxis anknüpften und inwiefern sie diese erneuerten und veränderten.

Der Aufsatz bietet nach der Einleitung zunächst einen Überblick über die bisherige Erforschung der Glossen in den frühen Handschriften des *Decretum Gratiani*. Es versteht sich von selbst, dass der kritischen Begutachtung des zweibändigen Werks von Weigand besonders viel Aufmerksamkeit eingeräumt werden muss.[14] Trotz der eher unbefriedigenden Forschungslage und des Fehlens einer umfassenden Übersicht über die Glossen in den ältesten *Decretum*-Handschriften gibt es eine Vielzahl verstreuter Aussagen verschiedener Gelehrter, die hier zusammengetragen werden sollen.

Die eigenständige Untersuchung beginnt mit der eingehenden Betrachtung von vier bedeutenden frühen Handschriften des *Decretum Gratiani* (Fd, Aa, Bc, Pf). Nach einigen Beobachtungen zur Paläographie, zum Layout und zur Textgliederung dieser Handschriften werden die dortigen Glossen insgesamt bewertet und einige ausgewählte Glossen im Detail analysiert. Darauf folgt

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[13] Neben den oben in den Amn. 7-8 genannten Werken vgl. auch Erich Genzmer, ‘Die iustinianische Kodifikation und die Glossatoren’, *Atti del Congresso Internazionale di Diritto Romano*, *Bologna, 1933* (Pavia 1934) 1.347-430, hier 389-390: ‘Die Glossen sind die Keimzellen nicht nur der mittelalterlichen, sondern der modernen Rechtswissenschaft’.

[14] Vgl. Stephan Haering, ‘Rudolf Weigand und die kirchenrechtliche Mediävistik’, ZRG Kan. Abt. 96 (2010) 381-406, hier besonders 390-394.

eine systematische Auswertung der Glossen zu D.1-8, die im Anhang 1 aus drei Handschriften (Aa, Bc, Pf) ediert und im Anhang 2 nach ihrer Gattung zusammengestellt wurden. Anhang 3 dokumentiert die Glossen zu D.1 c.5 in zwölf Handschriften des *Decretum Gratiani* aus dem 12. Jahrhundert und ihre Weiterentwicklung bis zur *Glossa ordinaria*, Anhang 4 die Allegationen des Dekrets von Burchard von Worms bei D.1-20 in drei Handschriften (Aa, Bc, Pf) und ihr unmittelbares Fortleben bis zum ersten Glossenapparat. Methodisch verfährt die Arbeit anhand von konkreten Beispielen und unter Einbezug des Überlieferungskontexts und der Funktionalität der Glossen. Die Quellenarbeit mit den Handschriften beruht ausschliesslich auf digitalen Abbildungen. Die Glosseneditionen befolgen die von Kuttner redigierten und von Weigand beherzigten Richtlinien von 1959.[15]

Terminologie, Quellengrundlage und Siglen

Die von Anders Winroth geprägten Begriffe der ersten Rezension und der zweiten Rezension werden in unserer Untersuchung aus praktischen Gründen weiterhin verwendet, ohne unbedingt die damit zusammenhängende Theorie zur Textentstehung und Textentwicklung des Verfassers zu übernehmen.[16] Die erste Rezension entspricht dem frühesten Textbestand des *Decretum Gratiani*, der in mehreren Handschriften (Aa, Bc, Fd, P, Pfr) überliefert wird und im Anhang von Winroths berühmtem Buch zusammengestellt

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[15] Stephan Kuttner, ‘Notes on the Presentation of Text and Apparatus in Editing Works of the Decretists and Decretalists’, *Traditio* 15 (1959) 452-464, hier 454-457; Weigand, *Glossen zum Dekret Gratians* xviii.

[16] Winroth, *Making of Gratian’s Decretum* 122, 130-133. Siehe die Terminologien, die darunterliegenden textgeschichtlichen Erklärungsmodelle und die Kritiken bei José Miguel Viejo-Ximénez, ‘La composición del Decreto de Graciano’, *Ius canonicum* 45 (2005) 431-485, hier 440; Atria A. Larson, ‘Gratian’s *De penitentia* in Twelfth-Century Manuscripts’, BMCL 31 (2014) 57-110, hier 61-64; Kenneth Pennington, ‘The Biography of Gratian, the Father of Canon Law’, *University of Villanova Law Review* 59 (2014) 679-706, hier 680; Giovanna Murano, ‘Graziano e il *Decretum* nel secolo XII’, RIDC 26 (2015) 61-139, hier 107 mit Anm. 157; Burden, ‘Gratian North of the Alps’ 89, Anm. 3.

ist.[17] Diese breitere Überlieferung unterscheidet die erste Rezension von einer weiteren frühen Fassung des *Decretum Gratiani*, die bislang nur aus der St. Galler Handschrift 673 bekannt ist.[18] Die zweite Rezension bezeichnet die stark erweiterte, verbreitete Version des *Decretum*—zunächst ohne und dann mit 'paleae'—deren Textbestand die Edition von Emil Friedberg wiedergibt und deren 'paleae' anhand jüngerer Studien verifiziert werden können.[19] Texte der zweiten Rezension, die in der ersten Rezension noch fehlten, werden in den Editionen durch einen hochgestellten Asterisk(*), 'paleae' durch eine entsprechende Beischrift als solche gekennzeichnet.

Die oben zitierten und später vielfach verwendeten Siglen der Handschriften der ersten Rezension sind folgendermassen aufzulösen:

Aa Admont, SB 23 und 43
Bc Barcelona, ACA, Ripoll 78

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[17] Winroth, *Making of Gratian's Decretum* 197-227. Präzisierung bzw. Korrektur zu D.100-101 (fehlen in P, Fd, Bc), C.2 q.6 c.39-40 (fehlen in P) und C.11 q.3 c.57 (in P kürzere Fassung) bei Carlos Larrainzar, 'El decreto de Graciano del códice Fd (= Firenze, Biblioteca Nazionale Centrale, Conventi Soppressi A.I.402)', *Ius Ecclesiae* 10 (1998) 421-489, hier 450, Anm. 43; Pennington, 'The Biography' 685; Kenneth Pennington, 'The Beginnings of Law Schools in the Twelfth Century' 27-28 (eingesehen unter www.academia.edu).
[18] Zur Handschrift und für weitere Literatur siehe Carlos Larrainzar, 'El borrador de la "concordia" de Graciano: Sankt Gallen, Stiftsbibliothek MS 673 (= Sg)', *Ius Ecclesiae* 11 (1999) 593-666; Philipp Lenz, Stefania Ortelli, *Die Handschriften der Stiftsbibliothek St. Gallen, Bd. 3: Abt. V: Codices 670-749. Iuridica. Kanonisches, römisches und germanisches Recht* (Wiesbaden 2014) xxi-xxii, 17-20; Philipp Lenz, 'The Context of Transmission of the *Decretum Gratiani* in Sankt Gallen, Stiftsbibliothek, Cod. 673 (= Sg): An Investigation of pp. 201a-246b', *Proceedings Toronto 2012* 95-114.
[19] *Decretum magistri Gratiani*, ed. Emil Friedberg (Corpus iuris canonici, pars prior; Leipzig 1879; Neudruck Graz 1955); Rudolf Weigand, 'Versuch einer neuen, differenzierten Liste der Paleae und Dubletten im Dekret Gratians', BMCL 22 (1998) 114-128; Jürgen Buchner, *Die Paleae im Dekret Gratians: Untersuchung ihrer Echtheit* (Pontificium Athenaeum Antonianum. Theses ad lauream in iure canonico 127; Rom 2000); José Miguel Viejo-Ximénez, 'Las *Paleae* del *Decretum Gratiani*: Notas para la crítica de su redacción', *Annaeus* 5 (2008) 107-141; Giovanna Murano, 'The list of paleae in MS Pal. Lat. 622', *Sacri canones editandi*, ed. Krafl 147-175.

Fd	Florenz, BN Centrale, Conv. Soppr. A I 402
P	Paris, BNF, nouvelle acquisition latine 1761
Pfr	Paris, BNF, lat. 3884 I, fol. 1

Die bereits genannte frühe Version des *Decretum* in der St. Galler Handschrift, deren Textgestalt sich von Winroths erster Rezension stark unterscheidet, spielt in der vorliegenden Studie nur eine marginale Rolle:

Sg	St. Gallen, SB 673

In der eigenen Analyse der Glossen greifen wir gelegentlich auf weitere *Decretum*-Handschriften der zweiten Hälfte des 12. Jahrhunderts zurück, die sich durch die Präsenz von frühen Glossen, durch deren Integrität und—vielleicht mit der Ausnahme von Mv—gute Lesbarkeit auszeichnen:[20]

Br	Bremen, SB- und BU a.142
Ca	Cambridge, Sidney Sussex College 101
Cd	Cambridge, Mass., Harvard Law School Library 64
Er1	Erlangen, UB 342, erste Glossenschicht
Gg	Grenoble, BM 34 (475)
Hk	Heiligenkreuz, SB 44
Ka	Köln, Erzbischöfliche Diözesan- und Dombibliothek 127
Kb	Köln, Erzbischöfliche Diözesan- und Dombibliothek 128
Mc	München, BSB, Clm 4505
Me	München, BSB, Clm 13004
Mk	München, BSB, Clm 28161
Mv	Montecassino, Biblioteca dell'Abbazia 64
Pf	Paris, BNF, lat. 3884 I-II

Die übrigen Siglen, die lediglich im Forschungsüberblick auftauchen, sind in der Handschriftenliste Weigands nachzuschlagen.[21]

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[20] Zu diesen Handschriften siehe Weigand, *Glossen zum Dekret Gratians* 695-698, 718-720, 721-722, 740-741, 768-769, 782-786, 841-843, 846-850, 858-859, 880-882; Gujer, *Concordantia* 236-243, 243-250, 263-268, 269-272, 272-278, 278-281, 281-290, 302-309.

[21] Weigand, *Glossen zum Dekret Gratians* xxi-xxiv. Siehe nun auch die aktualisierte Liste von Anders Winroth unter http://gratian.org/home/sigla/.

Zwar legt unsere Untersuchung den Schwerpunkt auf die frühen Glossen zum *Decretum Gratiani*, doch zeigt sie an einigen Beispielen auch deren Fortleben auf. Für diese Überprüfung bietet sich zunächst der Apparat *Ordinaturus magister* an, die wohl erste kontinuierliche, relativ einheitliche und stabile Glossenmasse auf den Seitenrändern von *Decretum*-Handschriften.[22] Dieser Apparat liegt in zwei Rezensionen aus dem Anfang bzw. dem Ende der 1180er-Jahre vor. Als Quellengrundlage dienen drei Handschriften aus dem ausgehenden 12. Jahrhundert bis zur Mitte des 13. Jahrhunderts, welche den Apparat in der ersten Rezension (Er2), in der zweiten Rezension (Md) und in einer Kombination der beiden Rezensionen (Mi) überliefern:[23]

Er2 Erlangen, UB 342, zweite Glossenschicht
Md München, BSB, Clm 10244
Mi München, BSB, Clm 27337, erste Glossenschicht (bis D.2 c.5 vollständig erhalten)

Als zweite Vergleichsmöglichkeit wird die um 1215 geschaffene und zwischen 1234 und 1241 überarbeitete *Glossa ordinaria* benutzt.[24] Sie stellte den Abschluss der Glossierung im traditionellen Stil dar und entfaltete als Standardglosse zum *Decretum Gratiani* über Jahrhunderte hinweg eine grosse Wirkung. Zitate der *Glossa ordinaria* stammen aus der von Petrus Albignanus herausgegebenen und 1474 in Venedig bei Nicolas

[22] Zur Definition von Glossenapparaten und zu Fragen der Terminologie siehe Kuttner, 'The Revival of Jurisprudence' 312; Fransen, 'Les gloses des canonistes et des civilistes' 137-138; Dolezalek, *Repertorium* 36-43; Weigand, 'The Development' 58. Manlio Bellomo,'Sulle tracce d'uso dei "libri legales",' *Civiltà comunale: Libro, scrittura, documento. Atti del Convegno, Genova 8-11 novembre 1988* (Atti della Società ligure di storia patria, nuova ser. 29; Genova 1989) 33-51, hier 50, unterschied zwischen 'apparatus', deren Glossen ihrer Form, Anzahl und Position nach perfekt festgelegt sind, und 'reticoli', die zwar wie Apparate aussehen, aufgrund der Varianz der Glossen jedoch keine wirklichen Apparate seien.

[23] Weigand, *Glossen zum Dekret Gratians* 562-563, 740-741, 847-848, 856-858; Weigand, 'The Development' 65-69; John C. Wei, 'Gratian's *Decretum* in France and Halberstadt', *Rechtshandschriften des deutschen Mittelalters: Produktionsorte und Importwege*, edd. Patrizia Carmassi und Gisela Drossbach (Wolfenbütteler Mittelalter-Studien 29; Wiesbaden 2015) 362-383 hier 370-371.

[24] Weigand, 'The Development' 82-91.

Jenson gedruckten Inkunabel.[25] Die Lesungen wurden systematisch an einer späteren Inkunabel überprüft und die Abweichungen, falls vorhanden, notiert. Es handelt sich um die 1500 in Basel von Sebastian Brant besorgte und bei Johann Froben und Johann Amerbach gedruckte *Decretum*-Ausgabe.[26]

Der Begriff Glossenschicht, den wir oben für die Handschrift Er verwendet haben, wird in dieser Arbeit in einem rein paläographischen Sinn verstanden. Er bezeichnet eine gleichförmige Glossenmenge, die in gleicher Schrift in einem begrenzten Zeitraum und somit wahrscheinlich von einem Schreiber in einem Arbeitsgang eingetragen wurde.[27] Dieser paläographisch bestimmte Begriff der Glossenschicht unterscheidet sich von dem bei italienischen Rechtshistorikern verbreiteten 'strato', der sich auf ein bestimmtes entwicklungsgeschichtliches Stadium der Glossierung bzw. auf die gemeinsame Herkunft einer Teilmenge der Glossen bezieht.[28]

Wie oben angetönt hat die Forschung zum *Decretum Gratiani* nicht immer einen eindeutigen Glossenbegriff verwendet. Grundsätzlich bezeichnen wir mit Glossen (im weiteren Sinn) sämtliche Sekundäreintragungen—d.h. Eintragungen ausserhalb oder zwischen den Zeilen des zentral angelegten und primär geschriebenen Texts—die der Erläuterung, Erschliessung, Gliederung und dem Verständnis des Texts dienen. Von diesem Glossenbegriff ausgenommen sind Textergänzungen, d.h. in unserem Fall Ergänzungen von 'canones' und 'dicta' (der zweiten Rezension) oder von substantiellen Teilen davon.[29]

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[25] *Gesamtkatalog der Wiegendrucke* (Stuttgart 2000) Bd. 10 Nr. 11354.

[26] Ibid. Nr. 11389. Zu möglichen Abweichungen unter den Inkunabeln und den Zusätzen in späteren Drucken siehe Weigand, 'The Development' 91-95.

[27] Dolezalek, *Repertorium* 23.

[28] Caprioli, 'Per uno schedario di glosse preaccursiane' 126 Anm. 19, 130-138; Dolezalek, *Repertorium* 23 Anm. 7; Bellomo, 'Sulle tracce d'uso' 49; Paolo Mari, 'Fenomenologia dell'esegesi giuridica bolognese e problemi di critica testuale', RSDI 55 (1982) 5-42 hier 26-28; Paolo Mari, 'Esperienze filologiche su glosse e apparati', *Initium* 8 (2003) 415-487 hier 416-418, der den Begriff 'strato' zusätzlich problematisiert.

[29] Ähnlich Gernot R. Wieland, *The Latin Glosses on Arator and Prudentius in Cambridge University Library, MS Gg. 5.35* (Studies and Texts 61; Toronto 1983) 7. Siehe auch C. Lukas Bohny, 'Glossen und Scholien zu Sallusts

Die Glossen (im weiteren Sinn) der aufkommenden Kirchenrechtswissenschaft umfassen folglich Hinweiszeichen, Zählungen, Textkorrekturen, Textvarianten, Allegationen, Notabilien und diskursive Glossen. Letztere reichen von reinen Worterklärungen über Erläuterungen juristischer Sachverhalte mit oder ohne Allegationen bis zu distinguierenden Glossen und Solutionsglossen.[30] Wir verwenden Notabilien im weiteren Sinn und verstehen darunter 'alle Bemerkungen, welche die Aufmerksamkeit auf eine bestimmte Stelle des Legaltexts lenken sollen', also nicht nur mit 'Nota' oder 'Notandum' eingeleitete Rechtsregeln, sondern auch Inhalts- und Quellenangaben, jedoch ohne blosse Hinweiszeichen und Illustrationen.[31]

Monographien Catilina und Iugurtha in einer Handschrift des 11. Jahrhunderts aus der Bibliothek des Klosters St. Emmeram in Regensburg: Première partie', *Archivum latinitatis medii aevi* 70 (2012) 91-145, hier 112-114; 'Seconde partie: Edition', *Archivum latinitatis medii aevi* 72 (2014) 187-287; Markus Schiegg, *Frühmittelalterliche Glossen: Ein Beitrag zur Funktionalität und Kontextualität mittelalterlicher Schriftlichkeit* (Germanistische Bibliothek 52; Heidelberg 2015) 7-10; Franck Cinato, *Priscien glosé: L'ars grammatica de Priscien vue à travers les gloses carolingiennes* (Studia artistarum 41; Turnhout 2015) 190-198. Die Definition von Hermann Lange, *Römisches Recht im Mittelalter, Bd. 1: Die Glossatoren* (München 1997) 119, ist zu eng gefasst: 'Glossen sind sämtliche Erläuterungen zum Text der Libri legales, die ohne diesen nicht verständlich sind'. Dieser Glossenbegriff schlösse z.B. eine für sich verständliche Definition der Gerechtigkeit ebenso aus wie zahlreiche für sich verständliche (regelhafte) Inhaltsangaben. Siehe die Beispiele im Anhang 1: Pf bei D.1 d.a.c.1 bzw. Bc bei D.4 c.6, D.8 c.1 (W, Nr. 12 und 29) etc. Vgl. auch die Kritik an diesem Glossenbegriff in der Rezension von jenem Werk durch Horst H. Jakobs, 'Die grosse Zeit der Glossatoren', ZRG Rom. Abt. 116 (1999) 222-258, hier 252.

[30] Für die Frühzeit der Glossierung besonders nützlich Pescatore, *Die Glossen des Irnerius* 49-80; Kuttner, *Repertorium* 3-6; Dolezalek, *Repertorium* 461-497, der seiner Darstellung eine Systematik aus Hinweiszeichen, Allegationen, Notabilien, sinnerläuternden Glossen und *authenticae* zugrunde legt. Die Typologien von Weimar, 'Die legistische Literatur' 52-62, und Lange, *Römisches Recht im Mittelalter* 1.119-122, bilden eine dichtere, fortgeschrittenere Glossierung ab und sind deshalb für unsere Zwecke ungeeignet.

[31] Stephan Kuttner, 'Réflexions sur les Brocards des Glossateurs', *Mélanges Joseph de Ghellinck, S.J.* (Gembloux 1951) 2.767-791, hier 770-771; Neudruck in Stephan Kuttner, *Gratian and the Schools of Law 1140-1234* (Variorum Collected Studies Series 185; London 1983). Zu den Hinweiszeichen und

Der Schwerpunkt dieser Studie liegt auf den Allegationen, Notabilien und diskursiven Glossen. Dies führt dazu, dass wir in der Praxis normalerweise von einem engeren Glossenbegriff (ohne Hinweiszeichen, Zählungen, Textkorrekturen, Textvarianten) als oben erläutert ausgehen. Die Begriffe Glossen und Glossierung beziehen sich, falls nicht anders vermerkt, in dieser Studie folglich immer auf Allegationen, Notabilien und diskursive Glossen, also auf Glossen im engeren Sinn.

Die bisherige Erforschung der frühen Glossen zum Decretum Gratiani: Kuttners Glossentypen

Stephan Kuttners *Repertorium* stellte nicht nur die Erforschung der Textgeschichte, sondern auch die Erforschung der frühen Glossen zum *Decretum Gratiani* auf eine neue Grundlage, weil dieses Werk erstmals auf eine systematische und vollständige Erfassung der Handschriften abzielte und eine Typologie der frühen Glossen entwarf. Die Systematik, der Wille zur Vollständigkeit, die Fähigkeit zur Synthese und Klarheit heben sein Werk von den älteren einschlägigen, manchmal äusserst materialreichen Studien von Friedrich Maassen, Johann Friedrich von Schulte, Franz Gillmann und Josef Juncker ab, auf die sich Kuttner häufig stützte.[32]

Illustrationen allgemein und in Rechtshandschriften vgl. Gero Dolezalek, 'Wie studierte man bei den Glossatoren', *Summe–Glosse–Kommentar*, edd. Frank Theisen und Wulf Eckhart Voß (Osnabrücker Schriften zur Rechtsgeschichte 2.1; Osnabrück 2000) 55-74, hier 66; Bohny, 'Glossen und Scholien' 1.117, 133-134; Susanne Wittekind, 'Überlegungen zur Verwendung graphischer Marginalien in Rechtshandschriften ausgehend von Dom-Handschrift 127', *Mittelalterliche Handschriften der Kölner Dombibliothek. Siebtes Symposion der Diözesan- und Dombibliothek Köln zu den Dom-Manuskripten (25. und 26. November 2016)*, ed. Harald Horst (Libelli Rhenani 70; Köln 2018) 83-114.

[32] Vgl. Friedrich Maassen, 'Beiträge zur Geschichte der juristischen Literatur des Mittelalters, insbesondere der Decretisten-Literatur des XII. Jahrhunderts', *Sb. Akad. Wien* 24 (1857) 4-84; Maassen, 'Paucapalea'; Schulte, 'Die Glosse zum Decret Gratians'; Franz Gillmann, 'Die Abfassungszeit der Dekretglosse des Clm 10244', AKKR 92 (1912); erweiterter Sonderdruck Mainz 1912; Franz Gillmann, 'Über die Abfassungszeit der Dekretglosse des Clm 10244', AKKR 93 (1913) 448-459; Franz Gillmann, 'Nochmals über die Abfassungszeit der

Kuttner versuchte, die nach seiner Aussage völlig disparaten und individuellen *Decretum*-Handschriften mit vorjohanneischen Glossen, d.h. mit Glossen vor der *Glossa ordinaria* des Johannes Teutonicus von ca. 1215, zu ordnen. Als Ordnungskriterium für seine drei Glossentypen galt das Erscheinungsbild der Glossen, d.h. die Dichte und die Art der Glossierung. Nach Kuttner besteht der älteste Glossentyp vorwiegend aus Allegationen, d.h. aus Parallel- und Konträrstellenzitaten zu bestimmten 'canones' und 'dicta', selten auch aus 'solutiones', d.h. aus Auflösungen der Widersprüche, die sich durch die angeführten Konträrstellen ergeben.[33] Anzutreffen sind zudem mit 'Argumentum', 'Nota' oder 'Notandum' eingeleitete Rechtssätze, ebenso Summarien, marginale oder interlineare Worterklärungen und 'continuationes', welche als Überleitung zwischen verschiedenen 'distinctiones' und 'causae' dienen.[34]

Der zweite, jüngere Glossentyp unterscheidet sich vom ersten durch die Zunahme von Worterklärungen und von Solutionsglossen und vor allem durch das Aufkommen von wirklich erläuternden Glossen in Form von Summen, Kommentaren und Distinktionen zu einigen Textstellen. Der zweite Glossentyp verkörpert eine neue Qualität, weil er von der reinen Materialsammlung zur sachlichen Rechtsauslegung übergeht. Diese Glossen lassen sich gemäss Kuttner zum Teil den ersten

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Dekretglosse des Clm 10244', AKKR 94 (1914) 436-443; Neudruck in *Gesammelte Schriften zur klassischen Kanonistik von Franz Gillmann: 1. Schriften zum Dekret Gratians und zu den Dekretisten*, ed. Rudolf Weigand (Forschungen zur Kirchenrechtswissenschaft 5.1; Würzburg 1988) Nr. 9-11; Josef Juncker, 'Summen und Glossen: Beiträge zur Literaturgeschichte des kanonischen Rechts im zwölften Jahrhundert', ZRG Kan. Abt. 14 (1925) 385-474; Josef Juncker, 'Die Summa des Simon von Bisignano und seine Glossen', ZRG Kan. Abt. 15 (1926), 326-500. Heinrich Singer, 'Beiträge zur Würdigung der Decretistenlitteratur' I AKKR 69 (1893) 369-447; II, AKKR 73 (1895) 3-124, befasste sich ausschliesslich mit frühen Summen, ohne Berücksichtigung der Glossen. Zur Rolle dieser Gelehrten in der Entwicklung der modernen mediävistischen Kanonistik vgl. Stephan Kuttner, 'Die mittelalterliche Kanonistik in der Forschung der letzten hundert Jahre', ZRG Kan. Abt. 69 (1985) 1-14, hier 3-7; Neudruck in Kuttner, *Studies in the History of Medieval Canon Law* IV.

[33] Ähnlich bereits Schulte, 'Die Glosse zum Decret Gratians' 30-33.

[34] Kuttner, *Repertorium* 1-4.

Dekretisten Paucapalea, Rufinus von Bologna und Stephan von Tournai zuweisen.[35] Schon sechs Jahre nach dem *Repertorium* veröffentlichte Kuttner eine Studie zur frühen Glossierung des *Decretum Gratiani*. Darin brachte er zahlreiche Ergänzungen und Präzisierungen an, sprach in einer Fussnote von mindestens fünf Glossentypen und unterstrich die Schwierigkeit und Komplexität der Aufgabe, die Glossen zu ordnen.[36]

Weigands Glossenkompositionen

Angeregt von Gero Dolezalek, der ein eigenes Computerprogramm zur Auswertung von Glossen entwickelt hatte, nahm Rudolf Weigand 1980 die anspruchsvolle Aufgabe in Angriff, aufbauend auf seinen früheren Forschungen die Glossen zum *Decretum Gratiani* nach Gruppen zu ordnen und eine Gesamtübersicht zu erstellen.[37] Die Resultate dieses aufwendigen Unterfangens veröffentlichte er zusammen mit den Beschreibungen sämtlicher verwendeter Handschriften in seiner zweibändigen Studie *Die Glossen zum Dekret Gratians*. Den Kern dieser Arbeit bildete die systematische Untersuchung der Notabilien und diskursiven Glossen—ohne die blossen Allegationen—zu sechs (oder je nach Zählweise sieben) Textstellen (D.11pr-c.6, D.12pr-c.6, C.1 q.3 c.4, C.1 q.3 c.13-15, C.27 q.2pr-c.11, C.30 q.4, De cons. D.4 c.1-5) in knapp zweihundert *Decretum*-Handschriften. Die ausgewählten Textstellen und Glossen entsprechen rund 0.8 Prozent des *Decretum*-Texts und rund einem Prozent der

[35] Kuttner, *Repertorium* 4-6.

[36] Stephan Kuttner, 'Bernardus Compostellanus antiquus', *Traditio* 1 (1943) 277-340, hier 277-282 mit Anm. 13. Vgl. dazu auch Gero Dolezalek, 'Libri magistrorum and the Transmission of Glosses in Legal Textbooks (12th and Early 13th Century)', *Juristische Buchproduktion im Mittelalter*, ed. Vincenzo Colli (Studien zur Europäischen Rechtsgeschichte 155; Frankfurt am Main 2002) 315-349, hier 325-329.

[37] Bereits in seiner Habilitationsschrift—Rudolf Weigand, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus* (Münchener Theologische Studien, III. Kan. Abt. 26; München 1967) 142, Anm. 6a, 148, Anm. 26, 149, Anm. 27, 159, Anm. 15 etc. —wertete er gelegentlich diskursive Glossen in Handschriften des *Decretum Gratiani* inhaltlich aus.

Glossen.[38] Auf dieser Grundlage edierte Weigand über 2100 Glossen. Deren computergestützte Auswertung brachte mehrere Glossenkompositionen zu Tage; sie zeigte aber auch, dass rund 60 Prozent aller Glossen nur einmal vorkommen.[39] Unter Glossenkomposition verstand Weigand 'eine (nur) relativ gleichmässig überlieferte Anzahl von Glossen in mehreren Handschriften, welche den Text nur teilweise (d.h. sporadisch) erklären'.[40] Eine Zusammenfassung, punktuelle Präzisierung und Aktualisierung dieser Erkenntnisse verfasste Weigand für den 2008 publizierten Sammelband *The History of Medieval Canon Law in the Classical Period*.[41]

Besonders relevant für unsere Fragestellung sind die erste und die zweite Glossenkomposition, deren Entstehung Weigand in den 1150er-Jahren ansetzte. Die erste Glossenkomposition beinhaltet Allegationen unmittelbar neben der entsprechenden Textstelle, Notabilien in Dreiecksform sowie diskursive Glossen, wobei sich Weigand in seiner Untersuchung, es sei nochmals daran erinnert, auf die letzten beiden beschränkte. Von den Glossen zu den genannten sechs Textstellen rechnete er je nach Zählweise 30 bis 32 Glossen dieser Komposition zu. Die gleichzeitige zweite Glossenkomposition unterscheidet sich von der ersten im Wesentlichen durch eine eigentümliche Einteilung des *Decretum* in vier Teile und in Titel (anstatt in 'distinctiones' und 'causae'), die entsprechende Zitierweise in den Allegationen und die häufige interlineare Überlieferung der Glossen. Diese Glossenkom-

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[38] Weigand, *Glossen zum Dekret Gratians* xi-xix.
[39] Ibid. 395.
[40] Weigand, 'Welcher Glossenapparat zum Dekret ist der erste?' 460, 474; Rudolf Weigand, 'Die Glossen des Johannes Faventinus zur Causa 1 des Dekrets und ihr Vorkommen in späteren Glossenapparaten', AKKR 157 (1988) 73-107, hier 76 (Zitat); Neudruck in Weigand, *Glossatoren* 215*-249*; Weigand, 'The Development' 58. Vgl. bereits die 'Composizioni di glosse' als Vorgänger der Apparate bei Alfons M. Stickler, 'Sacerdotium et regnum nei decretisti e primi decretalisti: Considerazioni metodologiche di ricerca e testi', *Salesianum* 15 (1953) 575-612, hier 581.
[41] Weigand, 'The Development'. Eine weitere Zusammenfassung der Methode und Resultate bei Dolezalek, 'Libri magistrorum' 329-345.

position ist nur in sechs von den kollationierten Handschriften vorhanden.[42]

Die Zugehörigkeit von Glossen bzw. Handschriften zur ersten Glossenkomposition ist nicht eindeutig und wechselt je nach Perspektive. Aufgrund seiner computergestützten Auswertung wies Weigand zunächst die erste Glossenschicht (entweder allein oder kombiniert mit anderen Glossen) folgenden Handschriften der ersten Glossenkomposition zu: Ad, Ar, Bi, Bl1, Ch, Da, Fa, Gf, Gt, Hk, Hl, Lu, Mb, Mc, Mo, Pk, Sr, Va, Vc, Vd (20).[43]

Aus der Edition der Notabilien und diskursiven Glossen zu D.1-14, die nicht Teil der computergestützten Auswertung waren, folgerte Weigand, dass weitere Handschriften, darunter Bc, der ersten Glossenkomposition zuzurechnen sind. Es handelt sich um Ao, Au, Bc, Br, (Cc, Cp), Dp, Fc, Lc, Mf, Pe, Pq, Pt, Py, Sl, Tt, Tx, Vi (16/18). Die Handschrift Bc ist hier mit 34 von 70 edierten Glossen sehr stark vertreten.[44] Aa weist hingegen nur drei der kollationierten Glossen zu D.1-14 auf, und zwar immer solche, die in Bc nicht vorkommen.[45] Fd konnte Weigand hier nicht bewerten, weil der erste Teil der Handschrift bis in D.28 d.p.c.13 verloren gegangen war.

Da drei der sechs untersuchten Textstellen in Fd fehlen und drei weitere Glossen auf dem Mikrofilm für Weigand nicht lesbar waren, dokumentierte er dreizehn zusätzliche Glossen in Fd von D.31 bis C.1 und kollationierte sie in zwanzig weiteren Handschriften. Weigand stellte aufgrund dieser Edition eine besondere Nähe von Fd zu Aa und Bc fest, welche zehn bzw. acht der dreizehn edierten Glossen enthalten.[46] Insgesamt attestierte er dann aber vor allem Gg, zudem Hk und Mc—also *Decretum*-Handschriften der zweiten Rezension—am meisten übereinstimmende Glossen mit der ersten Schicht in Fd.[47]

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[42] Weigand, *Glossen zum Dekret Gratians* 401-425; Weigand, 'The Development' 58-61.
[43] Ibid.
[44] Ibid. 686, gibt 39 Glossen an; ich habe 34 gezählt.
[45] Ibid. 403-423, Nr. 5, 24, 68 (Aa).
[46] Ibid. 749-751.
[47] Ibid. 752.

Hinsichtlich der Handschriften der ersten Rezension unterscheiden sich die Ergebnisse Weigands je nach den Textstellen, die er für den Vergleich heranzog. In der eigentlichen, systematischen Untersuchung erscheint keine einzige der Handschriften der ersten Rezension. Nimmt man D.1-14 als Vergleichsgrundlage, dann ist Bc ebenfalls zur ersten Glossenkomposition zu rechnen; zudem weicht Aa hier in der Glossierung vollständig von Bc ab. Im letzten Fall, wo dreizehn Glossen vornehmlich aus dem ersten *Decretum*-Teil von Fd ediert und in anderen Handschriften kollationiert wurden, lassen sich Verbindungen zwischen Ad, Bc und Fd nachweisen.

Die Tatsache, dass die Handschriftenliste der ersten Glossenkomposition (mit 20 und zusätzlichen 16-18 Handschriften) in Weigands grossem Werk nicht mit derjenigen in seiner Zusammenfassung (mit 17 Handschriften) übereinstimmt, stiftet zusätzlich Verwirrung, zeigt aber wiederum, dass es offenbar viele Grenzfälle und Unklarheiten gibt: Ad, Bc, Bi, Br, Ch, Da, Gf, Gt, Hk, Hl, Lu, Mc, Mo, Pk, Sr, Tt, Vc (17).[48]

Die unterschiedlichen Befunde je nach verglichenen Textstellen, die fehlende korrigierende Gewichtung bei unvollständigen *Decretum*-Handschriften wie Bc und Fd und die variierenden Listen von Handschriften der ersten Glossenkomposition offenbaren die Grenzen des grossen Werks von Weigand. Überhaupt ergeben sich gewisse methodische Bedenken, wenn im Rahmen der systematischen Auswertung 30 oder 32 gemeinsame Glossen von 2100 edierten Glossen genügen, um von einer ersten Glossenkomposition zu sprechen, und dieser kleine Kernbestand nicht einmal in allen Handschriften vollständig vorhanden ist. Bei der zweiten und dritten Glossenkomposition ist die Anzahl der derart ermittelten gemeinsamen Glossen sogar noch bedeutend kleiner. Mehrmals bildeten gar nicht die computergestützte Auswertung der systematisch edierten Glossen, sondern gezielte Nachforschungen oder qualitative Kriterien die Grundlage für die

[48] Ibid. 402, 423; Weigand, 'The Development' 59. Die sechs Handschriften Ar, Bl1, Fa, Mb, Va und Vd schied er in der jüngeren Liste aus, während er zusätzlich die drei Handschriften Bc, Br und Tt aus der Untersuchung von D.1-14 übernahm.

Definition einer Glossenkomposition.[49] Solche und ähnliche Einsichten mögen dazu geführt haben, dass das Konzept der Glossenkomposition bereits 1982 auf einer Würzburger Tagung in Vorbereitung zu Weigands Glossenstudie kontrovers diskutiert wurde.[50]

Während Kuttner mit seiner Typologie einen entwicklungsgeschichtlichen und handschriftennahen Ansatz verfolgte, zielte Weigand eher auf die inhaltliche, abstrakte und kumulative Gruppierung von Glossen ab. Zudem berücksichtigte Weigand die Allegationen in seiner computergestützten Auswertung nicht und erwähnte jene auch nicht systematisch in seinem Beschreibungsteil.[51] Diese methodischen Differenzen erklären, weshalb es zwischen der Handschriftenliste von Kuttners ältestem Glossentyp einerseits und den beiden Handschriftenlisten von Weigands erster und zweiter Glossenkomposition andererseits mehr Unterschiede als Gemeinsamkeiten gibt.[52]

Frühe, unkonventionelle Allegationen

Obschon Weigand in seiner grossen Studie zu den Glossen im *Decretum Gratiani* den Schwerpunkt gerade nicht auf die Allegationen legte, machte er einige interessante Beobachtungen

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[49] Weigand, *Glossen zum Dekret Gratians* 401-448, hier besonders 425: 'Diese [2.] Glossenkomposition ist bei keiner einzigen der verschiedenen Auswertungen sichtbar geworden . . . Bei den Auswertungen ist diese [3.] Komposition nur dadurch zum Vorschein gekommen, dass sie im wesentlichen die 2. Glossenschicht in der Handschrift Bl darstellt'; 442: 'Was ich hier als 4. Glossenkomposition bezeichnen und vorstellen möchte, ist aus keinem einzigen der Computerausdrucke deutlich geworden'.

[50] Rudolf Weigands Tagungsbericht in RHE 78 (1983) 192-194.

[51] Von den glossierten *Decretum*-Handschriften der ersten Rezension besitzen einzig Aa und Bc Allegationen in grösserer Anzahl. Während Weigand in der Handschriftenbeschreibung solche in Aa würdigte und eine gewisse Verwandtschaft mit denjenigen in Me feststellte, überging er diejenigen in Bc völlig. Weigand, *Glossen zum Dekret Gratians* 662-663, 686-687.

[52] So führt Kuttner, *Repertorium* 4, z.B. die Handschrift mit der heutigen Sigle In unter dem ältesten Glossentyp auf, während Weigand, *Glossen zum Dekret Gratians* 443, 777, sie als Überlieferungsträgerin der fünften Glossenkomposition bezeichnet.

dazu. Denn in seiner Untersuchung von dreizehn Notabilien und diskursiven Glossen von D.31 bis C.1 in Fd stellte er fest, dass deren drei Allegationen enthalten, die von der später üblichen Zitierweise abweichen. Besonders rudimentär erscheint die erste Allegation in einer Solutionsglosse zu D.32 c.16, die ohne den Hinweis 'supra' und ohne die Angabe des Incipits bloss die ursprüngliche Quelle nennt, die normalerweise in Texttinte in der 'inscriptio' vor dem rot geschriebenen 'summarium' steht:[53]

> Contra sancta Nicena sinodus (D.31 c.12), set hoc post mortem prime coniugis; uel hoc prius, quia post consequenter Paphnutius dissuasit.

Die Funktionalität dieses einfachen Verweises wurde wahrscheinlich dadurch gewahrt, dass die beiden Texte nur zwei Seiten entfernt sind, Paphnutius auch im rot geschriebenen 'summarium' von D.31 c.12 vorkommt und somit das Auffinden erleichterte.[54]

Eindeutiger sind die beiden folgenden Allegationen, die die Richtungsangabe 'supra', die Quelle und das Incipit enthalten. Sie stehen zu Beginn der Solutionsglosse bei D.84 c.5 und am Ende der Erläuterung von D.92 c.3 s.v. *non liceat*:[55]

> Contra Martinus papa supra Lector si uiduam (D.34 c.18). Set illud ubi necessitas, hoc ubi nulla necessitas urget.Nisi monachus cui abbas per episcopum consecratus manus imponit uel quem corepiscopus iussione episcopi benedicit, unde supra in vii. sinodo Quoniam multos (D.69 c.1).

Dass es sich bei den drei genannten Glossen um eine frühe Entwicklungsstufe handelt, belegt nicht nur die unkonventionelle Zitierweise. Für die in Fd und vier weiteren Handschriften überlieferte Glosse zu D.84 c.5 konnte Weigand zeigen, dass sie in anderen Handschriften in erweiterter und somit entwicklungsmässig in jüngerer Fassung vorkommt, welche überdies die später übliche Zitierweise mit Richtungsvermerk, Angabe der 'distinctio' und Incipit verwendet: 'Supra di.xxxiiii. Lector si uiduam'.[56]

Laut Weigand wurden solche alten Allegationsweisen im Lauf der Zeit in neue umgewandelt, jedoch nicht systematisch und nicht fehlerlos, sodass manchmal reine alte Zitierweisen, reine neue Zitierweisen, alte und neue Zitierweisen aneinandergereiht,

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[53] Weigand, *Glossen zum Dekret Gratians* 749-751 Nr. 2.
[54] Fd, fol. 1va, 2rb.
[55] Weigand, *Glossen zum Dekret Gratians* 749-751 Nr. 9, 11.
[56] Ibid. 749-751 Nr. 9a. Vgl. auch Weigand, 'The Development' 56-57.

korrekt oder fehlerhaft, in unterschiedlicher Kombination auftauchen. Ein Beispiel für die Kombination von alter und neuer Zitierweise lieferte er durch den Abdruck von je einer Allegation zu D.12 c.1 und c.2:[57]

Supra d. xi. Leo Hoc uestre (D.11 c.10)
Infra viiii. q.iii. Gelasius Ipsi sunt § iiii. (C.9 q.3 c.1)

Die erste, in mehreren Handschriften überlieferte Glosse stellte offenbar der älteren Zitierweise mit der Angabe der Quelle 'Leo' (Brief von Papst Leo I.) und dem Incipit 'Hoc uestre' die neuere Angabe der 'distinctio' voran, ohne die nun überflüssige Quellenangabe wegzulassen. Dasselbe trifft für das zweite Beispiel mit der redundanten Nennung von Gelasius (Brief von Papst Gelasius I.) zu, nur dass hier erstmals in unseren Beispielen auf den zweiten Teil des *Decretum Gratiani* verwiesen wird.

Da alle drei von Weigand in jenem Textabschnitt von D.31 bis C.1 in Fd gefundenen Allegationen in unkonventioneller Form ohne Nennung der 'distinctio' geschrieben wurden, mutmasste er, dass diese Zitierform auf jene Zeit zurückgehe, als die Einteilung des ersten Teils in 'distinctiones' noch nicht vollzogen worden war.[58] Hintergrund für diese Einschätzung ist der erstmals in der *Summa Parisiensis* vorhandene und in späteren Summen wiederholte Bericht, Paucapalea habe die Distinktioneneinteilung der *Pars prima* und der *Pars tertia* vollzogen und selber Parallel- und Konträrstellen mit vorangestelltem 'supra' oder 'infra' und mit Angabe der 'distinctio' oder 'causa' notiert.[59] Dieser Bericht verbindet mindestens in loser Weise die Einteilung des ersten und

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[57] Weigand, 'Frühe Glossen zu D.12 cc.1-6 des Dekret Gratians' 44-45. Siehe auch Anhang 1: Pf bei D.5 d.a.c.1; Aa bei D.1 d.a.c.1 in unüblicher Darstellung.
[58] Weigand, *Glossen zum Dekret Gratians* 751-752; Weigand, 'The Development' 56-57.
[59] *The Summa Parisiensis on the Decretum Gratiani* ad D.1 c.1, ed. Terence P. McLaughlin (Toronto 1952) x, 1: 'Distinctiones apposuit in prima parte et ultima Paucapalea, et concordantias atque contrarietates notavit in margine sic: infra, supra, tali Causa vel Distinctione'. Maassen, 'Paucapalea' 455-456, 465, 470; José Miguel Viejo-Ximénez, 'Una composición sobre el Decreto de Graciano: La suma "Quoniam in omnibus rebus animaduertitur" atribuida a Paucapalea', *De la primera a la segunda 'Escuela de Salamanca': Fuentes documentales y líneas de investigación*, ed. Miguel Anxo Pena González (Salamanca 2012) 197-251, hier 197-198.

dritten Teils in Distinktionen mit der in den *Decretum*-Handschriften üblichen Art der Allegation.

Im Unterschied zum ersten Teil des *Decretum* ergeben sich für den zweiten Teil gewisse Widersprüche unter den Zeugnissen. Folgt man der Logik der *Pars prima*, dann wäre die Nennung der Quelle in gemischten Allegationen als Relikt einer ursprünglich fehlenden Einteilung der *Pars secunda* in 'causae' und 'quaestiones' zu erklären. Demgegenüber besagen die Summe *Antiquitate et tempore* und die Summe des Sicardus von Cremona ausdrücklich, Gratian habe die Einteilung der *Pars secunda* in 'causae' und in 'quaestiones' selber vorgenommen.[60] Vielleicht müsste man zwischen der im Text angelegten Gliederung der *Pars secunda* in 'causae' und 'quaestiones' einerseits und deren Benennung und Zählung auf den Seitenrändern andererseits unterscheiden.

Insgesamt sei hinsichtlich der Einteilung des *Decretum Gratiani* festgehalten, dass in zwei sehr frühen Textfassungen, nämlich besonders in P und zu geringerem Mass in Fd, die Benennung und Zählung der 'distinctiones', 'quaestiones' und 'causae' neben und oberhalb der Textspalten, wie sie später durchgehend üblich wird, noch fehlte oder nur rudimentär ein- oder sogar erst nachgetragen wurde. In P notierte man die 'distinctiones' am äussersten Seitenrand in brauner Tinte in sehr kleiner Schrift. Die Zählung der 'causae' in brauner Tinte beschränkt sich auf jeweils einen Eintrag in, neben oder oberhalb der Textspalte zu Beginn der 'causa', während die Zählung der 'quaestiones' neben der Textspalte normalerweise gänzlich unterblieb. Die Paragraphenzeichen zur Markierung der 'dicta Gratiani' stehen in P statt im Text meistens neben der Textspalte.[61] Fd besitzt zwar in der ersten

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[60] Maassen, 'Paucapalea' 455-456: 'Secundum partem (Paucapalea) non distinxit, quia a magistro gratiano sufficienter distincta est per causas, themata, quaestiones'; Maassen, 'Paucapalea' 470: 'Primam divisit, ut quidam ajunt, pauca palea in C et I disti. Secundam gratianus in XXXVI causas et harum quamlibet in quaestiones'. Ähnlich impliziert in *The Summa Parisiensis* ad D.1 c.1, ed. McLaughlin 1.

[61] In der Handschrift P, die sonst fast keine Sekundäreintragungen aufweist, wurde die Zählung der 'distinctiones' und der 'causae' manchmal, aber nicht durchgehend in hellerer brauner Tinte (z.B. fol. 15rb bei D.17 d.a.c.1 und bei

Rezension eine Zählung der ‘distinctiones’ und der ‘quaestiones’, doch wurde sie in kleiner Schrift in brauner Tinte, manchmal schräg am äussersten Seitenrand ein- oder sogar erst nachgetragen.[62] Bc und die jüngeren Textfassungen Aa und Pf weisen in ihrer Anlage schon eine deutliche, sorgfältig und meistens farbig ausgeführte Benennung und Zählung der ‘distinctiones’, ‘causae’ und ‘quaestiones’ auf den Seitenrändern auf.

Dass es eine frühe Zitierweise des *Decretum Gratiani* gab, dürfte anhand der drei von Weigand aus Fd edierten und in anderen Handschriften kollationierten unkonventionellen Allegationen von D.31 c.12, D.34 c.18 und D.69 c.1, die ohne Angabe der ‘distinctio’ allein mittels der Nennung der Quelle und des Incipits oder sogar nur durch die Quellenangabe auf eine Textstelle verweisen, unbestritten sein. Da sie bislang nur sehr selten nachgewiesen wurden, stellt sich die Frage, ob neben den gemischten Allegationen, die in überflüssiger Weise die Quelle anzeigen, noch weitere vergleichbare unkonventionelle Allegationen ohne Zählung der ‘distinctiones’, ‘causae’ und ‘quaestiones’ existieren.

Als erste mögliche Parallelen drängen sich die 29 internen Verweise innerhalb des *Decretum*-Texts auf, von denen dreizehn besonders frei formulierte bereits in der ersten Rezension vorhanden waren.[63] Allerdings findet sich unter den 29 internen Verweisen keiner, der allein aus einer Angabe der ursprünglichen Quelle und dem Incipit der allegierten Textstelle besteht und somit völlig den frühesten Allegationen in Fd entspräche. Die internen Verweise verwenden vielmehr die Quellenangabe und das Incipit des ‘canon’ oder ‘dictum’ zusammen mit zusätzlichen Angaben

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D.19. d.a.c.1: ‘d.xvii.’ und ‘d.xviiii.’) als der Text notiert. Siehe z.B. die Einträge in, oberhalb und neben der Textspalte auf fol. 83vb bei C.1: ‘Ca. prima’, fol. 105v bei C.2: ‘Ca. ii.’, fol. 121v bei C.3: ‘Ca. iii.’

[62] Siehe unten bei Anm. 145.

[63] Franz Gillmann, ‘Rührt die Distinktioneneinteilung des ersten und dritten Dekretteils von Gratian selbst her?’, AKKR 112 (1932) 504-533, hier 504-513; Winroth, *Making of Gratian’s Decretum* 179-183, 184, Anm. 19; Larson, ‘Gratian’s *De penitentia* in Twelfth-Century Manuscripts’ 76.

zur ‘distinctio’ oder ‘causa’ mittels Incipit, Titelüberschrift, Inhaltsvermerken etc. in unterschiedlicher Kombination.[64]

Im Zusammenhang eines frühen Gliederungsprinzips des *Decretum*, das sich eher an Titeln, Themenblöcken und vagen Inhaltsangaben anstatt an gezählten ‘distinctiones’, ‘causae’ und ‘quaestiones’ orientiert, sei auf die doppelte Gliederung der Handschrift Aa verwiesen, die neben den später üblichen durchgezählten ‘causae’ parallel thematische Überschriften enthält. Ein gutes Beispiel für diese Logik der Werkgliederung bietet die Titelüberschrift ‘Causa de monachis’ in Aa 43, fol. 19v bei C.19, die sehr nahe bei der Formulierung des internen Verweises in C.13 q.2 d.p.c.1 ‘Quomodo autem distinguende sint he auctoritates, in causa monachorum inuenietur (C.16 q.4)’ der ersten Rezension steht.[65] Dass die Gliederung des *Decretum* zu Beginn noch rudimentär und nicht festgelegt war, zeigen zwei Gruppen von Handschriften, die eine alternative Gliederung in Titel bzw. in vier Teile und entsprechend gestaltete Allegationen besitzen.[66]

Die Zitate aus dem *Corpus iuris civilis* in gewissen ‘dicta Gratiani’ stehen den unkonventionellen Allegationen näher als die internen Verweise, denn sie beschränken sich manchmal auf die Nennung der ursprünglichen Quelle bzw. Autorität in einem bestimmten Rechtsbuch und auf ein wörtliches Zitat daraus. Kenneth Pennington hat auf diese ähnliche Zitierweise in einigen ‘dicta Gratiani’ und in der weiteren kanonistischen Literatur aufmerksam gemacht.[67] Solche und andere vage Quellenangaben

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[64] Winroth, *Making of Gratian’s Decretum* 179-183. Ein Beispiel der ersten Rezension bei C.11 q.1 d.p.c.26: ‘Unde Augustinus ait super Iohannem: “Quo iure uilla defendis? Diuino, an humano, etc.?” (D.8 c.1) Require in principio, ubi differentia designatur inter ius nature et ius constitutionis’. Ein Beispiel der zweiten Rezension bei C.7 q.1 d.p.c.48: ‘Hinc etiam Augustinus: “Tu bonus tollera malum etc.” (C.23 q.4 c.2) infra de tollerandis malis, in prima causa hereticorum, etc.’

[65] Winroth, *Making of Gratian’s Decretum* 179.

[66] Rudolf Weigand, ‘Romanisierungstendenzen im frühen kanonischen Recht’, ZRG Kan. Abt. 69 (1983) 200-249; Neudruck in Weigand, *Glossatoren* 23*-72*. Vgl. auch Bertram-Blumenthal, ‘Fragmente’ 88-90, 110-112.

[67] Kenneth Pennington, ‘Roman Law at the Papal Curia in the Early Twelfth Century’, *Canon Law, Religion, and Politics: Liber Amicorum Robert Somerville*, edd. Uta-Renate Blumenthal, Anders Winroth und Peter Landau

—mittels blosser Nennung des Rechtsbuchs oder des Titels, mittels blosser Angabe des Incipits oder einer Kombination derselben samt Buchzählung—trifft man ebenfalls in *Codex*- und *Institutiones*-Handschriften des 11. und beginnenden 12. Jahrhunderts, also aus der Übergangszeit vor dem Aufstieg der Bologneser Rechtsschule, an.[68]

Weitere Parallelen sind im archivalischen Schriftgut der Rechtspraxis aus der Mitte des 12. Jahrhunderts aufzufinden. Das erste solche Beispiel ist eine Klage- und Verteidigungsschrift, die zugunsten der Mönche von S. Ambrogio in Mailand im Zusammenhang mit ihrer langwierigen Auseinandersetzung mit den dortigen Kanonikern 1144 verfasst wurde. Sie enthält rund dreissig Allegationen des *Codex*, des *Digestum vetus* und des *Digestum novum*, die normalerweise zuerst das Rechtsbuch, dann den Titel und schliesslich die 'lex' mittels Incipit oder Zählung nennen und somit mindestens in ihrer Struktur den üblichen römischrechtlichen Allegationen auf den Seitenrändern juristischer Handschriften entsprechen. Peter Classen und dann Antonio Padoa-Schioppa hoben in ihrer Würdigung dieses Rechtsdokuments fünf bzw. drei kanonistische Allegationen hervor, die dem

(Washington, D.C. 2012) 233-252, hier 251 mit dem Beispiel C.2 q.6 d.p.c.27 und c.28: 'Quod postea Iustinianus in constitutionibus (Nov. 23) suis corrigens'; weiteres Beispiel bei C.15 q.3 d.a.c.1 und c.1: 'Unde in libro Codicis Inp. Diocletianus (Cod. 9.1.12) scribit, dicens'. Vgl. auch Bruce C. Brasington, 'Recte docens vel credens: Glosses to the Prologue to Ivo of Chartres' Panormia and Monastic Study of Canon Law', *De ordine vitae: Zu Normvorstellungen, Organisationsformen und Schriftgebrauch im mittelalterlichen Ordenswesen*, ed. Gert Melville (Vita regularis 1; Münster 1996) 101-123, hier 117.

[68] *La glossa pistoiese al Codice giustinianeo*, ed. Luigi Chiappelli (Torino 1885) 13; *Die Institutionenglossen des Gualcausus und die übrigen in der Handschrift 328 des Kölner Stadt-Archivs enthaltenen Erzeugnisse mittelalterlicher Rechtslitteratur als Entgegnung gegen Flach*, ed. Hermann Fitting (Berlin 1891) 37-43; Dolezalek, *Repertorium* 461, 467. *La glossa di Poppi alle istituzioni di Giustiniano*, ed. Crescenzi 601-632, scheint fast ausschliesslich (Ausnahme bei App. 1 37) die übliche Zitierweise römischer Rechtsbücher verwendet zu haben. Zu den drei Handschriften vgl. Charles M. Radding, Antonio Ciaralli, *The Corpus Iuris Civilis in the Middle Ages: Manuscripts and Transmission from the Sixth Century to the Juristic Revival* (Brill's Studies in Intellectual History 147; Leiden, Boston 2007) 86, 108, 111-112, 118-131, 143-147.

Herausgeber entgangen waren. Drei dieser Allegationen folgen hintereinander nach einem wörtlichen Quellenzitat:[69]

> privilegia enim ecclesiarum et monasteriorum sanctorum patrum auctoritate instituta nulla possunt improbitate convelli, nulla novitate mutari ut ex decretis Leonis pape [mancano quattro o cinque parole] idem Bonifacio primo defensori, item eidem Dominico cartaginensi episcopo colligitur.

Hier werden drei 'canones' einzig durch die Angabe der Quelle im Sinn einer 'inscriptio' allegiert, also in einer Form, die identisch ist mit der vorhin besprochenen Allegation der Konträrstelle D.31 c.12 ('Contra sancta Nicena sinodus') in Fd. Die Praxis, 'canones' aus Kirchenrechtssammlungen über die Angabe der ursprünglichen Quelle zu allegieren, ist somit auch ausserhalb der *Decretum*-Handschriften für das Jahr 1144 belegt. Falls die Vermutung von Classen und Padoa-Schioppa zutrifft und sich die drei Allegationen tatsächlich auf C.25 q.2 cc.2, 7, 8 des *Decretum Gratiani* und nicht etwa auf vorgratianische Kanonessammlungen beziehen, wäre der Vergleich besonders wertvoll.

Ein in vieler Hinsicht ähnliches Dokument hat Paolo Nardi veröffentlicht und untersucht. Es handelt sich um ein Urteil des Bischofs von Siena vom 9. März 1150, das den Zwist zwischen den Kanonikern der Kathedrale von Massa Marittima e Populonia und dem Abt des Klosters S. Bartolomeo di Sestinga beenden sollte. Zur Begründung seines Urteilsspruchs zitierte der Bischof insgesamt sechs Papstbriefe und Konzilsbeschlüsse. Gemäss Nardi sprechen quellenkritische Gründe dafür, dass sie dem *Decretum Gratiani* oder einer Kurzfassung davon entnommen wurden. Gleich dem vorangehenden juristischen Dokument wird

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[69] Ed. Gerolamo Biscaro, 'Note e documenti santambrosiani', *Archivio storico lombardo* 4.2 (1904) 302-359, Zitat von 352. Der Beginn des Zitats entspricht dem ersten Satz von C.25 q.2 c.2. Peter Classen, *Studium und Gesellschaft im Mittelalter*, ed. Johannes Fried (MGH Schriften 29; Stuttgart 1983) 38, 58-59 mit Anm. 37; Antonio Padoa-Schioppa, 'Aspetti della giustizia milanese dal X al XII secolo', *Settimane 1987* (Settimane alto medioevo 11; Spoleto 1989) 545-547; Antonio Padoa-Schioppa, 'Il diritto canonico come scienza nella prospettiva storica: Alcune riflessioni', *Proceedings München 1992* 419-444, hier 438.

hier nicht das *Decretum Gratiani* explizit allegiert, sondern allein die ursprünglichen Quellen:[70]

> quod affirmant ex sacris decretis Urbani et Nicholai (C.16 q.2 c.6 und c.8) . . . quod probare utuntur decreto Gelasii (C.16 q.3 c.5) . . . ex Magonensi concilio (C.16 q.1 c.46) . . . auctoritate Beati Gregorii (C.16 q.4 c.2) . . . ex decreto Pascalis intelligitur (C.16 q.1 c.47)

Manchmal sind diese Quellenhinweise mit einem kurzen wörtlichen Zitat aus der angeführten Quelle verbunden.

Ein drittes derartiges Schriftstück, das ebenfalls Classen untersucht hat, stammt aus dem Jahr 1155 oder 1156. Es entstand in der Folge eines langen Streits zwischen den Domkanonikern von Pisa und den Benediktinermönchen von S. Rossore. Das in Dialogform verarbeitete juristische Material enthält neben zahlreichen Zitaten aus dem *Codex*, dem *Digestum vetus,* dem *Digestum novum* und dem *Infortiatum* ein Dutzend Entlehnungen aus dem *Decretum Gratiani*. Die Allegationen bestehen sowohl für das *Corpus iuris civilis* als auch für das *Decretum Gratiani* einzig aus der Angabe der ursprünglichen Quelle und werden von der Wiedergabe eines meist längeren Textauszugs begleitet, der normalerweise einer 'lex', einem Paragraphen bzw. einem 'canon' der allegierten Quelle entspricht. Neben dem eigentlichen Wortlaut fehlen jegliche Hinweise zum Rechtsbuch, zum Titel, zur 'lex' und zum 'canon', wie die folgenden Beispiele zeigen:[71]

> testante Paulo iurisperitissimo (Dig. 41.2.11) . . . imperatoribus D(iocletiano) et M(aximiano) hoc attestantibus (Cod. 6.37.5) . . . Ait enim sanctus Ambrosius (C.11 q.1 c.27).

Pennington wies diese Allegationsart des *Corpus iuris civilis* im Umfeld der päpstlichen Kurie bereits für die Jahre 1123 und 1125 nach.[72]

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[70] Paolo Nardi, 'Fonti canoniche in una sentenza senese del 1150', SG 29 (1998) 661-670 mit den zitierten Beispielen bei Anm. 6-10.

[71] Classen, *Studium und Gesellschaft* 42, 99-125 mit den zitierten Beispielen bei Anm. 28, 48, 52.

[72] Pennington, 'Roman Law at the Papal Curia' 238 mit Anm. 19, 243-247 mit Anm. 41-44, 46, 55, 57-59, 61, 63. Einige wenige Beispiele von frühen Entlehnungen aus dem *Decretum Gratiani* nördlich der Alpen bei Martina Hartmann, 'The Letter Collection of Abbot Wibald of Stablo and Corvey and the *Decretum Gratiani*', BMCL 29 (2011-2012) 35-49, hier 38-41, 44. Die

Die drei Rechtsdokumente, die interessanterweise alle im Kontext eines Streits zwischen Kanonikern und Mönchen entstanden, belegen die Praxis, das *Decretum Gratiani* über die Nennung der ursprünglichen Quellen zu zitieren. Diese Art der Allegationen erscheint in Verbindung mit kurzen wörtlichen Zitaten (1144 und 1150) oder mit vollständigen oder längeren Zitaten (1155-1156) aus den allegierten Quellen. Man findet diese Allegationsart—Angabe der Quelle bzw. Autorität in Verbindung mit einem wörtlichen Auszug daraus—auch bei gewissen Zitaten des *Corpus iuris civilis* in den 'dicta Gratiani'.

Die Quellengrundlage ist zu klein, um zu entscheiden, ob diese unkonventionellen Allegationen in den drei Rechtsdokumenten die damalige Arbeitsweise an den Rechtsschulen und in den Rechtshandschriften, vielleicht mit einer leichten Verzögerung, widerspiegeln oder nicht. Die Chronologie spräche wohl nicht dagegen, wenn man die frühestens in der Mitte des 12. Jahrhunderts (nach 1139) begonnene Handschrift Fd,[73] die beim Text der ersten Rezension solche unkonventionellen Allegationen in diskursiven Glossen enthält, mit den Entstehungsjahren der Rechtsdokumente (1144, 1150, 1155-1156) vergleicht. Die unkonventionellen römischrechtlichen Verweise im jüngsten der drei Schriftstücke deuten hingegen die Möglichkeit an, dass in einem spezifischen Umfeld die aktuellen Standards der Bologneser Rechtsschule und der Bologneser Rechtshandschriften nicht befolgt wurden.[74]

Entlehnungen beschränken sich neben blossen Anspielungen auf bruchstückhafte wörtliche Zitate ohne Herkunftsangabe und auf die Nennung von ursprünglichen Autoritäten in Verbindung mit einem sinngemässen Zitat.

[73] Larrainzar, 'El Decreto de Graciano del códice Fd' 434; Winroth, *Making of Gratian's Decretum* 136-139. Zum möglichen *terminus post quem* 1133 vgl. Atria A. Larson, 'Early Stages of the *Decretum* and Lateran II: A Reconsideration', BMCL 21 (2007) 1-36, Larson, *Gratian's Tractatus de penitentia* xxxii, Anm. 34, und Pennington, 'The Biography' 681-682.

[74] Vgl. Dolezalek, *Repertorium* 461-462, 466-469, 482-483.

Vielfalt der allegierten Rechtssammlungen

Bereits Maassen und Schulte fiel auf, dass in den frühen Handschriften des *Decretum Gratiani* nicht nur dieses, sondern auch die Bücher der justinianischen Kodifikation, die *Lombarda* und ältere Kanonessammlungen, allen voran das Dekret des Burchard von Worms, allegiert werden.[75] Maassen setzte sich besonders intensiv mit den Allegationen älterer Kanonessammlungen auseinander. So legte er 1857 anhand der Handschrift Innsbruck, UB 90(In) dar, dass gewisse frühe Kanonisten das *Decretum Gratiani* nicht nur mit jüngeren Dekretalen und Konzilsbeschlüssen des III. Laterankonzils von 1179 aktualisierten, sondern auch mit 'canones' aus vorgratianischen Sammlungen ergänzten und solche in den Glossen allegierten.[76]

Unter den Kanonessammlungen, die für die Bearbeitung und Ergänzung des *Decretum Gratiani* in jener Handschrift beigezogen wurden, finden sich sicherlich die *Dionysio-Hadriana*, die unter der Bezeichnung *Liber conciliorum* zitiert wird,[77] sodann ein *Liber canonum*, der möglicherweise der *Hispana* entspricht, und vielleicht eine weitere chronologische Kanonessammlung. Besonders häufig kommen jedoch in der Innsbrucker Handschrift und in anderen Handschriften Verweise auf und Zitate aus dem Dekret von Burchard von Worms vor. Vergleichbare Ergebnisse, einschliesslich der Bezeichnungen *Liber conciliorum* und *Liber canonum* und der grossen Zahl von Burchard-Zitaten, legte Heinrich Singer in der Einleitung zu seiner Ausgabe der Summe des Rufinus vor.[78]

Maassen erklärte die Allegationen und Exzerpte aus älteren Kanonessammlungen dadurch, dass das *Decretum Gratiani* ein

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[75] Maassen, 'Beiträge' 47-67, 71-72; Maassen, 'Paucapalea' 487; Schulte, 'Die Glosse zum Decret Gratians' 3, 9, 12, 32-33, 74.

[76] Maassen, 'Beiträge' 47-67.

[77] Ich habe den Befund von Maassen, 'Beiträge' 47-53, anhand der Kapitelüberschriften, der Kapitelzählung und des Orts der zitierten Stellen in St. Gallen, SB 671, p. 147, 173, 358, überprüft. Zur Handschrift vgl. Lenz-Ortelli, *Die Handschriften* 6-13.

[78] Rufinus von Bologna, *Summa decretorum*, ed. Heinrich Singer (Paderborn 1902; Neudruck Aalen 1963) ciii-civ.

privates Lehrbuch ohne unmittelbare Rechtskraft und eine Sammlung alten Rechts ohne ausschliesslichen Charakter gewesen sei, welche sich beliebig durch rechtsgültige 'canones' ergänzen liesse.[79] Maassens These mag zwar formalrechtlich überspitzt ausgedrückt sein, doch liefert sie die mir einzige bekannte Erklärung für den—im Gegensatz zur justinianischen Kodifikation—zu Beginn relativ offenen Text des *Decretum Gratiani*.[80]

Über ein Jahrhundert später beschäftigte sich Weigand eingehend mit dem Verhältnis zwischen dem *Decretum Gratiani* und dem Dekret des Burchard von Worms. So wies er nach, dass Burchards Dekret für textkritische Vergleiche mit dem *Decretum Gratiani* herangezogen wurde.[81] Vor allem aber untersuchte er die Burchard-Allegationen. Ausgangspunkt waren fünf Handschriften des *Decretum Gratiani* (Du, In, Lo, Pa, Vl) der zweiten Hälfte des 12. Jahrhunderts, die im Anhang Zusätze aus dem Dekret des Burchard von Worms besitzen. Von diesen enthalten mindestens drei Handschriften (In, Lo, Pa) und eine weitere Handschrift ohne Anhang (Bb) auf den Seitenrändern Allegationen von Burchards Dekret, die sich häufig ausgeschrieben in den Zusätzen aus Burchard im Anhang wiederfinden und überdies eine bemerkenswerte Verwandtschaft mit der Dekretsumme des Rufinus aufweisen. Mitten in seinem Aufsatz hielt Weigand fest, dass in der *Pars prima* des *Decretum Gratiani* 65 Burchard Allegationen in Aa 23 stehen, die jedoch mit den obigen nicht verwandt seien. Dasselbe gilt gemäss Weigand für die 33 Allegationen von Burchards Dekret in der *Pars prima* in der Handschrift Pf I, die meistens denjenigen in Aa entsprechen, sowie für die mehrheitlich

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[79] Maassen, 'Beiträge' 47-48.

[80] Maassen diametral entgegengesetzt ist, mindestens für die Frühzeit, die Einschätzung von Michael H. Hoeflich, Jasonne M. Grabher, 'The Establishment of Normativ Legal Texts: The Beginning of the *Ius commune*', HMCL 2.9: 'A passage did not gain its importance because of its author; it gained importance because it was included in the *Digest* or *Decretum*. In short, the authoritativeness of the texts came primarily from inclusion in the canonical compilation, not because of the individual author or source'.

[81] Weigand, 'Frühe Glossen zu D.11 pr. - c.6 des Dekrets Gratians' 92.

identischen rund dreissig Burchard-Allegationen in der *Pars prima* in Hk und Mc.[82]

Ein Teil der Burchard-Auszüge und der Burchard-Allegationen in den genannten Handschriften entspricht den rund 58 'paleae' aus dem Dekret Burchards, die dem Text des *Decretum Gratiani* einverleibt wurden. Weigand beschloss seinen Aufsatz folgendermassen:[83]

> Als Ergebnis dieser Untersuchung darf festgestellt werden, dass offensichtlich Rufin systematisch das Dekret Burchards nach Zusatztexten zum Dekret Gratians untersuchte, diese in dem analysierten Auszug zusammenstellte und sehr viele dieser Texte in seiner Summe und in seiner Glossenkomposition [d.h. in der ersten Glossenkomposition] zitiert oder allegiert hat. Dieser Fundus an Burchardtexten stellte in Bologna mindestens bis einschliesslich Johannes Faventinus anscheinend das Hauptreservoir an solchen Texten bei der Kommentierung des Dekrets Gratians dar. Sicher war das aber nicht die einzige Quelle, wie sich bei der abschliessenden Überprüfung der *paleae* herausstellen wird, die wohl aus dem Dekret Burchards dorthin gelangten.

Aufgrund entwicklungsgeschichtlicher Überlegungen tendiere ich im Gegensatz zu Weigand dazu, den Prozess der Rezeption Burchards im *Decretum Gratiani* mit den Allegationen beginnen zu lassen, die danach manchmal durch Burchard-Zusätze im Anhang ergänzt wurden, bevor Burchard-Exzerpte als 'paleae' in grösserem Umfang in den Text des *Decretum Gratiani* aufgenommen wurden. Diese Ansicht wird dadurch gestützt, dass die reichlich glossierten Handschriften der ersten Rezension, Aa und Bc, einzig die Allegationen, nicht jedoch die entsprechenden Texte als Zusätze enthalten.

Während das Dekret des Burchard von Worms dem Text des *Decretum Gratiani* in der ersten und zweiten Rezension vor der Beifügung der 'paleae' kaum oder nur ausnahmsweise als unmittelbare Quelle diente,[84] spielte es—wie die Burchard'schen

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[82] Rudolf Weigand, 'Burchardauszüge in Dekrethandschriften und ihre Verwendung bei Rufin und als Paleae im Dekret Gratians', AKKR 158 (1989) 429-451, hier 446.

[83] Ibid. 447-448.

[84] Gemäss Peter Landau, 'Burchard de Worms et Gratien: À propos des sources immédiates de Gratien', RDC 48 (1998) 233-245, diente das Dekret Burchards von Worms für ungefähr zehn 'canones', die bereits in der ersten Rezension vorhanden sind, als unmittelbare Quelle. Rudolf Weigand, 'Mittelalterliche

Allegationen, Zusätze und 'paleae' belegen—in einer späteren Phase der Bearbeitung und Ergänzung des *Decretum Gratiani* eine wesentliche Rolle. Die Wirkung des Dekrets von Burchard von Worms auf das *Decretum Gratiani* kommt auch in der jüngst erschienen Monographie von John Wei kurz zur Sprache. Wei sieht nämlich den später dem *Decretum Gratiani* hinzugefügten Traktat *De consecratione* stark in der Tradition Burchards und italienischer Kanonessammlungen des ausgehenden 11. und beginnenden 12. Jahrhunderts verankert.[85] Die weitgehende Nichtbenutzung von Burchards Dekret in der Erarbeitung der ersten und zweiten Rezension des *Decretum Gratiani* und der danach einsetzende häufige Rückgriff auf jenes werfen interessante Fragen bezüglich der materiellen Quellen, des Entstehungsprozesses und des frühen Rezeptionskreises des *Decretum Gratiani* auf.

Spezielle Verweise: die roten Zeichen

Ein den Allegationen verwandtes, einfaches Verweissystem bildeten die sogenannten roten Zeichen. Gero Dolezalek und Rudolf Weigand haben sie in einem gemeinsamen Artikel sowohl in kanonistischen Handschriften als auch in solchen der justinianischen Kodifikation, der *Lombarda* und der *Libri feudorum* im Zeitraum von ca. 1150 bis 1190 nachgewiesen.[86]

Die roten Zeichen, häufig mit einem Strichpunkt darüber markiert, werden gewöhnlich von einem Punkt links bzw. rechts von ihnen begleitet, um anzugeben, ob der Verweis nach oben oder nach unten oder in beide Richtungen führt, d.h. ob das entsprechende Zeichen oben oder unten oder sogar in beide Richtungen zu suchen ist. Die roten Zeichen dienten dazu, im

Texte: Gregor I., Burchard und Gratian', ZRG Kan. Abt. 84 (1998) 330-340, weist die Benutzung von Burchards Dekret für mindestens eine Textstelle in der ersten Rezension nach. Vgl. auch Winroth, *Making of Gratian's Decretum* 17, Anm. 51.

[85] Wei, *Gratian the Theologian* 282-283.

[86] Gero Dolezalek, Rudolf Weigand, 'Das Geheimnis der roten Zeichen: Ein Beitrag zur Paläographie juristischer Handschriften des zwölften Jahrhunderts', ZRG Kan. Abt. 69 (1983) 143-199.

Nahbereich auf gleiche oder ähnliche Texte, auf identische Begriffe, Worte und Sachen, manchmal ziemlich oberflächlich, zu verweisen. Daraus konnten auch Ketten aus mehreren Verweisen entstehen.

Der Artikel von Dolezalek und Weigand kann den Eindruck erwecken, dass die roten Zeichen eine Erfindung der Rechtswissenschaft der zweiten Hälfte des 12. Jahrhunderts waren. In Wahrheit existierte ein vergleichbares Verweissystem mit paarweise auftretenden Zeichen, die gleiche Themen, Worte oder Zitate an verschiedenen Stellen eines Werks verbinden und manchmal zusammen mit einer abgekürzten Richtungsangabe für ‘in ante’ oder ‘retro’ auftreten, bereits im Frühmittelalter, nur dass die Zeichen nicht in roter Tinte geschrieben wurden. Ein solches Verweissystem ist z.B. aus Priscian-Handschriften des 9. Jahrhunderts, die in Irland oder in irischen Kreisen auf dem Festland entstanden, bekannt.[87]

Weigand hat in seiner Untersuchung von C.1 q.1 d.p.c.16 in mehreren *Decretum*-Handschriften festgestellt, dass die dortigen roten Zeichen auf identische Quellen, Aussagen und Begriffe in den vorangehenden ‘canones’ dieser ‘quaestio’ rückverweisen. Zudem erläuterte er zahlreiche Beispiele in D.1-16, wo die roten Zeichen dieselben Begriffe oder dieselben frühchristlichen Konzilien verbinden. Die Handschriften lassen sich in Untergruppen mit denselben Ketten roter Zeichen gliedern. Gemäss Weigand tauchen die roten Zeichen unter anderem in Handschriften der zweiten Glossenkomposition (Bl, Mb, Pe, Sr, Tx, Vl, Vp) und gelegentlich in solchen, die im Wesentlichen die erste

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[87] Pierre-Yves Lambert, ‘Les signes de renvois dans le Priscien de Saint-Gall’, *Études celtiques* 24 (1987) 217-238, hier 225: ‘il s’agit d’une sorte de “référence croisée” renvoyant d’un endroit à l’autre de Priscien lorsque les deux endroits traitent du même sujet, ou du même mot, ou simplement lorsqu’ils font la même citation’; Cinato, *Priscien glosé* 248-250, mit der wichtigen Einschränkung 250: ‘Comme leurs devanciers, les maîtres sont forcés de constater l’incohérance, sans proposer de solution’. Noch älter ist das komplexere System der Eusebianischen Kanontafeln und der entsprechenden Verweise auf parallele Bibelstellen. Vgl. Thomas O’Loughlin, ‘Harmonizing the Truth: Eusebius and the Problem of the Four Gospels’, *Traditio* 65 (2010) 1-29.

Glossenkomposition (Ch, Hk, Hl, Tt, Vc) überliefern, auf.[88] Es ist festzuhalten, dass in den glossierten Handschriften mit der ersten Rezension, Fd, Aa und Bc, solche Zeichen mit der geschilderten Funktion fehlen.[89]

Glossen und Summen

Weigand hat die Glossen auch in ihrer Wechselwirkung zu den frühen Summen der Schule von Bologna untersucht.[90] Dabei nahm er nach Maassen, Schulte, Gillmann und vor allem Juncker nochmals die Frage auf, ob in der frühen Dekretistik zunächst die Glossen entstanden und dann teilweise in die Summen übernommen wurden, oder ob die Entwicklung in umgekehrter Reihenfolge stattfand.[91] Im Fall der ältesten Summe, der Summe des Paucapalea, konnte er keine eindeutige Antwort liefern. Gleichwohl bietet seine Edition von vier Glossen zum *Decretum Gratiani*, welche er mit der Summe des Paucapalea verglich, einen interessanten Ausgangspunkt für die Einschätzung der Glossierung der Handschrift Bc, wie später dargelegt werden wird. Neben einem Vergleich der Glossen des Rufinus und seiner Summe durch Beate Kann seien hier die Arbeiten von José Miguel Viejo-Ximénez zur Summe des Paucapalea erwähnt, die im folgenden Kapitel genauer vorgestellt werden.[92]

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[88] Dolezalek-Weigand, 'Das Geheimnis der roten Zeichen' 180-192.

[89] In Aa 43, fol. 37v bei C.17 q.2 c.3 und fol. 38v bei C.17 q.2 d.p.c.2, dienen rote Zeichen offenbar dazu, die übliche Anordnung der *Decretum*-Texte herzustellen, nachdem ein Text der zweiten Rezension in C.16 statt in C.17 eingefügt worden war.

[90] Weigand, 'Frühe Glossen zu D.11 pr.-c. 6'; Rudolf Weigand, 'Paucapalea und die frühe Kanonistik', AKKR 150 (1981) 137-157; Neudruck in Weigand, *Glossatoren* 1*-21*; Rudolf Weigand, 'Die ersten Jahrzehnte der Schule von Bologna: Wechselwirkungen von Summen und Glossen', *Proceedings München 1992* 445-465.

[91] Maassen, 'Paucapalea' 457-459; Schulte, 'Die Glosse zum Decret Gratians' 5-6; Gillmann, 'Die Abfassungszeit der Dekretglosse des Clm 10244'; Gillmann, 'Über die Abfassungszeit der Dekretglosse des Clm 10244'; Gillmann, 'Nochmals über die Abfassungszeit der Dekretglosse des Clm 10244'; Juncker, 'Summen und Glossen'; Juncker, 'Die Summa des Simon von Bisignano und seine Glossen'.

[92] Kann, 'Die Rufinglossen'.

Aussagen zu den Glossen seit der Entdeckung von früheren Textfassungen des Decretum Gratiani

In Anders Winroths berühmtem Buch, das den Nachweis einer ersten Rezension des *Decretum Gratiani* erbrachte, steht entsprechend der Fragestellung natürlich der Text und nicht die Glossierung im Vordergrund. Trotzdem hat sich Winroth darin kurz mit den Glossen der frühesten *Decretum*-Handschriften auseinandergesetzt, vor allem insofern sie die Textentwicklung des *Decretum* beeinflussten. So zeigte er, dass zwei Glossen zu C.2 q.6 c.28, welche in Aa und Fd, aber auch in Gg (zweite Rezension) erscheinen, in den Text von P (und Pf; zweite Rezension) eingeflossen sind. Da die Handschrift P ansonsten nicht von der zweiten Rezension kontaminiert wurde, ist es wahrscheinlich, dass ihre Vorlage Glossen ohne Einfluss der zweiten Rezension enthielt.[93] Winroth schliesst seine Diskussion der Glossen mit dem Hinweis, dass es schwierig sei, spezifische Glossengruppen zu identifizieren, die sicherlich aus der Zeit vor der zweiten Rezension stammen.[94]

Carlos Larrainzar hat in seinen Untersuchungen der Handschriften Fd und Sg nicht nur deren Inhalte genau verzeichnet, sondern auch die verschiedenen Eintragungsschichten von Texten, Zusätzen und Glossen nach paläographischen und kodikologischen Kriterien in einer relativen Chronologie zu ordnen versucht. Im Fall von Fd plädiert er dafür, dass der ursprüngliche Text der ersten Rezension in mehreren Etappen zur zweiten Rezension erweitert wurde.[95]

Für die Handschrift Sg, die im Gegensatz zu Fd nicht nur über Notabilien, diskursive Glossen und Textergänzungen, sondern auch über zahlreiche Allegationen verfügt, hat er im *Decretum* 56 Textzusätze und 57 diskursive Glossen verzeichnet sowie die

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[93] Winroth, *Making of Gratian's Decretum* 183. Burden, 'Gratian North of the Alps' 111-112, behandelt sechs Glossen, die in Aa in den Haupttext eingeflossen sind.

[94] Winroth, *Making of Gratian's Decretum* 186.

[95] Larrainzar, 'El decreto de Graciano del códice Fd' explizit z.B. 463-464.

Fundorte von 79 Notabilien, kurzen Inhaltsangaben oder anderen Vermerken und von 50 Verweisen zu parallelen oder widersprüchlichen Textstellen im *Decretum* angegeben.[96]

Larrainzars These eines *texte vivant* bzw. einer mehrstufigen Entwicklung des *Decretum* zur zweiten Rezension hat von vielen Forschern Zustimmung erfahren.[97] Es wundert deshalb nicht, dass die Untersuchung der Textzusätze auf andere frühe *Decretum*-Handschriften ausgeweitet und das Erklärungsmodell verfeinert wurde. Zwar sind diese Textzusätze nicht eigentlicher Gegenstand der vorliegenden Studie, doch verdienen sie hier eine gewisse Beachtung, weil sie wie die Glossen Sekundäreintragungen, d.h. Eintragungen ausserhalb oder zwischen den Zeilen des zentral angelegten und primär geschriebenen Texts, sind. Hinsichtlich des eingerichteten und ausgeführten Seitenlayouts, der relativen Chronologie von Text und Sekundäreintragungen sowie der Funktionalität des Gesamtwerks stehen die Textzusätze in einer Wechselwirkung zu den Glossen.

Melodie Eichbauer hat die Ergänzungen von Texten der zweiten Rezension auf den Seitenrändern (Aa, Bc, Fd), im Anhang (Aa, Fd), auf Zusatzblättern (Bc) und zwischen den Textzeilen (Bc) in den Handschriften der ersten Rezension Aa, Bc und Fd systematisch untersucht. Aufgrund paläographischer und inhaltlicher Erwägungen hielt sie fest, dass die ‘canones’ und ‘dicta’ der zweiten Rezension nicht auf einmal in die Handschriften der ersten Rezension eingetragen wurden – was man beim Vorliegen eines vollständigen Exemplars der zweiten Rezension erwarten würde—sondern dass die ‘canones’ und ‘dicta’ über mehrere Etappen, häufig in unterschiedlicher Auswahl, manchmal als Doubletten oder an falscher Stelle ergänzt wurden.[98]

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[96] Larrainzar, ‘El borrador de la “concordia” de Graciano’ 604-606, 634-635, 662-666.

[97] Zusammenfassung seiner Thesen bei Carlos Larrainzar, ‘La formación del Decreto de Graciano por etapas’, ZRG Kan. Abt. 87 (2001) 67-83; Carlos Larrainzar, ‘La firma boloñesa del decreto de Graciano’, *Initium* 9 (2004) 495-515.

[98] Melodie H. Eichbauer, *From Gratian’s Concordia discordantium canonum to Gratian’s Decretum: The Evolution from Teaching Text to Comprehensive*

In die gleiche Richtung steuert Kenneth Pennington in einer jüngeren Publikation, wo er seine in zahlreichen älteren Studien veröffentlichten Erkenntnisse und Ansichten über die frühe Entwicklung des *Decretum Gratiani* und über dessen Autor zusammengefasst hat.[99] Seine beiden vielleicht wichtigsten Thesen betreffen die Art und die Chronologie der Textentwicklung des *Decretum Gratiani*. Nach ihm handelt es sich um einen *texte vivant*, der als Folge der Lehrtätigkeit Gratians in Bologna in den 1120er- bis 1140er-Jahren langsam anwuchs und sich deshalb in verschiedener Gestalt von Bologna aus über eine weite geographische Sphäre verbreitete. Um diese These zu untermauern, untersuchte er auch die Sekundäreintragungen. Erstens weist er nach, dass in den Handschriften vor Vollendung der zweiten Rezension gewisse 'canones', darunter auch die jüngsten (vermeintlich dem II. Laterankonzil 1139 entstammenden), bald, als Nachträge auf den Seitenrändern, im Anhang oder an beiden Orten—und dann sogar in verschiedenen Textversionen—bald im Text selber erscheinen, und zwar nicht unbedingt in vollständiger Anzahl.[100] Zweitens betont er, dass die beiden Handschriften Aa und Bc und die frühesten Handschriften der zweiten Rezension Glossen in Form von Allegationen des Dekrets Burchards und, weniger häufig, der *Lombarda* enthalten, welche eindeutig auf Italien als Entstehungsort der Glossen hinweisen.[101] In diesem Zusammenhang erinnert er auch an die vier marginal

Code of Canon Law (PhD Washington, D.C. 2010) 230-336; Melodie H. Eichbauer, 'From the First to the Second Recension: The Progressive Evolution of the *Decretum*', BMCL 29 (2011-2012) 119-167. Eine noch differenziertere Darstellung der Textentwicklung bei Larson, 'Gratian's *De penitentia* in Twelfth-Century Manuscripts' inklusive 107 Anm. 102 einige Korrekturen zu Eichbauer; zusammengefasst in Larson, *Gratian's Tractatus de penitentia* xxx-xxxvii.

[99] Pennington, 'The Biography'.

[100] Ibid. 680, 684-687. Pennington verwendet den Begriff 'pre-Vulgate' für Textfassungen vor der zweiten Rezension, um den evolutiven Charakter des Texts bis zur Vollendung der zweiten Rezension (ohne 'paleae'), welche er 'Vulgate' nennt, zu unterstreichen.

[101] Pennington, 'The Biography' 697-698, 701-702 mit Anm. 67. Verweise auf die *Lombarda* auch vermerkt bei Viejo-Ximénez, 'Una composición sobre el Decreto de Graciano' 218, Anm. 60.

eingetragenen ‘authenticae’ in Sg, die eine italienische Rechtsschule als Entstehungsumfeld suggerieren und deren zwei später in den Text des *Decretum* aufgenommen wurden.[102] Vereinzelte diskursive Glossen aus Dekrethandschriften des 12. Jahrhunderts wertete er—wie dies bereits Weigand in grösserem Umfang gemacht hatte—für eine dogmatische Untersuchung aus.[103]

José Miguel Viejo-Ximénez hat jenen Sachverhalt, d.h. den Prozess der Anreicherung des *Decretum Gratiani* mit Zusätzen auf den Seitenrändern, im Anhang und zwischen den Zeilen, deren Einverleibung in den Text sowie die daraus resultierende Vielgestaltigkeit der frühen Handschriften, mit einem besonderen Augenmerk für Entlehnungen aus den justinianischen Rechtsbüchern nachgezeichnet.[104]

Im Rahmen dieser römischrechtlichen Spurensuche präzisierte Viejo-Ximénez auch die Feststellung Winroths zur Glossierung der Textstelle C.2 q.6 c.28. Verbindet man die Ergebnisse der beiden *Decretum*-Forscher, dann lassen sich interessante Schlussfolgerungen zur frühen Glossierung ziehen. Winroth hat zu Recht hervorgehoben, dass die Vorlage von P wohl glossiert gewesen war, weil die Handschrift zwei—eigentlich sind es drei—Glossen in den eingerichteten Text von C.2 q.6 c.28 aufgenommen hat,

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[102] Kenneth Pennington, ‘The “Big Bang”: Roman Law in the Early Twelfth-Century’, RIDC 18 (2007) 43-70, hier 66-67; Kenneth Pennington, ‘The Beginning of Roman Law Jurisprudence and Teaching in the Twelfth Century: The *Authenticae*’, RIDC 22 (2011) 35-53, hier 44; Pennington, ‘The Biography’ 690, 695.

[103] Weigand, *Die Naturrechtslehre* 142, Anm. 6a, 148, Anm. 26, 149, Anm. 27, 159, Anm. 15 etc.; Kenneth Pennington, ‘Lex naturalis and ius naturale’, *The Jurist* 68 (2008) 569-591, hier 575, Anm. 17, 581, Anm. 44.

[104] José Miguel Viejo-Ximénez, ‘El Derecho Romano “nuevo” en el Decreto de Graciano’, ZRG Kan. Abt. 88 (2002) 1-19; José Miguel Viejo-Ximénez, ‘Las *novellae* de la tradición canónica occidental y del decreto de Graciano’, *Novellae constitutiones: L’ultima legislazione di Giustiniano tra Oriente e Occidente da Triboniano a Savigny. Atti del Convegno Internazionale Teramo, 30-31 ottobre 2009*, edd. Luca Loschiavo, Giovanna Mancini und Cristina Vano (Napoli 2011) 207-279; José Miguel Viejo-Ximénez, ‘Un capítulo del *Authenticum* boloñés en la *Concordia discordantium canonum*’, *Recto ordine procedit magister: Liber amicorum E. C. Coppens*, edd. Louis Berkvens, Jan Hallebeek, Georges Martyn und Paul Nève (Iuris scripta historica 28; Brussels 2012) 313-329.

welche in Aa und Fd—ausserdem die ersten beiden Glossen auch in Bc—am Seitenrand stehen.[105] In diesem Sinn erlauben die drei Glossen wahrscheinlich einen Einblick in die Glossierung der ersten Rezension vor der Erarbeitung der zweiten Rezension, denn P ist in keinerlei Weise von der zweiten Rezension kontaminiert worden.[106] Diese Glossen dürften somit einer der ältesten für uns fassbaren Stufen der wissenschaftlichen Bearbeitung des *Decretum Gratiani* zugehören.

Viejo-Ximénez erinnert in seiner detaillierten Untersuchung zunächst daran, dass C.2 q.6 c.28 dem Text von Nov. 23 bzw. Auth. Coll. 4.2 entspricht. Danach weist er nach, dass es sich bei der ersten und dritten Glosse um Zusammenfassungen von Nov. 23.1 und Nov. 23.2 und bei der zweiten Glosse um einen impliziten Verweis auf die Aussage von Cod. 7.42.1 handelt, die alle drei in gleicher oder ähnlicher Form als Marginalien in Handschriften des *Authenticum* überliefert wurden.[107] Daraus folgt, dass eine der ältesten Glossenmengen zum *Decretum Gratiani* noch vor Aufkommen der zweiten Rezension bereits 'summaria' von zwei Novellenteilen und einen impliziten inhaltlichen Verweis auf den *Codex* umfasste, die die Glossatoren des *Authenticum*, also eines römischen Rechtsbuchs, geschaffen hatten.

Ein weiteres wichtiges Untersuchungsfeld desselben Forschers stellt die sogenannte Summe des Paucapalea, die älteste Dekretsumme, dar.[108] Laut Viejo-Ximénez ist die Summe eine Zusammenstellung von Exzerpten ohne Quellenangaben, welche

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105 Winroth, *Making of Gratian's Decretum* 183.
106 Ibid.
107 Viejo-Ximénez, 'Las *novellae* de la tradición canónica occidental' 238-241, 261 (Nr. 42), 275-276; Viejo-Ximénez, 'Un capítulo del *Authenticum* boloñés'.
108 José Miguel Viejo-Ximénez, 'La *Summa Quoniam in omnibus* de Paucapalea: Una contribución a la historia del derecho romano-canónico en la Edad Media', *Folia theologica et canonica* 1 (2012) 151-196; Viejo-Ximénez, 'Una composición sobre el Decreto de Graciano'; José Miguel Viejo-Ximénez, 'Dos escritos de la decretística boloñesa: *Inter ceteras theologie disciplinas* y *Quoniam in omnibus*', REDC 71 (2014) 271-291; José Miguel Viejo-Ximénez, 'The *Summa Quoniam in omnibus* revisited', *Folia theologica et canonica* 3 (2014) 153-169; José Miguel Viejo-Ximénez, 'La suma *Quoniam in Omnibus* y las primeras *summae* de la Escuela de Bolonia', BMCL (2016) 27-62.

die Methoden der frühen Dekretistik abbildet. Die Summe kommentiert das *Decretum Gratiani*, als es bereits den Textzustand der zweiten Rezension (mit *De consecratione* in fünf Distinktionen) erreicht hatte,[109] und stammt in ihrer vollendeten Form sicherlich aus der Zeit nach 1146, wahrscheinlich aus der Mitte der 1150er-Jahre.[110] Sie besteht aus Summarien, Definitionen, Worterklärungen, Sacherklärungen, Zusätzen, Allegationen, 'introductiones', 'continuationes', 'distinctiones' und 'solutiones contrariorum'.[111]

Für die Fragestellung unserer Studie liegt der Wert der Arbeiten von Viejo-Ximénez vor allem darin, dass er in seiner Analyse des Verhältnisses zwischen der ältesten Dekretsumme und den Glossen zum *Decretum Gratiani* auch die beiden reichlich glossierten Handschriften der ersten Rezension, Aa und Bc, sowie die frühe Fassung des *Decretum* in Sg berücksichtigte.[112] Zudem beschränkte er seine Studie nicht auf längere diskursive Glossen, sondern analysierte auch die kürzesten und ältesten Glossenarten, die Allegationen und die Worterklärungen. Die Wertschätzung dieses anonymen Materials, die Hervorhebung der Summe als einer mosaikartigen Zusammenstellung und somit als eines kollektiven Produkts des Rechtsunterrichts und die Aberkennung der Autorschaft des Paucapalea regen überdies zu einer Abkehr von der übermässig personenzentrierten Erforschung der frühesten Dekretistik an.[113] Viejo-Ximénez unterscheidet sich somit von seinen Vorgängern nicht nur durch den gezielten Einbezug von Allegationen und diskursiven Glossen in *Decretum*-Handschriften der ersten Rezension und der St. Galler Handschrift, sondern auch

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[109] Viejo-Ximénez, 'La *Summa Quoniam in omnibus* de Paucapalea' 196; Viejo-Ximénez, 'Una composición sobre el Decreto de Graciano' 213, 241.
[110] Viejo-Ximénez, 'The *Summa Quoniam in omnibus* revisited' 159-160.
[111] Viejo-Ximénez, 'Una composición sobre el Decreto de Graciano' 203-216. Zum Charakter dieser Summen und zu ihrer Verbindung mit den Glossen als den frühesten Formen der wissenschaftlichen Auseinandersetzung mit dem *Decretum Gratiani* vgl. bereits Juncker, 'Summen und Glossen' 385-386, 396.
[112] Viejo-Ximénez, 'Una composición sobre el Decreto de Graciano' 222-244, besonders 228, Anm. 107 (Sg), 234 (Bc, Sg), 241 (Aa, Bc), 243 (Aa, Bc).
[113] Ähnlich, vielleicht zur Übertreibung neigend, bereits Caprioli, 'Per uno schedario di glosse preaccursiane' 107-119.

dadurch, dass für ihn nicht mehr die Zuweisung von Glossen an Paucapalea im Vordergrund steht. Folglich bezeichnet er die sogenannte Summe des Paucapalea als Summe *Quoniam in omnibus.*

Paläographie, Kodikologie, Layout, Überlieferungskontext und Funktion

Am *Fourteenth International Congress of Medieval Canon Law* in Toronto 2012 habe ich beklagt, dass es noch keine eingehende paläographische und kodikologische Studie zu den frühen *Decretum*-Handschriften gebe.[114] Vor allem dank der Arbeiten von Giovanna Murano sind auf diesem Gebiet inzwischen Fortschritte erzielt worden.[115] In zwei im Jahr 2015 veröffentlichten langen Aufsätzen hat sie nicht nur die Biographie Gratians, die Entstehung und das Entstehungsmilieu des *Decretum* und die frühe Dekretistik auf der Grundlage der bestehenden Literatur und eigener neuer Erkenntnisse dargelegt, sondern auch erste Resultate ihrer paläographischen und kodikologischen Untersuchungen zu den Handschriften des *Decretum* aus dem 12. Jahrhundert veröffentlicht.[116] Erste Ergebnisse der Erforschung von Fragmenten des *Decretum Gratiani* durch Martin Bertram und Uta-Renate Blumenthal versprechen überdies bessere Kenntnisse der Herkunft und Gestalt der Handschriften des 12. Jahrhunderts und deuten ein vielfältigeres Überlieferungsbild an, als dies gemeinhin angenommen wird.[117] Susanne Wittekind und Stephan Dusil haben jüngst je eine Studie zu graphischen Marginalien und

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[114] Lenz, 'The Context of Transmission' 107. Vgl. auch Bertram-Blumenthal, 'Fragmente' 91.
[115] Murano, 'Graziano e il *Decretum*' 129 Anm. 1, kündigt eine Monographie mit den Beschreibungen sämtlicher Handschriften des *Decretum Gratiani* des 12. Jahrhunderts an. Für die *Decretum*-Handschriften der französischen Σ-Gruppe siehe jetzt Wei, 'Gratian's *Decretum* in France and Halberstadt'.
[116] Giovanna Murano, 'Dalle scuole agli *Studia*: il *Decretum Gratiani* tra XII e XIII seculo', *Scriptoria e biblioteche nel basso medioevo (secoli XII-XV). Atti del LI Convegno storico internazionale, Todi 12-15 ottobre 2014* (Spoleto 2015) 71-108, hier 90-100; Murano, 'Graziano e il *Decretum*' 85-91, 105-127. Zu Sg vgl. Lenz, 'The Context of Transmission' 96-97.
[117] Bertram-Blumenthal, 'Fragmente'.

Distinktionenschemata in den Handschriften Ka und Kb vorgelegt.[118]

Zwar liegen heute präzisere Vorschläge zur Datierung und Lokalisierung der frühesten Handschriften des *Decretum Gratiani* als noch vor einem Jahrzehnt vor, doch fehlen meistens eine nachvollziehbare Beweisführung und eine saubere Trennung zwischen inhaltlichen und überlieferungsgeschichtlichen Kriterien einerseits und paläographischen und kunsthistorischen Indizien andererseits.[119] In dieser Hinsicht stellen die auf die Buchmalerei ausgerichteten Studien von Marina Bernasconi Reusser zu Sg und von Patricia Stirnemann zu nordfranzösischen Handschriften des *Decretum Gratiani* der zweiten Hälfte des 12. Jahrhunderts, darunter Pf, willkommene Ausnahmen dar.[120] Weitere Impulse sind aus der fortschreitenden Digitalisierung von Handschriften des *Decretum Gratiani* und ihrer Verfügbarkeit online zu erhoffen.[121]

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[118] Wittekind, 'Überlegungen zur Verwendung graphischer Marginalien'; Stephan Dusil, 'Visuelle Wissensvermittlung in der Gratian-Handschrift Köln, Diözesan- und Dombibliothek, 128', *Mittelalterliche Handschriften der Kölner Dombibliothek. Siebtes Symposion*, ed. Horst 115-137.

[119] Bc: Zentralitalien, Mitte des 12. Jahrhunderts gemäss Murano, 'Graziano e il *Decretum*' 114 mit Anm. 174. Fd: 1150-1160 gemäss Larson, 'Gratian's *De Penitentia* in Twelfth-Century Manuscripts' 65, Anm. 18. Pf: Nordfrankreich, wahrscheinlich Paris, allenfalls Sens, drittes Viertel des 12. Jahrhunderts gemäss Larson, *Gratian's Tractatus de penitentia* xxxvi-xxxvii.

[120] Pf: Chartres, um 1165-1175 gemäss Patricia Stirnemann, 'Souvenirs de l'enluminure chartraine, Chartres et sa cathédrale', *Archéologia*, hors série numéro 5 H 45 (1994) 58-65, hier 64; Patricia Stirnemann, 'En quête de Sens', *Quand la peinture était dans les livres: Mélanges en l'honneur de François Avril*, edd. Mara Hofmann und Caroline Zöhl (Turnhout 2007) 303-311, hier 311, Anm. 15. Sg: Kathedralschule Modena, drittes Viertel des 12. Jahrhunderts gemäss Marina Bernasconi Reusser, 'Considerazioni sulla datazione e attribuzione del Decretum Gratiani Cod. Sang. 673: un manuscritto di origine italiana in terra nordalpina', *Schaukasten Stiftsbibliothek St. Gallen: Abschiedsgabe für Stiftsbibliothekar Ernst Tremp*, edd. Franziska Schnoor, Karl Schmuki und Silvio Frigg (St. Gallen 2013) 142-147; Lenz-Ortelli, *Die Handschriften* xxi-xxii, 17-20; Murano, 'Graziano e il *Decretum*' 86 mit Anm. 83.

[121] Unter den von uns verwendeten und in der Einleitung mit ihren Siglen aufgeführten Handschriften sind folgende digitalisiert und online verfügbar (letztmals eingesehen am 1.10.2018): Bc bei PARES unter

Die beiden oben erwähnten Studien von Murano enthalten Ergebnisse, die direkt oder indirekt mit der Glossierung der frühesten *Decretum*-Handschriften zusammenhängen. Die Autorin unterstreicht, ähnlich wie bereits Carlos Larrainzar, dass Fd einen Teil des frühen Entstehungsprozesses abbilde und dem Autographen Gratians besonders nahe stehe bzw. eine Kopie davon sein müsse, weil der Schreiber einige Spalten der Handschrift absichtlich leer gelassen habe, um zusätzliche 'canones' und 'dicta' zum *Decretum* nachzutragen.[122] Bezüglich der Handschrift Sg, die wohl im dritten Viertel des 12. Jahrhunderts, möglicherweise im Skriptorium der Kathedrale von Modena, angefertigt wurde,[123] hält sie unter anderem fest, dass der leere Raum auf den Seitenrändern nicht für Glossen konzipiert und eingerichtet worden sei.[124] Deshalb und aus anderen kodikologischen Gründen verortet sie Sg in einem der Theologie und nicht der Rechtswissenschaft zugewandten Milieu.

Murano zählt weitere *Decretum*-Handschriften der zweiten Hälfte des 12. Jahrhunderts auf, deren Seitenlayout durch das Fehlen von Glossen und einer entsprechenden Einrichtung gekennzeichnet ist und die vorwiegend in Klöstern angefertigt und verbreitet worden seien. Gemäss Murano unterscheidet sich der monastische Typ der frühen *Decretum*-Handschriften nicht nur durch das Fehlen von eingerichteten Seitenrändern mit Glossen deutlich vom schulisch-universitären Typ, sondern auch durch weitere Merkmale. Sie nennt das Fehlen von durchgehenden (Seiten-)Überschriften, die unterlassene Korrektur offensichtlicher Fehler im Text, das Fehlen langer Eintragungen auf den

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https://pares.med.gob.es; Er bei der UB Erlangen-Nürnberg unter https://ub.fau.de/bibliotheken-sammlungen/digitale-sammlungen/; Ka und Kb bei CEEC unter https://www.ceec.uni-koeln.de; Mc, Md, Me, Mi (diese vier nur in schwarz-weissen Abbildungen) und Mk beim Münchener Digitalisierungszentrum unter https://www.digitale-sammlungen.de; P, Pf I-II und Pfr bei Gallica unter https://gallica.bnf.fr; Sg bei e-codices unter https://www.e-codices.unifr.ch.

[122] Murano, 'Dalle scuole agli *Studia*' 93-95; Murano, 'Graziano e il *Decretum*' 87-90.

[123] Ibid. 100. Siehe oben Anm. 120.

[124] Ibid. 97-100.

Seitenrändern und die häufig dem *Decretum* angehängten Dekretalen oder kleinen Kanonessammlungen.[125] Die Idee eines monastischen Typs von *Decretum*-Handschriften steht in engem Zusammenhang mit zwei weiteren Erkenntnissen Muranos: erstens die Schlussfolgerung, das *Decretum* habe sich früh und rasch innerhalb der Benediktinerklöster verbreitet,[126] und zweitens ihre Meinung, Gratian sei ein Benediktinermönch gewesen und habe im Benediktinerkloster SS. Felice e Narborre in Bologna in den 1120er- oder 1130er-Jahren unterrichtet.[127]

Diese auf paläographischen und kodikologischen Kriterien gründende Unterscheidung zwischen monastischem und schulisch-universitärem Typ von *Decretum*-Handschriften erinnert an die aus der Theologiegeschichte bekannte Gegenüberstellung von monastischer und scholastischer Theologie.[128] Der monastische

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[125] Murano, 'Graziano e il *Decretum*' 104-106.

[126] Ein eindrückliches, datierbares Beispiel für die Rolle der Benediktinerklöster in der Verbreitung von Schriften der frühen Dekretistik liefert St. Gallen, SB 711. Die Handschrift, welche die um 1150 oder kurz danach in Südfrankreich entstandene Dekretabbreviation *Quoniam egestas* überliefert, wurde unter dem gelehrten Abt Frowin (1147-1178) im Kloster Engelberg in den Zentralschweizer Alpen geschrieben und illuminiert. Siehe dazu Lenz-Ortelli, *Die Handschriften* xxii, 175-177; Cornel Dora et al., *Wenn Bücher Recht haben: Justitia und ihre Helfer in Handschriften der Stiftsbibliothek St. Gallen. Katalog zur Jahresausstellung in der Stiftsbibliothek St. Gallen, 30. November 2014 - 8. November 2015* (St. Gallen 2014) 50-51.

[127] Murano, 'Dalle scuole agli *Studia*' 73-84; Murano, 'Graziano e il *Decretum*' 62, 72-75, 77-84.

[128] Das Konzept einer monastischen Theologie geht zurück auf Jean Leclercq, *L'amour des lettres et le désir de Dieu* (Paris 1957); deutsche Übersetzung: *Wissenschaft und Gottverlangen: Zur Mönchstheologie des Mittelalters* (Düsseldorf 1963) 213-259. Dieselbe Unterscheidung zwischen monastischer und scholastischer Theologie vollzog Marie-Dominique Chenu, *La théologie au douzième siècle* (Études de philosophie médiévale 45; Paris 1957) 343-350. Vgl. dazu Ulrich Köpf, 'Monastische und scholastische Theologie', *Bernhard von Clairvaux und der Beginn der Moderne*, edd. Dieter R. Bauer und Gotthard Fuchs (Innsbruck, Wien 1996) 96-135. Eine andere Einteilung der *Decretum*-Handschriften nahm vor langer Zeit Jacqueline Rambaud-Buhot, 'L'étude des manuscrits du Décret de Gratian conservés en France', SG 1 (1953) 121-145, hier 122-123, vor. Sie unterschied zwischen reich ausgestatteten Handschriften, die für wichtige Persönlichkeiten geschaffen wurden, und Studienhand-

Decretum-Typ mag zwar die Existenz von Handschriften ohne Glossen erklären, doch bleiben für die Frühzeit des *Decretum* und der Dekretistik viele Fragen offen. Welche Funktion erfüllten die frühen *Decretum*-Handschriften in den Benediktinerklöstern? Herrschte dort—analog zur Theologie—eine möglicherweise andere Art der Pflege der Rechtswissenschaft als an den hohen Schulen? Sind die Benediktinerklöster eher Aufbewahrungsorte überkommener *Decretum*-Handschriften oder dynamische Produktionszentren?

Antworten auf diese und ähnliche Fragen sind am ehesten von der Abklärung des unmittelbaren Herstellungs- und Gebrauchskontexts der *Decretum*-Handschriften zu erhoffen. Solche Untersuchungen haben Winfried Stelzer für die Handschrift Aa und die Benediktinerabtei Admont sowie José Miguel Viejo-Ximénez für die Handschrift Mm und das 1140 von den Prämonstratensern reformierte Kloster Schäftlarn vorgelegt. Doch sogar in diesen überlieferungsgeschichtlich günstigen Fällen wird nicht immer deutlich, ob das Kloster allein als Umschlagplatz und Vervielfältigungszentrum diente oder ob dort auch eine eigenständige wissenschaftliche Auseinandersetzung mit dem *Decretum Gratiani* im Besonderen und mit dem Kirchenrecht im Allgemeinen erfolgte. So musste Stelzer trotz gründlicher Untersuchung der *Collectio Admontensis* offen lassen, ob diese Rechtssammlung in der Benediktinerabtei Admont neu zusammengestellt oder ob sie dort bloss von einer bestehenden Vorlage abgeschrieben wurde.[129]

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schriften, die anonymen Professoren und Studenten gehörten und mit ihren Glossenschichten die Rechtsentwicklung dokumentieren.

[129] Winfried Stelzer, *Gelehrtes Recht in Österreich: Von den Anfängen bis zum frühen 14. Jahrhundert* (MIÖG Ergänzungsband 26; Wien-Köln-Graz 1982) 21-44, hier 32 mit der expliziten Schlussfolgerung. Vgl. auch Johannes Fried, ‘Die Rezeption Bologneser Wissenschaft in Deutschland während des 12. Jahrhunderts’, *Viator* 21 (1990) 103-145, hier 115; Burden, ‘Gratian North of the Alps’ 104-109. Zum intellektuellen Klima im Doppelkloster Admont im 12. Jahrhundert vgl. Alison I. Beach, *Women as Scribes: Book Production and Monastic Reform in Twelfth-Century Bavaria* (Cambridge Studies in Palaeography and Codicology 10; Cambridge 2004) 72-79; Constant J. Mews, ‘Scholastic Theology in a Monastic Milieu in the Twelfth Century: The Case of Admont’, *Manuscripts and Monastic Culture: Reform and Renewal in Twelfth-Century*

Viejo-Ximénez, der die vom Priester Adalbert während zwei Jahren zwischen 1165 und 1170 geschriebene Handschrift Mm eingehend analysierte, kam zum Schluss, dass der auf C.26 q.7 c.18 folgende Traktat *De matrimonio et quid ipsum sit* (als Einleitung zu C.27-36) wohl nicht auf der Grundlage dieser Handschrift im Kloster Schäftlarn erarbeitet wurde.[130] Denn der Traktat allegiert das *Decretum Gratiani* unter anderem mittels solcher 'distinctiones' (D.27, D.28, D.31 und D.32), die in der *Pars prima* der Schäftlarner Handschrift weder durchgezählt noch beschriftet wurden.[131] Ein weiterer zusätzlicher Text, eine vier 'quaestiones' umfassende 'causa' mit dem Incipit *Quidam nobilis laicus*, steht zusammen mit Distinktionenschemata und 'summaria' auf einem zwischen den Lagen 'viii' und 'viiii' eingefügten, nur auf der Innenseite beschriebenen Doppelblatt und weist dieselbe Schrift und Ausstattung wie das übrige *Decretum Gratiani* auf. Da keine parallele Überlieferung dieser 'causa' bekannt ist und die 'causa' allein aus dem *Decretum Gratiani* zitiert, erachtete Viejo-Ximénez den Schreiber der Handschrift, Adalbert, als möglichen Verfasser.[132]

Das zweispaltige Layout dieser mit historisierten Initialen ausgestatteten Handschrift ist nicht für eine reiche, strukturierte

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Germany, ed. Alison I. Beach (Medieval Church Studies 13; Turnhout 2007) 217-239.

130 Digitalisat von Mm (München, BSB, Clm 17161) online verfügbar beim Münchener Digitalisierungszentrum unter:
https://www.digiale-sammlungen.de. Vgl. Weigand, *Glossen zum Dekret Gratians* 852-854; Gujer, *Concordantia* 290-297.

131 José Miguel Viejo-Ximénez, 'The introduction to the *Tractatus Coniugii* and the case relating to the prosecution of clerics in the *Discordantium Canonum Concordia* of Schäftlarn', *Sacri canones editandi*, ed. Krafl 64-80, hier 64-71 mit Anm. 68 sowie 76-77 mit Anm. 11, 16-19. Neben der sehr lückenhaften Distinktionenzählung sei auf die—allerdings nur stichprobenmässig ermittelte—fehlende Zählung der 'quaestiones' am Seitenrand in der *Pars secunda* verwiesen. Anstatt der konventionellen Paragraphenzeichen wurden überdies kleine blattförmige Ornamente vor die 'dicta Gratiani' gesetzt.

132 Viejo-Ximénez, 'The introduction to the *Tractatus Coniugii*' 71-76, 77-80. Die Verweise auf das *Decretum Gratiani* sind keine formalisierten Allegationen, sondern sie nennen die Autorität und zitieren den Wortlaut eines Auszugs aus der entsprechenden Textstelle.

Glossierung auf den Seitenrändern angelegt. Dennoch verfügt die Handschrift über interlineare und marginale Annotationen, die mit Ausnahme einiger seltener Eintragungen des 13. Jahrhunderts laut Viejo-Ximénez gleichzeitig oder kurz nach dem Text geschrieben wurden.[133] Diese alten Annotationen entsprechen mehrheitlich Korrekturen, Textvarianten, Inhaltsvermerken, Wort- und Sacherklärungen ohne spezifisch juristischen Charakter. Blosse Allegationen fehlen offenbar vollends. Eine Minderheit der Eintragungen bezeugt jedoch ein Interesse an der Aktualisierung des *Decretum Gratiani* und an einer rechtlich-inhaltlichen Auseinandersetzung damit. Es handelt sich um 15 'paleae' und um je ein römischrechtliches und patristisches Fragment, sodann um einige kurze Bewertungen von Autoritäten, juristischen Sachverhalten und Argumenten und schliesslich um fünf Glossen, die eine vertiefte Interpretation der juristischen Argumentation mittels Distinktionen und dreier Allegationen des *Decretum Gratiani* vornehmen. Von den drei Allegationen ist die erste nicht nachvollziehbar; die zweite benutzt die übliche Zitierweise und die dritte die alte Zitierweise mit Nennung der Quelle und des Incipits.[134]

Die Schäftlarner Handschrift scheint—direkt oder mindestens indirekt als Abschrift einer solchen Vorlage—eine momentane, selektive, verhältnismässig bescheidene wissenschaftliche Auseinandersetzung mit dem *Decretum Gratiani* nördlich der Alpen und fern der kanonistischen Schulen widerzuspiegeln. Mm steht somit irgendwo zwischen den Extremen der passiven Verwahrung und der aktiven, dynamischen wissenschaftlichen Bearbeitung des Texts und irgendwo zwischen Muranos Idealtypen der monastischen und der schulisch-universitären *Decretum*-Handschriften.

Eigene Beobachtungen und Neubewertung der Glossen und Glossierung in Fd, Aa, Bc und Pf

[133] Vgl. auch Weigand, *Glossen zum Dekret Gratians* 852-854.

[134] José Miguel Viejo-Ximénez, 'Anotaciones marginales en la *Discordantium canonum concordia* del monasterio de Schäftlarn (München, Bayerische Staatsbibliothek, lat. 17161)', *Folia theologica et canonica*, supplementum (2016), 245-274, hier besonders 271-272, Nr. 92-95, 123.

Wenn man sich auf die Suche nach den ältesten Glossen zum *Decretum Gratiani* begibt, dann drängen sich zunächst einmal die Vertreter der ersten Rezension, nämlich die Handschriften Aa, Bc, Fd, P und das Fragment Pfr, auf. Da Pfr keine Glosse und P neben einigen Textkorrekturen oder -varianten offenbar nur eine Digestenallegation und eine Notabilie auf den Seitenrändern überliefern, werden dieses Fragment und diese Handschrift ausgeschieden.[135] Mindestens P wurde entweder unmittelbar nach der Textabschrift für überholt befunden und deshalb nicht weiter glossiert oder die Handschrift steht am Beginn einer Tradition von Überlieferungsträgern des *Decretum Gratiani*, die nicht für die wissenschaftliche Erschliessung mittels Glossen bestimmt waren.[136]

Die Handschrift Mw, die laut Atria Larson eine *Abbreviatio* der ersten Rezension sein könnte und neben einem viel kürzeren Text durch das Fehlen von Glossen charakterisiert wird, findet ebenso keine Berücksichtigung.[137] Desgleichen wird die Handschrift Sg weggelassen, weil die abweichende Textgestalt dieser frühen Version des *Decretum* einen direkten Vergleich mit den vorhin genannten Handschriften der ersten Rezension erschwert.[138] Eine *Abbreviatio* in Form von Summarien und Inskriptionen in der Handschrift Gw, die gemäss John Burden die erste Rezension widerspiegeln, stellt geradezu eine andere Literaturgattung dar und scheidet gleichfalls aus.[139] Somit verbleiben für die folgende Untersuchung die Handschriften Aa, Bc und Fd. Um die Entwicklung der Glossierung zu verdeutlichen, berücksichtigen wir in den Beispieleditionen der Glossen zusätzlich eine sehr

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[135] P, fol. 3rb bei D.4 c.6: ‘ff. lx. privilegia (Dig. 42.5.32?)’, fol. 54va bei D.50 c.65: ‘Nota quod rebaptizati non possunt promoueri ad clericatum’. Zu P und Pfr vgl. Weigand, *Glossen zum Dekret Gratians* 881; Winroth, *Making of Gratian’s Decretum* 32.

[136] Siehe die zahlreichen Handschriften des monastischen Typs bei Murano, ‘Graziano e il *Decretum*’.

[137] München, BSB Clm 22272, fol. 117r-122r. Vgl. Larson, ‘An *Abbreviatio* of the First Recension of Gratian’s *Decretum* in Munich?’.

[138] Vgl. Lenz-Ortelli, *Die Handschriften* 17-20.

[139] Göttweig, SB 181 (88), fol. 2ra-23vb (Gw1), fol. 25ra-95ra (Gw2). Vgl. Burden, ‘Gratian North of the Alps’.

frühe Handschrift der zweiten Rezension, nämlich Pf, die hier ebenso vorgestellt werden soll.[140]

Handschrift Fd

Die Handschrift Fd enthält zunächst den am Anfang fragmentarischen Text—beginnend in D.28 d.p.c.13—der ersten Rezension des *Decretum Gratiani* (fol. 1ra-104ra). Der Text stammt von zwei gleichartigen Händen, die sich auf fol. 12vb in Zeile 47 oder 49 ablösten.[141] Eine dritte, scheinbar jüngere Hand schrieb einen Anhang. Dieser Anhang der dritten Hand umfasst zuerst 'canones' und 'dicta' der zweiten Rezension, welche in der ersten Rezension fehlen, und die Einleitung *In prima parte agitur*, deren Bestandteile hier der *Pars prima* und jeder 'causa' vorangestellt wurden (fol. 104rb-164rb), und schliesslich eine frühe, kurze Version von *De consecratione* (fol. 164rb-167vb).[142] Eine vierte, der dritten ähnliche Hand trug auf der teilweise leer gebliebenen letzten Spalte (fol. 167vb) am Lagenende die ersten beiden 'canones' des Konzils von Reims von 1148 nach, wobei der zweite 'canon' mitten in einem Wort abbricht.[143] Darauf folgt eine neue Lage mit Ergänzungen zu *De consecratione* von einer

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[140] Die Untersuchung wurde anhand digitaler Abbildungen der Handschriften durchgeführt.

[141] Die erste Hand (fol. 1ra-12vb, Zeile 47-48) schreibt ein fast 8-förmiges g, dessen Schleife unten durch einen diagonalen Haarstrich geschlossen wird, ein tironisches ʽet' mit gewelltem Horizontalstrich und einem Schaft, der auf der Grundlinie umgebogen endet, sowie b; für die Endung -bus. Die zweite Hand (fol. 12vb, Zeile 47-49 - fol. 104ra) schreibt ein g, dessen Schleife unten grösser ist als der Kopf, ein insgesamt grösseres tironisches 'et' mit einem geraden Horizontalstrich und einem Schaft, der manchmal unter die Grundlinie reicht, sowie die Kürzung b, für -bus, deren Kürzungsbogen weit unter die Grundlinie führt. Dieser Handwechsel auf fol. 12vb offenbar auch in der unveröffentlichten Dissertation von Adriana Di Domenico vermerkt gemäss Winroth, *Making of Gratian's Decretum* 30 mit Anm. 86.

[142] Neben später zu erläuternden Merkmalen wird die dritte Hand charakterisiert durch ein g mit einem nach links konkaven Rücken und mit zwei geschlossenen Bögen sowie durch die Kürzung b' für -bus.

[143] Im Unterschied zur dritten Hand lässt die vierte Hand die Schleife unten beim g offen und verwendet b; für -bus.

fünften Hand (fol. 168ra-175vb) in einer völlig anderen Schrift. Der Codex schliesst mit einem einseitig beschriebenen Fragment aus der *Compilatio quinta* (fol. 176r, fol. 176v leer) und mit weiteren Fragmenten aus liturgischen Büchern und aus Dokumenten der Kamaldulenser.[144]

Der zweispaltige *Decretum*-Text der ersten Rezension sah zu Beginn der 'causae' jeweils eine mehrzeilige ornamentale oder figürliche Initiale vor, die jedoch nur ausnahmsweise vollendet wurde und meistens als Federzeichnung unvollständig blieb oder behelfsmässig ausgeführt wurde. Zu Beginn der 'causae' steht zudem am oberen Seitenrand jeweils in roter Tinte in kleiner Schrift die Angabe der 'causa' (z.B. fol. 19r: 'Prima causa'), die danach jeweils verteilt auf das Verso und Recto in brauner Tinte in gekürzter Form wiederholt wurde (z.B. fol. 20v-21r: 'i. c.').

Neben den Initialen zu Beginn der 'causae' und der Zählung der 'causae' am oberen Seitenrand stellen die in roter Tinte geschriebenen Summarien und die Paragraphenzeichen bei den 'dicta Gratiani' die wichtigsten Orientierungshilfen dar, zumal die am äussersten Seitenrand vornotierten, ausgesparten roten Majuskeln zu Beginn der 'canones' im Text der ersten Rezension nur ausnahmsweise, und zwar später, ausgeführt wurden. Da die Incipits ein wesentlicher Bestandteil der meisten Allegationen sind, vermindern die fehlenden Majuskeln nicht nur die Übersichtlichkeit, sondern auch die Möglichkeit, die Handschrift im (fortgeschrittenen) Wissenschaftsbetrieb effizient zu gebrauchen.

Ein weiteres Gliederungsprinzip des *Decretum* ist die Zählung der 'distinctiones' und 'quaestiones' neben dem Text der ersten Rezension. Es ist unklar, ob die Kürzel und römischen Ziffern bereits bei der Textabschrift oder erst später eingetragen wurden, denn die Tintenfarbe der Zählung und diejenige des Texts unterscheiden sich manchmal (z.B. fol. 3vab, 4rab, 19rb), manchmal

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[144] Vgl. die ein wenig abweichenden Händezuschreibungen bei Larrainzar, 'El Decreto de Graciano del códice Fd' 425-428; Winroth, *Making of Gratian's Decretum* 28-32. Kurzbeschreibung mit Formatangabe 354×220-225 mm bei Murano, 'Dalle scuole agli *Studia*' 91.

aber auch nicht (z.B. fol. 18rb, 30rb, 34ra).[145] Jedenfalls sind diese Eintragungen wegen der braunen (statt roten) Tinte und ihrer oft schrägen Position nahe am Seitenrand eher unscheinbar.

Im Anhang mit den Ergänzungen der zweiten Rezension gliedern wiederum die Angabe der 'causa' am oberen Seitenrand in roter bzw. brauner Tinte, die roten Summarien, die Paragraphenzeichen und neu auch die ausgeführten roten Majuskeln den *Decretum*-Text. Zudem wurden gelegentlich die 'distinctiones', nicht aber die 'quaestiones' mittels römischer Ziffern in brauner Tinte durchgezählt.

Zwei verschiedene Verweissysteme dienen dem Zweck, die Texte der zweiten Rezension an der richtigen Stelle mit denjenigen der ersten Rezension zu verbinden. Das erste Verweissystem beschränkt sich darauf, am äussersten Seitenrand im Anhang das Incipit desjenigen 'canon' der ersten Rezension zu notieren, nach welchem die Ergänzung der zweiten Rezension einzufügen war. Im jüngeren Verweissystem verbinden Buchstaben neben der Textspalte die zweite mit der ersten Rezension.[146]

Das auffälligste Merkmal der ersten Rezension und in geringerem Mass der Ergänzungen der zweiten Rezension im Anhang in Fd sind die zahlreichen Eintragungen, die im und um den primär angelegten zweispaltigen *Decretum*-Text angebracht wurden. Larrainzar und Eichbauer haben mit viel Aufwand versucht, diese Sekundäreintragungen nach Händen und in einer relativen Chronologie zu ordnen, wobei sie zu unterschiedlichen Ergebnissen gelangt sind.[147] Beide richteten ihren Fokus auf die Textzusätze und die Textentwicklung und berücksichtigten die Glossen bestenfalls am Rand.

Angesichts der Masse der Textzusätze drohen die vergleichsweise seltenen und kurzen Glossen in Fd unterzugehen. Eine voll-

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[145] Vgl. Larrainzar, 'El decreto de Graciano del códice Fd' 441-442, der diese Nachträge seiner Hand C zuweist. Im Gegensatz dazu wurde wohl die Zählung der 'causae' in roter Tinte am Anfang derselben bereits zusammen mit den ebenfalls rot geschriebenen Summarien und Majuskeln angebracht.

[146] Ibid. 439-440.

[147] Larrainzar, 'El Decreto de Graciano del códice Fd' 429-444; Eichbauer, *From Gratian's Concordia discordantium canonum* 241-258; Eichbauer, 'From the First to the Second Recension' 123-125.

ständige Liste der Glossen in Fd existiert nicht, doch erlaubt es Weigands Edition der dreizehn Notabilien und diskursiven Glossen von D.31 bis C.1, auf eine geringe Dichte derselben zu schliessen.[148] Damit in Übereinstimmung schätzte Larrainzar die Zahl der Glossen in Fd auf rund fünfzig ein.[149]

Allegationen in Fd

Obschon Weigand explizit die Existenz von blossen Allegationen in Fd verneinte und weder Larrainzar noch Eichbauer irgendwelche erwähnten, habe ich bei meiner Durchsicht einige wenige aufgefunden. Sie stehen allesamt im Anhang (A) auf fol. 104v und stammen von derjenigen Ergänzungshand, die die meisten Textzusätze eintrug.[150] Die erste reine Allegation 'Infra xv. q.i. Aug. Sicut concupiscentia' taucht bei D.6 c.1 auf fol. 104va auf und verweist auf C.15 q.1 c.8, einen 'canon' im Anhang auf fol. 140rb. Dieselbe Allegation steht—ohne den überflüssigen Verweis auf die Quelle 'Augustinus'—ebenfalls an entsprechender Stelle beim interpolierten Text der ersten Rezension in Aa 23, fol. 11v, sodann angereichert um eine Inhaltsangabe auf einem Zusatzblatt (Z) mit Ergänzungen der zweiten Rezension in Bc, fol. 19va, und schliesslich bereits verdoppelt neben dem Text der frühen Handschrift der zweiten Rezension Pf I, fol. 18rb. Der hochgestellte Asterisk zeigt in den Editionen an, dass der 'canon' oder das 'dictum' gemäss Winroths Zusammenstellung in der ersten Rezension fehlte und dem Textbestand der zweiten Rezension angehört.[151]

D.6 c.1*

Fd 104va(A)	Infra xv. q.i. Aug. Sicut concupiscentia (C.15 q.1 c.8*)
Aa 11v	Infra xv. q.i. Si concupi. (C.15 q.1 c.8*)
Bc 19va(Z)	Ex quibus causis contingat pollutio.
	Infra xv. q.i. Si concu. (C.15 q.1 c.8*)

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[148] Weigand, *Glossen zum Dekret Gratians* 749-751.
[149] Larrainzar, 'El Decreto de Graciano del códice Fd' 435, Anm. 21.
[150] Weigand, *Glossen zum Dekret Gratians* 751. Zu dieser Hand vgl. Larrainzar, 'El Decreto de Graciano del códice Fd' 437; Eichbauer, *From Gratian's Concordia discordantium canonum* 248-250 (Gt[1]).
[151] Siehe oben Anm. 17.

Pf 18rb	Infra xv. q.i. Si concupiscam (C.15 q.1 c.8*)
	Infra xv. q.i. Si concup. (C.15 q.1 c.8*) contra

In der rechten Spalte, d.h. auf fol. 104vb, folgen mindestens vier weitere mit ‘Infra’ eingeleitete Allegationen bei D.10, von denen ich alle ausser diejenige bei D.10 c.3 grösstenteils entziffern konnte.[152] Nicht lesbare Stellen sind durch spitze Klammern und drei Punkte gekennzeichnet. Die drei identifizierten Allegationen bei C.10 c.5, c.8 und c.10 finden sich mit einer Ausnahme in sämtlichen weiteren glossierten Handschriften der ersten Rezension, nämlich im Anhang (A) von Aa 23 und als Marginalie (M) auf dem Seitenrand von Bc, also unter den Ergänzungen der zweiten Rezension, wieder.

D.10 c.5*

Fd 104vbA)	Infra e. di.x<…>vi. cap. Cum <…> (D.96 c.6*)
Aa 200v(A)	Infra e. d.xcvi. Cum ad uerum (D.96 c.6*)
Bc 22r(M)	Infra di.xxvi. Cum ad uu. (D.96 c.6*)
Pf 21rb	Infra e. di.xcvi. Cum ad ue. (D.96 c.6*)

D.10 c.8*

Fd 104vb(A)	Infra e. di.x<…>vi. Cum <…> (D.96 c.6*)
Aa 200v(A)	Infra e. d.xcvi. Cum ad uerum (D.96 c.6*)
Bc 21va(M)	Infra xxiii. q.v. Principes (C.23 q.5 c.20*)
	Infra di.xxvi. Cum ad uerum (D.96 c.6*)
Pf 21rb	Infra xxiii. q.v. Principis (C.23 q.5 c.20*)
	Infra di.xcvi. Cum (D.96 c.6*)
	Infra e. di.xcvi. Cum ad (D.96 c.6*)

D.10 c.10*

Fd 104vb (A)	Infra xxv. q.ii. GG. (Gregorius) Imperiali (C.25 q.2 c.13)
Aa 200v (A)	
Bc 21va (M)	C. de legibus etc. Non du. (Cod. 1.14.5)
	Infra xxv. q.ii. Imperiali (C.25 q.2 c.13)
Pf 21va	Infra xxxiii. q.ii. Inter (C.33 q.2 c.6) contra
	Infra di.xlv. De Iudeis (D.45 c.5*) contra
	Infra xxxv. q.ii. Imperiali (C.25 q.2 c.13)
	Infra iiii. § Ridiculum est (D.12 c.5)
	Infra xxv. q.i. Generali (C.25 q.1 c.11)
	Infra distinctio li.iiii. Quis (D.54 c.11, De con. D.4 c.144?

[152] Nicht zu verwechseln mit den ebenfalls in Fd auf fol. 104vb angebrachten Incipits, die anzeigen, wo die ‘canones’ der zweiten Rezension in der ersten Rezension einzufügen wären. Siehe dazu Larrainzar, ‘El Decreto de Graciano del códice Fd’ 438, Anm. 29.

Es fällt auf, dass Fd in zwei von vier edierten Allegationen als einzige der vier Handschriften noch die Quellen 'Augustinus' bzw. 'Gregorius' nennt. Die beiden Allegationen kombinieren somit—wie wir dies bereits im Forschungsüberblick gesehen haben—eine Zitierweise, die die Nennung der Quelle und ein Incipit umfasst, mit der später üblichen Zitierweise mittels durchgezählter 'distinctiones', 'causae', 'quaestiones' und Incipit des 'canon'.

In der obigen Edition ist ein grundsätzliches Anwachsen der Glossen und in diesem Fall ein Anstieg der Anzahl Allegationen vom Anhang in Fd über den Anhang in Aa und die Zusätze in Bc bis zum vollständigen integrierten Text von Pf, der dem Umfang nach der zweiten Rezension entspricht, zu beobachten. Bc zeichnet sich durch eine zusätzliche *Codex*-Allegation, Pf durch die explizite Markierung von Konträrstellen mit 'contra', die grosse Anzahl und die Verdoppelung von Allegationen—eine Folge des kumulativen Verfahrens in der Glossenüberlieferung—aus.[153] Die Edition von D.1-8 wird diese Charakteristika weitgehend bestätigen. Die Allegation von D.96 c.6 bei D.10 c.5, die auf der in beiden 'canones' bekräftigten Trennung der päpstlich-geistlichen und kaiserlich-weltlichen Gewalt gründet, gehört zur frühesten noch fassbaren Allegationsschicht in der Überlieferung des *Decretum Gratiani* und lebte bis zur *Glossa ordinaria* fort.[154]

Neben diesen internen Verweisen im *Decretum Gratiani* existieren ebenso seltene Allegationen der justinianischen Rechtsbücher.[155] Bereits Larrainzar vermerkte in einer Fussnote einen einfachen Verweis auf eine *Decretum*-Stelle und zwei 'authenticae'-Allegationen, ohne jedoch deren gesamte Tragweite erschlossen zu haben.[156] Auf fol. 26va trug eine Hand, die vor

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[153] Gemäss Bertram-Blumenthal, 'Fragmente' 98, weisen die zwischen 1160 und 1180 wohl in Süditalien geschriebenen *Decretum*-Fragmente in Rieti neben zweifachen bereits dreifache Abschriften derselben Allegation auf.

[154] *Glossa ordinaria* ad D.10 c.5 s.v. *Administrationibus*: 'Distincta est enim potestas sua a potestate pontificali: ut i. e. quoniam (D.10 c.8) et xcvi. di. Cum ad verum (D.96 c.8)'.

[155] Vgl. Viejo-Ximénez, 'El Derecho Romano'.

[156] Larrainzar, 'El Decreto de Graciano del códice Fd' 437, Anm. 26.

allem Korrekturen anbrachte und fehlende Wörter ergänzte, in der für sie charakteristischen pechschwarzen Tinte auf dem leer gelassenen Raum am Ende der ersten ‘causa’ den Text von C.1 q.7 c.26 sowie unmittelbar darunter den Vermerk ‘Constitutio noua. Si seruus sciente etc.’ und links davon ‘require retro’ nach.[157] Dieser Verweis auf D.54 c.20, dessen Text auf fol. 9va von derselben Hand oder einer ihr sehr ähnlichen Hand am Seitenrand ergänzt wurde,[158] setzt sich aus ‘Constitutio noua’, d.h. aus der Überschrift für ‘authenicae’ im *Decretum Gratiani*, sowie aus dem Incipit zusammen. Sowohl C.1 q.7 c.26 als auch D.54 c.20 gehören dem Textbestand der zweiten Rezension an.

Unter dem fol. 9va nachgetragenen Text von D.54 c.20 folgt am Seitenrand eine kurze Serie von Verweisen, die gemäss ihrer unterschiedlichen, gräulichen Tintenfarbe und gemäss ihrer Anordnung nach jenem ‘canon’ notiert wurden. Möglicherweise stammen diese Einträge von derselben Hauptergänzungshand, die die Allegationen im Anhang auf fol. 104v notierte:

> C. de episcopis et clerici c. n. (Cod. 1.3 Constitutio noua)
> Si seruus sciente (Auth. 9.15.17a: Nov. 123.17a)
> Episcopalis (Auth. 9.15.4: Nov. 123.4), Ascripticios (Auth. 9.15.17b: Nov. 123.17b)

Mit Hilfe einer Studie von Viejo-Ximénez zu den Novellen im *Decretum Gratiani* lässt sich die Bedeutung dieser Verweise entschlüsseln. Demnach besteht D.54 c.20 aus fünf ‘authenticae’ oder Teilen davon, welche ihrerseits Zusammenfassungen von und Exzerpte aus Nov. 123.17a *Si seruus sciente*, Nov. 5.2 *Verum et si*, Nov. 123.4 *Episcopalis ordo*, Nov. 81.3 *Sed et ius* bzw. *Sed dignitas episcopalis* und Nov. 123.17b *Inscripticios uero* bzw. *Adscripticios uero* sind.[159] Solche ‘authenticae’, welche die Grundlage für D.54 c.20 lieferten, findet man als Zusätze auf den

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[157] Zu dieser Hand vgl. Larrainzar, ‘El Decreto de Graciano del códice Fd’ 434-437, 481; Eichbauer, *From Gratian’s Concordia discordantium canonum* 241-247 (Ga).

[158] . Larrainzar, ‘El Decreto de Graciano del códice Fd’ 484, rechnet meiner Ansicht nach zu Unrecht D.54 c.20 derselben Eintragungsschicht wie die übrigen dort ergänzten ‘canones’ und ‘dicta’ von D.54 zu.

[159] Viejo-Ximénez, ‘Las *novellae* de la tradición canónica occidental’ 246 (Nr. 22), 249 (Nr. 26), 259 (Nr. 39), 265-270 (Nr. 48, 50). Vgl. auch Pennington, ‘The Beginning of Roman Law Jurisprudence’.

Seitenrändern von Handschriften des *Codex Iustinianus* aus dem 12. Jahrhundert.

Die hier in Fd allegierten ‘authenticae’ und der allegierte Fundort im *Codex Iustinianus* bilden offenbar eine frühe Entwicklungsstufe der späteren, ausformulierten und um zwei ‘authenticae’ bzw. Novellen erweiterten Form von D.54 c.20 ab. Dass diese Entwicklung nicht unbedingt einheitlich und geradlinig erfolgte, verdeutlicht ein Vergleich mit den Marginalien in Sg. Wie Viejo-Ximénez gezeigt hat, wurde in Sg auf p. 20a am Seitenrand von D.54 c.9 ein Zusatz notiert, der auf den beiden ‘authenticae’ *Si seruus* und *Verum* (*et*) gründet, wobei die erste in ausführlicherer Fassung erscheint als im später verbreiteten *Decretum*.[160]

Im Hinblick auf den Entstehungsprozess von Fd ergibt sich insofern ein Paradox, als allem Anschein nach der längere, definitive Text von D.54 c.20 auf fol. 9va vor den vier Allegationen eingetragen wurde, während man entwicklungsgeschichtlich ein Fortschreiten der Sekundäreintragungen von den Allegationen zum ausformulierten Text erwarten würde. Dieses Rätsel lässt sich wohl nur durch die Annahme lösen, dass der Text des ‘canon’ und die Allegationen aus verschiedenen Vorlagen kopiert wurden, die abweichenden Text-, Glossierungs- und Ergänzungsstufen der Entwicklung des *Decretum Gratiani* entsprachen. Eine nachträgliche Quellenanalyse von D.54 c.20, die jedoch nur drei von den fünf ausgeschriebenen ‘authenticae’ allegiert, erscheint höchst unwahrscheinlich.

Am Ende der zweiten ‘causa’, d.h. nach der Auflösung des scheinbaren Widerspruchs zwischen den vorangehenden ‘auctoritates’ mittels distinguierender Methode in C.2 q.8 d.p.c.5pr, steht auf fol. 32rb wiederum ein römischrechtlicher Verweis, diesmal jedoch aus Platzgründen neben der Textspalte. Es handelt sich um den Eintrag ‘Đ đ de accusat. uel inscript. (Dig. 48.2)’ in leicht gräulicher Tinte, welcher noch die durchgestrichene Majuskel als Abkürzung für die Digesten verwendet und fälschlicherweise die Kürzung für die Präposition ‘de’ wiederholt. Diese Allegation nimmt den Zusatz C.2 q.8 d.p.c.5 § 1-3 der zweiten Rezension vorweg, der ausser einer kurzen Einführung mit ‘summarium’ und

[160] Viejo-Ximénez, ‘Las *novellae* de la tradición canónica occidental’ 270.

Quellenangabe (§ 1) allein Dig. 48.2.3 (§ 2-3) wiedergibt. Im Anhang auf fol. 126rb ist nicht nur die allegierte Digestenerweiterung (§ 1-3) vorhanden, sondern auch der Kern des 'dictum Gratiani' mit dem juristischen Lösungsansatz (pr), der bereits im ursprünglichen Text in Fd auf fol. 32rb enthalten war. Diese Verdoppelung von C.2 q.8 d.p.c.5pr in der ersten und in der zweiten Rezension deutet darauf hin, dass der Anhang nicht unbedingt eine rein organische Erweiterung des älteren Handschriftenteils darstellt, sondern auch auf anderen Vorlagen der ersten Rezension beruht.

Ein komplexer Fall von Verweisen ist auf fol. 34ra auf den leer gelassenen Zeilen in der linken Spalte unmittelbar nach C.3 q.11 d.p.c.2pr, dem Ende der dritten 'causa' in der ersten Rezension, anzutreffen. Dort stehen nämlich folgende drei linksbündige Verweise:

C. de ordine r. (Cod. 3.8) Quando ciuil. q. pre. cri. etc. (C.3 q.11 d.p.c.3 § 1)[161]

C. de ordine. co. (Cod. 7.19) Quando ciuil. pre. ci. et quando cri. (ex C.3 q.11 d.p.c.4)[162]

C. libro viiii. t.i. (Cod. 9.1) Si quis enim (C.3 q.11 d.p.c.4 § 3 und Cod. 9.1.20)[163]

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[161] C.3 q.11 d.p.c.3 § 1: 'Aliquando enim criminalis questio preiudicat ciuili, aliquando criminali. Unde in III. libro Codicis titulo de ordine iudiciorum, legitur: "Ciuili questione intermissa sepe fit, ut prius de crimine iudicetur, quod, utpote maius, merito minori prefertur (Cod. 3.8.4)".' Siehe dort auch die *Notationes correctorum* in Friedberg zur Lesart 'aliquando ciuilis criminali'.

[162] *Ex* C.3 q.11 d.p.c.4: 'Aliquando ciuilis preiudicat ciuili, aliquando criminali. Sicut enim in septimo libro Codicis, titulo de ordine cognitionum, legitur: "Si de hereditate et libertate controuersia est, prius debet agi causa libertatis (Cod. 7.19.2) ". Item: 'Si crimen aliquod inferatur ei, qui ingenuus esse dicitur, liberalis causa suo ordine ante debet agi cognitionem suam preside prebente, quoniam si delictum probatum fuerit, ante sciri, necesse est, utrum ut in liberum et ingenuum, an ut in seruum constitui oportet (Cod. 7.19.3)". Item: "Qui confitetur se pati controuersiam status, frustra postulat dari sibi potestatem accusandi eum, qui se suum dominum esse fatetur. Causa uero liberali terminata, si seruus pronunciatus fuerit, dominum suum accusare non poterit (vgl. Cod. 7.19.3-4)".'

[163] C.3 q.11 d.p.c.4 § 3: 'Vocem enim funestam intercidi oportet potius quam audiri. Maiestatis autem crimen excipimus (Cod. 9.1.20)'.

Dieselbe Hand, die diese Eintragungen notierte, schrieb wohl auch über den ersten beiden Allegationen die schwer verständlichen Kürzungen des Incipits aus—'questio preiudicat criminali' bzw. 'preiudicat ciuili'—und zementierte im ersten Fall den Fehler oder die ungewöhnliche Lesart im Incipit. Vor der ersten und letzten Allegation brachte sie zudem den Begriff 'Codicis' am linken Seitenrand an.

Larrainzar wies in einer Fussnote knapp auf die Verbindung zwischen diesen Allegationen und dem auf fol. 128rb ausgeschriebenen Text von C.3 q.11 d.p.c.3 § 1, C.3 q.11 c.4 und C.3 q.11 d.p.c.4 im Anhang hin.[164] Hier sei daran erinnert, dass die Erweiterung des 'dictum Gratiani' C.3 q.11 d.p.c.3pr der ersten Rezension um C.3 q.11 d.p.c.3 § 1, C.3 q.11 c.4 und C.3 q.11 d.p.c.4 im Anhang mit der zweiten Rezension aus einer Sammlung von direkten Zitaten und Adaptionen aus dem *Codex Iustinianus* besteht, denen zweimal eine juristische Schlussfolgerung und dreimal eine Quellenangabe vorausgehen. Die Allegationen von Büchern und Titeln des *Codex Iustinianus* entsprechen direkten Zitaten und Adaptionen daraus im später verbreiteten *Decretum Gratiani*, während sich die Incipits auf die 'dicta Gratiani' beziehen.

Auf den ersten Blick möchte man in den drei Verweisen eine Notiz oder Vorstufe zur Ausarbeitung der zweiten Rezension sehen. Dagegen spricht jedoch, dass statt einer 'lex' in einem bestimmten Titel des *Codex* jeweils ein Incipit eines 'dictum Gratiani' angegeben wurde, welches sich in zwei von drei Fällen von demjenigen des *Codex* unterscheidet und die Existenz der zweiten Rezension bereits voraussetzt.

Als zweite Möglichkeit käme die Funktion eines Verweises von der ersten auf die zweite Rezension in Frage. Die Kombination der Angabe der ursprünglichen Quelle mit dem Incipit des 'dictum Gratiani' ist vergleichbar mit den älteren, unkonventionellen internen Verweisen. Gegen die Funktion als reine Verweise von der ersten auf die zweite Rezension ist jedoch einzuwenden, dass die drei seltsamen Allegationen auf fol. 34ra

[164] Larrainzar, 'El Decreto de Graciano del códice Fd' 437, Anm. 27. Vgl. auch ibid. 492.

und der entsprechende Text im Anhang in Fd auf fol. 128rb nicht völlig übereinstimmen. Erstens ist der Text im Anhang von Fd länger, als es die drei Verweise erahnen lassen, denn er umfasst auch den Beginn von C.3 q.11 c.4 'Prius est . . . inscriptionem deposuisti' samt vorangesetzter Quellenangabe 'Item l.ix. lege prima (Cod. 9.1.1)', die beide auf fol. 34ra nicht erscheinen. Zweitens stimmt das Incipit des ersten und des zweiten Verweises 'Quando' nicht mit dem tatsächlich nachgetragenen 'Aliquando' im Anhang überein. Drittens ergäbe nur der erste Verweis Sinn, denn der Text im Anhang ist als Einheit mit einer Majuskel zu Beginn und nicht dreigliedrig überliefert. Viertens taucht die letzte Quellenangabe 'C. libro viiii. t.i. (Cod. 9.1)' weder im Anhang von Fd noch in der Edition von Friedberg vor dem entsprechenden Text, einem wörtlichen Zitat von Cod. 9.1.20, auf.

Es entsteht somit der Eindruck, dass die drei Allegationen irgendwo zwischen reinen Quellennotizen zur Erweiterung des *Decretum* mit römischrechtlichen Texten und den vorliegenden ausformulierten Zusätzen der zweiten Rezension zu verorten sind. Da sich die Quellennotizen zum erweiterten 'dictum' am Ende der dritten 'causa' auf fol. 34ra und der Text im Anhang auf fol. 128rb nicht vollständig decken, ist wiederum von zwei verschiedenen Vorlagen für die beiden Ergänzungen auszugehen.

Eine letzte *Codex*-Allegation, die ich in Fd ausfindig machen konnte, steht auf fol. 35rb auf dem Seitenrand beim Ende von C.5 q.6 c.3pr und zu Beginn von C.5 q.6 c.4 und stammt wiederum von der Hauptergänzungshand, welche die Allegationen im Anhang auf fol. 104v notierte. Wie bereits Winroth festhielt, nimmt die Allegation 'C. de episcopis et clericis. Presbiteri citra in. (Cod. 1.3.8)' den ersten Teil (C.5 q.6 c.3 § 1) der römischrechtlichen Erweiterung dieses 'canon' in der zweiten Rezension (C.5 q.6 c.3 § 1-2) vorweg.[165] Der Text im Anhang überliefert bereits die vollständige römischrechtliche Erweiterung aus Cod. 1.3.8 (§ 1) und Nov. 123 (§ 2) auf fol. 129rb und geht somit über die in der Allegation neben dem Text der ersten Rezension suggerierte Ergänzung hinaus.

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[165] Winroth, *Making of Gratian's Decretum* 186.

Unsere Untersuchung der Allegationen in Fd, die keine Vollständigkeit beansprucht, hat zu folgenden Ergebnissen geführt. Reine interne Verweise zum *Decretum Gratiani* ausserhalb des Texts treten offenbar erst im Anhang mit der zweiten Rezension und nur in sehr geringer Zahl—nachgewiesen sind deren vier—auf und nennen in der Hälfte der Fälle neben 'causa', 'quaestio' und Incipit noch die ursprüngliche Quelle, was grundsätzlich auf einen frühen Ursprung schliessen lässt. Dieselben vier Allegationen sind in den anderen glossierten Handschriften der ersten Rezension Aa und Bc sowie in der frühen Handschrift der zweiten Rezension Pf mit einer Ausnahme ebenfalls überliefert.

Römischrechtliche Allegationen des *Codex*, des *Digestum novum* und der 'authenticae' sind bereits im ältesten Handschriftenteil von Fd vorhanden. Grundsätzlich entsprechen diese Allegationen in der ersten Rezension Teilen von 'canones' und 'dicta', die im Text der zweiten Rezension ausgeschrieben werden. Deshalb könnte man meinen, diese Allegationen bilden für einige Passagen die Erarbeitung der zweiten Rezension anhand des Texts der ersten Rezension in Fd ab. Dieser Eindruck erweist sich als falsch, denn die Incipits von zwei von den drei eigentümlichen Allegationen (auf fol. 34ra) stimmen nicht völlig mit dem entsprechenden Text im Anhang überein, und eine Serie von Allegationen (auf fol. 9v) wurde offenbar erst nach dem entsprechenden Text der zweiten Rezension am Seitenrand eingetragen, und zwar in einer Form, welche nur drei von fünf Paragraphen desselben vorwegnimmt. Mindestens für diese Allegationen folgt, dass sie auf einer anderen Texttradition als Fd gründen, also aus einer oder mehreren anderen Vorlagen abgeschrieben wurden.

Notabilien und diskursive Glossen in Fd

Weigands Untersuchung und Teiledition der Glossen (ohne Berücksichtigung der Allegationen) in Fd zeigt—neben den Verbindungen zu Aa, Bc und anderen frühen Handschriften—einerseits eine geringe Glossendichte und andererseits eine grosse

Glossenvielfalt. Von D.31 bis C.1 fand er insgesamt nur dreizehn Glossen, die ich drei verschiedenen Händen oder Eintragungsschichten zuweisen würde.[166] Die Glossen decken ein weites Spektrum ab, das Worterklärungen, Inhaltsangaben mittels eines Schlagworts oder eines umformulierten Exzerpts, Erklärungen eines juristischen Sachverhalts, die Angabe einer Parallel- oder Konträrstelle (noch in unkonventioneller Zitierweise) oder sogar eine ‘solutio’ umfasst. Die folgenden Beispiele mögen diese Vielfalt vor Augen führen.

Auf fol. 5vb steht zwischen den Zeilen von D.46 c.3 zum Wort ‘Accusatores’ in pechschwarzer Tinte von derjenigen Hand, die vornehmlich Korrekturen anbrachte, die Erklärung: ‘id est qui trahendo deferunt que probare non ualent’.[167] Dieselbe Hand trug ausserhalb des von Weigand analysierten *Decretum*-Teils vergleichbare Worterklärungen ein, die gemäss Viejo-Ximénez von Kenntnissen des römischen Rechts zeugen.[168]

Die andere Eintragshand, die in verschiedenen schwarzgrauen und dunkelbraunen Tintenfarben zahlreiche Textergänzungen auf den Seitenrändern schrieb, gliederte den langen Text von D.49 c.1 auf fol. 6rb-6va, indem sie Schlagwörter notierte und durchzählte, die Friedbergs § 1-10 (von 12) entsprechen. So steht bei D.49 c.1 § 1 ‘Ignorantia. Prima’, bei § 2 ‘ii. Imperfectio’, bei § 3 ‘iii. Indiscretio’.[169] Die Eintragung ‘Discernere est uirtutes eligere et delicta reprobare’ auf fol. 6rb stammt von derselben Hand.[170] Dieser Vermerk bezieht sich auf den Satz ‘Recte ergo per nasum discretio exprimitur, per quam uirtutes eligimus, delicta reprobamus’ in D.49 c.1 § 3, verallgemeinert dessen Aussage aber, indem er die Idee, die Nase verkörpere das Unterscheidungsvermögen, weglässt.

[166] Weigand, *Glossen zum Dekret Gratians* 749-751.
[167] Ibid. 750 Nr. 3. Ebenso Nr. 4 auf fol. 5rb.
[168] Viejo-Ximénez, ‘El Derecho Romano’ 9 Anm. 20.
[169] Weigand, *Glossen zum Dekret Gratians* 750, Nr. 5.
[170] Ibid. 750 Nr. 6. Ebenso Nr. 7, 8 auf fol. 53r, 53v.

Dieselbe Hand brachte bei C.1 q.1 c.3 auf fol. 19rb eine Glosse an, die zwar keine Allegation enthält, jedoch bereits einen juristischen Sachverhalt erläutert:[171]

> Decima nomen iuris et nomen rei corporee est. Vendere decimas ut frumentum uel ordeum et cetera talia peccatum non est, u<erum> dare alicui ius decimarum alicuius ecclesiae simoniacum.

Zwar ist die Lesung des Wortes ‘corporee’ nicht ganz eindeutig, doch scheint diese Glosse zwischen ‘decima’ als Bezeichnung für einen Rechtstitel und Rechtsanspruch einerseits, der nicht veräussert werden darf, und ‘decima’ als Bezeichnung für die gegenständlichen Einkünfte, die verkauft werden dürfen, zu unterscheiden. Diese Unterscheidung ist deshalb wichtig, weil laut C.1 q.1 c.1 der Kauf und Verkauf von ‘decimae’—deren Bedeutung hier nicht qualifiziert wird—Simonie bedeutet.

Von den dreizehn edierten Glossen von D.31 bis C.1 schliessen nur deren drei, die übrigens zwei verschiedenen Glossenschichten angehören, eine Allegation ein.[172] Angesichts der geringen Anzahl an Glossen erstaunt es, dass eine dieser komplexeren Glossen mit Allegation in zwei entwicklungsgeschichtlich gleichwertigen, aber im Wortlaut ein wenig abweichenden Fassungen vorliegt, nämlich zunächst auf fol. 15ra neben der zu erläuternden Textstelle D.84 c.5 und—unbemerkt von Weigand—im Anhang auf fol. 116rb als Marginalie, die laut Verweiszeichen im Text zwischen D.84 c.4 und d.p.c.5 einzufügen war. Beide Glossen stammen nicht von den beiden bislang erwähnten Eintragshänden, sondern von einer oder zwei weiteren Händen:[173]

> § Contra Martinus papa supra Lector si uiduam (D.34 c.18). Set illud ubi necessitas, hoc ubi nulla necessitas urget.
>
> § Contra Martinus papa Si lector uidu. (D.34 c.18) ut supra legitur. Set illud uero necessitas, hoc autem ubi nulla necessitas inuenit.

Diese Verdoppelung der Glossen in abweichenden Textfassungen erinnert an vergleichbare Phänomene in der Textentwicklung des *Decretum*, wo gelegentlich ‘canones’ und ‘dicta’ der zweiten

[171] Ibid. 751 Nr. 13.
[172] Ibid. 749-750 Nr. 2, 9, 11.
[173] Fd, fol. 15ra entspricht ibid. 750, Nr. 9. Fd, fol. 116rb ist nicht verzeichnet bei Weigand.

Rezension in unterschiedlichem Wortlaut und somit offenbar aus unterschiedlichen Vorlagen nachgetragen wurden.[174] Die Präsenz von zwei verschiedenen Fassungen derselben Glosse erstaunt umso mehr, als Fd insgesamt nur wenige diskursive Glossen, Notabilien und Allegationen besitzt.

Die Handschrift Aa

Das *Decretum Gratiani* und die damit verbundenen Texte sind in der Handschrift mit der Sigle Aa auf zwei Bände verteilt. Aa 23 überliefert die beiden Einführungen *In prima parte agitur* (fol. 1r-8r) und *Hoc opus inscribitur* (fol. 8r-8v) von D.1 bis C.14, das *Decretum Gratiani* in der ersten Rezension von D.1 bis C.14 (fol. 9r-199v) sowie einen Anhang mit 'canones' und 'dicta' der zweiten Rezension von D.1 bis C.14 (fol. 200r-296v), welche in der ersten Rezension fehlen. Aa 43 fährt fort mit den beiden genannten Einleitungen zu C.15-36 (fol. 1r-11r bzw. fol. 11r-12v), dem *Decretum*-Text in der ersten Rezension von C.15-36 (fol. 13r-198r), einer Rechtssammlung mit der Bezeichnung *Collectio Admontensis* (fol. 198r-236v), dem dritten *Decretum*-Teil mit *De consecratione* (fol. 237r-279v), einem Anhang mit ergänzenden 'canones' und 'dicta' der zweiten Rezension zu C.15-36 (fol. 280r-340v) und schliesslich mit einer Tabelle griechischer Buchstaben und D.73 (fol. 341r-342v).[175] An dieser Stelle sei daran erinnert, dass einige Ergänzungen der zweiten Rezension nicht erst in den Anhängen, sondern bereits als Interpolationen im eingerichteten Text der ersten Rezension oder als Nachträge auf den dortigen Seitenrändern vorhanden sind.[176]

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[174] Eichbauer, 'From the First to the Second Recension' 143; Pennington, 'The Biography' 687.

[175] Stelzer, *Gelehrtes Recht* 25-44; Winroth, *Making of Gratian's Decretum* 23-26. Kurzbeschreibung mit Formatangabe 385×250 (263×170) mm bei Murano, 'Dalle scuole agli *Studia*' 90-91.

[176] Z.B. Aa 23, fol. 11v-12r mit den interpolierten Texten D.6 d.a.c.1 und D.6 c.1 bzw. Aa 23, fol. 15v mit dem wohl von einer anderen Hand als der Texthand (vgl. die Kürzungen für con- und -bus) auf dem Seitenrand eingetragenen Text D.12 c.4. Vgl. Winroth, *Making of Gratian's Decretum* 131; Eichbauer, 'From

Mehrzeilige figürliche und ornamentale Initialen in roter, grüner, blauer und schwarzer Farbe zu Beginn des Gesamtwerks, der *Pars prima*, jeder 'causa', der *Collectio Admontensis* und der *Pars tertia* verleihen der Handschrift die Grundstruktur. Neben den häufigen Spaltleisteninitialen, die manchmal zoomorphe Elemente enthalten, seien die sieben historisierten Figureninitialen zu Beginn der Einleitung *In prima parte agitur* in beiden Bänden und zu Beginn von C.2, C.8, C.16, C.18 und C.27 hervorgehoben, ebenso das baumähnliche Bildschema zu den Verwandtschaftsverhältnissen unmittelbar vor C.36 q.5 c.6, welches hier bereits den Text der ersten Rezension illustriert.[177]

Die Feingliederung des einspaltigen Texts geschah durch rote Überschriften und Majuskeln sowie durch Paragraphenzeichen für die 'dicta Gratiani'. Aa 23 hebt in der ersten Rezension (fol. 9r-199v) überdies die 'inscriptiones' durch eine rote horizontale Linie hervor, welche die Buchstabenkörper durchquert. Die Zählung der 'distinctiones' und der 'quaestiones' dient ebenfalls der Textgliederung und der Funktionalität der Handschrift. Sie wurde in den Handschriftenteilen mit der ersten Rezension auf dem Seitenrand, in den Anhängen mit den Ergänzungen der zweiten Rezension teils im zentralen Schriftraum, teils auf dem Seitenrand angebracht.

Ungewöhnlich ist die ursprüngliche Zählung der *Pars prima* als 'liber' 1 (im Explicit) und der 36 'causae' als 'libri' 2 bis 37, und zwar parallel zur üblichen Zählung der 'causae' von 1 bis 36. Damit verbunden stehen bei den 'causae' normalerweise thema-

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the First to the Second Recension' 130-132; Larson, 'Gratian's *De Penitentia* in Twelfth-Century Manuscripts' 65.

[177] Aa 23, fol. 1r, 122r, 161r; Aa 43, fol. 1r, 19v, 40r, 110v. Zur Ausstattung der frühen *Decretum*-Handschriften vgl. Christine Jakobi-Mirwald, 'Die Schäftlarner Gratian-Handschrift Clm 17161 in der Bayerischen Staatsbibliothek', *Münchner Jahrbuch für bildende Kunst* 58 (2007) 23-70; Christine Jakobi-Mirwald, 'Gratian in Schäftlarn', *Ausbildung des Rechts: Systematisierung und Vermittlung von Wissen in mittelalterlichen Rechtshandschriften*, edd. Kristin Böse und Susanne Wittekind (Frankfurt am Main-Berlin-Bern 2007) 83-97. Aa 43, fol. 193r. Siehe Hermann Schadt, *Die Darstellungen der Arbores Consanguinitatis und der Arbores Affinitatis: Bildschemata in juristischen Handschriften* (Tübingen 1982) 149, 151, 153, 172.

tische Titel in den Überschriften, z.B. Aa 23, fol. 92v bei C.1 'Explicit liber primus. Incipit secundus. Tractatus de symonia. Prima causa', sodann Aa 23, fol. 122r bei C.2 'Secunda causa. Explicit liber secundus. Incipit tertius. Tractatus de iudiciis ecclesiasticis, de accusatione et responsione episcoporum'. Die Gliederung des ersten und zweiten Teils des *Decretum* in insgesamt 37 'libri' findet sich in Aa in der Überschrift 'Hoc opus inscribitur de concordantia discordantium canonum quod a quodam Gratiano compositum in libros xxxvii est distinctum' und im Text der zweiten Einleitung wieder.[178] Eine weitere Zählung, welche der üblichen Struktur und Gliederung des *Decretum* übergestülpt wurde, betrifft die 'capitula'. Im Handschriftenteil mit der ersten Rezension in Aa 43 (fol. 13r-198r) werden die 'capitula' innerhalb einer 'causa' (und nicht wie üblich innerhalb einer 'quaestio')—manchmal fehlerhaft—durchgezählt. In Aa 23 sind durchgezählte 'capitula' nur zu Beginn bei D.1-5 vorhanden (fol. 9r-11r).

In Aa 23, nicht aber in Aa 43, verweisen Zeichen und dann Buchstaben meistens in roter Tinte neben dem *Decretum*-Text der ersten Rezension auf die entsprechenden Ergänzungen der zweiten Rezension im Anhang. Das Fehlen von Verweiszeichen in Aa 43 verunmöglicht schon fast den praktischen Gebrauch der Handschrift in ihrer erweiterten Form. Da solche Verweiszeichen nicht nachgetragen wurden, ist auf eine beschränkte Benutzung des Handschriftenpaars zu schliessen.

Gemäss der Schrift, Einrichtung und Tintenfarbe lassen sich für die hier untersuchten Glossen, d.h. die Allegationen, Notabilien und diskursiven Glossen, mindestens drei Eintragungsschichten bzw. Hände unterscheiden.[179] Wohl als erste trug die

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[178] Aa 23, fol. 8r. Carlos Larrainzar, 'Notas sobre las introducciones *In prima parte agitur* y *Hoc opus inscribitur*', *Medieval Church Law and the Origins of the Western Legal Tradition: A Tribute to Kenneth Pennington*, edd. Wolfgang P. Müller und Mary E. Sommar (Washington, D.C. 2006) 134-153, hier 137-138.

[179] Dies trifft mindestens für die aus Fd edierten dreizehn Notabilien und diskursiven Glossen von D.31 bis C.1 gemäss Weigand, *Glossen zum Dekret Gratians* 749-751, zu. Von den dort edierten Glossen stehen Nr. 2 und Nr. 3 auf fol. 39v und fol. 51r im Text der ersten Rezension. Nr. 4 wurde wohl von der

Texthand einige Glossen am Seitenrand ein. Äusserliche Merkmale dieser Glossen sind ihre Rubrizierung mittels einer roten Linie durch die Buchstabenkörper im Stil der ‘inscriptiones’ im eingerichteten Text der ersten Rezension in Aa 23, ein Paragraphenzeichen oder eine Majuskel zu deren Beginn und manchmal ein relativ grosser Schriftgrad.[180] Unter diesen Glossen finden sich vorwiegend Worterklärungen, Präzisierungen von Sachverhalten und vage Verweise auf eine Autorität bzw. Norm. Wir beschränken uns hier auf drei bislang nicht edierte Beispiele aus Aa 23, von denen das zweite und dritte auch in Bc, nicht aber in Fd stehen:[181]

D.50 c.59

Aa 60r § Vt ait Leo papa: Semel agentibus penitentiam ultra non sunt concedenda coniugia.

D.51 c.1

Aa 61r Sicuti sunt aduocati qui multociens etiam iniustas causas quarum fiunt aduocati maximo litigio, ne uicti uideantur, defendunt.

D.51 c.2

Aa 61r Curiales appellantur qui curie officio mancipati sunt.

Da solcherart gestaltete Glossen von der Texthand—soweit ich sehe—nur in Aa 23 und nur im Handschriftenteil mit der ersten Rezension vorkommen, gehen sie vielleicht auf eine Glossierung bzw. eine Vorlage zurück, die vor der zweiten Rezension entstand. Diese Hypothese wird dadurch bestärkt, dass drei Glossen von der Texthand bei C.2 q.6 c.28, die sich auch auf den Seitenrändern von Fd und Bc finden, in den Text von P aufgenommen wurden.[182] Es handelt sich um Zusammenfassungen von Nov. 23.1 und Nov. 23.2 und um einen impliziten Verweis auf die Aussage von Cod.

Texthand auf dem Seitenrand von fol. 51r in relativ grosser Schrift ergänzt. Nr. 5-8 auf fol. 52v-53v stammen von der ersten Glossenhand, während die komplexeren Glossen mit internen Verweisen Nr. 9, 10, 11 auf fol. 80r, 83v, 84v von der zweiten Glossenhand eingetragen wurden.

[180] Weigand, *Glossen zum Dekret Gratians* 749, Nr. 3 auf dem Seitenrand von Aa 23, fol. 51r. Des Weiteren Aa 23, fol. 60v bei D.50 c.65 und c.66, fol. 61r bei D.51 c.1 und c.2, fol. 63r bei D.54 c.10, fol. 63v bei D.54 c.21 und z.B. fol. 131v bei C.2 q.6 c.28.

[181] In Bc auf fol. 65rb marginal (‘Sicut’ statt ‘Sicuti’) und auf fol. 65va interlinear von der zweiten Glossenhand (D). Nicht vorhanden in Fd, fol. 8vb-9ra.

[182] Aa 23, fol. 131v.

7.42.1, die im Zusammenhang mit P erläutert worden sind.[183] Die Glossen der Texthand in Aa gehören somit wahrscheinlich einer besonders alten Glossenmenge an.

Danach brachte eine andere Hand, die erste Glossenhand, Annotationen im gesamten *Decretum*-Text der ersten Rezension, in *De consecratione* und in den Anhängen der zweiten Rezension in Aa 23 und Aa 43 an. Die erste Glossenhand schrieb vornehmlich Allegationen, aber auch einige der wenigen Notabilien und diskursiven Glossen.[184] Zu Beginn der beiden Handschriften verwendete der Schreiber blaue, grüne, rote und seltener braune Tinte für die Allegationen, die eigens und nur bei Bedarf mit einer Blind- oder Metallstiftlinierung eingerichtet wurden, und zwar in identischer Weise wie die Zählung der 'distinctiones' am Seitenrand. In Aa 23 gab die erste Glossenhand nach fol. 42r und in Aa 43 nach fol. 198r die bunten Farben zugunsten der Farbe Rot auf. Die Blind- oder Metallstiftlinierung für die Allegationen scheint in beiden Handschriften ebenfalls im Lauf der Arbeit ausgesetzt worden zu sein. Jedenfalls ist sie in Aa 23 nach ca. fol. 100v und in Aa 43 nach ca. fol. 198r nicht mehr sichtbar.

In Aa 23 ist—neben der Texthand und der ersten Glossenhand—eine zweite Glossenhand auszumachen. Sie hinterlässt manchmal einen flüchtigen Eindruck und schrieb die Allegationen ausschliesslich in brauner Tinte und ohne Linierung. Von dieser Glossenhand stammen auch einige der seltenen Notabilien und diskursiven Glossen mit Allegationen (in unkonventioneller Zitierweise).[185] Ihr dürften ausserdem einige Anmerkungen, möglicherweise auch ein Teil der interlinearen Korrekturen im Text und vereinzelte Zusätze von 'canones' und 'dicta' am Seitenrand zuzuweisen sein.[186] Diese oder eine andere Hand löste

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[183] Siehe oben S.80.

[184] Weigand, *Glossen zum Dekret Gratians* 749-751, Nr. 5-8 sind reine Inhaltsangaben in Aa, fol. 52v-53v.

[185] Ibid. 749-751, Nr. 9, 10, 11 auf fol. 80r, 83v, 84v wohl von der zweiten Glossenhand, ebenso die Notabilie auf fol. 95v bei C.1 q.1 c.24.

[186] Z.B. Aa 23, fol. 9v bei D.1 c.7; fol. 95v-96r *ex* C.1 q.1 c.27 § 2-3 'Quicquid enim in dei sacrificio . . . accedat', vielleicht auch fol. 202v D.17 c.6 § 4, D.17 c.7 d.p.c.7, *ex* D.18 d.a.c.1 'Illud de clericis pro pace in urbe . . . obseruari preceptum. Vnde Leo Thessalonicensi episcopo'.

in Aa 43 gelegentlich die formalisierten Allegationen auf, indem sie ‘Supra’, ‘parte’, ‘distinctione’, ‘causa’, ‘questio’, ‘capitulum’ und ‘contra’ in kleinerer brauner Schrift darüber hinschrieb.[187]

Betrachtet man das Layout, dann fallen die roten, blauen, grünen und seltener braunen Allegationen auf den Seitenrändern zu Beginn von Aa 23 und Aa 43 auf. Ansonsten finden sich neben dem einspaltigen Text die farbigen, vorwiegend roten römischen Ziffern der Zählungen der ‘distinctiones’, ‘quaestiones’ und gelegentliche der ‘capitula’, sodann diskursive Glossen, Notabilien und ‘Nota’-Zeichen und schliesslich Textergänzungen sowie—in Aa 23—Verweiszeichen. Das Seitenlayout entspricht jedoch nicht dem sich ausbildenden Standard der *Decretum*-Handschriften, sondern weist aufgrund des einspaltigen Texts, der manchmal rot durchgestrichenen ‘inscriptiones’, der farbigen Allegationen, der durchgehenden Buchzählung der *Pars prima* und *secunda* und der gelegentlich durchgehenden Kapitelzählung innerhalb einer ‘causa’ unkonventionelle Züge der Seitengestaltung und Textgliederung auf. Diese Eigenheiten wie auch die oben erwähnte Auflösung der gebräuchlichen Allegationen lassen auf einen dem dynamischen Wissenschaftszentrum entfernten Ort der Herstellung und Rezeption der Handschriften schliessen.

Die Allegationen, Notabilien und diskursiven Glossen stehen mehr oder weniger linksbündig untereinander. Dies trifft mindestens für die aktivste Hand, die erste Glossenhand, zu, die den Schriftraum an der entsprechenden Stelle häufig eigens mit einem Griffel oder Metallstift liniert. Im Vergleich zu Fd vermittelt die Seiteneinrichtung trotz gewisser Nachträge einen übersichtlichen und geordneten Eindruck. Die praktische Handhabung des in zwei Bände aufgeteilten *Decretum* mit je einem Teil mit der ersten Rezension und einem Teil mit Ergänzungen der zweiten Rezension, denen in Aa 43 zudem die *Collectio Admontensis* und *De consecratione* vorangestellt waren, dürfte sich ziemlich aufwendig gestaltet haben. Dies traf besonders dann zu, wenn man den Allegationen folgen wollte, zumal sich die Richtungshinweise ‘supra’ und ‘infra’ auf einen normalen, kontinuierlichen *Decretum*-Text bezogen. Es ist davon

[187] Aa 23, fol. 40v, 43r.

auszugehen, dass die konventionellen Allegationen von einer Vorlage mit der gewohnten, linearen Textordnung stammen. Die fehlenden Verweise zwischen der ersten und der zweiten Rezension in Aa 43 müssen die Verwendbarkeit des *Decretum* zusätzlich stark eingeschränkt haben.

Da die Eintragungsschicht der ersten Glossenhand nicht nur den Text der ersten Rezension samt Interpolationen der zweiten Rezension,[188] sondern auch *De consecratione*[189] und die Anhänge der zweiten Rezension umspannt und überdies Verweise auf *De consecratione* enthält,[190] steht ausser Zweifel, dass sie erst nach Vorliegen der zweiten Rezension entstand.[191] Dasselbe gilt auch für die in Aa 23 gelegentlich anzutreffenden Eintragungen der zweiten Glossenhand, welche nach der ersten tätig war.[192]

Obschon die Glossenschicht erst nach Vorliegen der zweiten Rezension samt *De consecratione* geschrieben wurde, besitzt sie einige bemerkenswerte Eigenschaften. Die internen Verweise auf die 'distinctiones' und *De consecratione* beinhalten normalerweise die Angabe der *Pars prima* und der *Pars ultima* des *Decretum*. So steht z.B. in Aa 23 auf fol. 180v bei C.11 q.4 c.95 'Supra p.i. d.x. Non licet (D.10 c.2)', in Aa 43 auf fol. 20r bei C.16 q.1 c.5 'Infra p.ult. d.v. Numquam (De cons. D.5 c.33)' und auf fol. 280v im Anhang mit Ergänzungen der zweiten Rezension bei C.15 q.4 c.2 'Infra p.ult. d.iiii. c.i. (De cons. D.4 c.1)'. Demgegenüber nennen die Verweise auf die 'causae' nie eine *Pars secunda*.

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[188] Z.B. Aa 23, fol. 48v D.44 c.3 und c.4.

[189] Z.B. Aa 43, fol. 246v bei De cons. D.2 c.30: 'Supra p.i. d.iiii. Denique (D.4 c.6)'.

[190] Z.B. Aa 23, fol. 60v bei D.50 c.65: 'Infra p.ult. iiii. Qui b< . . .> (De cons. D.4 c.117)', fol. 72v bei D.68 c.1: 'Infra p.ult. d.iiii. Non lic. (De cons. D.4 c.59, 103, 107)', bei D.68 d.p.c.2: 'Infra p.ult. d.iiii. Paruulos, Placuit, Cum itaque, Si nulla (De cons. D.4 c.110-113)', fol. 229r bei D.68 c.3: 'Infra p.ult. d.i. Ecclesiis. (De cons. D.1 c.20)'.

[191] Gemäss Wei, *Gratian the Theologian* 277-280, begannen Arbeiten an *De consecratione* vielleicht schon vor Abschluss der zweiten Rezension, doch ist die Vollendung des Traktats wahrscheinlich unmittelbar nach Vorliegen der zweiten Rezension anzusetzen.

[192] Gut erkennbar in Aa 23, fol. 9v, 48v, 204r.

Weigand hat bereits in seiner Edition von einigen Glossen zu Beginn der Florenzer Handschrift auf Zitierweisen verwiesen, welche nach ihm auf die Zeit zurückgehen, als die *Pars prima* des *Decretum Gratiani* noch keine feste Gliederung besass. Eine diskursive Glosse mit einer solchen Allegation wurde in Aa 23 auf fol. 80r bei D.84 c.5 von der zweiten Glossenhand eingetragen:[193]

> Contra Martinus papa supra Lector si uiduam (D.34 c.18). Set illud ubi necessitas occurrit, hoc uero ubi necessitas urget'.

Über der unkonventionellen Zitierweise mit der Quellenangabe 'Martinus papa' ergänzte man in roter Tinte den üblichen formalisierten Verweis auf D.34, nämlich 'Supra d.xxxiiii'. Solche unkonventionelle Allegationen, die neben dem Incipit des 'canon' oder des 'dictum' die ursprüngliche Quelle nennen und sich somit auf die 'inscriptio' beziehen, beschränken sich jedoch nicht auf den ersten Teil des *Decretum*. In Aa 43 auf fol. 26v steht bei C.16 q.1 c.55 'Infra prox. Simachus In can. (C.16 q.1 c.57)' als Verweis auf das übernächste Kapitel, das die Quelle aus der entsprechenden 'inscriptio' und das Incipit des 'canon' wiedergibt. Dort befindet sich der Rückverweis in derselben Form: 'Supra prox. Anastasius Statuimus (C.1 q.1 c.55)'.[194] Andernorts im zweiten Teil wird die Quelle vor dem Incipit zitiert, obschon die 'causa' und die 'quaestio' angegeben werden, so in Aa 23, fol. 198v bei C.14 q.5 c.2: 'Supra i. q.i. GG. (Gregorius) Non est p. (C.1 q.1 c.27)'.

Neben internen Verweisen gibt es auch Allegationen der justinianischen Rechtsbücher. Besonders häufig treten sie zu Beginn von D.1 auf. Allegiert werden dort die *Digesta* und *Institutiones*,[195] an späterer Stelle auch der *Codex*.[196] Sie dokumentieren das Eindringen des römischen Rechts in den Unterricht des Kirchenrechts und in den *Decretum*-Text. Da die erste Glossenhand bei der Allegation der *Institutiones* systematisch die

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[193] Weigand, *Glossen zum Dekret Gratians* 750, Nr. 9.

[194] Dolezalek, *Repertorium* 468, betont das paarweise Auftreten von alten, unpräzisen Allegationen in *Codex*-Handschriften im frühen 12. Jahrhundert.

[195] Anhang 1. Zudem später wie in Aa 23, fol. 290v bei C.12 q.2 d.p.c.58: 'Infra (In) instit. de pena. te. de litig. C. ueli (?) (i.e. Inst. 4.16)'.

[196] Aa 23, fol. 74r bei D.74 c.7: 'C. de episcopis et clericis contra. Si quemquam (Cod. 1.3.30)'.

Abkürzung für ʽInfra' (I mit übergeschriebenem kleinen a) statt diejenige für ʽIn' i.e. ī oder Ī (mit übergeschriebenem Querstrich) verwendet, ist davon auszugehen, dass dieser Glossenschreiber, ohne die Rechtsterminologie und die juristischen Kürzungen zu beherrschen, die Allegationen aus einer Vorlage kopierte.[197]

Zu beachten ist die Abkürzung für die Digesten in Form von einem durchgestrichenen Majuskel-D, welches sich gemäss Gero Dolezalek in den *Codex*-Handschriften in den 1140er-Jahren durchsetzte und seit der Mitte des 12. Jahrhunderts dem später gebräuchlichen 'ff.' wich.[198] Die Verwendung dieses alten Digestenkürzels ist als Indiz zu werten, dass die Vorlage von Aa auf die 1140er- oder 1150er-Jahre zurückgeht.

Ebenso häufig oder noch häufiger als römischrechtliche Allegationen sind in sämtlichen Teilen des *Decretum Gratiani* in Aa Allegationen des Dekrets von Burchard von Worms anzutreffen. Weigand hat allein im ersten Teil des *Decretum* 65 Burchard-Allegationen gezählt.[199] Ihre Gestalt und ihre Funktion seien anhand von zwei Beispielen dargestellt. Bei den 'canones' der zweiten Rezension D.44 c.3 und c.4, die dort bereits im zentral angelegten Text der ersten Rezension in Aa 23 auf fol. 48v vorhanden sind, trifft man auf die Verweise 'B. iii. Perlatum est ad sanctam synodum (BD 3.84)' und 'B. ii. Canonum statuta (BD

[197] Vgl. Lenz, 'Neu entdeckte voraccursische Glossen' 428, Anm. 42.

[198] Dolezalek, *Repertorium* 467, 483.

[199] Weigand, 'Burchardauszüge' 446, ohne jedoch die Allegationen und ihre Fundorte aufzulisten. Burchard-Allegationen finden sich z.B. in Aa 23, fol. 37r bei D.31 c.4: 'B. iiii. Preterea quod dignum (BD 2.118)', fol. 38r bei D.32 c.1: 'B. i. In ciuitatibus quarum (BD 1.5)', fol. 40v bei D.34 c.1: 'B. ii. Episcopum presbyterum, Omnibus seruis' (BD 2.13, 2.14), fol. 45v bei D.40 c.12: 'B. iii. Sanguis martyrum (BD 3.92)', fol. 48v bei D.44 c.3: 'B. iii. Perlatum est ad sanctam synodum (BD 3.84)', bei D.44 c.4: 'B. ii. Canonum statuta (BD 2.129)' etc. Sie kommen aber auch im Anhang vor, z.B. Aa 23, fol. 290v bei C.12 q.2 c.51: 'B. iii. Si quis presbyter aut diaconus, Quicumque presbyter, Si quis episcopus, Omnes enim (BD 3.179-182)'; Aa 43, fol. 282v bei C.16 q.1 c.41: 'B. ii. Nullum enim (BD 2.94)'. Die zweite Glossenhand zitiert in ungewöhnlicher und falscher Weise ('cap.') das Dekret Burchards in Aa 23, fol. 39v bei D.33 c.1: 'B. cap. ii. De his qui conc. (BD 2.19)'.

2.129)'.[200] Die Majuskel B steht für Burchards Dekret, die römische Ziffer für das Buch und das Incipit für das Kapitel.

D.44 c.3 verbietet Klerikern, ein Wirtshaus oder eine Werkstatt zu betreiben, und droht ihnen mit der Degradation, sollten sie sich nicht an das Verbot halten.[201] Die allegierte Burchard-Stelle im 84. Kapitel des dritten Buchs verbietet Priestern unter Androhung der Degradation und Laien unter Androhung der Exkommunikation, Wirtshäuser in Kirchen zu betreiben und dort Wein auszuschenken. Als Argumente dienen die neutestamentliche Episode der Tempelreinigung nach Io 2,13-16 und—wie in D.44 c.3—die Tatsache, dass Klerikern schon das Betreten von Wirtshäusern verboten ist.[202] D.44 c.4 besagt, dass Kleriker Wirtshäuser zum Essen und Trinken nur dann besuchen dürfen, wenn die Umstände einer Reise sie dazu zwingen.[203] Kapitel 129 im zweiten Buch des Dekrets von Burchard ist in der Aussage identisch, nur dass hier dem Fehlbaren mit disziplinarischer Massregelung gedroht wird.[204] Die beiden 'canones' aus dem *Dekret* Burchards bieten somit parallele, ausführlichere Belege mit unterschiedlichen 'inscriptiones' bzw. aus unterschiedlichen Quellen für die beiden 'canones' des *Decretum Gratiani*.

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[200] Aa 23, fol. 48v. Diese Burchard-Allegationen sind nicht vorhanden in Bc, fol. 53v und Pf I, fol. 54rb-55va.

[201] D.44 c.3: 'Nulli licet clerico tabernam aut ergasterium habere. Si enim huiusmodi tabernam ingredi inhibetur, quanto magis aliis ministrare in ea? Si quis uero tale quid fecerit, aut cesset aut deponatur'.

[202] BD 3.84 ist gemäss Burchard, *Decretum* (Coloniae 1548); Neudruck unter dem Titel *Burchard von Worms, Decretorum libri XX: Ergänzter Neudruck der Editio princeps Köln 1548*, edd. Gérard Fransen und Theo Kölzer (Aalen 1992) fol. 65rab mehr als fünfmal so lang wie D.44 c.3. Vgl. Hartmut Hoffmann, Rudolf Pokorny, *Das Dekret des Bischofs Burchard von Worms: Textstufen. Frühe Verbreitung. Vorlagen* (MGH Hilfsmittel 12; München 1991) 193.

[203] D.44 c.4: 'Clerici edendi uel bibendi causa tabernas non ingrediantur, nisi peregrinationis necessitate compulsi'.

[204] BD 2.129, edd. Fransen-Kölzer fol. 45va: 'Canonum statuta prohibent vt nullus ex ecclesiastico ordine sumendi cibi aut potus causa, nisi peregrinationis necessitate compulsus, tabernas ingredi audeat. Sed si aliquis haec interdicta violauerit, vt sanctorum canonum contemptor, acerrimis corripiatur disciplinis'. Vgl. Hoffmann-Pokorny, *Das Dekret des Bischofs Burchard* 186.

Zum Abschluss der Untersuchung der Handschrift Aa sei aufgezeigt, dass die paläographische Unterscheidung der Glossenhände nicht nur die Struktur und die Chronologie der Glossierung der Handschrift, sondern auch die überlieferungsgeschichtliche Stellung derselben erhellen kann. Weigand wies bereits auf die zahlreichen inhaltlichen Parallelen zwischen Aa und Me hin. Dazu zählen die isolierte Überlieferung von D.73 mit Zahlenübersicht, die Überschrift 'Claues tytulorum . . .', die Einleitungen *In prima parte agitur* und *Hoc opus inscribitur,* der Traktat *De sacrilegiis* (in Aa als Teil der *Collectio Admontensis*) und die grosse Übereinstimmung von Glossen einschliesslich der Allegationen.[205] Hinzuzufügen ist die Umstellung der Kapitel D.1 c.8 und c.9.[206]

Für den Vergleich von Aa und München BSB Clm 13004 (Me) bieten sich die im Anhang 1 edierten Glossen zu D.1-8 an.[207] Aus einem solchen Vergleich geht hervor, dass die Glossierung der ersten Glossenhand in Aa mit derjenigen in Me mit drei Ausnahmen völlig deckungsgleich ist, d.h. dass dieselben Textstellen mit den identischen Allegationen in gleicher Form (Kürzungen, Angabe der Kapitel mit Incipit oder Zählung in römischen Ziffern) versehen wurden. Abweichungen sind die fehlende Allegation zu D.1 d.a.c.1 in Me auf fol. 32r, wo das 'dictum Gratiani' zu Textbeginn in eine ganzseitige Illumination integriert wurde, sodann die präzisere und längere, jedoch am Schluss ('Scriptum le< . . . >equid') nicht vollständig entzifferte Allegation von Inst. 1.2.3 ab 'Scriptum' bei D.2 c.1 in Me auf fol. 32vb und die diskursive Glosse zu D.1 c.12, die in Aa auf fol. 9v in den Text eingeflossen ist und in Me auf fol. 32vb wie üblich am Rand steht. Die Allegationen, Notabilien und diskursiven Glossen der zweiten Glossenhand sowie die Korrekturen und Textvarianten, die von derselben Hand stammen könnten, fehlen in Me im untersuchten Textteil und bekräftigen somit den paläographischen Befund von zwei verschiedenen Eintragungs-

[205] Weigand, *Glossen zum Dekret Gratians* 662-663, 848-850; Gujer, *Concordantia* 225; Winroth, *Making of Gratian's Decretum* 134.
[206] Aa, fol. 9v; Me, fol. 32va.
[207] Anhang 1 gemäss Aa, fol. 9r-13v und fol. 200r (Anhang); Me, fol. 32vab.

schichten in Aa 23.[208] Soweit aus D.1-8 ersichtlich ist, gehen die Glossen in Me und die Glossen der ersten Glossenhand in Aa auf eine gemeinsame Vorlage zurück.

Aa unterscheidet sich von den übrigen hier untersuchten Handschriften durch das einspaltige Layout, die farbigen Allegationen und die rot durchgestrichenen ‘inscriptiones’. Diese Merkmale sind mir auch aus anderen glossierten *Decretum*-Handschriften des 12. Jahrhunderts nicht bekannt. Der überwiegende Teil der Glossen stammt von der ersten und der zweiten Glossenhand. Zwar stösst man unter diesen Glossen gelegentlich auf die unkonventionelle Allegationsform mit der Nennung der ursprünglichen Quelle und des Incipits des ‘canon’ oder ‘dictum’, doch setzen die beiden Glossenschichten die zweite Rezension in jeglicher Hinsicht voraus, denn sie kommentieren und allegieren sie bereits. Einzig einige Glossen der Texthand, von denen wir drei Beispiele bei D.50 c.59, D.51 c.1 und D.51 c.2 ediert haben, könnten einer isolierbaren Glossenmenge entsprechen, die allein die erste Rezension kommentierte und vor der zweiten Rezension entstand.

Die Handschrift Bc

Die Handschrift Bc enthält zunächst die Einleitung *In prima parte agitur* zu D.1 bis C.36 (fol. 1r-15v) und dann den ersten und zweiten Teil des *Decretum Gratiani* in der ersten Rezension bis ans Ende von C.12 (fol. 17r-178v), wo die Handschrift endet.[209] Auf den eingefügten Zusatzblättern fol. 19, 23, 29, 30, 31, 36, 38, 63, 70-71 (Bifolium), 77, 81, 82, 85, 88, 91, 98, 106 sowie gelegentlich auf den Seitenrändern wurden die meisten, aber nicht alle Texte der zweiten Rezension, die in der ersten Rezension fehlen, ergänzt.[210] Giovanna Murano betonte die Ähnlichkeit der Buchausstattung mit dem geometrischen Stil und den Riesen-

[208] Vgl. die Allegationen der zweiten Glossenhand in Aa auf fol. 9v zu D.1 c.10 und D.2 d.a.c.1 sowie den Inhaltsvermerk der zweiten Glossenhand auf fol. 12r bei D.6 d.p.c.3, welche in Me auf fol. 32vb und fol. 34rb fehlen.

[209] Winroth, *Making of Gratian’s Decretum* 26-28. Kurzbeschreibung mit Formatangabe 295x205 mm bei Murano, ‘Dalle scuole agli *Studia*’ 91.

[210] Eichbauer, ‘From the First to the Second Recension’ 153-167.

bibeln und schlug eine Herstellung der Handschrift in Zentralitalien in der Mitte des 12. Jahrhunderts vor.[211]

Eine erste Hand (A) schrieb das *Decretum* in der ersten Rezension in den dafür eingerichteten beiden Spalten nieder. Die Einführung *In prima parte agitur* in der ersten Lage (fol. 1-16) sowie die Nachträge der zweiten Rezension auf den Seitenrändern und auf den eingefügten Zusatzblättern stammen von einer weiteren Hand (C), die sich unter anderem durch den Gebrauch von unterschiedlichen Kürzungen für die Endungen -bus (b; statt b,) und -orum von der ersten unterscheidet.

Eine Glossenhand (D), die sich von den vorangehenden beiden Händen (A und C) durch ein gedrungenes, unten offenes g, einen senkrechten Schaft bei der tironischen *et*-Kürzung und—typisch für Glossenschriften—durch ein einstöckiges a und relativ lange Ober- und Unterlängen abhebt, brachte durchgehend Allegationen, Notabilien, diskursive Glossen und ausnahmsweise eine Textergänzung der zweiten Rezension im eingerichteten Schriftraum auf fol. 19ra, fol. 19vb unten und fol. 20ra oben an.[212] Von ihr stammen wohl auch die interlinearen Worterklärungen und Suppletivglossen in der Edition von D.1-8 im Anhang 1.[213] Diese Hand (D) glossierte nicht nur den zweispaltig eingerichteten

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[211] Murano, 'Graziano e il *Decretum*' 114 mit Anm. 174. Vgl. auch Bernasconi Reusser, 'Considerazioni' 144.

[212] Die Ergänzungshand (C) schrieb in Bc auf fol. 19va ab Zeile 1 das Ende von D.5 c.4 'percipere non debet … ut esuriamus' sowie D.6 d.a.c.1* und D.6 c.1*. Danach schrieb die zweite Glossenhand (D) auf fol. 19vb, Zeile 20-44, den Beginn von D.6 c.2 (palea) 'Propter talem a sacro pollutionem … carnis volup', dann auf fol. 20ra im Schriftraum der Zeilen 1-6, den die Anlagehand (A) offenbar leer gelassen hatte (so Larrainzar) oder dessen Text getilgt worden war (so Eichbauer), die Fortsetzung von D.6 c.2 (palea) 'tantibus reluctans … in membris meis'—wonach die Anlagehand (A) mit D.6 d.p.c.3 fortfährt – und schliesslich auf fol. 19ra, Zeile 1-28, das Ende von D.6 c.2 (palea) 'repugnantem legi … fletibus tergat' und D.6 c.3*. Vgl. Larrainzar, 'La edición critica del decreto de Graciano' 87-91, 103-104, und Eichbauer, 'From the First to the Second Recension' 126-127, die diesen Sachverhalt erklären, aber die Ergänzungen einer einzigen Hand zuschreiben und nicht zwischen meinen Glossenschichten C und D unterscheiden.

[213] Suppletivglossen sind gemäss Eisenhut, *Die Glossen Ekkeharts IV.* 271, 'inhaltlich aus dem Grundtext abzuleiten, bieten also keine zusätzlichen Informationen, sondern ergänzen grundsätzlich implizit im Satz Enthaltenes'.

Text der ersten Rezension, sondern auch die auf den Rändern oder eingefügten Blättern ergänzten 'canones' und 'dicta' der zweiten Rezension.

Die Ergänzung von Texten der zweiten Rezension führte manchmal dazu, dass die Glossen nicht unmittelbar neben der zu erläuternden Textstelle des *Decretum Gratiani* eingetragen werden konnten. In diesen Fällen verband die Glossenhand (D) Text und Glosse mit einer Tintenlinie oder mit einem Verweiszeichen.[214] Wenn die Nachträge der Ergänzungshand (C) den gesamten Raum auf den Seitenrändern beanspruchten, trug die Glossenhand (D) ihre Annotationen, darunter auch Allegationen, interlinear ein.[215] Es zeigt sich somit eindeutig, dass zunächst die Ergänzungen der zweiten Rezension (C) und erst dann jene Glossen (D), und zwar wohl in einem Arbeitsgang, in sämtlichen *Decretum*-Texten, d.h. im zentral angelegten Text der ersten Rezension und in dem auf den Rändern und Zusatzblättern ergänzten Text der zweiten Rezension, eingetragen wurden.

Neben diesen drei durchgehenden oder fast durchgehenden Text- und Glossenschichten der Anlagehand (A), der Ergänzungshand (C) und der Glossenhand (D) gibt es ganz seltene Eintragungen, die gemäss ihrer Position eindeutig nach dem *Decretum*-Text der ersten Rezension und vor den Ergänzungen der zweiten Rezension geschrieben wurden. Einzig diese äusserst spärlichen Glossen (B), die möglicherweise von zwei verschiedenen Händen (B1 und B2) eingetragen wurden, kommentierten bereits den Text der ersten Rezension.

Zwar habe ich bislang nur vier Glossen dieser ersten Glossenmasse (B) aufgespürt, doch besitzen sie eine besondere Qualität. Von den bei Weigand aus Fd geschöpften dreizehn Glossen zu D.31 bis C.1 erscheinen acht auch in Bc, wobei vier der ersten Glossenmasse (B) und vier der zweiten Glossenschicht (D) anzurechnen sind.[216] Unter den erstgenannten vier Glossen

[214] Z.B. Bc, fol. 18rb.

[215] Z.B. Bc, fol. 22rab.

[216] Weigand, *Glossen zum Dekret Gratians* 749-751, Nr. 1-13. Nr. 2, 8, 9, 11 in Bc auf fol. 47rb, 58va, 87va, 90va gehören zur ersten Glossenmasse (B), die sich vielleicht in zwei Hände (B1 für Nr. 2 und Nr. 8) und (B2 für Nr. 9 und Nr.

befinden sich die drei einzigen von Weigand aus Fd edierten diskursiven Glossen, die eine Allegation des *Decretum Gratiani*, und zwar eine unkonventionelle, beinhalten. Überdies zitieren alle drei Allegationen einen 'canon' aus der ersten Rezension.[217]

Dass in Bc zwei entwicklungsgeschichtlich unterschiedliche Stufen der Glossierung abgebildet werden, verdeutlicht die Kommentierung von D.84 c.5 besonders anschaulich. Eine erste Hand (B2) notierte auf fol. 87va unmittelbar neben der entsprechenden Textstelle—unbemerkt von Weigand—die folgende alte Glosse:

> § Contra Martinus papa supra Lector si uiduam (D.34 c.18). Set illud ubi necessitas, hoc ubi nulla necessitas urget.

Nachdem diese Glosse auf dem linken unteren Seitenrand von Ergänzungen der zweiten Rezension (C) umgeben worden war, schrieb die zweite Glossenhand (D) eine längere, aktuellere Fassung jener Glosse am oberen Seitenrand von fol. 87va:

> § Solutio. Illud ubi necessitas, hoc ubi nulla necessitas urget; uel ex dispensatione illud usque ad subdiaconatum; set nichil supra permittitur bigamos et uiduarum maritos promoueri.

Zu dieser Glosse gehört ein interlinear im Text von D.84 c.5 angebrachter interner Verweis von der zweiten Glossenhand (D): 'Supra d.xxxiiii Lector (D.34 c.18) contra'. Wie Fd überliefert auch Bc diese Glosse in zwei verschiedenen Fassungen, wobei die erste Fassung mit der ersten Version in Fd übereinstimmt. Es existieren in Bc noch weitere Beispiele für die doppelte, unterschiedliche Glossierung derselben Textstelle durch verschiedene Hände.

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11) unterteilen lässt; Nr. 2, 9, 11 sind jeweils von Zusätzen der Ergänzungshand (C) umgeben und somit eindeutig vor jenen geschrieben worden. Die Glossen Nr. 5, 6, 7, 9a in Bc auf fol. 57rb-58rb, 57va, 57va, 87va stammen von der zweiten Glossenhand (D). Nr. 4 wurde von der Ergänzungshand (C) in Bc auf fol. 56v als Teil des Zusatzes der zweiten Rezension unmittelbar nach D.47 c.10 am unteren Seitenrand notiert. Die zweite Glossenhand (D) fügte möglicherweise eine unterschiedliche Glosse zu D.47 c.2 s.v. *emiola* (= Nr. 4) auf fol. 56ra ('§ Emiola enim …') bei. Nr. 11 erscheint mit einer kleinen Variante ('Nisi monachus episcopi cui abbas …') ebenfalls der Vertikalen entlang geschrieben auf fol. 90va, entweder von der Ergänzungshand (C) oder von der zweiten Glossenhand (D).

[217] Weigand, *Glossen zum Dekret Gratians* 749-751, Nr. 2, 9, 11.

In seinem Vergleich zwischen der ersten Glossenkomposition und der Summe des Paucapalea edierte Weigand eine diskursive Glosse zu D.22 c.3, einem ‘canon’, der bereits in der ersten Rezension vorhanden war.[218] Unter den zwölf handschriftlichen Quellen, die er beizog, befindet sich auch Bc. Allerdings steht dort die Glosse in abgeänderter Reihenfolge, was die Edition von Weigand nicht vermerkt:[219]

> Infra eadem (parte) Constantinus (D.96 c.14). Noua Roma ideo dicitur dicitur (sic) quia nouiter ibi translatum est Romanum imperium.

In Bc geht die Allegation von D.96 c.14 der Erläuterung von ‘Noua Roma’ voran, während die beiden Glossenteile in der Edition in umgekehrter Reihenfolge wiedergegeben sind. Wichtiger ist jedoch die Tatsache, dass die Glosse mit D.96 c.14 eine ‘palea’ allegiert. Das bedeutet, dass die Glossenschicht einen *Decretum*-Text voraussetzt, der mindestens durch einen Teil der ‘paleae’ angereichert worden war.[220]

Erwähnenswert sind die zahlreichen Verweise auf *De consecratione*.[221] Sie belegen wie die relative Chronologie der Hände, dass die Glossierung bei Vorliegen der zweiten Rezension vollzogen wurde. Die internen Verweise entsprechen meistens der verbreiteten Zitierart ohne die Angabe von *Pars prima* und *Pars ultima*. Nur selten überliefert Bc Allegationen, die innerhalb der ‘distinctiones’ noch auf ‘eadem pars’ verweisen oder statt ‘de consecratione’ noch ‘pars ultima’ zitieren z.B. auf fol. 78rb bei

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[218] Weigand, ‘Die ersten Jahrzehnte der Schule von Bologna’ 448-449.
[219] Mein Dank gilt Gloria López, Jefe del Departamento de Referencias, ACA, Barcelona, die mir die exakte Transkription der Glosse, welche auf dem Digitalisat nicht vollständig sichtbar war, geliefert hat. Vgl. Viejo-Ximénez, ‘La suma Quoniam in Omnibus y las primeras *summae* de la Escuela de Bolonia’ 36.
[220] Weigand, ‘Die ersten Jahrzehnte der Schule von Bologna’ 449, hat diese ‘palea’ in 56 von 141 von ihm untersuchten frühen *Decretum*-Handschriften vorgefunden; Weigand, ‘Versuch einer neuen, differenzierten Liste der Paleae’ 126. Vgl. auch Buchner, *Die Paleae* 321, 400; Murano, ‘The list of paleae in MS Pal. Lat. 622’ 169; Viejo-Ximénez, ‘Las *Paleae* del *Decretum Gratiani*’ 109, 119, 127, 137.
[221] Anhang 1: Bc bei D.3 c.5*, D.5 c.3. Des Weiteren z.B. Bc, fol. 23va bei D.12 c.13: ‘Infra de con. eccl. di.ii. Institucio (De cons. D.2 c.31)’, ‘Infra de cons. e. di.i. Altaria (De cons. D.1 c.31 oder c.32)’.

D.68 c.2: ‘Infra p.ult. di.iiii. Paruulos, Placuit, Cum itaque, Si nulla (De cons. D.4 c.100-113)’.

Die Allegationen des römischen Rechts erscheinen in der üblichen Form mit ‘ff.’ für die *Digesta*. Wiederum finden sich äusserst zahlreiche Verweise auf das Dekret von Burchard von Worms.[222] Bemerkenswert ist die Form des Buchstabens B in den Burchard-Allegationen, denn er ist ähnlich dem doppelten ‘ff.’ der *Digesta* gestaltet.[223]

Der zweispaltig angelegte Text wird durch mehrzeilige Deckfarbeninitialen zu Beginn der Einleitung *In prima parte agitur*, der *Pars prima* und jeder ‘causa’, durch rote Überschriften und Majuskeln, durch Paragraphenzeichen bei den ‘dicta Gratiani’ und durch die durchgehende Zählung der ‘causae’ am oberen Seitenrand in roter Tinte sowie die Zählung der ‘distinctiones’ und ‘quaestiones’ seitlich der Textspalten in roter Tinte gegliedert.

Die äusseren Blattränder der aufgeschlagenen Doppelseite bieten, sofern sie nicht durch Textergänzungen besetzt sind, reichlich Platz für die Glossen, die inneren sind hingegen eher knapp bemessen. Die zahlreichen Allegationen sind einheitlich, linksbündig ausgerichtet. Die diskursiven Glossen heben sich durch ein vorangestelltes Paragraphenzeichen ab, die Notabilien durch eine vorausgehende Majuskel und die nach unten spitz zulaufende Textgestaltung in Form eines kopfstehenden Dreiecks. Zudem sind sowohl die diskursiven Glossen als auch die Notabilien gegenüber den Allegationen nach rechts oder links eingerückt. Dort, wo keine Zusätze der zweiten Rezension die Übersichtlichkeit und die Ästhetik der Seite stören, kommt das Seitenlayout den Standards römischrechtlicher Handschriften, die

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[222] Z.B. Bc, fol. 22vb bei D.11 c.6: ‘B. iii. Petistis per Ylarium (BD 3.124)’, fol. 23va bei D.12 c.13: ‘B. iii. Vt in constit. miss. (BD 3.66)’, fol. 29va bei D.17 d.p.c.6: ‘B. i. Item placuit (BD 1.55, 68, 200)’, ‘B. i. Valentinus episcopus (BD 1.56)’.

[223] Dasselbe Phänomen in anderen Handschriften auch bei Weigand, ‘Burchard-auszüge’ 431 Anm. 8.

sich besonders in Bologna seit der Mitte des 12. Jahrhunderts ausprägten, schon ziemlich nahe.[224]

Diese mindestens ansatzweise dreigliedrige Staffelung und graphische Kennzeichnung der Allegationen, Notabilien und diskursiven Glossen grenzt Bc deutlich von der unübersichtlichen Handschrift Fd, aber auch von Aa und vielen anderen frühen und eher spärlich glossierten *Decretum*-Handschriften ab, in denen sich meistens sämtliche Glossen in eine einzige Spalte auf dem Seitenrand einfügen (z.B. Br, Cd, Er1, Gg, Ka, Kb, Mk).[225] Eine durch die Position auf der Seite und die Gestaltung graphisch eindeutige Unterscheidung der verschiedenen Glossenarten findet man noch ausgeprägter als in Bc z.B. in Mc, in der ersten Glossenschicht von Ca sowie in der zweiten Glossenschicht von Er (Er2), die den Apparat *Ordinaturus magister* überliefert. Mindestens die besagten Glossen in Ca und Er2 dürften erst um oder nach 1180 eingetragen worden sein.[226]

Die überwiegende Mehrheit der Glossen in Bc wurde in inhaltlicher und paläographisch-kodikologischer Hinsicht zweifellos von der Hand (D) nach Vorliegen der zweiten Rezension eingetragen, denn diese Glossenschicht allegiert und kommentiert bereits die Ergänzungen der zweiten Rezension. Eine Ausnahme stellen vier bereits von Weigand edierte Glossen dar, die wir hier erstmals einer frühen, ersten Glossenmasse (B) zuweisen. Diese frühe Glossenmasse (B) stammt möglicherweise von zwei Händen (B1 und B2) und wurde sicherlich vor den Nachträgen der zweiten Rezension der Ergänzungshand (C) notiert. Diese vier Glossen kommentieren und allegieren ausschliesslich ‘canones’ der ersten Rezension. Wie Fd enthält diese frühe *Decretum*-Handschrift in einigen Fällen zwei Versionen derselben Glosse bzw. zwei Glossen zu derselben Textstelle.

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[224] Z.B. Bc, fol. 20v, 23v, 25r, 30r, 30v, 36r, 57r. Vgl. Dolezalek, ‘Der Glossenapparat des Martinus Gosia’ 249-252; Dolezalek, *Repertorium* 480-485.

[225] Zu diesen Handschriften siehe Weigand, *Glossen zum Dekret Gratians* 695-698, 721-722, 740-741, 768-769, 782-786, 858-859.

[226] Weigand, *Glossen zum Dekret Gratians* 718-720, 740-741, 846-847; Susan L’Engle und Robert Gibbs, *Illuminating the Law: Legal Manuscripts in Cambridge Collections* (London 2001) 105-110.

Die Handschrift Pf

Die Handschrift Pf besteht wie Aa aus zwei Bänden (Pf I und Pf II). Der erste umfasst zunächst ein *Decretum*-Fragment (fol. 1ra-1vb) und ein Blatt mit sogenannten *Arbores consanguinitatis et affinitatis* (fol. 2r-2v), danach die Einleitung *In prima parte agitur* (fol. 3ra-15rb) und eine einführende Bemerkung (fol. 15vb) und schliesslich das *Decretum Gratiani* bis und mit C.18 (fol. 16ra-237vb).[227] Der zweite Band schliesst nahtlos an den ersten an und enthält C.19-36 und *De consecratione* (fol. 1ra-170vb). Die letzten beiden Blätter des Bands (fol. 171ra-172vb) geben im Wesentlichen nochmals das Textstück De cons. D.1 c.39-70 in falscher Reihenfolge wieder.[228]

Pf I wurde von mindestens zwei frühgotischen Händen geschrieben, die sich am Übergang von fol. 114v auf fol. 115r ablösten.[229] In Pf II waren mehrere Hände—wohl mindestens deren vier—am Werk.[230] Eine dieser Texthände geht bereits einige Bogenverbindungen ein und hinterlässt einen jüngeren Eindruck. Von ihr—oder von ihr und einer sehr ähnlichen Hand—stammen drei Lagen (fol. 103ra-126vb) innerhalb des Traktats *De penitentia* (fol. 103ra-126vb) und das Ende von *De consecratione* ab der Mitte von De cons. D.4 c.153 (fol. 167vb, wohl ab Zeile 3 - fol. 170vb).

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[227] Gemäss Schadt, *Die Darstellungen der Arbores Consanguinitatis und der Arbores Affinitatis* 181, Anm. 233, bilden fol. 1 und fol. 2 ein Doppelblatt. Diesen Befund bestätigte auf Anfrage Delphine Mercuzot, Conservateur au Département des Manuscrits, BNF Paris.

[228] Weigand, *Glossen zum Dekret Gratians* 880-882; Gujer, *Concordantia* 302-319; Atria A. Larson, 'The Evolution of Gratian's *Tractatus de penitentia*', BMCL 26 (2004-2006) 59-123, hier 60 Anm. 3.

[229] Die erste Texthand schliesst die untere Schleife beim g mit einem Haarstrich, die zweite schreibt eine fast horizontale, offene untere Schleife beim g.

[230] Man vergleiche z.B. die verschiedenen Hände in Pf II auf fol. 34v (ähnlich oder identisch mit der zweiten Texthand in Pf I), fol. 123r (geschweiftes, unter die Grundlinie reichendes s am Wortende, tironisches ʿetʾ und et-Kürzung in Form einer 3, manchmal unter die Grundlinie reichendes i., fol. 143r (im Gegensatz zu den übrigen Händen ausschliesslich karolingische ʿetʾ-Ligatur), fol. 154v (tironisches ʿetʾ mit zackenförmigem Deckstrich).

Die erwähnte Wiederholung einer Passage aus *De consecratione* von derselben Hand am Schluss der Handschrift bedarf einer Erklärung. Es handelt sich um zwei falsch eingebundene Blätter (fol. 171ra-172vb) mit De cons. D.1 c.39 ab 'habeat aliquis aut in pariete ...', c.40-46, c.48-57, c.59-70 bis '… cogitet precatur'. Da der Schreiber De cons. D.1 c.47 übergangen hatte, kopierte er den Text neu samt diesem 'canon' (fol. 141va-143vb), wobei die in der ursprünglichen Fassung vorhandenen Glossen mit einer Ausnahme (fol. 143rb bei De cons. D.1 c.55) hier nicht mehr notiert wurden. Die ursprüngliche, lückenhafte Fassung weist durchgehend Lombarden und meistens Glossen, aber nur ausnahmsweise und unvollständig (fol. 171v, 172v) Summarien in roter Tinte auf. Daraus folgt, dass die Glossen gleichzeitig wie der Text abgeschrieben wurden und dass die roten Summarien offenbar nach den Glossen und den Lombarden angebracht wurden.[231] Nachdem die beiden Blätter ersetzt worden waren, fanden sie Verwendung als Nachsatzblätter.

Zwar besitzt das *Decretum* in Pf bereits den Umfang der zweiten Rezension, doch gibt es mehrere Anzeichen, die auf einen relativ frühen Entwicklungsstand mindestens einzelner Inhalte schliessen lassen. So spricht die oben erwähnte einführende Bemerkung von einem *Decretum* in zwei Teilen—wie es in der ursprünglichen Fassung von Fd noch anzutreffen ist—also noch ohne den in Pf bereits vorhandenen dritten Teil:[232]

> In nomine domini nostri Iesu Christi incipit prima pars de iure scripto et non scripto . . . Concordantia discordantium canonum iuxta determinationem Gratiani episcopi que in duas partes est diuisa. Prima pars constat centum et una distinctione . . . Secunda uero causis xxxvi.

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[231] Zu den verschiedenen Arten der Abschrift von römischrechtlichen Büchern mit Text und Glossen im 12. und frühen 13. Jahrhundert vgl. die aus den Handschriften selbst geschöpften Erkenntnisse von Dolezalek, 'Wie studierte man bei den Glossatoren' 61-66.

[232] Pf I, fol. 15vb. Rudolf Weigand, 'Frühe Kanonisten und ihre Karriere in der Kirche', ZRG Kan. Abt. 76 (1985) 135-155, hier 152-155; Neudruck in Weigand, *Glossatoren* 403*-423*; Enrique de León, 'La biografia di Graziano', *La cultura giuridico-canonica medioevale: Premesse per un dialogo ecumenico*, edd. Enrique de León und Nicolás Álvarez de la Asturias (Pontificia Università della Santa Croce, Monografie giuridiche 22; Milano 2003) 89-107, hier 93-98; Murano, 'Graziano e il *Decretum*' 69.

Des Weiteren wies Larson für *De penitentia* nach, dass der Text von Pf zwischen der ersten und der zweiten Rezension anzusiedeln ist, weil die Handschrift trotz kompletten Umfangs im Sinn der zweiten Rezension Lesungen der ersten Rezension bewahrt hat.[233] Schliesslich besitzen die Glossen, wie unten kurz ausgeführt wird, ebenfalls Eigenschaften, die einen frühen Überlieferungszustand anzeigen.

Laut Patricia Stirnemann wurde Pf in Chartres geschrieben und illuminiert, und zwar wohl unter Bischofselekt Guillaume aux Blanches Mains (1164-1176), der gleichzeitig als Erzbischof von Sens (1168-1176) amtete, bevor er Erzbischof von Reims (1176-1202) wurde.[234] Vom selben Illuminator wie Pf stammt gemäss ihrer Einschätzung das Pontifikale Reims, BM 307, welches Guillaume aux Blanches Mains bei seiner Translation auf den Sitz des Erzbischofs von Reims mitbrachte und den dortigen Gebräuchen anpassen liess. Die H-Initiale (Pf I, fol. 16ra) und das Fleuronné in Pf sollen als Vorlage für eine weitere Handschrift des *Decretum Gratiani*, nämlich Paris, Bibliothèque Mazarine 1288, gedient haben.[235] Pf ist nur eine von mehreren illuminierten *Decretum*-Handschriften, welche in Chartres, Sens und Paris in der zweiten Hälfte des 12. Jahrhunderts geschaffen wurden. Die Hofhaltungen von Papst Alexander III. (1159-1181) und vom Erzbischof von Canterbury, Thomas Becket (1162-1170), im Exil in Sens in den 1160er-Jahren förderten die Verbreitung des *Decretum Gratiani* in Nordfrankreich und die Herstellung repräsentativer Handschriften dieses Rechtsbuchs.[236]

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[233] Larson, 'Gratian's *De penitentia* in Twelfth-Century Manuscripts' 87-97. Zum Text der Einleitung *In prima parte agitur* vgl. Larrainzar, 'Notas sobre las introducciones' 100-104.

[234] Vgl. Ludwig Falkenstein, 'Wilhelm von Champagne, Elekt von Chartres (1164-1168), Erzbischof von Sens (1168-1176), Erzbischof von Reims (1176-1202), Legat des apostolischen Stuhles, im Spiegel päpstlicher Schreiben und Privilegien', ZRG Kan. Abt. 89 (2003) 107-284.

[235] Stirnemann, 'Souvenirs de l'enluminure chartraine, Chartres et sa cathédrale' 64; Stirnemann, 'En quête de Sens' 311, Anm. 15.

[236] Stirnemann, 'En quête de Sens' 305, 307, 311, Anm. 15. Vgl. Anne J. Duggan, 'Master of the Decretals: A Reassessment of Alexander III's Contribution to Canon Law', *Pope Alexander III (1159-81): The Art of Survival*, ed. Peter D. Clarke und Anne J. Duggan (Farnham 2012) 365-417.

Grosse, prächtige ornamentale und figürlich-historisierte Initialen in Deckfarbenmalerei in Blau-, Grün-, Rot-, Gelb- und Weisstönen sowie Gold markieren den Beginn der Einleitung *In prima parte agitur*, der *Pars prima* und jeder 'causa'. Die goldene Majuskel auf blauem Grund zu Beginn von *De consecratione* (Pf II, fol. 139vb) ist hinsichtlich ihrer Grösse und Gestaltung im Vergleich zu den vorangehenden bescheidener. Der zweispaltige Text wird durch 'summaria' in roter Tinte und durch abwechselnd rote und blaue zweizeilige Majuskeln, die in der Gegenfarbe mit einfachstem Fleuronné geschmückt sind, gegliedert. Zu Beginn von jedem 'dictum Gratiani' stehen ein Paragraphenzeichen und eine Majuskel in abwechselnd roter und blauer Farbe. Die durchgehende, gross geschriebene Angabe der *Pars prima*, der jeweiligen 'causa' bzw. von *De consecratione* am oberen Seitenrand und die Zählung der 'distinctiones' und 'quaestiones' neben den Textspalten wurden in denselben Farben ausgeführt. Diese Art der Farbgebung und Textgliederung sollte später zum Kennzeichen kanonistischer Handschriften werden.[237]

In der Handschrift Pf I, die ich im Gegensatz zu Pf II durchgearbeitet habe, stammen die meisten Sekundäreintragungen von einer einzigen Hand. Diese Glossenhand brachte die Allegationen, Notabilien und diskursiven Glossen in kleiner, zierlicher Schrift an. Ihr Kennzeichen ist der Buchstabe a, dessen Schaft am Wortende in aussergewöhnlicher Weise nach oben und unten verlängert wurde. Eine andere Hand, die weit weniger häufig in Erscheinung tritt, ergänzte übergangene Worte oder Textteile wie in D.19 c.1 auf fol. 29rb und notierte einige seltene interlineare und marginale Suppletivglossen, die durch die Beifügung eines Worts oder eines Wortpaars das Verständnis des Texts zu erleichtern suchten.[238] Diese Hand ist wohl identisch mit der Texthand und dürfte die Annotationen schon vor der Glossenhand geschrieben haben. In der Edition im Anhang 1 werden die Eintragungen der Texthand und dieser Glossenhand mit den Ziffern 1 und 2 bezeichnet.

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[237] Vgl. L'Engle-Gibbs, *Illuminating the Law* 64-65.

[238] Vgl. Wieland, *The Latin Glosse*s 61-77, 109-143; Eisenhut, *Die Glossen Ekkeharts IV.* 271-273.

Die Mehrheit der Allegationen, Notabilien und diskursiven Glossen in Pf II stammt von derselben Glossenhand wie in Pf I. Davon ausgenommen sind die drei Lagen (fol. 103ra-126vb) in *De penitentia*, die von der oben erwähnten Texthand geschrieben wurden, die bereits Bogenverbindungen verwendete. Die dortige neue Glossenhand schrieb manchmal unsorgfältiger und unterscheidet sich von der vorangehenden Glossenhand unter anderem durch den Buchstaben d, die Kürzung für -bus (b; statt bʒ) und das Fehlen des aussergewöhnlich gestalteten Buchstabens a. Hinzu kommen Nachträge einer zeitgenössischen Hand, die übergangene Textfragmente ergänzte,[239] sowie gelegentliche spätmittelalterliche Eintragungen in heller Tinte.

In der Handschrift Pf fügen sich grundsätzlich sämtliche Glossen in dieselbe Spalte am Seitenrand ein. Horizontale Blindlinien sind nur bei Bedarf, also dort, wo Glossen stehen, vorhanden. Die Allegationen richten sich sorgfältig an einer doppelten vertikalen Blindlinie aus. Die Kürzung für das Rechtsbuch (die Majuskeln D mit Querstrich und C für *Digesta* und *Codex Iustinianus*) und die Richtungsangabe bei internen Verweisen (die Majuskeln I und S für ʻInfra' und ʻSupra') stehen an der ersten, diejenige für die übrigen Angaben an der zweiten vertikalen Blindlinie. Die Notabilien und die diskursiven Glossen orientieren sich mehr oder weniger an denselben Vertikalen wie die Allegationen, unterscheiden sich jedoch von diesen häufig durch ihre Länge und vor allem ihre graphische Gestaltung, denn meistens laufen sie nach unten, manchmal auch nach oben (Pf I, fol. 58va) spitz zu und sind mit einem Paragraphenzeichen und einer Majuskel in roter und blauer Farbe versehen. Eine mindestens rudimentäre dreigliedrige Staffelung der Glossen wie in Bc fehlt hier.

Die Allegationen verweisen neben dem *Decretum Gratiani* auf die justinianische Kodifikation, offenbar eher selten auf Burchards Dekret und relativ häufig auf die *Lombarda.*[240] Bemerkenswert ist die in Pf verwendete ältere Kürzung von Majuskel-D mit Quer-

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[239] Z.B. Pf II fol. 39rb: C.23 q.7 c.4 § 4.

[240] Anhang 4. Zur *Lombarda* vgl. die später edierten Beispiele bei Anm. 242-245.

strich durch den Bauch für *Digesta* statt der seit der Mitte des 12. Jahrhunderts in *Codex*-Handschriften aufkommenden jüngeren Kürzung 'ff.'[241] Nicht nur die Digesten-Allegationen, sondern auch die internen Verweise zeigen manchmal deutliche Spuren eines sehr frühen Überlieferungsstandes. So wird—mindestens zu Beginn des *Decretum* in Pf I—relativ häufig die ursprüngliche Quelle genannt, obschon sie durch die Zählung der 'distinctiones', 'causae' und 'quaestiones' nicht nötig wäre.

D.13 c.1
Pf 23va — Infra c.xxii q.iiii. Beda Non solum (C.22 q.4 c.7)
D.14 c.2
Pf 24va — Infra e. di.xxix. Sciendum est (D.29 c.1)
Infra ca.i. q.vii. Necessaria (C.1 q.7 c.6) et Leo Requiritis (C.1 q.7 c.5*)
Infra e. di.lxxxvi. Gregorius Tanta nequitia (D.86 c.24)
D.15 c.2
Pf 25ra — Infra e. di.xvi. Beda Sexta (D.16 c.9)
D.15 c.3 (§ 16)
Pf 25rb — Infra e. di.xix. capitulo primo (D.19 c.1)
Infra e. di.xix. Aug. In canonicis (D.19 c.6*)
D.17 c.2*
Pf 27rb — Infra cap. iii. q.vi. Iul. Dudum a sanctis (C.3 q.6 c.9*)
Infra di.xxviii. capitulo tertio (D.28 c.3*)
Infra di.xcii. Si quis episcopus ua. (D.92 c.8*) contra
D.23 c.25*
Pf 36rb — Infra p. ult. di.i. Sixtus In sancta (De cons. D.1 c.41*)
Infra p. ult. di.i. Stephanus Vestim. (De cons. D.1 c.42*)

Die unüblichen Allegationen mit Nennung der Quelle sind bunt gemischt mit den üblichen, die ihrerseits den 'canon' bald mit dem Incipit, bald mit römischer Ziffer anzeigen. Zudem schliessen die unkonventionellen Allegationen Verweise auf alle drei Teile des *Decretum Gratiani* ein. Die Hypothese, dass die unkonventionellen Allegationen ausschliesslich bei Texten der ersten Rezension stehen und ausschliesslich diese allegieren, erweist sich als falsch, denn sie tauchen ebenfalls im Zusammenhang mit 'canones' der zweiten Rezension auf.

Die Zitierweise mit Angabe der Quelle ist auch in Allegationen der *Lombarda* anzutreffen. Im ersten Beispiel folgt auf die

[241] Vgl. die Beispiele in Pf I im Anhang 1 sowie z.B. Pf II, fol. 10ra, 10rb, 95vb. Dolezalek, *Repertorium* 467, 483.

Kürzung für die *Lombarda* die Titelangabe, dann die Quelle, die Lothar statt Ludwig heissen müsste, und schliesslich das Incipit des Kapitels. Das dritte Beispiel, das einen Titel mit einem einzigen Kapitel allegiert, und das vierte Beispiel verzichten auf die Angabe des Incipits des Kapitels. Im letzten Fall ergibt die Angabe der Quelle zwei mögliche Kapitel. Als typischer Fehler steht zweimal die Abkürzung für Infra statt für In.

C.16 q.1 c.55

Pf I 221rb — Infra e. In canonibus (C.16 q.1 c.57), etiam lomb. De decimis Imperator Ludouuicus Quicumque (*Lombarda* 3.3.7)[242]

C.24 q.3 c.23*

Pf II 52va — In lomb. De homicid. liberorum hominum Imperator Pipinus (*Lombarda* 1.9.29[28])[243]

C.30 q.1 c.4

Pf II 81va — Infra (In) lomb. Si mulier ad confirmandum tenuerit (*Lombarda* 3.30[28].1)[244]

C.32 q.7 c.5*

Pf II 94rb — Infra (In) lomb. Si quis uxorem dimiserit Imperator Karolus (*Lombarda* 2.13.4-5)[245]

Die Glossenedition von D.1-8 hat in Pf I bei D.3 d.p.c.2 in zwei Allegationen eine Sigle ‘p.’ zutage gefördert.[246] Weitere, ohne systematische Suche gefundene Beispiele belegen wiederholt die Verwendung dieser Sigle durch die wichtigste Glossenhand. In einem Fall steht nicht ‘p.’, sondern ‘pa.’[247]

D.21 c.6*

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[242] MGH LL 4.635 (3.3.7) und *Leges Langobardorum cum argutissimis glosis Caroli Tocco* (Venetiis 1537), fol. 221v schreiben das Kapitel Lothar zu. Zur *Lombarda*, zur Editionslage bzw. zu den Drucken vgl. Eltjo J. H. Schrage, *Utrumque ius: Eine Einführung in das Studium der Quellen des mittelalterlichen gelehrten Rechts*, unter Mitwirkung von Harry Dondorp (Schriften zur Europäischen Rechts- und Verfassungsgeschichte 8; Berlin 1992) 29-31; Lange, *Römisches Recht im Mittelalter* 1.90-92.

[243] MGH LL 4.624 (1.9.29) und *Leges Langobardorum cum argutissimis glosis Caroli Tocco* (Venetiis 1537), fol. 28r-28v (1.9.28).

[244] MGH LL 4.637 (3.30.1) und *Leges Langobardorum cum argutissimis glosis Caroli Tocco* (Venetiis 1537), fol. 113r-113v (3.28.1).

[245] MGH LL 4.629 (2.13.4-5) und *Leges Langobardorum cum argutissimis glosis Caroli Tocco* (Venetiis 1537), fol. 230r.

[246] Anhang 1.

[247] Vgl. auch Pf I, fol. 215ra.

Pf I 32va Infra di.i. Renouantes (D.22 c.6*) contra. p.

D.23 c.5

Pf I 35ra Infra ii. q.v. Omnibus (C.2 q.5 c.19*) contra, Si mala (C.2 q.5 c.16*). p.

C.15 q.8 c.4

Pf I 215ra Supra di.lxxxi. Si quis sunt (D.81 c.15*) contra. p.

C.16 q.1 c.2

Pf I 215va Infra e. q. e. § ii. His omnibus (C.16 q.1 d.p.c.36; eher als d.p.c.25). p.

C.16 q.6 c.1

Pf I 227ra Supra xiiii. q.v. Non sane (C.14 q.5 c.15) contra. p.

C.16 q.6 c.3*

Pf I 227rb Infra xxxiii. q.i. Quid (? C.33 q.1 c.1) contra. pa.

C.16 q.6 d.p.c.7

Pf I 227va Infra proxima q.iii. Quisquis (C.17 q.4 c.21). p.

Welcher Kanonist sich hinter dieser sehr frühen Sigle verbirgt, kann hier nicht abschliessend geklärt werden. In Frage kämen Paucapalea, Weigands 'Magister P', der Dekretist mit der Sigle 'p.' in der *Summa Parisiensis*, der Verfasser der 'p.'- Glossen in der Handschrift Pommersfelden 142 oder ein weiterer, unbekannter Rechtsgelehrter.[248] Auszuscheiden ist wahrscheinlich 'Magister P', der gemäss Weigand möglicherweise identisch ist mit einem um 1159 in Bologna bezeugten Magister Petrus. Ein Vergleich zwischen den oben edierten Beispielen zu D.2 d.p.c.2, D.21 c.6 und D.23 c.5 und den von Weigand edierten Glossen von 'Magister P' zu D.1-30 zeigt, dass alle drei hier fehlen. Ausserdem gibt es gewichtige stilistische Unterschiede zwischen 'Magister P' und unserem Glossator. Während 'Magister P' fast ausschliesslich Erläuterungen in Worten beiträgt und in den rund achtzig Glossen zu D.1-30 nur viermal eine Allegation verwendet, beschränkt sich unser Glossator offenbar auf Allegationen.[249] Es bliebe noch zu prüfen, ob diese Sigle in Pf II tatsächlich nicht vorhanden ist, wie mein erster Eindruck nahelegt. Ein Fehlen der Sigle in Pf II würde die Ansicht Weigands erhärten, dass sich die Glossen in den beiden Teilbänden unterscheiden.[250]

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[248] Weigand, *Glossen zum Dekret Gratians* 569-570, 573-583, 911-912; Weigand, 'The Development' 69-71.

[249] Weigand, *Glossen zum Dekret Gratians* 573-583.

[250] Ibid. 880-882.

Zum Abschluss sei noch eine Sigle 'Iohs.' erwähnt, auf die ich zufällig gestossen bin. Man könnte hier an Johannes Faventinus denken, der jedoch verhältnismässig spät, nämlich erstmals in den 1170er-Jahren, nachzuweisen ist.[251]

C.13 q.2 c.4

Pf I 203rb Supra xii. q. ult. ca. Obitum (C.12 q.5 c.2) contra, quia Iohs. contra.

Pf enthält als erste hier untersuchte Handschrift einen integrierten, kontinuierlichen Text des *Decretum Gratiani* im Umfang der zweiten Rezension ohne die zahlreichen Textergänzungen auf den Seitenrändern, auf Zusatzblättern oder in Anhängen. Das zweispaltige Layout ist sorgfältig gestaltet und die alternierend rote und blaue Farbgebung zukunftsweisend. Gleich dem Text bewahrten auch die Glossen gelegentlich Züge einer älteren Überlieferungsstufe. Man findet nämlich wie in Fd, Aa und Bc mindestens in Pf I noch häufig gemischte Allegationen, die trotz der Angabe der 'distinctio' oder 'causa' und 'quaestio' neben dem Incipit des 'canon' oder 'dictum' die ursprüngliche Quelle anzeigen. In Pf sind überdies wie in Bc *Lombarda*-Allegationen anzutreffen. Schliesslich unterscheidet sich Pf I von Fd, Aa und Bc durch das Auftreten der Siglen 'p.', 'pa.' und 'Iohs.'

Die Glossen zu D.1-8 in Aa, Bc und Pf

Die im Anhang 1 abgedruckte Edition der Glossen zu D.1-8 bezweckt, deren Bestand, Gestalt, Funktion, dogmatischen Gehalt und deren Verbindungen zu den ältesten Dekretsummen beispielhaft zu dokumentieren und auszuwerten. Im Gegensatz zur grossen Glossenedition von Weigand werden hier wie in zwei seiner älteren Arbeiten die in den frühen *Decretum*-Handschriften so zahlreichen Allegationen eingeschlossen.[252] Um die Übersichtlichkeit trotz Einschluss der Allegationen zu wahren, beschränkt sich die Edition auf drei Handschriften. Es sind dies zunächst die

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[251] Weigand, 'Die Glossen des Johannes Faventinus'; Weigand, *Glossen zum Dekret Gratians* 607-608; Weigand, 'The Development' 74.

[252] Weigand, 'Welcher Glossenapparat zum Dekret war der erste?'; Weigand, 'Frühe Glossen zu D.12 cc.1-6 des Dekrets Gratians'. Vgl. auch Kann, 'Die Rufinglossen'.

beiden einzigen Handschriften der ersten Rezension, die durchgehend über Glossen einschliesslich Allegationen verfügen, nämlich Aa und Bc. Da in Fd aufgrund der Blattverluste zu Beginn der Handschrift D.1-8 in der ersten Rezension fehlen und grundsätzlich nur wenige, schwer auffindbare Glossen und kaum Allegationen vorhanden sind, wird sie in unserer Edition wie die ganz bzw. beinahe glossenlosen Handschriften Pfr und P weggelassen. Dieses Vorgehen erscheint auch deshalb sinnvoll, weil Weigand die Glossen von D.31 bis C.1 in Fd vor längerer Zeit ediert hat und wir die seltenen blossen Allegationen bei D.6 und D.10 im Anhang von Fd oben abgedruckt haben.[253]

Zur Ergänzung von Aa und Bc berücksichtigt die Edition mit Pf I eine frühe Handschrift der zweiten Rezension, die eine gut lesbare, ziemlich korrekte und—mit der Ausnahme einiger Worterklärungen und Suppletivglossen—von einer Hand geschriebene Glossenschicht zu Beginn des *Decretum* besitzt. Selbstverständlich böten sich weitere Handschriften der zweiten Rezension mit einer intakten Glossenschicht an, um die Glossenedition breiter abzustützen.[254]

Der Vergleich der Glossen zu D.1-8 in Aa, Bc und Pf wird dadurch erleichtert, dass ihr Textbestand fast identisch ist. Die einzigen Abweichungen betreffen die 'palea' D.5 c.1, die allein in Pf, und zwar ohne Glossen, vorliegt, sowie die 'palea' D.6 c.2, die sowohl in Bc als auch in Pf vorhanden ist. Die drei 'canones' der zweiten Rezension D.4 c.4-5 und D.8 c.9 stehen jeweils in Pf im eingerichteten Text, in Bc als ergänzte Marginalie auf dem Seitenrand (M) und in Aa im Anhang (A). Die Texte der zweiten Rezension D.6 d.a.c.1, c.1 und c.3 sowie die 'palea' D.6 c.2 erscheinen im eingerichteten Text von Pf, auf einem Zusatzblatt in Bc (Z) und—ausser der fehlenden 'palea'—im Text der ersten Rezension (und nicht im Anhang) von Aa.

Die Edition berücksichtigt alle Allegationen, Notabilien und diskursiven Glossen samt Suppletivglossen und Worterklärungen (letztere meistens eingeleitet mit 'id est', 'scilicet'), wogegen neben Hinweiszeichen und Zählungen auch reine Korrektur-

[253] Weigand, *Glossen zum Dekret Gratians* 749-751.
[254] Siehe oben bei Anm. 20.

eintragungen (einschliesslich der Ergänzung fehlender Worte),[255] Textvarianten (manchmal eingeleitet mit ‘uel’) und Textanpassungen weggelassen werden.[256] Zwar bezeugen diese ein philologisches Bewusstsein, die Instabilität des frühen Texts und manchmal den Versuch, den Text zu aktualisieren bzw. den Text der ersten Rezension demjenigen der zweiten anzupassen,[257] doch würde ihre Berücksichtigung den Rahmen dieser Arbeit sprengen und die Übersichtlichkeit der Edition vermindern. Diese Wahl ist ausserdem deshalb gerechtfertigt, weil die in Entstehung begriffene Edition der ersten Rezension des *Decretum Gratiani* unter der Leitung von Anders Winroth offenbar darauf angelegt ist, Korrekturen, Textvarianten und Textanpassungen systematisch im kritischen Apparat zu verzeichnen.[258]

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[255] So wurden in Aa 23 auf fol. 9v bei D.1 c.6 und c.7 die fehlenden Summarien ‘Que species iuris sint’ und ‘Quid sit ius naturale’ ergänzt und bei D.1 c.10 die falsche Lesart ‘pre decisio’ in ‘prede decisio’ korrigiert, ebenso in Bc, fol. 17va. In Bc, fol. 18ra, korrigierte man D.4 c.1 ‘nodi’ in ‘nocendi’. In Pf I, fol. 19va, ergänzte man in D.8 c.2 ‘suo’ über dem Wort ‘uniuerso’.

[256] So verbesserte man in Aa 23 auf fol. 9v in D.1 d.p.c.5 ‘scripturis’ in ‘scriptis’ und in Pf I auf fol. 17ra in D.4 c.1 ‘nocendi facultas’ in ‘audacia nocendi et facultas’ (vgl. ed. Friedberg 5 mit Anm.). Manchmal wird einem Wort ein gleichbedeutendes Wort als Variante dazugestellt, wie z.B. in Aa 23 auf fol. 13r bei D.8 c.1 ‘ueneremini: uel reueremini’. Andernorts ist die Textvariante nicht völlig gleichbedeutend und die Grenzen zwischen Textvariante, Textumdeutung und Texterklärung verwischen sich. In Bc stehen auf fol. 20vb im ersten Satz von D.8 c.2 über dem Wort ‘diuersitate’ die Wörter ‘uel consuetudine’. Wegen dem vorangestellten ‘uel’ habe ich hier ‘pro consuetudine’ als Textvariante für ‘pro morum diuersitate’ bewertet und von der Edition ausgeschlossen, obschon es sich auch um eine Interpretation handeln könnte.

[257] Ein Beispiel dafür ist das Wort ‘curationibus’ in D.1 c.12 § 1: ‘In quo agitur de legitimis heredidatibus, de curationibus, de tutelis, de usucapionibus’. In Aa 23, fol. 9v, wurde über das Wort ‘curationibus’ als Alternative ‘uel curatoribus’ geschrieben, in Bc, fol. 17va, wurde dem Wort ‘cretionibus’, das der Textfassung der in der ‘inscriptio’ zitierten Etymologien Isidors von Sevilla entspricht (*Isidori Hispalensis episcopi Etymologiae sive Originum libri XX*, ed. Wallace Martin Lindsay [Oxford 1911], Liber 5,19), die Lesart ‘curationibus’ beigefügt und in Pf I, fol. 16va, korrigierte man ‘contentionibus’ in ‘curationibus’.

[258] Für D.1-8 in Bc bereits eingearbeitet in der Version vom 25.09.2018 bei www.gratian.org.

Um die frühen diskursiven Glossen in den wissenschaftlichen Kontext einzubinden, wird—im Anschluss an Weigand—auf Parallelen in den ältesten Dekretsummen verwiesen.[259] Im Vordergrund steht der Vergleich mit der ältesten Summe, nämlich der Summe des Paucapalea, die der Struktur und dem Inhalt von Glossen besonders nahe steht und der Rechtsschule von Bologna zuzurechnen ist.[260] Ebenfalls systematisch ausgewertet werden die viel ausführlichere und sehr einflussreiche Summe des Bologneser Rechtslehrers Rufinus (ca. 1164) und die erste Summe der französischen Schule, die *Summa Parisiensis* (Ende der 1160er-Jahre), die—im Gegensatz zur Summe des Paucapalea—beide in guten Editionen vorliegen.[261] Andere frühe Summen werden punktuell beigezogen, wenn bestimmte diskursive Glossen in den drei genannten Summen nicht auftreten und jene als die frühesten Überlieferungen ausserhalb der Glossen in Frage kommen.[262]

Allegationen

Bc (100) und Pf (99) weisen rund viermal so viele Glossen auf wie Aa (24).[263] In allen drei Handschriften übertreffen die Allegationen die diskursiven Glossen und die Notabilien anzahl-

[259] Weigand, 'Frühe Glossen zu D.11 pr. - c.6 des Dekrets Gratians'; Weigand, 'Paucapalea' 144-157, jedoch ohne Aa, Bc und Pf.
[260] *Die Summa des Paucapalea über das Decretum Gratiani*, ed. Johann Friedrich von Schulte (Giessen 1890; Neudruck Aalen 1965).
[261] *The Summa Parisiensis*, ed. McLaughlin; *Rufinus, Summa,* ed. Singer.
[262] Es sind dies die *Summa Alenconensis*, einige Auszüge ed. Weigand, *Die Naturrechtslehre*, und Weigand, 'Paucapalea', sodann *Die Summa des Stephanus Tornacensis über das Decretum Gratiani*, ed. Johann Friedrich von Schulte (Giessen 1891; Neudruck Aalen 1965), und schliesslich die Summe *Antiquitate et tempore*, einige Auszüge ed. Singer, 'Beiträge zur Würdigung der Decretistenlitteratur II'. Zu sämtlichen benutzten Summen vgl. Kenneth Pennington, Wolfgang P. Müller, 'The Decretists: The Italian School', HMCL 2.121-173, hier 128-140; Rudolf Weigand, 'The Transmontane Decretists', HMCL 2.174-210, hier 181-184; 'Bio-Bibliographical Guide to Medieval and Early Modern Jurists' online unter:
http://amesfoundation.law.harvard.edu/BioBibCanonists/general_search.php
[263] Anhang 2.

mässig bei Weitem, denn die letzten beiden machen in Pf nur rund einen Achtel, in Aa rund einen Fünftel und in Bc rund einen Viertel aus. Bc und Pf repräsentieren somit einen je mit eigenem Schwerpunkt—im ersten Fall liegt er auf Notabilien, im zweiten auf Allegationen—gegenüber Aa weiter entwickelten Glossenbestand.

Vergleicht man den Bestand der Allegationen in den drei Handschriften, so ergibt sich trotz gewisser Übereinstimmungen ein buntes Bild. Mehrmals stehen bei einem ‘canon’ oder ‘dictum’ einzig in Pf und seltener einzig in Bc Allegationen.[264] Mindestens einmal stimmt der Glossenbestand in allen drei Handschriften überein,[265] während andernorts Aa und Bc und häufiger Bc und Pf identische Allegationen zu einer Textstelle aufweisen.[266] Manchmal besitzen alle drei Handschriften oder nur Bc und Pf einen identischen Grundbestand an Allegationen, der in Bc und Pf oder nur in einer der beiden Handschriften erweitert wurde.[267] Obschon Bc insgesamt weniger Allegationen besitzt als Pf, weist jene Handschrift bei gewissen Textstellen mehr Allegationen als Pf auf. Die Allegationen zu D.8 c.1 widerspiegeln die Vielfalt der Glossen in den drei Handschriften in eindrücklicher Weise. Während Aa dort überhaupt keine Allegationen hat, teilen Bc und Pf je zwei von sechs Allegationen zu diesem langen ‘canon’.

Allegiert werden vor allem andere Stellen im *Decretum Gratiani* und die justinianischen Rechtsbücher, genauer die *Institutiones*, das *Digestum vetus*, das *Digestum novum*, das *Authenticum* und der *Codex*. Weit seltener stehen in Aa und Bc Allegationen des Dekrets von Burchard von Worms und in Bc und Pf Allegationen der *Lombarda*. Die Präsenz bzw. das Fehlen dieser Allegationen verleiht den drei Handschriften ein eigenes Glossenprofil.

Allegationen sind wegen der gekürzten Angabe der Rechtsbücher und ihrer Teile sowie wegen der römischen Ziffern fehler-

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[264] Anhang 1: Allegationen einzig in Pf bei D.3 d.p.c.2, D.4 c.2, D.4 d.p.c.3, D.8 c.8; einzig in Bc bei D.7 c.1, D.8 d.p.c.1, D.8 c.7.
[265] Anhang 1: D.1 c.11.
[266] Anhang 1: D.5 c.2; D.2 c.3, D.4 d.p.c.2, D.5 c.3.
[267] Anhang 1: D.1 c.10, D.4 d.p.c.6, D.5 d.a.c.1; D.4 c.3, D.8 c.3, D.8 c.4.

anfällig.[268] Diese Fehleranfälligkeit wurde dadurch noch erhöht, dass das Abschreiben der Allegationen in der Regel ohne konkreten inhaltlichen Nachvollzug und nicht unbedingt parallel zum Text erfolgte.[269] Das Unvermögen, sämtliche Allegationen in der Edition aufzulösen, dürfte zum grössten Teil auf solche Fehler zurückgehen. Die Edition verzichtet zugunsten der Übersichtlichkeit grundsätzlich auf die Kennzeichnung oder Emendation solcher Fehler in der Allegation und beschränkt sich auf die korrekte Auflösung derselben in Klammern.

Im Folgenden seien einige typische Fehler und Fehlerquellen in der Überlieferung der Allegationen vorgestellt. Die erste Glossenhand in Aa schrieb bei Allegationen der *Institutiones*—in Analogie zu den internen Verweisen—durchgehend die Kürzung für Infra (I mit übergeschriebenem a) statt der Kürzung für In (I mit übergeschriebenem Querstrich), weil der Schreiber offenbar das Abkürzungssystem der Allegationen nicht verstand. Denselben Fehler machte zu Beginn auch die erste Glossenhand in Pf. Mindestens einmal wurde in Pf die Allegation an falscher Stelle, nämlich bei D.1 c.12 statt bei D.1 c.11, notiert. Dies konnte umso leichter geschehen, als D.1 c.11 nur zwei Zeilen lang war.[270] Es ist offensichtlich, dass beim Abschreiben der römischen Ziffern kleine Fehler unterliefen, die die Allegation komplett verfälschten. Man unterliess ein ‘i.’, schrieb ‘xxi.’ statt ‘xix.’ oder ‘xxvi.’ statt ‘xcvi.’ oder trug gar eine unsinnige Zahl wie ‘xxiiiv.’ ein.[271]

Manchmal erscheint eine Allegation zweimal zur selben Textstelle, weil während des Prozesses des Abschreibens die Glossen mehrerer Handschriften kumuliert wurden. In der Glossenedition von D.1-8 ist dieses Phänomen viermal in der Handschrift Pf anzutreffen, deren Glossierung folglich direkt oder indirekt auf

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[268] Weigand, ‘Frühe Glossen zu D.12 cc.1-6 des Dekrets Gratians’ 44-46; Weigand, ‘Frühe Glossen zu D.11pr - c.6’ 73; Dolezalek, ‘Der Glossenapparat des Martinus Gosia’ 266-267; Dolezalek, ‘Azos Glossenapparat zum Infortiatum’ 187-189; van de Wouw, ‘Zur Textgeschichte’ 259; Bertram-Blumenthal, ‘Fragmente’ 105.

[269] In Pf wurden jedoch der Text und die Glossen gleichzeitig geschrieben. Siehe oben bei Anm. 231.

[270] Anhang 1: Pf bei D.1 c.12 statt D.1 c.11.

[271] Anhang 1: Bc bei D.3 c.3; Pf bei D.1 d.a.c.1, D.3 c.3, D.4 d.p.c.2.

mehreren Vorlagen beruhen muss. Dass der Kopist nicht einfach versehentlich zweimal dieselbe Glosse aus einer einzigen Vorlage abschrieb, wird in diesen Fällen besonders deutlich, wo er dieselbe Allegation in unterschiedlicher Weise notierte. So steht in Pf bei D.4 c.6 dieselbe Allegation von D.44 c.1 einmal mit dem Incipit und einmal mit der römischen Ziffer für die Kapitelangabe, nämlich 'Infra di.xliiii. cap. Commessa' und 'Infra di.xliiii. capitulo i.'.[272] Die doppelte Abschrift von drei Allegationen in Bc auf fol. 19vb, 19ra und 20ra resultierte wohl aus der Präsenz der 'palea' D.6 c.2 auf fol. 19vb, die möglicherweise im *Decretum*-Text der Glossenvorlage fehlte und dann versehentlich mit den Allegationen zu D.6 c.3 und D.6 d.p.c.3 versehen wurde.

In den edierten Glossen zu D.1-8 finden sich gelegentlich Reste unkonventioneller Allegationen, die neben der Suchrichtung (Infra, Supra), der 'distinctio' bzw. 'causa' und 'quaestio' und dem Incipit die ursprüngliche Quelle des allegierten Textfragments anführen. So nennt die Allegation in Pf bei D.5 d.a.c.1 Augustinus als Quelle des allegierten 'canon' der zweiten Rezension: 'Infra xiiii. q.ii. Aug. (Augustinus) Precepto' (C.14 q.1 c.3).[273] Wie schon Weigand festgehalten hat, führten solche inzwischen überflüssigen, ungewohnten Quellenangaben häufig zu Fehlern.[274] Bereits zu Beginn unserer Edition setzte die erste Glossenhand in Aa bei D.1 d.a.c.1 die Kurzform 'Melc.' über die dazugehörige Allegation 'Infra c.ii. q.i. Primo semper (C.2 q.1 c.13)', welche Papst Melchiades als Quelle bezeichnet und, wenn überhaupt, vor dem Incipit des 'canon' stehen müsste. In Mc auf fol. 2ra führte die Verwirrung zur Allegation 'Infra ii. q.i. Melualde', in welcher der Name der Quelle unkenntlich ist und den Platz des Incipits einnimmt.

Die Anfälligkeit für Fehler, die mechanische Abschrift ohne inhaltlichen Nachvollzug, der kumulative Charakter der Überlie-

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[272] Anhang 1: Pf bei D.4 c.6; ebenso Pf bei D.6 c.1*, D.6 d.p.c.3. Ein vergleichbarer Fall in Br, fol. 1va bei D.1 c.5: 'In instit. (sic) xi. eadem parte In his rebus (D.11 c.7)' sowie 'Infra e. p. distinc. xi. Aug. In his rebus (D.11 c.7)'.

[273] Ein weiteres Beispiel in Br, fol. 1va bei D.1 c.5: 'Infra e. p. distinc. xi. Aug. In his rebus (D.11 c.7)'.

[274] Weigand, 'Frühe Glossen zu D.12 cc.1-6 des Dekrets Gratians' 44-45.

ferung und die Mischung aus völlig übereinstimmenden, teils identischen und teils verschiedenen sowie gänzlich abweichenden Allegationen und Allegationsketten sind Phänomene, die Gero Dolezalek und Hans van de Wouw in ihren breiter abgestützten Untersuchungen der bereits dichteren voraccursischen Glossenmassen und -apparate zum *Infortiatum* und zum *Digestum novum* ebenfalls feststellten und die auch in den von mir auszugsweise edierten Beispielen aus dem Apparat des Placentinus und Pillius zu den *Tres Libri* gegenwärtig sind.[275]

Trotz gelegentlicher Fehler ist die Qualität der Überlieferung der Allegationen in den drei Handschriften Aa, Bc und Pf verhältnismässig hoch einzuschätzen. So sind z.B. die ersten vier Allegationen in der Handschrift Mc alle mit Fehlern behaftet.[276] Die gelegentliche mechanische Anhäufung identischer Allegationen bleibt auf Pf beschränkt, was wahrscheinlich damit zusammenhängt, dass es sich bei den untersuchten Handschriften um relativ frühe Überlieferungsträger handelt; das Potential für die Kumulation von Fehlern war geringer und die spärliche Glossierung erlaubte es grundsätzlich, die Glossen und insbesondere die Allegationen neben die entsprechende Textstelle zu setzen. Festzuhalten bleibt, dass die Fehler in den Allegationen in Aa, Bc und Pf wie auch in vielen anderen *Decretum*-Handschriften von den späteren Benutzern kaum korrigiert wurden. Dies deutet darauf hin, dass nicht nur die Kopisten, sondern offenbar auch die Leser und Benutzer der drei Handschriften die Allegationen ignorierten oder mindestens den Inhalt und den Sinn jener nicht völlig erfassten.[277]

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[275] Dolezalek, 'Der Glossenapparat des Martinus Gosia' 166-167; Dolezalek, 'Azos Glossenapparat zum Infortiatum' 187-189; van de Wouw, 'Zur Textgeschichte' 258-271; Lenz, 'Neu entdeckte voraccursische Glossen' 428-431.

[276] Mc, fol. 2ra bei D.1 d.a.c.1: 'Infra ii. q.i. Melualde (C.2 q.1 c.13*)', 'Infra di.xciv. Duo (D.96 c.10*)', 'Infra ii. quest.i. Semper' (C.2 q.1 c.13*)'; bei D.1 c.2: 'D. de iusticia et i. Ius. (Inst. 1.1pr)'.

[277] Als Gegenbeispiel aus späterer Zeit sei auf die Inkunabel mit dem *Decretum Gratiani* und der *Glossa ordinaria* (Venetiis 1474) verwiesen, in welcher der rechtsgelehrte St. Galler Konventuale Johannes Bischoff († 1495) eigenhändig die fehlerhafte Allegation in der *Glossa ordinaria* ad D.13 c.2 s.v. *Et quia tunc*: 'xxiii. (sic) q.iiii. vir cum propria' (C.33 q.4 c.7) korrigierte. Es handelt sich um

In praktischer Hinsicht stellt sich überdies die Frage, was die römischrechtlichen Allegationen in den frühen *Decretum*-Handschriften nützten, wenn den interessierten Lesern die Bände des *Digestum vetus*, des *Infortiatum*, des *Digestum novum*, des *Codex* und des *Volumen* mit den *Institutiones*, dem *Authenticum* und den *Tres libri* mit ihren insgesamt über tausend Blättern fehlten.[278] Diese Frage drängt sich besonders für den ausseritalienischen Raum auf, wo im 12. Jahrhundert häufig Summen und Exzerpte der justinianischen Rechtsbücher sowie *ordines iudiciarii* und *quaestiones disputatae* anstatt des kostspieligen vollständigen *Corpus iuris civilis* die Kenntnisse des Römischen Rechts vermittelten.[279] So war das florierende Kloster Admont im 12. Jahrhundert zwar gut bestückt mit kanonistischer Literatur und den neuesten theologisch-scholastischen Werken, doch gibt es keine Hinweise dafür, dass es damals auch nur einen Teil der Bände des *Corpus iuris civilis* besessen hätte, welche die Auswertung und das Studium der Allegationen neben dem Text des *Decretum Gratiani* erlaubten hätten.[280] Sogar im 13. Jahr-

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St. Gallen, SB, Inc. 635; *Gesamtkatalog der Wiegendrucke*, Bd. 10, Nr. 11354. Zu Johannes Bischoff vgl. Philipp Lenz, *Reichsabtei und Klosterreform: Das Kloster St. Gallen unter dem Pfleger und Abt Ulrich Rösch 1457-1491* (Monasterium sancti Galli 6; St. Gallen 2014) 245, 270, 280, 286-288, 484-486.

[278] Zum Umfang vgl. Gero Dolezalek, 'Les gloses des manuscrits de droit: reflet des méthodes d'enseignement', *Manuels, programmes de cours et techniques d'enseignement dans les universités médiévales. Actes du Colloque international de Louvain-la-Neuve 9-11 septembre 1993*, ed. Jacqueline Hamesse (Publications de l'institut d'études médiévales. Textes, études, congrès 16; Louvain-la-Neuve 1994) 235-255, hier 235-236.

[279] Vgl. André Gouron, 'L'enseignement du droit civil au XIIe siècle: de la coutume à la règle', *Manuels, programmes de cours et techniques d'enseignement*, ed. Hamesse 183-199, hier 287, 194-195: 'De tels manuscrits, aptes à transmettre directement le contenu des sources du droit byzantin, n'ont circulé qu'assez tard en dehors d'Italie, et en tout petit nombre'; Dolezalek, 'Wie studierte man bei den Glossatoren' 58-59; James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago, London 2010) 89-94.

[280] Nach Stelzer, *Gelehrtes Recht* 21-44, scheint sich die römischrechtliche Literatur in Admont im 12. Jahrhundert auf Exzerpte in der *Collectio Admontensis* beschränkt zu haben. Mews, 'Scholastic Theology in a Monastic Milieu in the Twelfth Century'.

hundert scheint man sich in Admont mit den *Institutiones* und mit Summen derselben und des *Codex* begnügt zu haben.[281]

Obschon die Überlieferung nicht perfekt ist, zeugen die grosse Anzahl von Allegationen in den frühen *Decretum*-Handschriften (seit der zweiten Rezension) und die andauernde Präsenz bis zur *Glossa ordinaria* von ihrer grossen Bedeutung in der aufstrebenden Kanonistik des 12. Jahrhunderts. Mindestens in den dynamischen Zentren der Wissenschaft des römischen und kirchlichen Rechts, an den hohen Schulen und jungen Universitäten, müssen die Allegationen eine bedeutende Rolle gespielt haben, auch wenn sich später Fehler in die Überlieferung einschlichen. Es muss also unser Ziel sein, über eine Analyse der Allegationen in den drei ausgewählten frühen *Decretum*-Handschriften deren Zweck, Funktion und Bedeutung in der wissenschaftlichen Texterschliessung und Textauslegung mindestens in Ansätzen zu ergründen. Dazu werden Verweise auf das *Decretum Gratiani*, die justinianischen Rechtsbücher und andere Rechtssammlungen anhand ausgewählter Textstellen in Aa, Bc und Pf untersucht. Ausgangspunkt bildet die Glossenedition von D.1-8 im Anhang 1.

Zu Textbeginn des *Decretum Gratiani* steht in Aa neben der Textstelle D.1 d.a.c.1 die Allegation 'Infra c.ii. q.i. Primo semper (C.2 q.1 c.13)'. Der allegierte 'canon' der zweiten Rezension befindet sich in Aa 23 nicht auf fol. 123r nach C.2 q.1 c.12, sondern im Anhang auf fol. 254v mit einem entsprechenden Verweiszeichen. Ein Rückverweis auf D.1 d.a.c.1, der eigentlich logisch wäre, fehlt. Dafür wird im Anhang bei C.2 q.1 c.12 auf C.2 q.1 c.8 verwiesen. Bc und Pf allegieren zu Beginn des *Decretum Gratiani* ebenfalls C.2 q.1 c.13. Die allegierte Textstelle besitzt auch in Bc auf fol. 121vb, soweit lesbar, und in Pf I auf fol. 131vb Allegationen, doch finden sich darunter wiederum keine Rückverweise auf D.1 d.a.c.1; Pf allegiert hier wie Aa unter anderem C.2 q.1 c.18. Das paarweise Auftreten von Allegationen, das Dolezalek als wesentliches Charakteristikum und Erfordernis für

[281] Gero Dolezalek, *Verzeichnis der Handschriften zum römischen Recht bis 1600: Grundverzeichnis I Aachen – Montserrat* (Frankfurt am Main 1972) s.v. Admont.

die frühesten (unpräzisen) Allegationen in Handschriften des *Codex* aus dem frühen 12. Jahrhundert bezeichnete, fehlt hier.[282]

Die Verbindung von D.1 d.a.c.1 mit C.2 q.1 c.13 erscheint aufgrund ihres rechtlichen Gehalts nicht offensichtlich. Das berühmte 'dictum' besagt zunächst, dass die Menschheit einerseits vom Naturrecht ('ius naturale') und andererseits von den Gewohnheiten ('mores') regiert wird. Das Wesen des Naturrechts, das im Gesetz (des Alten Testaments: 'lex') und im Evangelium enthalten ist, wird mit der positiv und negativ formulierten Goldenen Regel erklärt, welche ihrerseits mit dem Zitat von Mt 7.12 untermauert wird.[283]

C.2 q.1 c.13 fordert, niemanden aufgrund eines Verdachts oder ohne gerechtes Urteil zu verurteilen sowie Sorgfalt in der Untersuchung und Nächstenliebe im Urteilsspruch walten zu lassen und beschliesst die Ermahnungen mit einer negativen Fassung der Goldenen Regel.[284] Bindeglied zwischen den Textstellen D.1 d.a.c.1 und C.2 q.1 c.13 und Anlass für die Allegation ist also nicht ihre rechtliche Aussage, sondern ihre gemeinsame, jedoch verschieden ausführliche Begründung durch die Goldene Regel. Diese eher oberflächliche Parallele erinnert an die Verweise mittels roter Zeichen, die hauptsächlich identische Formulierungen und Wortlaute, identische Begriffe und Quellen, identische Personen und Sachen verbinden.[285]

In Bc steht bei D.1 d.a.c.1 eine weitere Allegation, nämlich 'Infra xcvi. Duo (D.96 c.10)', ebenso in Pf, hier jedoch mit einem Fehler in der römischen Ziffer und mit der Angabe 'contra' am

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[282] Dolezalek, *Repertorium* 468. Siehe auch oben bei Anm. 196.

[283] D.1 d.a.c.1: 'Humanum genus duobus regitur, naturae 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 quecumque uultis ut faciant uobis homines, et uos eadem facite illis. Haec est enim lex et prophetae (Mt 7.12; cf. Lc 6.31)".' Zur Goldenen Regel vgl. Hans-Peter Mathys, Roman Heiligenthal, Heinz-Horst Schrey, 'Goldene Regel', TRE 13.570-583.

[284] C.2 q.1 c.13*: 'Primo semper omnia diligenter inquirite, ut cum iustitia et karitate diffiniatis; neminem condempnetis ante iustum et uerum iudicium; nullum iudicetis suspicionis arbitrio; sed primum probate, et postea karitatiuam proferte sententiam, et quod uobis non uultis fieri alteri nolite facere'.

[285] Dolezalek-Weigand, 'Das Geheimnis der roten Zeichen' 176-177, 181-185.

Schluss. Beide Handschriften enthalten zwar Allegationen bei der allegierten Textstelle auf fol. 96rb bzw. auf fol. 101vb, doch fehlen wiederum die Rückverweise auf D.1 d.a.c.1. Der allegierte 'canon' besagt im Wesentlichen, dass es zwei Gewalten gibt, welche die Welt regieren, nämlich die heilige Autorität der Päpste und die königliche Macht, wobei jene diese an Bedeutung übertrifft.[286] Dieser 'canon' ist insofern von Interesse für die Auslegung von D.1 d.a.c.1, als er die päpstliche Autorität und die königliche Macht dem Naturrecht und den Gebräuchen als die beiden Gewalten entgegenstellt, welche die Menschheit beherrschen. Der Vergleich drängt sich allein schon wegen der sprachlichen Parallelen der Anfänge der beiden 'canones'—'Humanum genus duobus regitur' bzw. 'Duo sunt quippe . . . quibus principaliter hic mundus regitur'—auf.

Die Markierung von D.96 c.10 als Konträrstelle durch die Beifügung von 'contra' in Pf ist angesichts der inhaltlichen Unterschiede sinnvoll. Von den drei edierten Handschriften bezeichnet allein Pf Konträrstellen im *Decretum Gratiani* mit 'contra', und zwar in D.1-8 in 19 Fällen, während Aa und Bc 'contra' nur einmal bzw. zweimal verwenden, und zwar einzig in einer Allegation von Burchards Dekret und in einer diskursiven Glosse.[287] Zwar existieren nur wenige grundsätzlich identische Allegationen, bei denen Pf im Vergleich zu Bc ein 'contra' beifügt, doch scheint es, dass die Explizierung des konträren Charakters einer Allegation nicht einfach nur ein Merkmal von Pf ist, sondern insgesamt eine weiter gediehene Entwicklungsstufe in der Glossierung darstellt.[288]

Während Aa bei D.1 d.a.c.1 nur die Allegation C.2 q.1 c.13 besitzt, steht in Bc und fast allen anderen frühen glossierten *Decretum*-Handschriften das Allegationspaar D.96 c.10 und C.2

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[286] D.96 c.10*: 'Duo sunt quippe, inperator auguste, quibus principaliter hic mundus regitur: auctoritas sacra Pontificum, et regalis potestas. In quibus tanto grauius est pondus sacerdotum, quanto etiam pro ipsis regibus hominum in diuino sunt reddituri examine rationem'.
[287] Anhang 1: Aa und Bc bei D.5 c.2; Bc bei D.5 c.4.
[288] Anhang 1: D.1 d.a.c.1, D.4 c.5, D.6 c.1 (?).

q.1 c.13.[289] Diese beiden Allegationen sind noch als Teil des Apparats *Ordinaturus magister* aus der Zeit um oder kurz nach 1180 vorhanden,[290] wogegen die *Glossa ordinaria* in den Inkunabeln einzig D.96 c.10 beibehält und die Allegation C.2 q.1 c.13 weglässt.[291] Offenbar sprach die blosse Erwähnung der Goldenen Regel in D.1 d.a.c.1 und C.2 q.1 c.13, deren rechtliche Inhalte keine substantielle Gemeinsamkeiten aufweisen, gegen die Aufnahme in die *Glossa ordinaria*.

Eine weitere Ausnahme neben Aa zu dieser in sieben Handschriften völlig konsistenten frühen Glossierungspraxis mit dem besagten Allegationspaar ist Pf, wo die beiden Allegationen durch vier weitere angereichert wurden. Von den insgesamt sechs allegierten *Decretum*-Texten D.96 c.10, C.2 q.1 c.13, C.2 q.1 c.18, C.12 q.2 c.8, D.11 c.7 und C.10 q.1 c.12 besitzt kein einziger einen Rückverweis auf D.1 d.a.c.1.[292] Dafür wird beim dritten allegierten Text auf den vierten und beim vierten auf den zweiten und sechsten verwiesen. Zwei oder drei der in Pf zusätzlich allegierten Texte handeln ähnlich wie D.96 c.10 von der Dualität oder Komplementarität der Rechtsautoritäten oder Rechtssphären.

In C.12 q.2 c.8 wendet sich der Papst in einer rechtlichen Angelegenheit in einem Brief an eine Königin von Gallien. Dieser Brief spricht unter anderem die Koexistenz eines päpstlichen, kirchlichen Rechts ('nostri predecessoris Bonifatii decreta pro emunitate') und eines weltlichen Volksrechts ('seculi leges') an

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[289] Br, fol. 1va; Er1, fol. 11ra, hier bereits eine zusätzliche Allegation: 'Infra D.6 § His ita (D.6 d.p.c.3)'; Gg, fol. 8vb; Ka, fol. 9rb; Kb, fol. 10va; Mc, fol. 2ra; Mv, p. 3a.

[290] Mi, fol. 1ra; Md, fol. 1ra. In Er, fol. 11ra, sind die beiden Allegationen bereits Teil der ersten Glossenschicht (Er1). Die zweite Glossenschicht (Er2) mit dem Apparat *Ordinaturus magister* in der ersten Rezension wiederholt D.96 c.2*, nicht aber C.2 q.1 c.13*.

[291] Der Widerspruch wurde in der *Glossa ordinaria* aufgelöst, indem sie zwischen Urhebern und Mitteln unterschied. *Glossa ordinaria* ad D.1 d.a.c.1 s.v. *Duobus*: 'Signatur contrarium infra xcvi. di. Duo (D.96 c.10) sed (de *add.* ed. Basilea 1500) illis duobus regitur tanquam auctoribus istis tanquam instrumentis'.

[292] Pf I, fol. 101vb, 131vb, 132vab, 193ra, 22ra, 176rb.

und zitiert aus letzterem ('lege uulgari teste').[293] D.11 c.7 bestimmt, dass man auf das Gewohnheitsrecht zurückgreifen soll, wenn die Heilige Schrift ('diuina scriptura, leges diuinae') zu einem Sachverhalt nichts aussagt. Die Komplementarität von 'diuina scriptura' und 'mos populi Dei et instituta maiorum' bzw. von 'leges diuinae' und 'consuetudines ecclesiasticae' erinnert stark an die Gegenüberstellung von 'lex et euangelium' als Quellen des 'ius naturae' einerseits und von 'mos' andererseits in D.1 d.a.c.1. Die Allegation des langen Texts von C.2 q.1 c.18 mag sich auf die periphere Nennung einer Alternative eines kirchlichen oder weltlichen Urteils ('aut in aliquo siue seculari, siue ecclesiastico iudicio') beschränken. Die Verbindung zu D.1 d.a.c.1 bestünde damit einzig in einer weiteren Dualität, nämlich derjenigen der kirchlichen und weltlichen Rechtssphären.

Die letzte Allegation in Pf zu D.1 d.a.c.1 ist C.10 q.1 c.12. Dieser 'canon' handelt von bischöflichen Visitationen, von der Prüfung und Verbesserung der religiösen Bildung des Klerus und von der bischöflichen Unterweisung des Volkes, welche neben Ausführungen über Sünden und Glaubensgrundsätze die Goldene Regel in der negativen Fassung beinhaltet. Wie bei der Allegation von C.2 q.1 c.13 betrifft die Goldene Regel, die die Verbindung zu D.1 d.a.c.1 herstellt, nicht die rechtliche Kernaussage des 'canon', sondern ist Bestandteil einer untergeordneten Aufzählung. Erneut behält der Apparat *Ordinaturus magister* diese Allegation bei, während die *Glossa ordinaria* darauf verzichtet.[294]

Die erste römischrechtliche Allegation taucht bei D.1 c.2 in Bc auf, wo 'ius' definiert wird. Die Allegation verweist auf die Definition von 'iustitia' zu Beginn der *Institutiones* (Inst.1.1pr), die den Begriff 'ius' einschliesst.[295] In Aa und Pf fehlt diese

[293] C.12 q.2 c.8. Vielleicht ist auch die Fortsetzung in C.12 q.2 c.9 mitgemeint, welche in Pf I, fol. 193ra, nur mit einer einfachen Majuskel im Textblock vom vorangehenden c.8 abgetrennt ist.
[294] Er2, fol. 11ra; Mi, fol. 1va. Md, fol. 1ra hingegen: 'Infra xvi. Placuit (D.16 c.4)'. Vielleicht verschrieben 'xvi.' statt 'x. q.i.' *Glossa ordinaria* ad C.10 q.1 c.12.
[295] Inst. 1.1pr:'Iustitia est constans et perpetua voluntas ius suum cuique tribuens. Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia'.

Allegation, während sie in den meisten anderen frühen glossierten Handschriften vorhanden ist.[296] Bei D.1 c.7, wo das 'ius naturale' definiert wird, stehen erstmals in allen drei untersuchten Handschriften Allegationen der justinianischen Rechtsbücher. Aa und Bc verweisen—wie mindestens drei weitere frühe *Decretum*-Handschriften[297]—auf die Textstelle Dig. 1.1.7, die das 'ius civile' (und das 'ius praetorium') definiert.[298] Der Verweis auf das 'ius civile' gründet vielleicht auf dessen Gegensatz oder Komplementarität zum 'ius naturale'. Eigentlich würde man diese Allegation beim nächsten 'canon', nämlich bei D.1 c.8 erwarten, der eine kurze Umschreibung des 'ius civile' enthält. Die *Glossa ordinaria* nennt diese Allegation bei D.1 c.7 zwar nicht mehr, doch handelt sie ebenfalls an dieser Stelle vom 'ius civile'.[299]

Pf weicht in der Glossierung von D.1 c.7 völlig von Aa und Bc ab, denn die Handschrift allegiert zunächst als Konträrstellen Dig. 1.1.3 und Cod. 7.33.12. Danach verweist Pf auf Dig. 1.1.9 und Inst. 1.2, während Aa Inst. 1.2.1 und Bc Dig. 1.1.9 und Inst. 1.2.1 bei D.1 c.8 vermerken. Dig. 1.1.9 erläutert den Unterschied zwischen 'ius civile' und 'ius gentium', wobei letzteres als 'naturalis ratio inter omnes homines' erklärt wird, was wiederum das 'ius naturale' evoziert.[300] Inst. 1.2 behandelt zu Beginn das 'ius naturale' (pr), danach das 'ius gentium' (§ 1) und das 'ius civile' (§ 2). Die *Glossa ordinaria* greift bei D.1 c.7 auf Inst. 1.2pr zurück, um mit dieser und zahlreichen anderen Allegationen die verschiedenen Bedeutungen von 'ius naturale' zu eröffnen.[301] Im

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[296] Br, fol. 1va; Er1, fol. 11ra; Gg, fol. 8vb: 'D. de iust. et iure (Inst. 1.1)'; Ka, fol. 9r; Mc, fol. 2ra; Mv, p. 3ra. Fehlt hingegen in Kb, fol. 10va.

[297] Br, fol. 1vb; Er1, fol. 11rb; Ka, fol. 9rb.

[298] Dig. 1.1.7pr: 'Ius autem civile est, quod ex legibus, plebis scitis, senatus consultis, decretis principum, auctoritate prudentium venit'.

[299] *Glossa ordinaria* ad D.1 c.7 s.v. *Ius naturale*: 'Similiter ius ciuile dicitur variis modis . . .'

[300] Dig. 1.1.9: 'Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur'.

[301] *Glossa ordinaria* ad D.1 C.7 s.v. *Ius naturale*: 'Secundo modo dicitur natura quidam stimulus sive (seu ed. Basilea 1500) instinctus nature ex sensualitate proueniens ad appetendum vel ad procreandum vel ad educandum xxxii. q. v. horrendus (C.32 q.5 c.17), ff. de ven. inspi. l. i. (Dig. 37.9.1) § Ius naturale insti. de iure na. gen. & ci. in prin. (Inst. 1.2pr)'.

Apparat *Ordinaturus magister* fehlt bei D.1 c.7 ein Verweis auf Inst. 1.2. Dafür allegiert er Inst. 1.2.2 bei D.1 c.8, um das ‘ius civile’ zu definieren.[302]

Der Verweis von D.1 c.7 auf Dig.1.1.3 steht sowohl im Apparat *Ordinaturus magister* als auch in der *Glossa ordinaria*. Der allegierte Digestentext bezieht sich auf den Begriff ‘per vim’ und besagt, dass Gewaltanwendung zur Selbstverteidigung jedem erlaubt ist, dass es aber unrecht und wider die Natur ist, wenn Menschen einander nachstellen.[303] Die Summe des Rufinus nutzt Dig. 1.1.3, um, ausgehend von diesem Schlüsselbegriff, den Unterschied zwischen ‘ius naturale’, aus dem das Recht auf Selbstverteidigung hervorgeht, und dem ‘ius gentium’, das den Bereich der willkürlichen Gewaltanwendung abdeckt, zu erläutern.[304] Die Summe des Paucapalea und die *Summa Parisiensis* verwenden an dieser Stelle einzig Dig. 9.2.45.4.[305] Der Sinn der Allegation von Cod. 7.33.12 bei D.1 c.7 bleibt noch zu entschlüsseln.

Die Untersuchung der beiden ausgewählten Textstellen D.1 c.2 und D.1 c.7 ermöglicht erste Einblicke in die Funktion, die Vielfalt und die Entwicklung der römischrechtlichen Allegationen in den frühen *Decretum*-Handschriften. Während im ersten Fall die Handschriften in zwei Gruppen zerfallen, nämlich diejenigen mit und diejenigen ohne die Allegation Inst. 1.1pr, unterscheidet

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[302] Er2, fol. 11ra; Mi, fol. 1rb; Md, fol. 1rb.

[303] Dig. 1.1.3: ‘Ut vim atque iniuriam propulsemus: nam iure hoc evenit, ut quod quisque ob tutelam corporis sui fecerit, iure fecisse existimetur, et cum inter nos cognationem quandam natura constituit, consequens est hominem homini insidiari nefas esse’. Die Allegation in Er, fol. 11ra, bereits in der ersten Glossenschicht (Er1) vorhanden und in der zweiten Glossenschicht (Er2) nicht wiederholt; Mi, fol. 1ra; Md, fol. 1ra: möglich, aber nicht vollständig lesbar. *Glossa ordinaria* ad D.1 C.7 s.v. *per vim*: ‘quod cuilibet licet: ut ff. de iusti. et iur.: ut vim (Dig.1.1.3)’.

[304] Rufinus, *Summa,* ed. Singer 9: ‘In primo namque titulo Digestorum habetur quod vim atque iniuriam propellere de iure gentium est: si de iure gentium, non igitur de iure naturali, cum aliud sit ius gentium, aliud ius naturale. Sed, ut aiunt ipsi legis periti, aliud est repellere vim tantum, aliud iniuriam etiam propulsare: primum, inquiunt, est de iure naturali’.

[305] *Die Summa des Paucapalea*, ed. Schulte 6; *Summa Parisiensis*, ed. McLaughlin 2.

sich im zweiten Fall Pf von anderen frühen glossierten *Decretum*-Handschriften durch eine abweichende Allegationskette. Betrachtet man das Weiterleben der Allegationen zu den beiden Textstellen, so zeigt sich, dass nur ein kleiner Teil derselben in die *Glossa ordinaria* Eingang fand und dass diese im Verhältnis zu den ausgeschiedenen Allegationen in den frühen *Decretum*-Handschriften nicht unbedingt am verbreitetsten waren. Das bedeutet wiederum in Hinsicht auf die Allegationen, dass ihre Entwicklung nicht linear zur *Glossa ordinaria* hin verläuft, dass sie mindestens teilweise eine wissenschaftliche Bearbeitung des *Decretum Gratiani* bezeugen, die sich von der späteren nicht nur bezüglich des Umfangs und der Form, sondern auch hinsichtlich des Inhalts unterscheidet.

Die übrigen Glossen, vornehmlich Notabilien und diskursive Glossen

Nach den Allegationen seien hier die übrigen edierten Glossen vorgestellt. Ich habe sie mit Rücksicht auf den vorliegenden Forschungsgegenstand in kurze Worterklärungen, Notabilien, Quellenangaben und längere Erklärungen unterteilt. Die entsprechenden Nachweise sind in kompakter Form im Anhang 2 zusammengestellt. Kurze Worterklärungen, einschliesslich Suppletivglossen, tauchen im untersuchten Text von D.1-8 einzig in Bc und Pf auf, meistens zwischen den Zeilen, in Pf zudem selten am Seitenrand. Es handelt sich normalerweise um die Ergänzung eines Worts oder die Nennung eines Synonyms, das häufig durch ‘scilicet’ bzw. ‘id est’ eingeleitet wird. Diese Art der Glossierung knüpft nahtlos an die frühmittelalterliche Wissenschaftspflege im Rahmen des *Trivium* an.[306] Man findet solche kurzen Worterklärungen zusammen mit Korrekturen und Textvarianten auch in frühmittelalterlichen Handschriften von Kanonessammlungen und

[306] Genzmer, ‘Die iustinianische Kodifikation und die Glossatoren’ 388; Paradisi, ‘Le glosse come espressione del pensiero giuridico medievale’ 738-741. Vgl. Wieland, *The Latin Glosse*s 26-46; Eisenhut, *Die Glossen Ekkeharts IV.* 265-269; Bohny, ‘Glossen und Scholien’ 1.124-126; Cinato, *Priscien glosé* 227-229.

Leges,[307] sodann in grösserer Anzahl in Handschriften der justinianischen Rechtsbücher aus dem 11. und beginnenden 12. Jahrhundert zur Zeit der Wiederentdeckung und Wiederherstellung des *Corpus iuris civilis*, die weitgehend noch vor und ausserhalb, allenfalls ganz zu Beginn der Bologneser Rechtsschule geschrieben wurden.[308] Es ist bemerkenswert, dass ein Teil dieser knappen Worterklärungen und Textvarianten aus jenen 'Vorbologneser' Handschriften Eingang in den Glossenapparat des Accursius fand.[309]

Notabilien, deren Text bei ausreichender Länge oft graphisch als auf der Spitze stehendes Dreieck gestaltet wurde, sind in grosser Zahl in Bc, ausnahmsweise auch in Aa und Pf anzutreffen. Häufig ähneln sie dem dem 'canon' vorangestellten 'summarium', exzerpieren einen kurzen Satz oder fassen eine Textpassage zusammen. Manchmal sind sie als 'Accusativus cum infinitivo' ohne das einleitende finite Verb redigiert. Sie dienen als praktische Benutzerhinweise, stellen jedoch wie die gelegentlichen Quellenangaben zu biblischen Textstellen keine Rechtsauslegung dar. Sowohl graphisch hervorgehobene Zusammenfassungen und Inhaltsvermerke als auch Quellenhinweise zu im Grundtext vor-

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[307] Lenz-Ortelli, *Die Handschriften* xviii-xix.

[308] Siehe z.B. die Glossen zur *Epitome Codicis* in Pistoia, Archivio Capitolare, C. 106 (Hs. drittes Viertel 11. Jh., Glossen zweite Hälfte 11. Jh.), die Glossen zu den *Institutiones* in Poppi, Biblioteca Comunale 206 (Hs. letztes Viertel 11. Jh. oder erstes Viertel 12. Jh., Glossen Ende 11. Jh. bis 13. Jh.) und die Glossen zu den *Institutiones* und zur *Epitome Iuliani* in Köln, Historisches Archiv, W 328 (Hs. und Mehrheit der Glossen Anfang 12. Jh.) gemäss *La glossa pistoiese*, ed. Chiappelli 10, 40-64; *Die Institutionenglossen des Gualcausus*, ed. Fitting 13-14, 21, 92-121; *La glossa di Poppi alle istituzioni di Giustiniano*, ed. Crescenzi; Antonio Ciaralli, 'Ancora sul manoscritto pistoiese del Codex (Arch. Cap. C. 106): note paleografiche e codicologiche', *Scrittura e civiltà* 24 (2000) 173-225; Radding-Ciaralli, *The Corpus Iuris Civilis* 108, 111-112, 118-131, 143-147. Weitere Beispiele bei Conrat, *Geschichte* 165, 174, 175-177 mit Anm. 2, 177-180 mit Anm. 2. Vgl. auch Mari, 'Fenomenologia dell'esegesi giuridica bolognese e problemi di critica testuale', 8 Anm. 7 am Ende, 19; Dolezalek, *Repertorium* 461-463; Lange, *Römisches Recht im Mittelalter* 1.23-28.

[309] *La glossa pistoiese*, ed. Chiappelli 10, 40-64; *Die Institutionenglossen des Gualcausus*, ed. Fitting 13-14, 21, 92-121; Conrat, *Geschichte der Quellen und Literatur* 175-177 mit Anm. 2, 177-180 mit Anm. 2.

handenen Zitaten aus der Bibel oder anderen Autoritäten wie Vergil sind bereits aus früheren Jahrhunderten bekannt.[310]

Es scheint sinnvoll, die längeren erläuternden Glossen in zwei Kategorien zu unterteilen, obschon die Grenzen manchmal fliessend sind. Es handelt sich einerseits um Zitate aus oder um Zusammenfassungen von Texten aus dem *Decretum Gratiani*, den justinianischen Rechtsbüchern oder sogar aus anderen Quellen, andererseits um Umschreibungen, Erläuterungen und Auflösungen von Widersprüchen, die alle eine gewisse intellektuelle Eigenleistung des Verfassers bei deren Formulierung voraussetzen. Solche längeren diskursiven Glossen sind in den drei untersuchten Handschriften bei D.1-8 nur selten anzutreffen, nämlich einmal in Aa und je sechsmal in Bc und Pf.[311]

Erläuternde Glossen verschiedenster Art stellen grundsätzlich keine Neuigkeit der juristischen Literatur des 12. Jahrhunderts dar, sondern sind schon früher bezeugt. Dasselbe gilt für die Praxis, ein Zitat aus der Bibel oder anderen Autoritäten wie Vergil, auf welches der Text Bezug nimmt, als Glosse daneben auszuschreiben und vielleicht sogar zu erläutern.[312] Handschriften der justinianischen Kodifikation aus der Übergangszeit vom 11. Jahrhundert bis zum Anfang des 12. Jahrhunderts enthalten auf ihren Seitenrändern gelegentlich Definitionen in Form von wörtlichen Zitaten aus Isidor von Sevilla und Cicero, in seltenen

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[310] Wieland, *The Latin Glosse*s 161-163, 185; Eisenhut, *Die Glossen Ekkeharts IV.* 289-293; Bohny, 'Glossen und Scholien' 1.133-134; Cinato, *Priscien glosé* 243-247. Ebenso *La glossa pistoiese*, ed. Chiappelli 11: 'In generale lo scolio [d.h. die längere Glosse] è la riproduzione del canone di diritto espresso nelle costituzioni; ma non sempre l'interprete segue esclusivamente il testo che illustra, e talvolta se ne distacca, ricorrendo anche ad altri luoghi del Codice giustinianeo;' *Die Institutionenglossen des Gualcausus*, ed. Fitting 21; Conrat, *Geschichte* 171, 333: 'Ihrem Inhalt nach sind die Glossen [zu den Institutionen in der Kölner Handschrift W 328]. . . . rubrikenhafte Inhaltsangaben, die nach dem Texte gebildet sind, ein offenbar Nota bedeutender Vermerk (N), welcher die Aufmerksamkeit des Lesers auf bezügliche Stellen des Textes zu lenken bestimmt ist, das Wort Argumentum an Stellen, die sich wie Regulae juris ausnehmen, schliesslich Erörterungen zum Texte'.

[311] Anhang 2.

[312] Wieland, *The Latin Glosse*s 185-189; Eisenhut, *Die Glossen Ekkeharts IV.* 289-293.

Fällen auch aus verschiedenen Teilen des *Corpus iuris civilis*, und zwar manchmal mit und manchmal ohne (vage) Angabe ihrer Herkunft.[313]

Ein erstes Zitat steht in Pf—übrigens wie in Kb—bereits zu Beginn bei D.1 d.a.c.1.[314] Es handelt sich um eine Definition der Gerechtigkeit, nämlich 'Iustitia est nature tacita conuentio in adiutorium multorum inuenta', die laut ihrem Entdecker Stephan Kuttner von Martin von Braga stammt, in der Überlieferung aber anderen Autoritäten zugewiesen wurde.[315] Sie greift zwar nicht direkt einen Begriff aus D.1 d.a.c.1 auf, streift jedoch das dort behandelte Thema des Naturrechts über die Idee einer natürlichen Ordnung, einer 'stillschweigenden Übereinkunft der Natur' ('nature tacita conuentio').[316] Wie gewisse Allegationen in frühen *Decretum*-Handschriften lebte auch diese Definition der Gerechtigkeit in der späteren Glossentradition nicht mehr fort. Dafür ist sie in der Summe des Paucapalea, in zwei von dieser abhängigen Summen sowie in einzelnen späteren juristischen Schriften vorhanden.[317]

Aa zitiert bei D.1 c.12—ohne Quellenangabe—Dig. 41.3.3, um den Begriff 'usucapio', der im dortigen 'canon' vorkommt, zu bestimmen.[318] Ähnlich verfährt Bc bei D.6 d.p.c.3, wo eine Glosse einen Auszug aus C.2 q.7 d.p.c.27 §3 wiedergibt, um das Wort 'robusti' zu erklären, nur dass hier ausdrücklich die entsprechende Textstelle ('ut infra c.ii. q.vii. § De his etiam') genannt wird.

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[313] *La glossa pistoiese*, ed. Chiappelli 11-13; *Die Institutionenglossen des Gualcausus*, ed. Fitting 37-43; Conrat, *Geschichte* 172-173, 333-335; Dolezalek, *Repertorium* 461 mit Anm. 5.
[314] Kb, fol. 10v.
[315] Stephan Kuttner, 'A Forgotten Definition of Justice', *Mélanges Gérard Fransen*, edd. Stephan Kuttner und Alfons M. Stickler (SG 20; Rom 1976) 2.76-110, hier 79-83; Neudruck in Stephan Kuttner, *The History of Ideas and Doctrines of Canon Law in the Middle Ages* (Variorum Collected Studies Series 113; 2. Aufl. London 1992) V; Pennington, 'Lex naturalis' 574-575.
[316] D.1 d.a.c.1.
[317] Kuttner, 'A Forgotten Definition of Justice' 81-82, 84, 90, 92.
[318] Laut Kantorowicz-Buckland, *Studies in the Glossators*, S. 73, Anm. 2, waren Zitate aus den römischen Rechtsbüchern ohne Quellenangabe in den Schriften der ältesten Glossatoren stark verbreitet.

Einen komplexeren Fall der Glossierung bietet D.1 c.1, exakter die zweite Hälfte von D.1 c.1, in Bc. Dieses Textstück definiert 'fas' als göttliches Recht und 'ius' als menschliches Recht und erklärt den Unterschied zwischen den beiden an einem konkreten Beispiel. Die Überquerung eines fremden Ackers sei 'fas', aber nicht 'ius', also göttliches und nicht menschliches Recht.[319]

Neben dieser Textstelle steht in Bc zunächst die Allegation 'C. de seruit. Per agrum (Cod. 3.34.11)', darunter die diskursive Glosse '§ Nisi seruitutem debeat, set uia publica uti nemo prohibetur', welche den Inhalt von Cod. 3.34.11'Per agrum quidem alienum, qui servitutem non debet, ire vel agere vicino minime licet: uti autem via publica nemo recte prohibetur' in Bezug auf D.1 c.1 zusammenfasst.

Die Art und die Ausrichtung der Allegation und der Glosse in Bc deuten darauf hin, dass in der früheren Überlieferung ursprünglich nur der Verweis auf Cod. 3.34.11 angebracht worden war, bevor eine Zusammenfassung der 'lex' ergänzt wurde. Andere frühe *Decretum*-Handschriften enthalten dieselbe Glosse und Allegation in üblicher Form, nämlich zuerst die Aussage und direkt anschliessend die Allegation, manchmal eingeleitet mit 'ut'.[320] In Kb steht an dieser Stelle dieselbe Allegation mit einem verkürzten Wortlaut: 'Nisi seruitutem debeat C. de seruit. Per agrum (Cod. 3.34.11)'.[321] Die in mehreren Varianten überlieferte Glosse bietet einen Ausnahmefall, für welchen die Durchquerung eines fremden Ackers nicht 'fas', sondern 'ius' ist. Hier fand also eine Präzisierung oder sogar Korrektur der Aussage von D.1 c.1 mit Hilfe des *Codex Iustinianus* statt.

Die diskursive Glosse mit der nachfolgenden *Codex*-Allegation ist in dieser Form im Apparat *Ordinaturus magister* anzutreffen, wo sie mit einem Verweis auf C.23 q.2 c.3 angerei-

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[319] D.1 c.1 § 1: 'Fas lex diuina est: ius lex humana. Transire per agrum alienum, fas est, ius non est'.
[320] Mc, fol. 2ra: '§ Nisi seruitutem debeat, set uiam publicam nemo prohibetur ut C. de seruitutibus Per agrum'. Vgl. Weigand, *Glossen zum Dekret Gratians* 402, Nr. 1, wo jedoch die spezielle, entwicklungsgeschichtlich interessante Anordnung in Bc nicht ersichtlich ist.
[321] Kb, fol. 10v.

chert wurde.[322] Die *Glossa ordinaria* hingegen änderte und erweiterte den Wortlaut und erläuterte unter anderem den juristischen Gehalt der im Apparat *Ordinaturus magister* allegierten Textstelle C.23 q.2 c.3: [323]

> Fas est, id est equum est cum subest causa: et innoxius est transitus: ut xxiii. q.ii. c. ult. (C.23 q.2 c.3) . . . Transire tamen per agrum alienum licet in casibus scilicet si seruitutem debeat: ut C. de ser. per agrum (Cod. 3.34.11).

Der auf Cod. 3.34.11 gründende Zusatz zu D.1 c.1 blieb nicht auf Einzelglossen und Glossenapparate beschränkt. Im Gegensatz zur Summe des Paucapalea verwerteten die Summe des Rufinus und die *Summa Parisiensis* jenen Zusatz, und zwar in verschiedenem Wortlaut, ohne jedoch die Allegation zu nennen, weshalb die Editoren die Verbindung zum *Codex Iustinianus* nicht erkannten.[324] Dieses Beispiel zeigt, dass die frühen Glossen wichtige Quellenhinweise für die Edition von Summen liefern können und, noch grundsätzlicher formuliert, dass die Arbeit mit den frühen Summen immer auch die Beschäftigung mit den frühen Glossen und umgekehrt erfordert.

Unter den komplexen Glossen gibt es solche, für die bisher kein direkter Bezug zu einer externen Rechtsquelle im Sinn einer daraus geschöpften Worterklärung, einer Allegation oder eines Zitats hergestellt werden konnte. Zwei solche Beispiele befinden sich in Pf bei D.1 c.1. Gegenstand der beiden Glossen ist der Satz '(Leges) Diuinae natura, humanae moribus constant' zu Beginn von D.1 c.1. Der erste Satzteil wird mit 'Id est a naturali equitate

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[322] Er2, fol. 11ra links oben mit Verweiszeichen: '§ Nisi seruitutem debeat, set uia publica nemo uir prohibitur arg. infra xxiii. q.ii. cap. ult. (C.23 q.2 c.3), arg. C. de seruitu. Per agrum (Cod. 3.34.11)'; identisch in Mi, fol. 1ra links oben mit Verweiszeichen; Md, fol. 1ra neben der Textstelle am Seitenrand.

[323] *Glossa ordinaria* ad D.1 c.1 s.v. *Fas est*.

[324] *Summa des Paucapalea* ad D.1 c.1, ed. Schulte 4: 'i.e. quantum ad humanam legem non est licitum transire, domino renitente vel non permittente, quantum vero ad divinam licitum est, qua omnium naturali maxime iure communis est possessio'; Rufinus, *Summa* ad D.1 c.1, ed. Singer 8: 'iure naturali, quo sunt omnia communia, licitum est transire per agrum alienum; de iure humano non licet, nisi forte ager, per quem transit, servitutem debeat agro transeuntis'; *Summa Parisiensis* ad D.1 c.1 s.v. *fas*, ed. McLaughlin 1: 'i.e. faciendum jure naturali quasi diceret non est juris laquaeis innodatum ut cuicumque peragi liber sit transitus nec debeat ei servitutem sed jure naturali est licitum'.

habent initium' erläutert, wobei der Akzent von einer Zustandsbeschreibung zur Herkunftsherleitung verschoben wird.[325] Diese Glosse steht fast gleichlautend in der Summe des Paucapalea.[326] Die zweite Glosse besagt wohl in Vorwegnahme von D.1 c.5 und in Bezug auf die 'mores', aus welchen die 'leges humanae' bestehen, dass die 'consuetudo scripta et non scripta' sein kann. Eine vergleichbare Glosse ohne unmittelbaren Bezug zu einer externen Rechtsquelle liegt wahrscheinlich in Pf bei D.2 c.6 vor, wo die 'premia patrum (patrum premia Pf) pro suscipiendis liberis' erläutert werden.[327] Man findet denselben Wortlaut als Teil des Kommentars in der Summe *Antiquitate et tempore*, nicht aber im Apparat *Ordinaturus magister* und in der *Glossa ordinaria*.[328]

Eine für die Rechtsentwicklung interessante Glosse steht in Bc bei D.1 c.5. Dieser 'canon' hält am Anfang fest, dass das Gewohnheitsrecht zur Anwendung gelangt, wenn gesetztes Recht fehlt.[329] Der Glossator ergänzte, dass, falls beide, also Gewohnheitsrecht und gesetztes Recht, fehlen, 'de similibus ad similia procedendum est', also nach dem Analogieprinzip zu verfahren ist.[330] Die Lehre der analogen Rechtsanwendung, die die Gelehrten des römischen und kanonischen Rechts entwickelten, wird in der nach oben abgesetzten, zusammen mit zwei weiteren Verweisen (D.11 c.7, *Lombarda* 2.40) überlieferten Allegation von Dig. 1.3.32 mindestens angetönt. Denn dieses Digestenfragment fordert, bei Fehlen von geschriebenem Gesetz und von Gewohnheitsrecht das zu

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[325] Kuttner, 'A Forgotten Definition of Justice' 80-81.
[326] Die Quellen- und Literaturnachweise finden sich in der Edition. Anhang 1: in Pf bei D.1 c.1.
[327] D.2 c.6.
[328] Anhang 1: Pf bei D.2 c.6. Fehlt in Er2, fol. 11va; Mi, fol. 1rb; Md, fol. 1rb. Fehlt in *Glossa ordinaria* ad D.2 c.6.
[329] D.1 c.5pr: 'Consuetudo autem est ius quoddam moribus institutum, quod pro lege suscipitur, cum deficit lex'.
[330] Anhang 1: Bc bei D.1 c.5. Vgl. Harald Siems, 'Die Analogie als Wegbereiterin zur mittelalterlichen Rechtswissenschaft', *Europa an der Wende vom 11. zum 12. Jahrhundert: Beiträge zu Ehren von Werner Goez*, ed. Klaus Herbers (Stuttgart 2001) 143-170, hier 146-149.

beobachten, was am nächsten und folgerichtig ist, oder notfalls das Recht der Stadt Rom anzuwenden.[331]

Die Glosse mit dem Analogieprinzip ist in den meisten von mir eingesehenen glossierten Handschriften der zweiten Hälfte des 12. Jahrhunderts vorhanden.[332] Man trifft sie überdies in fast identischem Wortlaut in der *Summa Parisiensis* und in der Summe des Stephan von Tournai an.[333] Die besagte diskursive Glosse fand, um einen Zusatz samt Allegation (D.20 c.3) erweitert, Eingang in den Apparat *Ordinaturus magister*. In der *Glossa ordinaria* steht schliesslich das Äquivalent der Glosse in anderem Wortlaut, weiter ausgearbeitet und unter Verwendung der oben erwähnten Allegation von Dig. 1.3.32 und einer neuen Allegation von Dig. 1.3.12 gegen Ende eines langen Kommentars zu D.1 c.5. Spätestens die *Glossa ordinaria* verbindet somit die beiden *sedes materiae* des Analogieprinzips im römischen und kanonischen Recht, Dig. 1.3.12 und D.1 c.5, miteinander. Die Allegation von Dig. 1.3.32 in Bc bei D.1 c.5 und auf den Seitenrändern anderer früher *Decretum*-Handschriften, die später in den Apparat *Ordinaturus magister* und in die *Glossa ordinaria* einging, beweist wiederum, dass die Allegationen in organischer Verbindung zu den übrigen Glossen stehen und zusammen mit diesen zu edieren und analysieren sind.

Bc enthält eine längere scharfsinnige Glosse zu D.8 d.p.c.1, ein 'dictum Gratiani', das den Vorrang des Naturrechts vor allem anderen Recht und die Ungültigkeit von letzterem im Fall eines Widerspruchs mit ersterem postuliert.[334] Der Verfasser der Glosse entgegnet zunächst dem 'dictum', indem er—möglicherweise in Anlehnung an Inst. 1.2.2—auf den Widerspruch zwischen der ursprünglichen Freiheit aller Menschen nach dem Naturrecht

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[331] Dig. 1.3.32pr: 'De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine inductum est: et si qua in re hoc deficeret, tunc quod proximum et consequens ei est: si nec id quidem appareat, tunc ius, quo urbs Roma utitur, servari oportet'.

[332] Anhang 3.

[333] Anhang 1: Bc bei D.1 c.5.

[334] D.8 d.p.c.1: 'Dignitate uero ius naturale simpliciter preualet consuetudini et constitutioni. Quecunque enim uel moribus recepta sunt, uel scriptis comprehensa, si naturali iuri fuerint aduersa, uana et irrita sunt habenda'.

einerseits und dem Aufkommen und der Rechtmässigkeit der Sklaverei nach dem Gewohnheitsrecht, Völkerrecht und den Gesetzen andererseits hinweist. Danach wird der Widerspruch aufgelöst, und zwar mit der Distinktion von geschriebenem und ungeschriebenem Naturrecht und mit dem Hinweis, dass nur das geschriebene Naturrecht eindeutig dem übrigen Recht voranstehe.[335] Die spätere Glossenüberlieferung scheint diesen Gedankengang nicht aufgenommen zu haben, denn er fehlt im Apparat *Ordinaturus magister* und in der *Glossa ordinaria*.[336]

Obschon nicht sämtliche im Anhang 1 edierten diskursiven Glossen untersucht werden konnten, glaube ich, einige wichtige Erkenntnisse oder Eindrücke gewonnen zu haben. Die untersuchten Beispiele zeigen zwei verschiedene Facetten der ältesten längeren, komplexen diskursiven Glossen zum *Decretum Gratiani* auf, nämlich deren Originalität und deren lange Wirkung in Bezug auf die spätere Glossenüberlieferung. Einerseits scheiden die Gerechtigkeitsdefinition in Pf und Kb bei D.1 d.a.c.1, die Erläuterung zu 'premia patria' in D.2 c.6 in Pf sowie die Auflösung eines erörterten Widerspruchs bei D.8 d.p.c.1 in Bc in der nachfolgenden Glossierung aus. Andererseits leben gewisse diskursive Glossen über den Apparat *Ordinaturus magister* bis in die *Glossa ordinaria* fort. Darunter befinden sich z.B. die diskursive Glosse in Bc bei D.1 c.1, die Cod. 3.34.11 allegiert und zusammenfasst und die rechtliche Aussage des 'canon' ergänzt oder modifiziert, und diejenige in Bc bei D.1 c.5, die in vorerst noch lockerer Verbindung mit der Allegation von Dig. 1.3.32 das wichtige Analogieprinzip postuliert.

Summen und Glossen

Die Forschung hat sich, wie in der Forschungsübersicht bereits erwähnt wurde, schon mehrmals eingehend mit dem Verhältnis von diskursiven Glossen und den frühen Summen beschäftigt. Die Glossenedition von D.1-8 auf der Grundlage von drei Hand-

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[335] Anhang 1: Bc bei D.8 d.p.c.1.

[336] Er2, fol. 13va; Md, fol. 2rb-3ra. *Glossa ordinaria* ad D.8 c.1 ad s.v. *Dignitate*.

schriften erlaubt uns ebenfalls, dieses Verhältnis zu beleuchten. Die Definition von 'iustitia' in Pf bei D.1 d.a.c.1, die Erklärung zu 'diuinae leges' in Pf bei D.1 c.1, die aus Dig. 41.3.3 exzerpierte Definition von 'usucapio' in Aa bei D.1 c.12 und eine längere Erläuterung in Bc zu D.5 c.4 stehen, in identischem oder ähnlichem Wortlaut, in der Summe des Paucapalea. Weitere Parallelen existieren zwischen einer Glosse in Pf zu D.2 c.6 und der Summe *Antiquitate et tempore*, zwischen zwei Glossen in Bc zu D.5 c.4 und der Summe des Stephan von Tournai und zwischen einer Glosse in Bc zu D.8 d.p.c.1 und der *Summa Alenconensis*.[337] Obschon die Materialbasis für eine grundsätzliche Stellungnahme zum Verhältnis zwischen diskursiven Glossen und Summen aus der Frühzeit der Dekretistik zu dünn ist, möchte man aufgrund der Vielfalt der Parallelen doch für eine zeitliche Präzedenz der diskursiven Glossen vor den Summen plädieren. Es liesse sich nämlich kaum erklären, weshalb ein oder mehrere Rechtsgelehrte für so wenige diskursive Glossen auf mehrere Summen zurückgreifen würden bzw. wie die relativ wenigen diskursiven Glossen in einem so frühen Überlieferungsstadium aus so vielen verschiedenen Summen stammen könnten.

Während sich die Forschung normalerweise auf die Beziehung der Dekretsummen zu den diskursiven Glossen beschränkt hat, soll hier auch das Verhältnis zu den Allegationen beurteilt werden. Die drei Handschriften Aa, Bc und Pf enthalten mehrere Allegationen zu externen Rechtsquellen, die als ausgeschriebene Kommentare an entsprechender Stelle in die Summe des Paucapalea eingeflossen sind. Man findet somit dasselbe Phänomen wieder, das wir innerhalb der Glossen bereits festgestellt haben: Anstatt sich mit einer Allegation zu begnügen, schrieb man manchmal den allegierten Text eines Rechtsbuchs aus.

Es überrascht nicht, dass man für die Begriffsbestimmung des 'ius naturale', 'ius ciuile' und 'ius gentium' in D.1 c.6-11 auf die Behandlung derselben in den *Institutiones* und *Digesta* zurückgriff. Die Summe des Paucapalea verwertete in einem Teil ihrer

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[337] Anhang 1: Aa bei D.1 c.12; in Bc bei D.5 c.4, D.8 d.p.c.1; in Pf bei D.1 d.a.c.1, D.1 c.1, D.2 c.6.

Ausführungen dem Sinn oder sogar dem Wortlaut nach genau diese allegierten Texte. So wird in Pf bei D.1 c.6 Inst. 1.2pr allegiert, um auf die dortige Erläuterung des Begriffs 'ius naturale' zu verweisen.[338] Die Kommentierung von D.1 c.6-7 in der Summe des Paucapalea stützt sich im Zusammenhang mit der 'viri et femine coniunctio' auf einen Wortlaut (viri et femine coniunctio, quam nos matrimonium appellamus), der an eine Passage in Inst. 1.2pr (maris atque feminae coniunctio, quam nos matrimonium appellamus) erinnert. Aa allegiert bei D.1 c.8 und c.9, die das 'ius ciuile' und das 'ius gentium' definieren, Inst. 1.2.1 und Inst. 1.2.2.[339] Die beiden allegierten Texte beeinflussten—wie bereits Viejo-Ximénez vermerkte—die Summe des Paucapalea zu den besagten Kapiteln im *Decretum Gratiani*, besonders deutlich im Beispiel eines 'ius civile Atheniensium (Inst. 1.2.2)' und im Satz 'Iure enim naturali ab initio omnes homines liberi nascebantur (Inst. 1.2.2)', der im Wortlaut übernommen wurde.[340] Das deutlichste und in zwei von unseren drei Handschriften belegte Beispiel einer Allegation eines römischrechtlichen Texts, der in der Summe des Paucapalea ausformuliert wurde, betrifft die Definition des 'ius publicum' in D.1 c.11. Sowohl Aa als auch Bc allegieren dort die Textstelle Dig. 1.1.1.2, welche in Form von Exzerpten in umgekehrter Reihenfolge den grössten Teil für den Text der Summe zu D.1 c.11 liefert.[341] Der Apparat *Ordinaturus magister* nahm übrigens diese Allegation im Gegensatz zur *Glossa ordinaria* ebenfalls auf.[342]

Solche wirkungsmächtige Allegationen beschränken sich nicht auf das *Corpus iuris civilis*, sondern schliessen auch das Dekret von Burchard von Worms ein. Die erste Burchard-Allegation in unserer Edition betrifft D.5 c.2. Laut diesem 'canon' darf eine Frau unmittelbar nach der Geburt die Kirche betreten, um

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338 Anhang 1: Pf bei D.1 c.6.
339 Anhang 1: Aa bei D.1 c.8 und c.9.
340 Viejo-Ximénez, 'La *Summa Quoniam in omnibus* de Paucapalea' 172.
341 Anhang 1: Aa und Bc bei D.1 c.11. Viejo-Ximénez, 'La *Summa Quoniam in omnibus* de Paucapalea' 156-157.
342 Er1&2, fol. 11rb; Mi, fol. 1rb; Md, fol. 1rb: 'ff. de iusti. et iure l.i. § Publicum (Dig. 1.1.1.2 publicum)'. Fehlt in *Glossa ordinaria* ad D.1 c.11.

Gott zu danken.[343] Daneben steht sowohl in Aa als auch in Bc die Allegation 'B. xviiii. contra Mulier que (BD 19.141)'.[344] Gemäss der auf den Seitenrändern notierten Konträrstelle in Burchards Dekret ist es der Frau hingegen verboten, nach der Geburt eines Knaben bzw. eines Mädchens die Kirche während 33 bzw. 56 Tagen zu betreten.[345] Obschon die Editionen für eine tiefschürfende philologische Prüfung des Sachverhalts unzureichend sind, ist unverkennbar, dass die Summe des Paucapalea zu D.5 die relevante Passage aus Burchards Dekret (samt der 'inscriptio') übernimmt und nicht aus der angegebenen Quelle, dem Bussbuch von Theodor von Canterbury.[346] Die Summe des Paucapalea bei D.5 c.2 lautet:[347]

> Et sciendum est, quod, ut dicit beatus Gregorius: Si mulier hora eadem etc. (= Incipit von D.5 c.2). Sed in poenitentiali Theodori contra legitur, ut si mulier ante praefinitum tempus praesumpserit ecclesiam intrare, tot dies in pane et aqua poeniteat, quot ecclesia carere debuerat (= BD 19.141). Solutio. Beatus Greg. illam dicit in hoc non peccare, quae gratias actura humiliter ecclesiam ingreditur. Theodorus vero de ea dicit, quae non causa orationis sed alia qualibet necessitate ducta temere ingreditur. Sic et menstrua orationis causa non prohibitur ecclesiam ingredi.

In diesem spezifischen Fall nimmt also die Burchard-Allegation in Aa und Bc, die übrigens auch in Ka vorkommt,[348] die

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[343] D.5 c.2: 'Si mulier eadem hora qua genuerit actura gratias intrat ecclesiam, nullo pondere peccati grauatur …'

[344] Anhänge 1 und 4: in Aa und Bc bei D.5 c.2.

[345] BD 19.141; edd. Fransen-Kölzer, fol. 217rb: '(Ex ponitentiali Theododori): Mulier quae intrat Ecclesiam ante mundum sanguinem post partum, si masculum generat, XXXIII dies, si feminam LVI. Si qua autem praesumpserit ante tempus praefinitum Ecclesiam intrare: tot dies in pane et aqua peniteat, quot Ecclesia carere debuerat. Qui autem concubuerit cum ea his diebus, decem dies poeniteat in pane et aqua'. Vgl. Hoffmann-Pokorny, *Das Dekret des Bischofs Burchard von Worms* 239.

[346] Friedrich W. H. Wasserschleben, *Die Bussordnungen der abendländischen Kirche* (Halle 1851; Neudruck Graz 1958) 199, §18: 'Similiter poeniteant, quae intrant ecclesiam ante mundum sanguinem post partum, i.e. XL dies'. *Paenitentiale Umbrense* I, 14,18, ed. Michael D. Elliot, online unter http://individual.utoronto.ca/michaelelliot/manuscripts/texts/transcriptions/pthu.pdf. 17 (eingesehen am 1.12.2017): 'Similiter peniteat quae intrat in ecclesiam ante mundum sanguinem post partum, id est XL diebus'.

[347] *Die Summa des Paucapalea*, ed. Schulte 11.

[348] Ka, fol. 10v.

ausführlichere Diskussion der Frage in der Summe des Paucapalea vorweg, ohne jedoch schon wie diese eine 'solutio' liefern zu können. Abgesehen von Viejo-Ximénez, der dieselbe Textstelle untersucht hat, scheint bislang niemand Burchard als Quelle für die Summe in Erwägung gezogen zu haben.[349] Im Gegensatz zur Summe des Paucapalea nennt Rufinus in seiner weitschweifigen Behandlung dieses 'canon' nicht nur das *Poenitentiale* des Theodor als eigentliche Autorität, sondern auch das Dekret des Burchard als unmittelbare Quelle.[350]

Die untersuchten Allegationen von Inst. 1.2pr, Inst. 1.2.1, Inst. 1.2.2, Dig. 1.1.12 und BD 19.141, die in verschiedener Auswahl auf den Seitenrändern von Aa, Bc und Pf zu Beginn des *Decretum Gratiani* anzutreffen sind, lieferten wesentliche Bausteine für die Kommentierung von D.1 c.6-7, D.1 c.8-9 und D.1 c.11 in der Summe des Paucapalea. Der Prozess der Anreicherung der knappen Allegationen durch wörtliche Zitate aus der allegierten Textstelle oder durch Erläuterungen dazu, den wir auf den Seitenrändern der Handschriften des *Decretum Gratiani* beobachtet haben, wirkte sich auch auf die älteste Dekretsumme aus.

Allegationen von Burchards Dekret

Aa, Bc und Pf überliefern zahlreiche Allegationen von Burchards Dekret. Die Ergänzung des *Decretum Gratiani* mit vielen Verweisen auf eine vorgratianische Kanonessammlung, die in der Komposition von jenem kaum eine Rolle spielte, offenbart, wie bereits festgehalten wurde, eine plötzliche Ausweitung oder Verschiebung der Quellengrundlage der frühen Dekretistik und den relativ offenen Charakter des frühen Texts des *Decretum Gratiani*. Um diesem faszinierenden Phänomen, das die frühen Handschriften des *Decretum Gratiani* grundlegend von den gleichzeitigen Handschriften der justinianischen Kodifikation unterscheidet, Rechnung zu tragen, wurden die Burchard-Allega-

[349] Viejo-Ximénez, 'Una composición sobre el Decreto de Graciano' 219 mit Anm. 64. Vgl. *Die Summa des Paucapalea*, ed. Schulte xiv-xv; Pennington-Müller, 'The Decretists' 128-131.
[350] *Rufinus, Summa* ad D.5 c.1, ed. Singer 16.

tionen zu D.1-20 im Anhang 4 separat zusammengestellt und die systematische Untersuchung entsprechend erweitert.

Gemäss dieser Zusammenstellung kommen die Allegationen von Burchards Dekret jeweils in allen drei, zwei von drei oder nur in einer der drei Handschriften vor. Es ist bemerkenswert, dass die Handschrift Aa (7), die zu D.1-8 die geringste Glossendichte aufweist, zusammen mit Bc (6) rund doppelt so viele Burchard-Allegationen wie die Handschrift Pf (3) enthält, deren Text und Glossen einen späteren Überlieferungszustand wiedergeben. Aus den Unterschieden unter den drei Handschriften folgt, dass die Anreicherung des *Decretum* mit Burchard-Allegationen kein einmaliger oder linearer Vorgang, sondern eine verbreitete Praxis war.

Angesichts der relativ häufigen Burchard-Allegationen drängt sich die Frage nach ihrem Zweck auf. Im Rahmen der Analyse von Aa haben wir bei D.44 c.3 und c.4 bereits die beiden Allegationen BD 3.84 und BD 2.129 angetroffen, die zusätzliche und ausführlichere Belege für die Normen der glossierten 'canones' anführen. Wie die beiden Allegationen von BD 19.112 und BD 20.70 bei C.13 q.2 c.22 und c.23 in Pf I auf fol. 205rab zeigen, sind die allegierten Burchard-Texte manchmal auch kürzer. Die beiden allegierten Texte aus Burchards Dekret liefern hier eine mit Ausnahme der 'inscriptio' identische und eine ähnliche Fassung je eines Teils des 'canon' im *Decretum Gratiani*.[351]

[351] BD 19.112, edd. Fransen-Kölzer, fol. 45va: '(Ex dictis Origenis) Animae defunctorum quatuor modis soluuntur, aut oblationibus sacerdotum, aut precibus sanctorum, aut charorum eleemosynis, aut ieiunio cognatorum'. Identisch mit C.13 q.2 c.22pr, wo dieser 'canon' aber Gregorius (III.) zugeschrieben wird. BD 20.70, edd. Fransen-Kölzer, fol. 232rb: '(Ex dictis Augustini) Quatuor genera sunt oblationis. Pro valde bonis, gratiarum actiones sunt: hoc est, Deo gratias agunt, quia bene vixerunt. Pro non valde bonis, vt plena remissio fiat. Pro non valde malis propitiationes sunt, vt tolerabilior fiat damnatio. Pro valde malis, non adiumenta mortuorum, sed tantum consolationes viuorum sunt'. Teilweise gleicher Wortlaut bei C.13 q.2 c.23 § 2: 'Cum sacrificia altaris siue quarumcumque elemosinarum pro baptizatis omnibus offerentur, pro ualde bonis gratiarum actiones sunt, pro non ualde malis propiciationes sunt, pro ualde malis, etiam si nulla sunt adiumenta mortuorum, tamen uiuorum consolationes sunt. Quibus autem prosunt aut ad hoc prosunt, ut sit plena remissio, aut certe, ut tollerabilior fiat ipsa dampnatio'.

Die erste Allegation von Burchards Dekret in der Edition von D.1-8 steht— wie oben bereits erwähnt—in Aa und Bc bei D.5 c.2. Die dort zitierte Konträrstelle BD 19.141 entfaltete eine grosse Wirkung auf die Dekretistenliteratur, welche die Aufnahme in die Summen des Paucapalea und des Rufinus übersteigt. Weigand hat nämlich den entsprechenden Textauszug im Anhang von zwei Handschriften des *Decretum Gratiani* (Du, Vl) nachgewiesen.[352] Ausserdem gehört diese Konträrstelle zu jenen drei Burchard-Allegationen von insgesamt elf in unserer Edition von D.1-20, die in den Apparat *Ordinaturus magister* eingegangen sind.[353]

D.5 c.2

Aa 11r	B. xviiii. contra Mulier que (BD 19.141)
Bc 18va	B. xviiii. contra Mulier que (BD 19.141)
Er2 12rb	B. xviiii. Mulier (BD 19.141)
Mi 2ra	B. xviiii. Mulier (BD 19.141) contra
Md 2ra	I. (B.) ix. Mulier (BD 19.141) contra

Diese Burchard-Allegation lebte sogar bis zur *Glossa ordinaria* fort. Denn dort wird bei der mittlerweile hinzugefügten ‘palea’ D.5 c.1 der in BD 19.141 überlieferte ‘canon’ aus dem Bussbuch des Theodor von Canterbury zusammengefasst, wobei wie in der Summe des Rufinus ‘brocardo’ statt ‘burchardo’ steht:[354]

> Sed nonne in brocardo legitur in penitentionali theodori: quod femina post partum masculi abstinebit xxxiii. diebus ab ingressu ecclesie: sed post partum femine lxvi. et si ante intrabit tot diebus penitebit in pane et aqua quot diebus intrauit ecclesiam et qui illis diebus commiscetur ei x. diebus penitebit in pane et aqua.

Der nächste Verweis auf das Dekret des Burchard steht in Aa und Bc bei D.5 c.4. Dieser ‘canon’ verbietet dem Mann den Beischlaf mit seiner Frau nach der Geburt, bis das Neugeborene entwöhnt ist.[355] Die allegierte Stelle in Burchard, BD 5.53, erlaubt einer Mutter, nach der Geburt die Kommunion zu empfangen.[356] Eine Verbindung besteht hier nicht zwischen der rechtlichen Kern-

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[352] Weigand, ‘Burchardauszüge’ 441.
[353] Anhang 4.
[354] *Glossa ordinaria* ad D.5 c.1 s.v. *pondere peccati*. Vgl. Rufinus*, Summa* ad D.5 c.2, ed. Singer 16.
[355] D.5 c.4: ‘Ad eius uero concubitum uir suus accedere non debet, quousque qui gignitur ablectetur’.
[356] BD 5.53, edd. Fransen-Kölzer, fol. 99vb: ‘Mulier enixa, si vult, communionem percipiat’.

aussage der beiden 'canones', sondern einzig im Umstand der Frau nach der Geburt und in der Frage, welche Verbote dieser nach sich zieht. Trotz einer vermeintlichen Oberflächlichkeit kann diese rudimentäre Zusammenstellung der rechtlichen Folgen für die Frau und den Mann nach der Geburt von Nutzen sein.

Eine weitere Art der Verknüpfung zwischen dem *Decretum Gratiani* und Burchards Dekret illustriert der Verweis bei D.8 c.3.[357] Gemäss diesem 'canon' sind schlechte Gewohnheiten so schnell wie möglich auszurotten, damit die Gottlosen daraus keinen Anspruch auf ihre Privilegien ableiten und damit ihr frevlerisches und anmassendes Verhalten nicht für Recht und Brauch erklärt wird.[358] Die Allegation 'B. i. Osius episcopus' kann sich theoretisch auf sieben verschiedene Kapitel des ersten Buchs beziehen (BD 1.17, 1.19, 1.26, 1.79, 1.82, 1.118. 1.119). Am wahrscheinlichsten ist der Verweis auf BD 1.79, und zwar aus formalen und inhaltlichen Gründen. Dieser 'canon' beginnt nicht nur mit einem fast identischen Wortlaut, sondern liefert auch ein konkretes Beispiel für eine schlechte Gewohnheit, nämlich diejenige, dass Bischöfe aus Habgier, Ehrgeiz und Herrschersucht auf einen bedeutenderen Bischofssitz wechseln, was streng zu ahnden ist.[359] Diese Allegation ist in verstümmelter Form 'B. Osius episcopus', ohne römische Ziffer zur Angabe des Buchs, in allen drei beigezogenen Textzeugen des Apparats *Ordinaturus magister* vorhanden, nicht aber in der *Glossa ordinaria*.

Eine dem äusseren Anschein nach seltsame Burchard-Allegation befindet sich in Aa am Seitenrand zwischen D.6 c.1

[357] Anhang 1: Bc bei D.8 c.3; Anhang 4: D.8 c.3.

[358] D.8 c.3: 'Mala consuetudo, non minus quam pernitiosa corruptela uitanda est, que nisi citius radicitus euellatur, in priuilegiorum ius ab impiis assumitur, et incipiunt preuaricationes et uariae presumptiones, celerrime non compressae, pro legibus uenerari et priuilegiorum more perpetuo celebrari'.

[359] BD 1.79, edd. Fransen-Kölzer, fol. 10a: 'Osius episcopus dixit: Non minus mala consuetudo, quam perniciosa corruptela funditus eradicanda est, ne cui liceat episcopo de ciuitate sua ad aliam transire ciuitatem. Manifesta est enim causa, pro qua re hoc facere tentat: quum nullus in hac re inuentus sit episcopus, qui de maiore ciuitate ad minorem transiret. Vnde apparet auaritiae ardore eos inflammari, et ambitioni seruire, et vt dominationes agant. Si omnibus placet, huiusmodi pernicies saeuius et austerius vindicetur, vt nec laicam communionem habeat qui talis est. Responderunt vniuersi, placet'.

und D.6 c.3.[360] Sie lautet 'Deest B. v.' und möchte wohl anzeigen, dass im Vergleich zum fünften Buch Burchards, genauer BD 5.43, die Fortsetzung des in D.6 c.1 begonnenen Zitats aus einem Brief von Papst Gregor dem Grossen fehlt.[361] Diese Fortsetzung von D.6 c.1 bzw. die zweite Hälfte von BD 5.43 sollte später in Form einer 'palea' als D.6 c.2 das *Decretum Gratiani* bereichern.[362] Die Burchard-Allegation kündigt an dieser Stelle die spätere Textentwicklung des *Decretum Gratiani* an, ein Phänomen, das Weigand nicht für diese, aber für andere Stellen bereits nachgewiesen hat.[363]

Da solche Allegationen für die Textentwicklung besonders interessant sind, sei zum Abschluss ein ähnlicher Fall ausserhalb von D.1-8 betrachtet. In Aa 23 wurden im Anhang auf fol. 202v, ausserhalb des zentral angelegten Texts, mehrere 'canones', darunter D.17 c.7, sowie danach die beiden Verweise auf BD 1.55 und BD 1.56 nachgetragen. Weigand hat die beiden identischen Allegationen bei D.17 c.7 und die entsprechenden ausgeschriebenen Textstellen aus Burchard in anderen Handschriften dokumentiert.[364] Man findet sie auch im Apparat *Ordinaturus magister*. Ob die ansteigende Fehlerhaftigkeit von der ersten zur zweiten Rezension dieses Apparats handschriftenspezifisch ist oder die langsame Entfremdung von den Burchard-Allegationen widerspiegelt, muss hier offen bleiben:

D.17 c.7*	
Aa 202v	B. i. Item placuit (BD 1.55)
	B. i. Valentinus (BD 1.56)
Bc 29va	B. i. Item placuit (BD 1.55)
	B. i. Valentinus episcopus (BD 1.56)
Er2 20vb	B. i. Item placuit, Valentinus (BD 1.55, 1.56)
Mi 7va	B. i. Placuit item, Valentinus (BD 1.55, 1.56)
Md 8ra	B. primo. Placuit idem, Valentinus (BD 1.55, 1.56)

Unser Augenmerk richtet sich auf die Allegation von BD 1.55, die —über den Zwischenschritt der Ausformulierung in Burchard-Zusätzen im Anhang gewisser Handschriften—als 'palea' D.18 c.1 in das *Decretum Gratiani* aufgenommen wurde. In den oben

[360] Anhang 1: Aa bei D.6 c.1*; Anhang 4: D.6 c.1*.
[361] BD 5.43, edd. Fransen-Kölzer, fol. 98rb-99ra.
[362] Vgl. Weigand, 'Burchardauszüge' 448.
[363] Ibid.
[364] Ibid. 432.

zitierten Handschriften des Apparats *Ordinaturus magister* fehlt diese ‘palea’ noch. Die *Glossa ordinaria* zu D.17 c.7 verweist an ihrem Ende statt auf BD 1.55 bereits auf die dem *Decretum Gratiani* integrierte ‘palea’ D.18 c.1.[365] Die drei Burchard-Allegationen bei D.5 c.2, D.8 c.3 und D.17 c.7, die mindestens bis zum Apparat *Ordinaturus magister* weiterleben, sind laut unserer Zusammenstellung zu D.1-20 jedoch die Ausnahme.[366] Die übrigen acht Allegationen von Burchards Dekret wurden nicht in jenen Apparat einverleibt.

Die Untersuchung der Burchard-Allegationen zu D.1-20 und einiger weiterer in Aa, Bc und Pf hat zu folgenden Ergebnissen geführt. Die Vielfalt und die Abweichungen der Burchard-Allegationen zeigen, dass die wissenschaftliche Bearbeitung des *Decretum Gratiani* unter Benutzung von Burchards Dekret nicht einmalig oder linear zur Textentwicklung, sondern an verschiedenen Orten parallel erfolgte. Die Burchard-Allegationen dienen verschiedenen Zwecken. Sie liefern inhaltlich vergleichbare, ähnliche oder identische Belege anderer Autoritäten für die rechtliche Kernaussage eines ‘canon’ oder für die dort geschilderten Umstände einer Rechtsfolge. Andernorts nennen sie widersprüchliche Bestimmungen oder verweisen auf den zweiten Teil eines Texts, der im *Decretum Gratiani* fehlt, aber bei Burchard zusammen mit dem ersten Teil überliefert wird. Hervorzuheben sind diejenigen Verweise auf Burchards Dekret, die den Text des *Decretum Gratiani* weiterentwickelt haben. Es handelt sich in unserem untersuchten Textteil um die beiden Burchard-Allegationen BD 19.141 und BD 1.55 auf dem Seitenrand bei D.5 c.2 und D.17 c.7, deren ausformulierte Texte im Anhang gewisser *Decretum*-Handschriften zusammengestellt und als ‘paleae’ D.5 c.1 und D.18 c.1 dem *Decretum Gratiani* integriert wurden. Hinzu kommt bei D.6 c.1 ein Verweis auf den ‘canon’ BD 5.43, der im Gegensatz zu jenem nicht nur den ersten, sondern auch den zweiten Teil eines Briefs enthält und somit die ‘palea’ D.6 c.2 mit dem zweiten Teil vorwegnimmt. Unsere Untersuchung hat

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[365] *Glossa ordinaria* ad D.17 c.7 *in fine* : ‘qui licet sint posterius ordinati: tamen preponuntur aliis: ut hic in palea (D.18 c.1)’.
[366] Anhang 4.

überdies gezeigt, dass nur eine Minderheit der Burchard-Allegationen in den Apparat *Ordinaturus magister* und—in gewandelter Form—in die *Glossa ordinaria* Eingang fand. Dieser Befund bekräftigt somit die inhaltliche Originalität der frühen Glossen gegenüber den späteren Apparaten sowie die Notwendigkeit, erstere für sich genommen auf ihren funktionalen und dogmatischen Gehalt zu prüfen.

Schlussfolgerungen und neue Hypothesen

Die grosse Zahl an Einzelbefunden und die häufig auf Stichproben und Beispielen beruhenden Erkenntnisse erlauben es nicht, sämtliche Ergebnisse hier nochmals aufzugreifen und überall ein abschliessendes Urteil zu fällen. Wir beschränken uns deshalb auf die wichtigsten Schlussfolgerungen und einige neue Hypothesen, die der künftigen Forschung zur Prüfung unterbreitet werden sollen.

Aus der Untersuchung von Fd, Aa, Bc und Pf und der punktuellen Betrachtung von anderen frühen glossierten Handschriften des *Decretum Gratiani* geht hervor, dass im 12. Jahrhundert keine einheitlichen Standards für die Gesamtanlage und die farbliche Codierung der Handschriften herrschten und dass das Layout der Glossen in der Mitte und im dritten Viertel des 12. Jahrhunderts mit wenigen Ausnahmen, darunter Bc, noch weniger differenziert war als das der gleichzeitigen römischrechtlichen Bologneser Handschriften mit ihrer dreistufigen Gliederung der verschiedenen Glossenarten. Es fällt zudem auf, dass in Fd, Aa und Bc—im Gegensatz zu Pf—noch keinerlei Siglen auftauchen. Es scheint, als ob die kanonistischen Schulen in ihren Anfängen hinsichtlich der differenzierenden Einrichtung der Glossen und der Verwendung von Siglen einen gewissen Rückstand oder eine gewisse Distanz zum Bologneser Studium des römischen Rechts bis über die Mitte des 12. Jahrhunderts hinaus bewahrten.

Das Layout ist teilweise verknüpft mit der Frage der Funktionalität und der Funktion sowie mit dem Herstellungs- und Gebrauchskontext der *Decretum*-Handschriften. Hilfreich für eine effiziente wissenschaftliche Handhabung und Voraussetzung für

die Erschliessung des Rechtsbuchs mittels (vieler konventioneller) Allegationen sind eine deutlich sichtbare, einheitliche Zählung und Benennung der 'distinctiones', 'causae' und 'quaestiones' auf den Seitenrändern, sodann die einheitliche farbliche und graphische Markierung der Summarien, der Anfänge der 'canones' und der 'dicta Gratiani' und schliesslich ein kontinuierlicher *Decretum*-Text. Die teilweise fehlende, möglicherweise manchmal nachgetragene und unscheinbare Zählung der 'distinctiones', 'quaestiones' und 'causae' ausserhalb des Texts bzw. auf den Seitenrändern in P und zu geringerem Mass in Fd kann als natürliche Folge der frühen Überlieferungsstufe gewertet werden. Da die erste Rezension in P sicherlich und diejenige in Fd wahrscheinlich keine blossen und keine konventionellen Allegationen des *Decretum Gratiani* auf ihren Seitenrändern enthalten, wirkt sich die fehlende Zählung der Textglieder in dieser Hinsicht nicht negativ auf den Gebrauch der Handschriften aus. Die Verbindung von lückenhafter und fehlender Zählung der 'distinctiones' und 'quaestiones' mit der weitgehenden Absenz von Allegationen auf den Seitenrändern ist auch beim *Decretum Gratiani* aus dem Kloster Schäftlarn (Mm), einer Handschrift der zweiten Rezension, anzutreffen. Die Unterteilung der *Pars prima* und der *Pars tertia* in 'distinctiones' und die deutliche Zählung derselben, der 'causae' und der 'quaestiones' auf den Seitenrändern stehen in ihren Anfängen in einem logischen Zusammenhang mit der Verwendung von formalisierten, konventionellen Allegationen des *Decretum Gratiani*.

Die mehrheitlich fehlenden Majuskeln zu Beginn der 'canones' in der ersten Rezension in Fd und die fehlenden Verweiszeichen zwischen der ersten und zweiten Rezension in Aa 43 bedeuten, dass die beiden Handschriften von Beginn an dysfunktionale Aspekte aufwiesen. Es ist ein Glücksfall, dass Fd und Aa in ihrer endgültigen, erweiterten Form mit dem aufgeteilten, nicht kontinuierlichen *Decretum*-Text, der wissenschaftlich nicht effizient zu gebrauchen war, überhaupt erhalten geblieben sind. Solche dysfunktionale Eigenschaften, aber auch die Präsenz und das Fehlen von Glossen, die Dichte und die Art der Glossierung, die Zitierweise der Allegationen, die allegierten

Rechtsbücher sowie der konventionelle oder unkonventionelle Charakter des Layouts offenbaren die ganze Bandbreite an möglichen Herstellungs- und Gebrauchskontexten, die von der analytischen und schöpferischen Bearbeitung des *Decretum Gratiani* an den dynamischen kanonistischen Schulen über die bescheidene oder überkommene wissenschaftliche Auseinandersetzung damit bis zur blossen Abschrift und passiven Verwahrung desselben reichen.

Die Analyse der Glossen in Aa und Bc—den beiden einzigen durchgehend mit Allegationen, Notabilien und diskursiven Glossen versehenen Handschriften mit der ersten Rezension des *Decretum Gratiani*—zeigt eindeutig, dass die überwiegende Mehrheit dieser Glossen erst eingetragen wurde, als die zweite Rezension samt *De consecratione*, deren 'canones' allegiert werden, bereits existierte. Die Glossen in Aa, Bc und Pf besitzen je ein eigenes Profil. Bc und Pf weisen einen dichteren Glossenbestand als Aa auf, wobei Bc über besonders viele Notabilien und Pf über besonders viele Allegationen bei D.1-8 verfügt. Neben Allegationen des *Decretum Gratiani* und des *Corpus iuris civilis* stehen in Aa und Bc auch solche des Dekrets von Burchard von Worms, in Bc und Pf auch solche der *Lombarda*. Pf I unterscheidet sich von den Handschriften Fd, Aa und Bc durch das Vorhandensein von Siglen, nämlich 'p.', 'pa.' und 'Iohs.'.

Bislang wurden nur ganz wenige Glossen zur ersten Rezension nachgewiesen, die vor der Existenz der zweiten Rezension erarbeitet und eingetragen worden sein können. Den Grundstock bilden die seltenen Notabilien und diskursiven Glossen im Textteil der ersten Rezension in Fd, von denen Weigand dreizehn edierte. Diesen sind einige Verweise auf die justinianischen Rechtsbücher beizufügen, die die Textentwicklung von der ersten zur zweiten Rezension zwar ankündigen, die sich aber wegen der Abfolge der Eintragungen und aus textkritischen Gründen nicht organisch zu den tatsächlich ergänzten Texten der zweiten Rezension in Fd weiterentwickelt haben können. Die Sachlage lässt sich nur durch den Rückgriff auf mindestens eine von Fd verschiedene Vorlage erklären.

Einige von der Texthand eingetragene Glossen in der ersten Rezension in Aa 23 und mindestens vier Glossen von zwei Händen (B1 und B2) in Bc, welche ihre Annotationen vor den Zusätzen der zweiten Rezension anbrachten, überschneiden sich teilweise mit Weigands Glossen zur ersten Rezension in Fd und dürften ebenfalls auf die frühsten fassbaren Bearbeitungen des *Decretum Gratiani* zurückgehen. P liefert als indirektes Zeugnis Hinweise auf die Glossierung der ersten Rezension mit zwei zusammengefassten Novellenteilen und einem impliziten Verweis auf eine Aussage im *Codex*. Es fällt auf, dass sich unter diesen wenigen, aber immerhin aus vier Handschriften geschöpften Belegen für die Glossierungspraxis vor Vorliegen der zweiten Rezension keine einzige blosse, alleinstehende Allegation des *Decretum Gratiani* befindet. Mindestens aus den noch erhaltenen Handschriften folgt somit, dass sich die Glossen zur ersten Rezension erstens durch eine sehr geringe Dichte und zweitens durch das Fehlen von reinen marginalen Allegationen des *Decretum Gratiani* charakterisieren. Das Vorherrschen und die grosse Anzahl von Allegationen sind somit Kennzeichen der frühen Handschriften der zweiten, nicht jedoch der ersten Rezension.

Fd verkörpert diesen Sachverhalt bestens, denn die Handschrift enthält offenbar keine blossen Parallel- oder Konträrstellenangaben zum *Decretum Gratiani* im ursprünglichen Teil und nur sehr wenige im Anhang. Die spärliche (Fd, Aa, Bc; als indirektes Zeugnis P) bis quasi inexistente (als direktes Zeugnis P, Pfr) Glossierung der ersten Rezension legt die Hypothese nahe, dass der Fokus der wissenschaftlichen Beschäftigung zunächst auf der Weiterentwicklung, Gliederung und Sicherung des Texts des *Decretum Gratiani* lag, bevor nach Abschluss der zweiten Rezension die Exegese und die Erschliessung des *Decretum* mittels Allegationen, Notabilien und diskursiver Glossen auf den Seitenrändern in den Vordergrund rückten.

Die Untersuchung der Glossen zu D.1-8 in Aa, Bc und Pf bestätigt die Richtigkeit unserer Methode, nicht nur die Notabilien und diskursiven Glossen, sondern auch die blossen Allegationen zu edieren. Manchmal weisen die Allegationen einen innigen Zusammenhang mit den benachbarten diskursiven Glossen auf,

nehmen die künftige Glossenüberlieferung vorweg oder erhellen die gleichzeitigen und kommenden Dekretsummen. Mehrere Beispiele zeigen eindrücklich, wie unscheinbare Allegationen auf den Seitenrändern von frühen *Decretum*-Handschriften die Summen und die Glossierung bis zur *Glossa ordinaria* beeinflussten oder sogar die Texterweiterungen des *Decretum Gratiani* in Form von 'paleae' vorzeichneten.

Nicht alle frühen Glossen, insbesondere auch nicht alle Allegationen, entfalteten eine solche Breiten- und Langzeitwirkung. Denn es gibt es auch Allegationen, die bereits vor dem Apparat *Ordinaturus magister* oder spätestens bei der Zusammenstellung der *Glossa ordinaria* ausgeschieden wurden. Unter ersteren findet sich die Mehrheit der aus D.1-20 edierten Allegationen des Dekrets von Burchard von Worms. Unter letzteren sind Verweise auf das *Decretum Gratiani* anzutreffen, die anstatt Parallelen in der rechtlichen Kernaussage identische Argumente (z.B. die Goldene Regel) oder ähnliche äussere Umstände in zwei 'canones' oder 'dicta' im *Decretum Gratiani* anzeigen. Solche Allegationen widerspiegeln wie die Burchard- und vielleicht die *Lombarda*-Allegationen eine Glossierungspraxis und somit eine juristische Methode, die für eine bestimmte Zeit, um das dritte Viertel und teilweise das letzte Viertel des 12. Jahrhunderts, herrschten, bevor sie verschwanden. Die frühen Glossen zum *Decretum Gratiani* zeichnen sich somit teils durch ihre Langzeitwirkung, teils durch ihre Originalität und Alterität bezüglich der späteren Glossentradition aus.

Die Glossen spielen spätestens seit Vorliegen der zweiten Rezension die entscheidende Rolle in der unmittelbaren wissenschaftlichen Bearbeitung des *Decretum Gratiani*, auch wenn der Text weiterhin durch 'paleae' angereichert werden sollte. Es stellt sich somit die Frage, inwiefern die frühen Glossen (im engeren und weiteren Sinn) eine Neuerung darstellen und inwiefern sie an ältere Traditionen anknüpfen. Während die lexikalischen, textkritischen und sacherläuternden Glossen, die Suppletivglossen und die Korrekturen, die Quellenangaben, die Hervorhebung von Zitaten in Notabilien und der Eintrag von Zitaten aus anderen Autoritäten der frühmittelalterlichen Art der Texterschliessung

entsprechen, stellen die Allegationen die eigentliche Innovation der Glossierung der justinianischen Rechtsbücher und des *Decretum Gratiani* im 12. Jahrhundert dar. Der Formalisierungsgrad, die Klarheit, Präzision und grosse Zahl an internen und externen Verweisen sowie die Praxis, über solche Verweise ermittelte Widersprüche durch eine distinguierende Glosse aufzulösen, unterscheiden diese standardisierten juristischen Allegationen von frühmittelalterlichen Hinweisen zu parallelen und widersprüchlichen Stellen, die man z.B. in Handschriften der Grammatik des Priscian findet, und von den noch sehr seltenen, vagen, formlosen bzw. in ihrer Form variierenden Allegationen in Handschriften der justinianischen Rechtsbücher der Übergangszeit vom 11. bis zum Anfang des 12. Jahrhunderts. Jene formalisierten Allegationen heben sich ebenso von den ältesten Allegationen der ersten Rezension des *Decretum Gratiani* ab, welche mindestens die ursprüngliche Quelle (gemäss der 'inscriptio'), machmal auch eine Richtungsangabe ('supra') und das Incipit des allegierten 'canon' nennen.

Die Allegationen verkörperten wohl das entscheidende dynamische Element, welches das rasche organische Wachstum der Glossen zum *Corpus iuris civilis* und zum *Decretum Gratiani* bis zu einer grossen Dichte ermöglichte, ohne wie bei der biblischen *Glossa ordinaria* in grossem Umfang auf längere und kürzere Exzerpte aus älteren Kommentaren und Traktaten zurückzugreifen.[367] Die Erfindung dieser neuen wissenschaftlichen Methode und die standardisierte Schreibweise der Allegationen vermerkte bereits der Verfasser der *Summa Parisiensis*, der sie wie die Distinktioneneinteilung dem Paucapalea zuschrieb: 'Distinc-

[367] Vgl. Lesley Smith, *The Glossa ordinaria: The Making of a Medieval Bible Commentary* (Commentaria 3; Leiden-Boston 2009), besonders 39-72; Alexander Andrée, 'Editing the Gloss (later *Glossa ordinaria*) on the Gospel of John: A Structural Approach', *The Arts of Editing Medieval Greek and Latin: A Casebook* (Toronto 2016) 2-21.

tiones apposuit in prima parte et ultima Paucapalea, et concordantias atque contrarietates notavit in margine sic: infra, supra, tali Causa vel Distinctione'.[368]

Sankt Gallen.

[368] *Summa Parisiensis*, ed. McLaughlin, pp. X, 1.

Anhang 1: Edition der Glossen zu D.1-8 gemäss Aa, Bc und Pf

Aa[1,2]	Admont, SB, hier Aa 23, erste (1) und zweite (2) Glossenhand
Bc	Barcelona, ACA, Ripoll 78[369]
Pf[1,2]	Paris, BNF, lat. 3884, hier Pf I, Glossen der Texthand (1) und erste Glossenhand (2)
gl.	Worterklärung oder Suppletivglosse
interl.	interlinear
marg.	marginal
W	Ed. Weigand, *Glossen zum Dekret Gratians* 402-423
*	Text bzw. Verweis auf einen Text der zweiten Rezension, der in der ersten fehlt.
(A)	ʿCanon' bzw. ʿdictum' im Anhang
(M)	ʿCanon bzw. ʿdictum' als Marginalie auf dem Seitenrand ergänzt
(Z)	ʿCanon' bzw. ʿdictum' auf einem Zusatzblatt ergänzt

Die Reihenfolge der Glossen folgt exakt den Handschriften, jedoch werden die interlinear oder marginal angebrachten Worterklärungen und Suppletivglossen jeweils am Ende eines 'canon' bzw. 'dictum' unter Angabe des Lemmas zusammengestellt.

D.1 d.a.c.1

Aa[1] 9r	Melc.
	Infra c.ii. q.i. Primo semper (C.2 q.1 c.13*)
Bc 17ra	Infra xcvi. Duo (D.96 c.10*)
	Infra c.ii. q.i. Primo (C.2 q.1 c.13*)
Pf[2] 16ra	§ Iustitia est nature tacita conuentio in adiutorium multorum inuenta.[370]
	Lex diuina: euangelica, Mosaica, ecclesiastica.[371]
	Infra di.xxvi. Duo (D.96 c.10*) contra
	Infra ii. q.i. Primo semper, Multi (C.2 q.1 c.13*, c.18)
	Infra xii. q.ii. Cum deuo. (C.12 q.2 c.8*)
	Infra di.xi. In his (D.11 c.7)
	Infra x. q.i. Placuit (C.10 q.1 c.12*)

[369] Mein Dank gilt Alberto Torra, Subdirector, ACA, Barcelona, der auf meine Bitte hin die Lesung ausgewählter Glossen in Bc auf fol. 17ra, 17vb, 18ra, 18vb, 19ra, 20va, 21ra am Original überprüft hat.
[370] Identisch in *Die Summa des Paucapalea* ad D.1, ed. Schulte 4: 'Iustitia est naturae tacita conventio in adiutorium multorum inventa'. Kuttner, 'A Forgotten Definition of Justice' 80-83.
[371] Dieselbe schematisch dargestellte Distinktion in Kb, fol. 10va. Vgl. Dusil, 'Visuelle Wissensvermittlung'.

D.1 c.1

Bc 17ra	C. de seruit. Per agrum (Cod. 3.34.11)
	§ Nisi seruitutem debeat, set uia publica uti nemo prohibetur (W, Nr. 1).
Pf^2 16ra	§ Id est a naturali equitate habent initium (*fehlt in* W2).[372]
	§ Consuetudine scripta et non scripta (*fehlt in* W2).[373]

D.1 c.2

Bc 17ra	In inst. <de> iustitia et i. Ius. (Inst. 1.1pr)

D.1 c.5

Aa^1 9r	Infra e. d. xi. In his rebus (D.11 c.7)
Bc 17rb	ff. de legibus et const. De quibus (Dig. 1.3.32)
	Infra e. p. di.xi. In his rebus (D.11 c.7) In loth. De scabinis (*Lombarda* 2.40)
	§ Et si utrumque in aliquo negotio deficere contingit, tunc de similibus ad similia procedendum est (W, Nr. 2).[374]
Pf^2 16rb	Infra d. xii. Consuet. (D.12 c.7)
	Infra d. xi. In his rebus (D.11 c.7)
	Infra (In) le. lon. De scabinis et cancellariis Placuit (*Lombarda* 2.40.?)[375]

D.1 d.p.c.5

Pf^2 16rb	Infra xii. q.ii. Cum redemp. (C.12 q.2 c.68*)
	Infra di.viii. c.i. (D.8 c.1)

D.1 c.6

Aa^1 9v	§ Ius aut naturale est aut ciuile aut gentium (*fehlt in* W2).[376]
Pf^2 16rb	Infra (In Inst.) de iustitia et iure li.i. Ius naturale (Inst. 1.2pr)[377]

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[372] Vgl. *Die Summa des Paucapalea* ad D.1, ed. Schulte 4: 'Divinae leges natura, i. e. principium a naturali iure habent'.

[373] Ebenfalls in Kb, fol. 10v.

[374] *The Summa Parisiensis* ad D.1 c.5 *in fine*, ed. McLaughlin 2: 'Sed si haec in aliquo negotio defecerint, de similibus procedetur'; *Die Summa des Stephanus Tornacensis* ad D.1 c.5 s.v. *saluti*, ed. Schulte 9: 'Nota, quia, ubi ius scriptum et consuetudo deficiunt in aliquo negotio, tunc de similibus ad similia procedendum est'.

[375] *Die Summa des Paucapalea*, ed. Schulte XVIII, Anm. 1. Diese Allegation mit dem Incipit 'Placuit' auch in Br, fol. 1va; Kb, fol. 10vb; Mc, fol. 2ra; Mv, p. 3ra. Unter dem Titel 'De scabinis et cancellariis' gibt es kein Kapitel mit dem Beginn 'Placuit' in der *Lombarda* gemäss MGH LL 4.632 (2.40) und *Leges Langobardorum cum argutissimis glosis D. Caroli de Tocco* (Venetiis 1537) 178-179 (2.39). Vgl. Bertram-Blumenthal, 'Fragmente' 105.

[376] Diese Wiedergabe von D.1 c.7 war möglicherweise als Notabilie gedacht, wurde dann aber durchgestrichen.

[377] *Die Summa des Paucapalea* ad D.1 c.6-7, ed. Schulte 5: 'viri et femine coniunctio, quam nos matrimonium appellamus'. Identisch mit einer Wortfolge

D.1 c.7

Aa^1 9v — (D.) de iustitia et iure iuris. Ius autem (Dig. 1.1.7)
Bc 17rb — ff. de iustitia et iure. Iustum (Dig. 1.1.?)
ff. de iustitia er iure. Iuris (?) § Ius autem (Dig. 1.1.7)
Pf^2 16rb — D. de ius. et iure l.iii. (Dig. 1.1.3) contra
C. de prescrip. longi. t. l.ult. (Cod. 7.33.12) contra
D. de ius. et iure li. i. § Omnes (Dig. 1.1.9)
D. (In Inst.) de iure naturali, gentium et ciuili (Inst. 1.2)

D.1 c.8

Aa^1 9v — Infra (In) inst. de iure naturali, gentium et ciuili. Ius autem (Inst. 1.2.1)[378]
Bc 17rb — ff. de iust. et iure l.i. Omnes (Dig. 1.1.9)
In inst. de iure naturali § Set ius quidem (Inst. 1.2.2), § Ius autem (Inst. 1.2.1)

D.1 c.9

Aa^1 9v — Infra de iust. (In Inst.) de iure naturali et gentium et ciuili. Set ius quidem (Inst. 1.2.2)

D.1 c.10

Aa^2 9v — D. de iure et iustitia l.i. Ius g. (Dig. 1.1.1.4)
Bc 17va — ff. de iustitia et iure. Omnes (Dig. 1.1.9)
ff. de iustitia et iure l.i. Ius gentium (Dig. 1.1.1.4)
Pf^2 16va — D. de iure et iustitia. Omnes (Dig. 1.1.9)
D. de ius. et iure. Ius gentium (Dig. 1.1.1.4)
Pf^1 16va — (*interl. gl. s.v. commissio*) pugne

D.1 c.11

Aa^1 9v — D. de iustitia et iure l.i. Huius (Dig. 1.1.1.2)[379]
Bc 17va — ff. de iust. et iure § Huius (Dig. 1.1.1.2)
Pf^{2}16va — D. de ius. et iure. l.i. § Huius (Dig. 1.1.1.2)[380]

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aus Dig. 1.1.1.3: 'maris atque feminae coniunctio, quam nos matrimonium appellamus'. Viejo-Ximénez, 'La *Summa Quoniam in omnibus* de Paucapalea' 157.

[378] Aa, fol. 9v D.1 c.8 und c.9 in umgekehrter Reihenfolge, welche durch die Buchstaben B und A gekennzeichnet wurde. Laut Viejo-Ximénez, 'La *Summa Quoniam in omnibus* de Paucapalea' 172, könnte *Die Summa des Paucapalea* ad D.1 c.8-9, ed. Schulte 6, auf Inst. 1.2.1-2 beruhen, ohne dass die Quellen wörtlich zitiert wurden. Die edierten Glossen stützen diese Vermutung. Fast identisch in Rufinus, *Summa* ad D.1 c.8, ed. Singer 10.

[379] Vgl. *Die Summa des Paucapalea* ad D.1 c.11, ed. Schulte, S.7, wo zwei Auszüge aus Dig. 1.1.1.2 in umgekehrter Reihenfolge wiedergegeben werden. So bereits Viejo-Ximénez, 'La *Summa Quoniam in omnibus* de Paucapalea' 156-157.

[380] Steht in der Handschrift eigentlich zwei Zeilen tiefer bei D.1 c.12 statt bei D.1 c.11.

Pf[1] 16va (*interl. gl. s.v. sacris*) ordinibus[381]

D.1 c.12

Aa[1] 9v In inst. de iure na. et gen. et c. (Inst. 1.2)

Vsucapio est adiectio uel acquisitio dominii per possessionis continuationem temporis lege diffiniti (Dig. 41.3.3; W, Nr. 5).[382]

Aa[2] 9v Capitulum decisum: Vsucapio est. Glosa est non littera uel series.

Bc 17va In inst. de iure naturali (Inst. 1.2)

Pf[2] 16va In inst. de iure naturali et g. et ci. (Inst. 1.2)

D.2 c.1

Aa[2] 9v Infra (In) insti. de iure na. et gen. et ci. (Inst. 1.2)

Bc 17va In inst. de iure naturali § Scrip. (*ex* Inst. 1.2.3 Scriptum)

ff. de legibus et con. Quod (Dig. 1.4.1pr)

In inst. de iure naturali § Lex est (Inst. 1.2.4)

Pf[2] 16va In inst. de iure naturali, g. et ci. (Inst. 1.2)

D. de const. principum § Quod (Dig. 1.4.1pr)

D.2 c.3

Bc 17va ff. de origine iu. (Dig. 1.2)

Pf[2] 16va D. de origine iuris (Dig. 1.2)

D.2 c.6

Aa[1] 10r Infra (In) inst. de lege falcidia (Inst. 2.22)

Bc 17vb In inst. ad l. f. (Inst. 2.22)

(*interl. gl. s.v. pro suscipiendis*) id est pro adoptandis

Pf[2] 16vb In inst. de lege falcidia (Inst. 2.22)

(P)remia patrum pro suscipiendis liberis sunt quod semper in sua sint potestate et, si quid ad eos ab alienis diuoluitur, ei pater dominatur (*fehlt in* W2).[383]

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[381] Bereits Viejo-Ximénez, 'La *Summa Quoniam in omnibus* de Paucapalea' 157 Anm. 23.

[382] Steht im eingerichteten Text unmittelbar nach dem Wort 'usucapionibus' und nicht als Glosse dazu, deshalb wurde der Satz im Text durchgestrichen. Diese Definition aus den Digesten—neben derjenigen von Isidor von Sevilla—ebenfalls in *Die Summa des Paucapalea* ad D.1 c.12, ed. Schulte 8: 'Usucapio est acquisitio dominii per continuationem temporis lege definiti'. Vgl. Weigand, 'Paucapalea' 146, Nr. 2. Identisch in Rufinus, *Summa* ad D.1 c.12, ed. Singer 11. Die Definition der Digesten auch in *The Summa Parisiensis* ad D.1 c.12, ed. McLaughlin 3.

[383] Dieser Wortlaut fast identisch in der Summe *Antiquitate et tempore* ad D.2 c.6 s.v. *continentes patrum premia pro suscipiendis liberis*, ed. Singer, 'Beiträge zur Würdigung der Decretistenlitteratur II' 67: 'premia patrum pro suscipiendis liberis sunt, quod semper liberi in eorum potestate sunt et, si quid ad eos ab alienis devolvitur, ei pater dominatur, nisi forte quod filius in castrensis peculio lucratus fuerit, quia de hoc nichil habebit pater'.

D.2 c.7

Pf^2 16vb	In inst. de lege fal. (Inst. 2.22)

D.2 c.8

Bc 17vb	ff. ad lege. ro. (Dig. 14.2)
	ff. de legibus et con. et s. c. Leg. (Dig. 1.3.7)
Pf^2 16vb	In inst. (D.) de lege rodia (Dig. 14.2)

D.3 d.p.c.2

Pf^2 16vb	Infra di.xcii. cap. penult. (D.92 c.8*) contra
	Infra iii. q.vi. Dudum (C.3 q.6 c.9*) contra. p.
	Infra di.xvii. Regula (D.17 c.2*), Multis (D.17 c.5*), Conciliis (D.17 c.6) contra. p.

D.3. c.3

Bc 18ra	Infra c.xxi. q.ii. Due (C.19 q.2 c.2)
	Infra xxv. q.i. coll. ult. (C.25 q.2 d.p.c.25*?)
Pf^2 17ra	Infra c.xxiiiv. q.i. c.ii. (C.? q.1 c.2?)
	Infra xxv. q.i. c.ult. His ita (C.25 q.1 d.p.c.16 § 1)

D.3 c.4

Aa^1 10r	D. de legibus et con. Legis uirtus (Dig. 1.3.7)
Bc 18ra	ff. de leg. et con. leg. § Si (Dig. 1.3.37)
	Infra c.xxiii. q.iiii. cap. (?) vii. (C.23 q.4 c.7)[384]
	Infra xxvii. q.i. Que Christo, Nubendi, Si quis solli. (C.27 q.1 c.10, c.20, c.30?)
	Infra xxiii. q.iii. Igitur uiole. (C.23 q.4 c.47*)
	Infra xx. q.i. Puelle (C.20 q.1 c.8)
Pf^2 17ra	D. de legibus et s. con. et. Leg. ui. (Dig. 1.3.7)
	D. ad le. corn. de sic. l.i. iii. penult. (Dig. 48.10.1, 3, 32) contra
	Infra c.xxiii. q.iiii. c.vi. Si (C.23 q.4 c.7)
	Infra c.xxii. q.iii. Igitur uiolentes (C.23 q.4 c.47*)
	Infra xx. q.i. § Puelle (C.20 q.1 c.8)

D.4 c.2

$Pf^2$17ra	Infra e. di.xiiii. Sicut (D.14 c.2)
	Infra di.lxv. Mos (D.65 c.6*)
	Infra xv. q.i. In temporis (?)[385]

D.4 d.p.c.2

Bc 18ra	Infra d. xiiii. Sicut (D.14 c.2)
Pf^2 17ra	Infra e. di.xiii. Sicut (D.14 c.2)

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[384] Gemäss Winroth, *Making of Gratian's Decretum* 219, C.23 q.4 c.7 in der ersten Rezension in kürzerer Fassung und mit anderem Incipit als in der zweiten Rezension.

[385] Er2, fol. 11vb: 'Infra xv. q.i. Non est (C.15 q.1 c.10)'.

D.4 c.3
Bc 18rb(M) Infra di.x. D. cap. et cap. ult. (D.10 c.9, c.13)
Infra di.liiii. Quis aut (D.54 c.11)
Pf[2] 17rb Infra di.x. De capitulis et cap. ult. (D.10 c.9, c.13)
D.4 d.p.c.3
Pf[2] 17rb Infra di.liiii. § Qui autem (D.54 d.p.c.4)
Pf[1] (*marg. gl. s.v. pape*) decretum
D.4 c.4*
Bc 18rb(M) Septem ebdomadibus ante Pascha clericos a carnibus debere abstinere (M, W, Nr. 11).
D.4 c.5*
Bc 18rb(M) Infra de consecra. e. di.v. Quadragesima (De cons. D.5 c.16*)
Pf [2]17rb Infra de consecratione ecclesiarum. Quinta
D. cap. Quadragesima (De cons. D.5 c.16*) contra
D.4 c.6
Aa[1] 10v Infra e. di.xliiii. capitulum i. (D.54 c.1)
Infra e. d.xxxv. Sexto die (D.35 c.8*)
Bc 18rb A quinquagesima propositum ieiunandi clericis esse sumendum (W, Nr. 12).
Infra de consecra. e. di.ii. cap. ii. Sacerdotium (De cons. D.2 c.30*)
Infra di.xliiii. cap. i. (D.44 c.1)
Infra di.xxxv. Sexto die (D.35 c.8*)
Infra di.xliiii. Concessa ei (Commessationes? D.44 c.1?)
(*interl. gl. s.v. pensum*) id est pensionem
(*interl. gl. s.v. par*) id est equum
Bc 18va Infra di.xxxv. Luxuriosa res, Sexto (D.35 c.3*, c.8*)
Pf[2]17rb Infra de consecratione ecclesiarum di.iii. ca. vi. Sacerdotibus (De cons. D.3 c.6*) contra
Pf[2] 17va Infra di.xliiii. cap. Commessa. (D.44 c.1)
Infra di.xliiii. capitulo i. (D.44 c.1)
Infra di.xxxv. Sexto die (D.35 c.8*)
D.4 d.p.c.6
Aa[1] 11r Infra xxv. q.i. Hec consona (C.25 q.1 c.13)
Bc 18va Infra c.xxv. Hec consorta (C.25 q.1 c.13)
Quid decretum, quid exortatio faciat (W, Nr. 13). Nota.
Pf[2] 17va Infra xxv. q.i. Hec consona (C.25 q.1 c.13)
Infra xxxv. di.Luxuriosa res, Sexto (D.35 c.3*, c.8*)
Infra c.xxv. q.i. Hec consona (C.25 q.1 c.13)
D. de legibus De quibus in fine (Dig. 1.3.32.1) contra
Infra xxv. q.i. Gg. exorum (C.25 q.1 c.13?)

D.5 d.a.c.1

Aa[1] 11r — Infra xiii. q.i. Precepto (C.14 q.1 c.3*)[386]
In Leuitico (Lv 12,1-5; 15,20)

Bc 18va — Infra di.vi. § His (D.6 d.p.c.3)
Infra xvii. q.i. Precepto (C.14 q.1 c.3*)
In Leuitico (Lv 12,1-5; 15,20; *fehlt in* W, Nr. 13b)

Pf[2] 17vb — Infra xiiii. q.ii. Aug. Precepto (C.14 q.1 c.3*)
Infra di.vi. § His (D.6 d.p.c.3)
Infra xxxii. q.iiii. liberorum (C.32 q.4 c.14*) contra

Pf[1] — (*marg. gl. s.v. eidem*) Angelorum episcopo

D.5 c.2

Aa[1] 11r — B. xviiii. contra Mulier que (BD 19.141)

Bc 18va — B. xviiii. contra Mulier que (BD 19.141)

Pf[2] 17vb — Infra di.xiii. ca. Nerui (D.13 c.2) in fine contra

D.5 c.3

Bc 18vb — Infra de consec. e. di.iiii. Si qua, Placuit (De cons. D.4 c.116*, c.111, 152, 153, 154, 156*?)

Pf[2] 17vb — Infra de consecratione ecclesiarum di.iiii. ca.vii. Si qua et cap. viii. Placuit (De cons. D.4 c.116*, c.111, 152, 153, 154, 156*?)

D.5 c.4

Aa[1] 11v — B. v. Mulier (BD 5.53)[387]

Bc 18va — § Tempus ablectationis hic accipitur cum mulier sine lactis emissione potest esse. Dicitur enim quod in partu pre habundantia lactis infirmentur mulieres, nisi per suum aut alterius puerum desinat lactis abundantia (W, Nr. 15).[388]

Bc 18vb — § Hoc ideo dixisse Augustinum patet ut secundum consilium

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[386] Der allegierte Text fehlt in Aa 23, fol. 197r, 294v. Der Beginn 'Precepto' wie bei Polycarp 1.26.2 gemäss dem Typoskript von Uwe Horst und Carl Erdmann, online unter www.mgh.de/datenbanken/leges/kanonessammlung-polycarp/ (eingesehen am 10.11.2017), und nicht 'Quisquis praeceptis' wie in Friedberg.

[387] Vgl. Ka, fol. 10v und Kb, fol. 12ra bei D.5 c.4: 'B. s.v. *Mulier enixa* (BD 5.53)'.

[388] Teilweise Übereinstimmung mit der ersten der beiden Deutungen in *Die Summa des Paucapalea* ad D.5 c.4, ed. Schulte 12: 'Tempus ablactionis hic accipitur duobus modis: Sive quousque enim mulier puero sine periculo carere potest—dicitur enim, quod pro abundantia lactis mulier in partu infirmatur, nisi lactis abundantia per suum vel alterius puerum minuatur—sive quousque tempus purgationis transierit, quod XL dierum tempus colligitur'. Vgl. Weigand, 'Paucapalea' 146, Nr. 3.

ad continentiam inuitaret, alioquin fere omnes habentes uxores transgressionis arguentur (W, Nr. 16).[389]

Infra c.1 q.i Si concup. (C.15 q.1 c.8*)

B. v. Mulier enixa (BD 5.53)

Bc 19va — Ibi culpas congnocendas ubi culpa non est (W, Nr. 18).

Infra xxii. q.ii. contra. Cum humili (C.22 q.2 c.9)[390]

Solutio. Hic dicit de illis que ignoramus nos comisisse, de quibus dolere debemus. Sicut cum manducando, loquendo committimus quod tamen nescimus; ibi de his de quibus certioramur. Cum enim quis scit se non homicidium comisisse, humilitatis causa mentiri non debet se homicidam esse (W, Nr. 19).[391]

Pf^{2}18ra — (H)oc ideo dixisse argumentum patet ut secundum consilium ad continentiam inuitaret, alioquin omnes fere habentes uxores transgressionis arguerentur (W, Nr. 16). ʒ.(?)

Infra xii. q.ii. (C.12 q.2) contra

Infra xxii. contra. Ag. Incaute (C.22 q.2 c.10)

Pf^{2} 18rb — Infra q.v. contra. Si non licet (C.23 q.5 c.9)[392] Solutio. Hic dicit de illis de quibus scilicet dubitamus uel que ignoramus commisisse nos, de quibus dolere debemus. Sicut est manducando, loquendo commit-timus quod tamen nescimus; ibidem de his de quibus certioramur;cum enim quis scit se homicidam non esse, humilitatis causa se homicidam esse mentiri non debet. § Vel ibi debemus nostras culpas quas ab Adam traximus agnoscere, ubi tamen non peccamus quod uidetur uelle sequens littera quod uidetur uelle sequens littera (sic). ʒ.(?)(W, Nr. 19 Anm.).[393]

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[389] Die beiden diskursiven Glossen (W, Nr. 15 und Nr. 16) erscheinen in ähnlicher, ausführlicherer Form in *Die Summa des Stephanus Tornacensis* ad D.5 c.4, ed. Schulte 17: 'Tempus ablactionis multis modis accipitur, sive usque quo mulier puero sine periculo carere potest. Dicitur enim, quod prae lactis abundantia mulier in partu infirmetur, nisi per suum vel alterius filium lactis superfluitas minuatur. Vel tempus ablactionis tempus intelligitur purificationis. Vel ablactari puer dicitur, quia a lacte separatur et solido cibo uti potest. Quod si ita intelligitur, dicemus argumentum ad continentiam consulendo invitare, alioquin fere omnes habentes uxores transgressionis arguerentur'.

[390] Dieselbe Allegation, aber verschiedener Text in *The Summa Parisiensis* ad D.5 c.4, ed. McLaughlin 5-6; *Rufinus, Summa* ad D.5 c.4, ed. Singer 17.

[391] Vgl. Weigand, *Glossen zum Dekret Gratians* 456.

[392] Gemäss Winroth, *Making of Gratian's Decretum* 219, C.23 q.5 c.9 in der ersten Rezension in kürzerer Fassung und mit anderem Incipit als in der zweiten Rezension.

[393] Das Verweiszeichen dieser Glosse steht beim ersten Wort von D.6 d.a.c.1* statt unmittelbar davor in D.5 c.4.

D.6 c.1*

Aa[1] 11v Infra xv. q.i. Si concupi. (C.15 q.1 c.8*)
Aa[1] 12r Deest B. v. (BD 5.43)
Bc 19va(Z) Ex quibus causis contingat pollutio (W, Nr. 21).
Infra xv. q.i. Si concu. (C.15 q.1 c.8*)
Pf[2] 18rb Infra xv. q.i. Si concupiscam (C.15 q.1 c.8*)
Infra xv. q.i. Si concup. (C.15 q.1 c.8*) contra

D.6 c.2 (*palea*)[394]

Bc 19vb(Z) Infra c.xv. q.i. Merito (C.15 q.1 c.1*)
Infra xii. q.i. Merito (C.15 q.1 c.1*)
Supra di.iiii. p. ult. (D.4 d.p.c.6)

D.6 c.3*

Bc 19ra(Z) Infra c.xv. q.i. Merito (C.15 q.1 c.1*)
Infra xii. q.i. Merito (C.15 q.1 c.1*)
Pf[2] 18vb Infra c.xv. q.i. Merito (C.15 q.1 c.1*)

D.6 d.p.c.3

Aa[2] 12v In Genesi (Gn 10,8-9; W, Nr. 24)
Bc 20ra <Supra d.>iiii. p.ult. (D.4 d.p.c.6)
Quando ius consuetudinis originem habuit (W, Nr. 22).
In Genesi (Gn 10,8-9; *fehlt in* W, Nr. 24)
§ Illi dicuntur robusti qui dum de sua iustitia presumunt misericordiam peccantibus negandam putant et inpendentes reprehendunt ut Infra c.ii. q.vii. § De his etiam (*ex* C.2 q.7 d.p.c.27 De his etiam; W, Nr. 23).
Pf[2]18vb Supra di.iiii. paragra. ult. (D.4 d.p.c.6)
Supra d.iiii. § ult. (D.4 d.p.c.6)

D.7 d.a.c.1

Bc 20ra Quando ius constitutionis originem habuit (W, Nr. 25a).
Pf[2] 18vb (Q)uando ius consuetudinis originem habuit (*fehlt in* W, Nr. 25a).

D.7 c.1

Bc 20rb Infra c.ii. q.vii. § De illis (C.2 q.7 d.p.c.27?)
Institutores legum (W, Nr. 26)
Qui primus Romanis edidit leges (W, Nr. 27)
(*interl. gl. s.v. leges*) scilicet scriptas
(*interl. gl. s.v. iura*) scilicet consuetudinaria
(*interl. gl. s.v. auctoritate*) id est oraculo

D.7 c.2

Bc 20rb (*interl. gl. s.v.* [*H*]*ermogeniani*) scilicet codicis

D.8 d.a.c.1

[394] Vgl. Weigand, 'Versuch einer neuen, differenzierten Liste der Paleae' 126; Buchner, *Die Paleae* 319, 329; Viejo-Ximénez, 'Las *Paleae* del *Decretum Gratiani*' 117, 126, 135.

Bc 20rb	Infra c.xii q.i. Scimus, c.n. (C.12 q.1 c.9, c.2)[395]
Pf^2 19rb	Infra c.xii q.i. Scimus, cap. i. (C.12 q.1 c.9, c.2)
D.8 c.1	
Bc 20va	Infra xvi. q.vii. cap. ult. (C.16 q.7 c.43*)
	Infra xxiiii. q.iiii. c.i. (C.24 q.3 c.1)
	Infra xi. Cum ergo (C.11 q.1 d.p.c.26)
	Infra xvi. q.i. Reuertimini (C.16 q.1 c.65)
	Infra xiii. q.ii. In ecclesiastico (C.13 q.2 c.14)
	Iure humano dici hoc meum esse, illud illius (W, Nr. 29).
	Infra xxiiii. q.iiii. Non inue. (C.23 q.4 c.41*)
Pf^2 19rb	D. de rerum diu. li.iii. (Dig. 1.8.3?) contra
	Supra di.i. Ius naturale (D.1 c.7) contra
	Infra c.xi. q.i. § Cum ergo (C.11 q.1 d.p.c.26)
	Infra c.xii. q.i. cap. i (C.12 q.1 c.1)
	Infra xxvi. cap. i. (C.26 q.? c.1) in fine contra
Pf^2 19va	Infra xxiii. q.iiii. Non inueni (C.23 q.4 c.41*)
D.8 d.p.c.1	
Bc 20va	Supra e. di.v. His (D.6 d.p.c.3)
	Hoc non uidetur uerum. Nam iure naturali omnes homines sunt liberi, postea consuetudine, iure gentium siue lege introductum est ut serui essent qui in bello caperentur et aliis modis et hoc obseruatur, ergo non preualet ius naturale. Set notandum quod ius naturale aliud continetur in scriptis, aliud non. Ius ergo nature scriptum insignitum semper preualet consuetudini et legi (W, Nr. 30).[396]
D.8 c.2	
B 20vb	Infra di.xc. iii. (D.90 c.3*)[397]
Pf^2 19va	Infra paragrapho decreto primo (?)[398]
	Infra xxii. q.iiii. Inter § Set, Innocens § Vnde (C.22 q.4 d.p.c.22, *ex* d.p.c.23 § 6 Vnde?) contra
	Infra di.x. cap. iii. (D.10 c.3*)
D.8 c.3	
Bc 20vb	In aut. Vt nulli iudicum (Auth. Coll. 5.17: Nov. 134)

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[395] Wohl 'n.' statt 'ii.'. Vgl. Br, fol. 3ra bei D.8 c.1: 'Infra c.xii. q.i. cap. ii., S(c)imus (C.12 q. 1 c.2, c.9)'; Er1, fol. 13rb, Ka, fol. 11r, Kb, fol. 12v und Mv, p. 6b bei D.8 c.1: 'Infra c.xii q.i. Scimus, cap. ii. (C.12 q.1 c.9, c.2)'.

[396] Grundsätzlich identisch in der *Summa Alenconensis* ed. Weigand, *Die Naturrechtslehre* 387, Nr. 675. Weigand, 'Paucapalea' 150, Nr. 23. Diesem Befund ist die inhaltliche Parallele der Glosse mit Inst. 1.2.2 beizufügen: '… bella etenim orta sunt et captivitates secutae et servitutes, quae sunt iuri naturali contrariae; iure enim naturali ab initio omnes homines liberi nascebantur …'

[397] Siehe oben bei Anm. 256.

[398] Ka, fol. 11v bei D.8 c.2: 'Infra c.vii. decreto i.'.

B. i. Osius episcopus (BD 1.79)[399]
Pf² 19va Infra (In) au. v. Nulli iudicio (Auth. Coll. 5.17: Nov. 134)

D.8 c.4
Bc 20vb Infra di.xi. c.i. et ult. (D.11 c.1, D.11 c.11*)
Pf² 19vb Infra di.xi. capitulo i. (D.11 c.1)

D.8 c.5
Bc 21ra Vsum ueritati contrarium omnimodo abolendum (W, Nr. 32).

D.8 c.7
Bc 21ra Infra di.xi. In his (D.11 c.7)

D.8 c.8
Pf² 20ra Infra di.xi. In his (D.11 c.7)

Anhang 2: Zusammenstellung der Glossen zu D.1-8 in Aa, Bc und Pf

Hs.	Allegationen[400]	Glossen ausgenommen Allegationen					
	Total D. 1-8	Total D.1-8	Quellenangaben	Kurze Worterklärunge, Suppletivglossen	Notabilien, Inhaltsangaben	Längere Erläuterungen	Andere
Aa	19	5	D.5 d.a.c.1 D.6 d.p.c.3 (2)		D.1 c.6 (1)	D.1 c.12 (1)	D.1 c.12 (1)
Bc	74	26	D.5 d.a.c.1 D.6 d.p.c.3 (2)	D.2 c.6 D.4 c.6 (2) D.7 c.1 (3) D.7 c.2 (7)	D.4 c.4 D.4 c.6 D.4 d.p.c.6 D.5 c.4 D.6 c.1 D.6 d.p.c.3 D.7 d.a.c.1 D.7 c.1 (2) D.8 c.1 D.8 c.5 (11)	D.1 c.1 D.1 c.5 D.5 c.4 (3) D.8 d.p.c.1 (6)	
Pf	87	12		D.1 c.10 D.1 c.11 D.4 d.p.c.3 D.5 d.a.c.1 (4)	D.7 d.a.c.1 (1)	D.1 d.a.c.1 D.1 c.1(2) D.2 c.6 D.5.4(2) (6)	D.1 d.a.c.1 (1)

[399] Diese Allegation wurde ursprünglich zwei Mal geschrieben. Danach wurde die obere Allegation getilgt.
[400] Allegationen, die einer erläuternden Glosse vorausgehen und mit dieser nicht syntaktisch verbunden sind, werden separat gezählt (in Bc bei D.5 c.4, D.8 d.p.c.1; in Pf bei D.5 c.4). Allegationen, die am Schluss einer erläuternden Glosse stehen und mit ‘ut’ eingeleitet werden, werden als Bestandteil dieser angesehen (in Bc bei D.6 d.p.c.3).

Anhang 3: Das Analogieprinzip in den Glossen zu D.1 c.5 von den frühesten *Decretum*-Handschriften über den Apparat *Ordinaturus magister* (Er2, Mi, Md) bis zur *Glossa ordinaria*

D.1 c.5

Aa 9r Infra e. d.xi. In his rebus (D.11 c.7)

Ebenfalls in Cd 6rb, Me 32va.

Bc 17rb ff. de legibus et const. De quibus (Dig. 1.3.32)
Infra e. p. di.xi. In his rebus (D.11 c.7) In loth. De scabinis (*Lombarda* 2.40)
§ Et si utrumque in aliquo negotio deficere contingit, tunc de similibus ad similia procedendum est (W, Nr. 2).

Ebenfalls in Er1 11ra, Gg 8vb, Ka 9rb (diskursive Glosse W, Nr. 2 von anderer Hand), Mc 2rab, Mv 3a; Br 1va ohne die diskursive Glosse (W, Nr. 2).

Pf 16rb Infra d.xii. Consuet. (D.12 c.7)
Infra d.xi. In his rebus (D.11 c.7)
Infra (In) le. lon. De scabinis et cancellariis Placuit (*Lombarda* 2.40.?)

Ebenfalls in Kb 10vb, aber mit der diskursiven Glosse (W, Nr. 2).

Er2 11ra Set si utrumque in aliquo negotio deficere contingit, tunc de similibus ad similia procedendum est uel ita faciendum est ut habeat Infra di.xx. De quibus (D.20 c.3).

Mi 1ra Set si utrumque in aliquo negotio deficere contingit, tunc de similibus ad similia procedendum est uel ita faciendum est ut habetur Infra di.xx. De quibus (D.20 c.3).
Infra di.xi. In his rebus (D.11 c.7)
ff. de legi. et con. De quibus (Dig. 1.3.32)
In lon. De scabinis (*Lombarda* 2.40).

Md 1ra Si utrumque in alio negotio deficere contigit, tunc de similibus ad similia procedendum est uel ita faciendum est ut habetur Infra di.xx. de quibus (D.20 c.3).
Infra d. xi. In his rebus (D.11 c.7)
ff. de legi. et eorum de quibus (Dig. 1.3.32)

Gl. ord.[401]	licet quidam tunc dicant recurrendum ad consuetudinem romanam, deficiente iure et consuetudine procedat de similibus ad similia: ut xx. di. de quibus (D.20 c.3) ff. de legi. l. Non possunt (Dig. 1.3.12) omnibus deficientibus ad roma-nam consuetudinem procedat ut ff. de legi. et con. de quibus (Dig. 1.3.32)

Anhang 4: Edition der Allegationen von Burchards Dekret bei D.1-20 in Aa, Bc und Pf unter Berücksichtigung ihres Weiterlebens im Apparat *Ordinaturus magister* (Er2, Mi, Md)

D.5 c.2	
Aa 11r,	B. xviiii. contra Mulier que (BD 19.141)
Bc 18va	B. xviiii. contra Mulier que (BD 19.141)
Er2 12rb[402]	B. xviiii. Mulier (BD 19.141)
Mi 2ra	B. xviiii. Mulier (BD 19.141) contra
Md 2ra	I. (B.) ix. Mulier (BD 19.141) contra
D.5 c.4	
Aa 11v	B. v. Mulier (BD 5.53)
Bc 18vb	B. v. Mulier (BD 5.53)
D.6 c.1*	
Aa 12r	Deest B. v. (BD 5.43)
D.8 c.3	
Bc 20vb	B. i. Osius episcopus (BD 1.79)
Er2 13vb	B. Osius episcopus (BD 1.79)
Mi 2vb	B. Osius episcopus (BD 1.79)
Md 3ra	b. Osius episcopus (BD 1.79)
D.11 c.7	
Aa 15v	B. iii. Petistis enim per Hil. (BD 3.124)
Bc 22vb	B. iii. Petistis enim per Ylarium (BD 3.124)
Pf 22ra	B. iii. Petistis enim per Ylarium (BD 3.124)
D.12 c.13*	
Aa 202r	B. iii. Ut institutiones (BD 3.66)
Pf 23rb	B. iii. Ut institutiones m. (BD 3.66)
D.15 c.3	
Bc 26rb	B. iii. Pos. (BD 3.220)
D.17 c.2*	
Aa 21v	B. i. Synodorum uero, Quam omnes (BD 1.42, 1.179)
D.17 c.7*	
Aa 202v	B. i. Item placuit (BD 1.55)
Bc 29va	B. i. Item placuit (BD 1.55)

[401] *Glossa ordinaria* ad D.1 c.5 s.v. *Cum deficit* in fine .
[402] Im Text des *Decretum Gratiani* in Er, fol. 12rb, ist die ‘palea’ D.5 c.1 bereits vorhanden, bildet jedoch mit D.5 c.2 einen ‘canon’.

	B. i. Valentinus episcopus (BD 1.56)
Er2 20vb	B. i. Item placuit, Valentinus (BD 1.55, 1.56)
Mi 7va	B. i. Placuit item, Valentinus (BD 1.55, 1.56)
Md 8ra	B. primo Placuit idem, Valentinus (BD 1.55, 1.56)
D.18 c.15*	
Pf 28rb	B. i. Propter humilitatis (utilitatis; BD 1.44)

Leges non dedignantur sacros canones imitari: Canonical Reinterpretation of Justinian's Novel 83.1 (=Authen. 6.12.1) in Lucius III's Decretals[*]

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The relation between Roman law and canon law is a multifaceted and highly nuanced issue. The modest aim of this investigation is to present how medieval canonists elaborated on the relation between the two laws on the margins of their commentaries on two papal decretals from the late twelfth century. Both of them were issued by pope Lucius III, and they both referred to the passage from Justinian's law that the canonists knew from the collection of his legislation in the medieval *Authenticum*. In it the emperor declared that secular laws should not refrain from imitating sacred rules.[1] The research focuses on the most influential commentaries to the decretals written by canonists from the time they were issued up to Panormitanus.

To common maxims that attempted to grasp the complexity of the relation between the two laws, such as 'legista sine canonibus parum valet, canonista sine legibus nihil' or 'Ecclesia vivit lege romana', one may add another maxim—'leges non dedignantur sacros canones imitari'.[2] It seems that both for medieval canonists

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[1] The idea of making use of one law 'in adiutorium' was present also in other sources, see Giuseppe Ermini, 'Ius commune e utrumque ius', *Acta Congressus Iuridici Internationalis VII saeculo a Decretalibus Gregorii IX et XIV a Codice Iustiniano promulgatis, Romae 12-17 Novembris 1934* (Romae 1935) 2.526.

[2] See e.g. Hans E. Feine, 'Vom Vortleben des römischen Rechts in der Kirche', ZRG Kan. Abt. 52 (1956) 1-24; Pierre Legendre, *La pénétration du droit romain dans le droit canonique classique de Gratien à Innocent IV (1140–1254)* (Paris 1964) 17-22; Fredrich Merzbacher, 'Die Parömie "Legista sine canonibus parum valet, canonista sine legibus nihil",' *Collectanea Stephan Kuttner* (SG 13; Bologna 1967) 275-282; Carl G. Fürst, 'Ecclesia vivit lege Romana?' ZRG Kan. Abt. 61 (1975) 17-36; Kenneth Pennington, 'Legista sine canonibus parum valet, canonista sine legibus nihil', BMCL 34 (2017) 249-258.

and for contemporary scholars it may serve as a useful adage to examine this complicated matter in a systematic way.

The Roots: Justinian's Novel and Lucius III's Decretals

There were plenty of regulations referring to ecclesiastical issues in the *Novella* of emperor Justinian. Among them there was *Authenticum* 6.12.1 taken from Justinian's Novel 83.1 which set out the judicial privileges of clergy and the scope of judicial competence of bishops.[3] Medieval jurists did not have access to Justinian's *Novellae* and knew his legislation only from the *Authenticum* and the 'authenticae' that were added to the margins of *Institute* and *Codex* manuscripts. The emperor stated that in criminal accusations against clerics bishops should render judgments without participation of laymen. He referred to canon law's role in making judgments:[4]

> Neque enim volumus talia negotia omnino scire civiles iudices, cum oporteat talia ecclesiastice examinari et emendari animas delinquentium per ecclesiasticam multam secundum sacras et divinas regulas, quas etiam nostre sequi non dedignantur leges.

The interesting part of this sentence was its conclusion which determined the attitude of secular laws toward sacred and divine rules. According to Justinian, secular laws did not refrain from imitating ecclesiastical law.

Canonists found this passage from Justinian's legislation attractive early in the twelfth century. Gratian referred to this imperial law in his 'dictum' concerned with the inappropriateness of infamy for a widow marrying another man at a time of mourning. In such a case Roman law should not be followed

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[3] General notes on this Novel in religious context see Juan A. Bueno Delgado, *La legislación religiosa en la compilación justinianea* (Madrid 2015) 126, 237-242. See also Anne J. Duggan, 'Clerical Exemption in Canon Law from Gratian to the Decretals', *Medieval Worlds* 6 (2017) 79-80.

[4] Authen. 6.12.1 (=Nov. 83.1). In the Middle Ages this Novel was quoted from the *Authenticum*, that is Authen. 6.12.1, not from the *Novellae* of Justinian.

because there were significant changes in this matter in canon law:[5]

> Cum enim leges seculi precipue in matrimoniis sacros canones sequi non dedignentur, non uidentur pronunciare infamem, que apostolica et canonica auctoritate non illicite nubit.

Stephan of Tournai quoted the maxim in his *Summa* in his commentary to D.10 d.a.c.1 s.v. *constitutiones principum*:[6]

> Hic ostendit, imperatorum constitutiones ecclesiasticis postponendas, ibi enim utendum est lege imperatorum, ubi non est contraria legi canonum. Vnde Iustinianus ait: Leges nostre non dedignantur imitari sacros canones.

This sentence from Stephan shows how the openness of the emperor to the use of sacred rules was interpreted by canonists as a proof for the lower position of secular laws in the hierarchy of legal sources.

A significant application of 'leges nostre non dedignantur imitari sacros canones' to canonical jurisprudence was made by pope Lucius III in two decretals. The first one was a papal letter *Ad apostolice sedis* to the Archbishop of Esztergom, the only letter of this pope sent to Hungary.[7] It covered various issues ranging from the customary law on tithes to some specific procedural questions. We cannot say much about the context of issuing this decretal. The exact part of the letter which quoted the maxim was used first in two early decretal collections; then Bernardus Papiensis included it in his decretal collection, *Compilatio prima* with the incipit *Clerici*.[8] The italicized text was deleted by

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[5] C.2 q.3 d.p.c.7, omitted from the earlier recensions of Gratian; See e.g. Gerardo I. Arella, *Nuntiatio novi operis in ecclesiastical legislation* (Romae 1959) 66; José Miguel Viejo-Ximénez, 'La recepción del derecho romano en el derecho canónico', *Annaeus: Anales de la Tradición Romanística* 2 (2005) 157.

[6] Stephen of Tournai, *Summa*, ed. Schulte (Giessen 1891) 19; Munich, BSB lat. 17162, fol. 6vb. See Charles Munier, 'Droit canonique et droit romain d'après Gratien et les décrétistes', *Etudes d'histoire du droit canonique, dédiées à Gabriel Le Bras* (2 vols. Paris 1965) 2.949.

[7] Charles Duggan, 'Decretal Letters to Hungary', *Folia Theologica* 3 (1992) 14; reprinted in *Decretals and the Creation of the 'New Law' in the Twelfth Century: Judges, Judgements, Equity and the Law* (Variorum Collected Studies Series 607; Aldershot, 1998) V.

[8] 1 Comp. 2.1.8 (X 2.1.8).

Raymond de Peñafort when he included the canon in the *Liber extra*:[9]

> Clerici *vero, maxime in criminalibus, in nullo casu possunt ab alio quam ab ecclesiastico iudice condemnari, etiamsi consuetudo regia habeat, ut fures a iudicibus secularibus iudicentur.* Cum imperator dicat quod *etiam* leges *eorum* non dedignantur sacros canones imitari, in quibus generaliter traditur, ut de omni crimine clericus debeat coram ecclesiastico iudice conveniri, nec debeant in hac parte canonibus ex aliqua consuetudine preiudicium generari.

The pope stated that clerics, especially in criminal matters, should not be judged by anyone except an ecclesiastical judge and no custom contrary to this rule was valid. According to canons it was obvious that the criminal matters of the clerics were reserved for the ecclesiastical courts. Besides, the emperor stated that secular laws do not disdain following the holy canons even if royal custom happened to be contrary to canons on this point. Gathering these two points the conclusion appears—no custom should prejudice canons. The ecclesiastical practice of judging criminal affairs of clerics applied to Hungary.

A convincing argument for such an opinion was based on the interpretation of Justinian's maxim. If in the context of criminal cases of clerics the emperor said that 'leges' should follow 'canones', one could not allow the canons be negated by any custom because in this case it would lead to broadening the jurisdiction of secular power over thieves.[10] Again, the reference to the maxim was used as the evidence for the secular recognition of the position of canon law sources. *Clerici* was placed in the title on judges and the focus of its interpretation was put on procedural consequences of ecclesiastical jurisdiction over criminal affairs of clerics.

The second decretal of Lucius III citing the same passage was the answer of the pope to the bishop of Padua, Gerardo da Marostica Offreducci, issued between June and August 1185 and was included by Johannes Galensis in his *Compilatio secunda* ca.

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[9] Duggan, 'Decretal Letters to Hungary' 17.

[10] Duggan, 'Clerical Exemption in Canon Law' 90.

1210-1215.[11] The bishop was a delegated judge to solve the dispute between the prior of the Benedictine monastery of Saint Cyprian in Venice (Isnardus) who was in charge of the baptismal church in Costa and clerics from Rodigo. The latter built the chapel in Costa which was prejudicial to the monks' property. What was even more important, they built the chapel against the objection of the Benedictines who used the Roman institution *novi operis nuntiatio* to stop the detrimental actions of the clerics.[12] The monks asked the pope to judge the case because it was not clear what should be done to satisfy their claim.[13] According to Roman law, the building constructed after the raising of the objection should be destroyed but there was no rule in canon law which allowed applying *novi operis nuntiatio* to ecclesiastical property.

Lucius III, before allowing the bishop to apply Roman law, formulated a unique analogy between the two laws using the quotation from Authen. 6.12.1.[14] He said that as laws did not

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[11] 2 Comp. 3.26.3 (X 5.32.1). Most detailed description of the case was given by Arella, *Nuntiatio novi operis* 20-24, 52-56. There are several works of Antoni Dębiński on this topic written in Polish, but one may learn about his view in his book translated into English: *Church and Roman Law*, trans. K. Szulga (Lublin 2010) 90-96; it was also the main topic of my book available only in Polish with an English summary *Znaczenie dekretału Intelleximus (X 5.32.1) w procesie recepcji prawa rzymskiego w XIII-wiecznej kanonistyce* [*The Significance of the Decretal Intelleximus (X 5.32.1) in the Course of Roman Law Reception in the 13th Century Canon Law Jurisprudence*] (Poznań-Kraków 2018) passim.

[12] On medieval application of *novi operis nuntiatio* see André Gouron, 'Dénonciation de nouvel oeuvre et pratique meridionale', *Life, Law and Letters. Historical Studies in honour of Antonio García y García* (2 vols. SG 28-29; Roma 1998) 401-414, reprinted in *Pionniers du droit occidental au Moyen Âge* (Variorum Collected Studies Series 865; Burlington 2006) XVII.

[13] 2 Comp. 3.26.3; Raymond de Peñafort deleted this section from X 5.32.1: 'ob hoc prefatus prior in iudicio postulabat, quicquid in sepe dicta capella post appellationem ad nos factam et denunciationem novi operis factum fuerat, primitus demoliri. Super quo discretioni tue dubium videbatur, utrum ad hoc canonico procedi posset iudicio, cum nihil denunciatione novi operis sit in canonibus definitum, sedem duxisti apostolicam consulendam'.

[14] Gabriel Le Bras, 'Théologie et Droit Romain dans l'œuvre d'Henri de Suse', *Études historiques à la mémoire de Noel Didier*, ed. Gabriel le Bras (Paris 1960) 199 n. 26; Arella, *Nuntiatio novi operis* 65.

refrain from following sacred canons, conversely sacred provisions of canons were supported by constitutions of secular rulers. It led the pope to order Gerardo, since he was learned in both laws, to resolve the case by applying Roman law in this case:[15]

> Quia vero sicut leges non dedignantur sacros canones imitari, ita et sacrorum statuta canonum priorum principum constitutionibus adiuvantur, fraternitati tuae praesentibus respondemus, quod diligenter considerans, quod post denunciationem novi operis, sive iure sive iniuria aliquid constituatur, de legalibus debet constitutionibus demoliri. Et quia nulla ecclesia in preiudicium est alterius debet construi, ascitis tibi viris prudentibus negotium ipsum secundum canonum et legum statuta appellatione remota non differas terminare. Nam cum te credamus in utroque iure peritum, securius duximus causam per tuam sollicitudinem terminari qui per dicta partium et terminos et fines locorum plenius poteris cognoscere veritatem, quam aliquid a nobis ignorantibus qualitatem negotii definiri.

The decretal in its original form dealt with various issues regarding *novi operis nuntiatio* itself, the prohibition of detrimental actions against an existing church, and procedural points showing how the delegation of judges worked in practice. The following analysis of this decretal will focus only on these aspects of canonists' commentaries that marked the reinterpretation of the maxim.

The later canon law jurisprudence did not pay attention to the circumstance that both decretals were issued by the chancellery of the same pope. We can only ask what was characteristic about the pontificate of Lucius III that the quotation from the maxim was used to describe the relationship between the two laws. The focus here is on the jurisprudence on the decretals of Lucius III, but one should keep in mind that the same passage from Justinian's law was used not only in Gratian's quotation in C.2 q.3 d.p.c.7 in the last recension of his *Decretum*, but also in an early decretal of Pope Innocent III that the canonists included in their decretal compilations.[16] Secondly, there were also references in other

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[15] 2 Comp. 3.26.3. I present the text from the manuscripts of *Compilatio secunda* which reveal that the decretal has many better variant readings from Friedberg's unreliable text of the *Liber extra*.

[16] Alanus 4.15.1, 3 Comp. 4.16.1 (X 4.21.5).

classical canon law sources to different parts of the Roman text that were important for ecclesiastical issues.[17]

Jurisprudential Interpretations of Clerici

Lucius III's first decretal citing the maxim was not immediately connected by canonists to some general observations on the attitude of Roman law toward canon law. Tancred in his *Apparatus* in the gloss to *dedignentur* pointed to three texts related to this canon. The first was the passage from *Authenticum*, the second was to *Inherentes* (1 Comp. 1.35.2 [X 2.7.1]) and the third was to *Quoniam legibus* (1 Comp. 1.35.1 [X—]).[18] These two canons elaborated on 'iuramentum calumniae', and Pope Honorius' decretal included the most significant parts of the latter which was the constitution of the medieval Emperor Henry III. Honorius quoted the emperor's statute that reminded readers that, according to imperial decrees, canons of the Fathers should be given the force of statutes.[19] In the *Ordinary Gloss* Bernardus Parmensis omitted the reference to *Quoniam legibus* that was not included in the *Liber extra*, but he added *Intelleximus* (X 5.32.1) seeing a link between the two canons.[20] With one exception other major thirteenth-century canonists did not elaborate on the relation between the two laws.

The exception is *Lectura* of Henricus de Segusio (Hostiensis) to *Clerici*. Henricus summoned a couple of references to other imperial constitutions from the *Authenticum*. He pointed that the emperor not only proclaimed that secular laws should follow sacred rules but also that he wanted to preserve and imitate sacred rules, to accept the Scripture and rules and observe them as laws. Moreover, an ecclesiastical case should be examined according to

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[17] E.g. C.11 q.1 c.45 cited another part of the Novel.

[18] Tancred, to 1 Comp. 2.7.1, Vat. Borgh. lat. 264, fol. 15vb, s.v. *dedignentur*.

[19] 1 Comp. 1.35.1 (X—): 'Nam cum imperator Iustinianus iure decreverit ut canones Patrum vim legum habere oporteat, et in nonnullis Patrum canonibus reperiatur, ut clerici omnino iurare non audeant, dignum est, ut totus clericalis ordo a iuramento calumniae praestando sit immuni.' See MGH LL 2.41.

[20] *Glossa ordinaria* to X 2.1.8 s.v. *non dedignantur*.

sacred rules. Bishops were granted jurisdiction to punish anyone who would break the sacred rules.[21] All these notes and references to the *Authenticum* served to support the argumentation presented in the decretal itself, which made it clear that secular law should be treated as inferior. In his gloss to *imitari* he mentioned three canons: *Inhaerentes* (X 2.7.1), *Intelleximus* (X 5.32.1) and *Cum secundum* (X 4.21.5), id est the third decretal citing 'leges non dedignantur'. From Hostiensis we can say that the reference to Roman law in the commentaries on *Clerici* became a commonplace in the jurisprudence.

Johannes Andreae copied the gloss to *non dedignantur* from Hostiensis. Interestingly, in the note to *imitari* he probably followed Franciscus de Albano and said that canonists (doctores decretorum) should precede legists (doctores legum) even if the former are lay people.[22] The discussion about the position of canonists in late medieval Europe was an absorbing one, and the commentaries to this canon add only little light to this bigger issue.[23]

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[21] Hostiensis, *Lectura* (Argentini 1512) X 2.1.8 fol. 120vb, s.v. *non dedignantur*: 'etc. in Authenticum ut clerici apud proprios episcopos conveniuntur § Si vero ecclesiasticum, in fine coll. 6 [Authen. 6.12.1 (=Nov. 83.1)] et per omnia vult imparato et sequitur sacras regulas ut in Authenticum Quomodo oporteat episcopos § 1 coll. 1 [Authen. 1.6.1 (=Nov. 6.1)] et de monachis § Sancimus coll. 1 [Authen. 1.5.2 (=Nov. 5.2)] et sacras scripturas et regulas accipit et sicut leges servat in Authenticum de ecclesiasticis titulis § 1 coll. 9 [Authen. 9.6.1 (=Nov. 131,1)] et ecclesiastica causa secundum sacras regulas est examinanda et finienda nulla contradictione obstante in Authenticum de sanctissimis episcopis § Si autem ecclesiastica et sequenti usque ad § Pro omnibus [Authen. 9.6.21-22 (=Nov. 123.21,2-123.22)] et in Authenticum de mandatis principum § Si vero canonicum coll. 3 [Authen. 3,4,11 (=Nov. 17,11)] et possunt episcopi quamcumque personam transgredientem sacram regulam punire in Authenticum de sanctissimis episcopis § Vt autem omnis ecclesiasticus coll. 9 [Authen. 9.6.10 (=Nov. 123.10)]'.

[22] Johannes Andreae, *Novella* (Venetiis 1612) X 2.1.8 fol. 7ra s.v. *imitari*: 'arguit Franciscus quod doctores decretorum praecedere debent, etiam si sint laici, doctores legum'.

[23] See e.g. Gabriel Le Bras, 'Velut splendor firmamenti: Le docteur dans le droit de l'église médiévale', *Mélanges offerts à Étienne Gilson de l'Académie française*, ed. Callistus Edie (Toronto-Paris 1959) 373-388.

Petrus de Ancharano went much deeper in detail in his commentary to *Clerici.* He made four important points. He began with a more profound description of the relation between secular laws and canons. According to Petrus, it was obvious that statutes of the emperors were subject to canons and canons were above them. Then he followed Baldus' distinction on the spiritual or related to faith matters and mere temporal matters. In the former one should adhere to canons whereas in the latter appropriate law depended on the land's owner. One might apply the civil laws unless they lead to sin.[24] He added that in the episcopal forum it was better to apply canons and this remark was followed by the references to the other canon law and Roman law sources, especially the *Authenticum*. The second note completed the words of Franciscus de Albano with the clarification from which one could have an impression that the precedence of canon law doctors before civil law doctors was a delicate issue of dignity rather than any kind of practical motion.[25] The third and fourth notes concerned the question of jurisdiction over clerics in criminal matters and the power of canons against customs and therefore they may be omitted here.

It is worth noting, Franciscus Zabarella stated that from the words 'leges non dedignantur sacros canones imitari' the conclusion was drawn that canon law was more noble that civil

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[24] Petrus de Ancharano, *Commentaria* (Bononiae 1581) X 2.1.8 fol. 13rb, num. 1: 'Primo nota quod leges imperatorum succumbunt canonibus et canones debent legibus praevalere, concors Cod. de sacrosanctis ecclesiis l. Privilegia (Cod. 1.2.12pr) ubi Baldus sic distinguit. Aut loquimur in spiritualibus, et pertinentibus ad fidem et stamus canonibus, ut dicit l. Privilegia (Cod. 1.2.12pr). Et ibi concors idem in rebus ecclesiasticis, vel iuribus ecclesiasticarum de constitutionibus c.Ecclesia sanctae Mariae (X 1.2.10). Aut loquimur in materiis temporalibus. Et tunc aut in terris Ecclesiae et in utroque foro servamus canones. Aut in terris imperii tunc in foro civili servamus leges nisi talis observantia induceret peccatum qui filii sint legitimi c.Per venerabilem (X 4.17.13).'

[25] Petrus de Ancharano, *Commentaria* (Bononiae 1581) X 2.1.8 fol. 13rb, num. 2: 'Secundo nota quod dicit textus "imitari". Arguit enim ex hoc Franciscus quod doctores iuris canonici praecedere debent, etiam si sint laici legum doctores, quasi tanto quis nobilior reputetur, quanto praeest maioribus. Facit quod nota in c.Statuimus de maioritate et obedientia (X 1.33.15)'.

law. It seems that he personally rather saw them both as one 'scientia' without advantaging one or another[26]. This was also the claim that at most contrasted his commentary with the other canonists interpretations of *Clerici*.

A broad commentary on *Clerici* was written by Petrus' famous student, Antonius de Butrio. He repeated common teaching about the relations between civil statutes and canons. He also noted that it was Franciscus de Albano who concluded from the hierarchy of laws the precedence of canonists over legists, and he reasonably added that in consulting doubtful matters it was better to trust a lawyer who was truly skilful in his field.[27] After some other comments on jurisdictional issues, he came back to the matter of relation between the two laws. At first he referred to *Intelleximus,* which, according to him, explained whether the canon law follows the secular statute or conversely. Here he focused on the typical question: which one of these should be followed? The criterion for a differentiation was again the subject of the case. In the judgment over ecclesiastical and spiritual matters, canon law prevailed. When it was a civil matter, a civil statute should be followed unless it led to sin. Similarly, in the mixed matters one should preserve a statute appropriate for the forum, so the civil statute might be kept even when it was contrary to canons as long as it did not lead to sin. Antonius interestingly added a list of cases in which, according to him, a canon also prevailed even if it was contrary to

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[26] Franciscus Zabarella, *Commentaria* (Lugduni 1558) X 2.1.8 fol. 4ra: '"leges" etc. ex qua arguitur nobilitas scientiae canonicae super civili, potest tamen dici quod proprie sunt una scientia, pro hoc quod dico de consanguinitate Non debet (X 4.14.8). Item ex hoc secundum Franciscum Vercellensem, quod doctor decretorum ceteris paribus debet precedere doctorem legum'.

[27] Antonius de Butrio, *Commentaria* (Venetiis 1578) X 2.1.8 fol. 13vb, num. 5-6: 'Nota tertio, quod non dedignantur leges sacros canones imitari: et sic in materia spectante ad canones, lege contrariante canoni, standum est canoni. Imperator protestatur se velle prosequi, et servare regulas sacras in Authenticum Quomodo oporteat episcopos § 1 coll. 1 [Authen. 1.6.1 (=Nov. 6.1)]. Per hoc arguit Franciscus doctores legum postponendos doctoribus Decretorum, etiam si non sunt clerici, quo ad honorem deferendum. In iudicando autem vel consulendo, in materia sua in dubio est magis credendum in arte sua peritis, caeteris paribus plus creditur, ut nota de testibus Causam (X 2.20.11).'

a civil statute. 'Personae miserabiles' and 'pauperes' were always subject to ecclesiastical courts because they needed protection and defence. Finally, when the fora were not separated in the ecclesiastical court canon law ruled. At the end he added another original remark—when there was a case in which the sin had occurred, secular judges might be forced by ecclesiastical ones to obey canonical norms.[28]

Johannes de Imola strictly followed his master Antonius reiterating the notion of the precedence of canonists and adding

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[28] Antonius de Butrio, *Commentaria* (Venetiis 1578) X 2.1.8 fol. 13vb-14ra, num. 12: 'De materia decreta an canon sequatur legem vel econverso vide de operis novi nuntiatione c.1 (X 5.32.1). Dic si quaeritur an lex, vel canon sit servandus: in materia spectante ad iudicium ecclesiae canon servandus est, et non servanda lex, ut hic. Et hoc quando natura materiae est talis, quia ecclesiastica, vel spiritualis: sed si altero accidenti, ut quia conveniretur clericus coram ecclesiastico a laico, vel causa laici tractaretur: dic, ut dicam infra de foro competenti Quod clericis (X 2.2.9). Ideo si causa tangit clericum conventum, vel agitur de re ecclesiastica, vel spirituali, tractanda est causa secundum decisiones ecclesiasticas. Si materia est civilis tantum, sequenda est lex in foro suo, dummodo non inducat ad peccandum de praescriptionibus c.finalis (X 2.26.20) de consuetudine c.finalis (X 1.4.11) et nota in regula Possessor de regulis iuris liber sextus (VI 5.12.2). Si materia est mixta, si lex obviet canoni, et possit servari sine peccato, in foro civili servanda est lex, in foro canonico lex canonica. Si fori sunt divisi, ubi est lex: ut nota de testamentis c.Relatum (X 3.26.11) et c.Cum esses (X 3.26.10). Hoc verum, nisi materia esset pia, quia servandus esset canon. Ideo puto si in causis dotis, libertatis, testamenti ad pias causas, pupillorum, viduarum, vel aliarum miserabilium personarum canon aliquid statueret contra rigorem legum, quid canon ille servandus esset in illa materia: quia quo ad tales protectiones, et defensiones sunt subiecti iudici ecclesiastico: de quo infra titulo infra c.Licet (X 2.2.10) et c.Ex tenore (X 2.2.11). Ad hoc quod nota in dicto canone Cum esses (X 3.26.10). Et idem in causis pauperum: et est glossa expressa de testamentis c.Relatum. Si fori non sunt divisi, quia ambo sunt uniti in ecclesiam, ut quando ecclesia habet temporalem iurisdictionem in locum: tunc dico, quod servandus est canon de appellationibus c.Cum sit Romana (X 2.28.5) et c.Si duobus (X 2.28.7). Ad hoc quod nota infra titulo infra c.Licet (X 2.2.10) imo idem si aliter accidentaliter, vel ex consuetudine fori uniantur, ut dicam ibi, si lex non posset servari sine peccato, servandus est canon de praescriptionibus c.finalis (X 2.26.20) de consuetudine c.finalis (X 1.4.11) nota in regula Possessor de regulis iuris liber sextus ubi glossa. Ad hoc quod nota de iureiurando c.Licet liber sextus (VI 2.11.2) et ubi non vellent seculares iudices servare canones in materia peccati, possent ad hoc compelli per ecclesiasticos iudices, ut ibi'.

remarks, similar to his predecessors, about the significance of disputed matter for the ecclesiastical jurisdiction.[29]

Finally, Nicolaus de Tudeschis may be seen not only as a pupil of Zabarella and de Butrio, but also as an influential author who reflected upon the relation between secular law and ecclesiastical law. His ideas on the precedence of canons before secular law were similar to Antonius'. He noted that the decisive question was the type of the case. Antonius' analyses were more extensive, but Panormitanus added some other sources and he also pointed out that this question was discussed more extensively in his comment on *Intelleximus*.

He wrote on the precedence between the doctors of law in his commentary on *Clerici*. Having recalled the standard formula from Franciscus de Albano, he made an effort to present a more sophisticated argument to explain the precedence of canonists. It was founded on the notion that the prestige and position of one 'scientia' is higher than the other because the status of the branch of knowledge depends on its subject.[30] Therefore, the subject

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[29] Johannes de Imola, *Commentaria* (Lugduni 1549) X 2.1.8 fol. 5vb-6ra, num. 1-2: 'Nota quod leges non dedignantur sacros canones imitari etc. et pro hoc facit in argumentum secundum Johannem Andreae quod doctores decretorum etiam si sint laici praecedere debeant doctores legum . . . Dicit tamen hic dominus Antonius quod in consulendo in materia legali magis credendum est doctori legum tamquam verisimiliter magis perito in arte sua. . . . Nota quod canones legibus praevalent quod est verum in materia spirituali vel ecclesiastica vel personarum ecclesiasticorum et idem in materia temporali in terris subiectis eccleasiae. In aliis secus quia in foro suo praevalent leges nisi agatur de materia peccati vel de causa pia . . . Et per praedicta videtur quod si in causis miserabilium personarum vel pauperum canones contrarientur legibus servari debebunt canones etiam in foro civili secundum dominum Antonium'.

[30] Earlier Zabarella made a short comment on such thought. Similar argumentation was also present in works of other writers discussing the position of 'doctores' in a much wider perspective, such as Johannes von Legnano or Thomas Diplovatatius. A part of Panormitanus' passage on the subjects of 'scientiae' was copied verbatim by Petrus Lenauderii: see Thomas Wetzstein, 'Der Jurist. Bemerkungen zu den distinktiven Merkmalen eines mittelalterlichen Gelehrtenstandes', *Beiträge zur Kulturgeschichte der Gelehrten im späten Mittelalter*, ed. Frank Rexroth (Vorträge und Vorschungen 73; Ostfildern 2010) 243-296 at 283. Cf. Ines Kauffmann, Matthias Schwaibold, 'Doctor dicitur fulgere: Zum Tractatus De doctoribus des Petrus Lenauderius',

which 'scientia' is more noble grants that 'scientia' and her practitioners higher prestige. To make this argument, Panormitanus needed to define the subject of each 'scientia'. The purpose of civil law was to guide a man to common good whereas canonical knowledge had as its purpose to lead a person toward the common good, but also toward God himself according to sacred rules. Nicolaus added to this hierarchy other 'scientiae'. Canon and civil lawyers were placed above 'doctores artium et medicinae' and above all were theologians. Additionally, he mentioned that a doctor of both laws should be positioned above a doctor of canon law who did not have a doctorate in both laws. At the end he cited Petrus de Ancharano who argued that a doctor of canon law should take precedence over a civil law jurist who obtained the second degree 'honoris causa', but who knew nothing about canons.[31] His *Lectura* on *Clerici* was then followed by two

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Rechtshistorisches Journal 5 (1986) 278-280; Helmut G. Walther, 'Canonica sapiencia und civilis sciencia: Die Nutzung des aristotelischen Wissenschaftsbegriffs durch den Kanonisten Johannes von Legnano (1320-1383) im Kampf der Disziplinen', *Scientia und ars im Hoch- und Spätmittelalter: Albert Zimmermann zum 65. Geburtstag*, ed. Ingrid Craemer-Ruegenberg (2 vols. Miscellanea Mediaevalia 22; Berlin-New York 1994) 863-876.

[31] Nicolaus de Tudeschis, *Lectura* (Venetiis 1571) X 2.1.8 fol. 29vb-30ra, num. 3: 'Et ex hoc et ex textus nota secundum Franciscum et Ioannem Andraee quod doctores Decretorum etiam si sint laici, debent praecedere doctorem legum. Et hoc dictum probo sic. Quaelibet scientia dicitur nobilior, quanto subiectum ipsium scientiae est nobilius argumentum hic et praeallegatio Authenticum Quomodo oporteat episcopos [Authen. 1.6 (=Nov. 6)]. Sicut in simili dicimus, quod tanto quis melior est, quanto melioribus praeest, ut in Authenticum De defensoribus civitatum in principio [Authen. 3.2 (=Nov. 15)]. Sed subiectum canonicae scientiae est nobilius, quam subiectum civilis scientiae, quia subiectum in civili scientia, est homo dirigibilis simpliciter in bonum commune, sed subiectum in canonica scientia, est homo dirigibilis non solum simpliciter in bonum commune, sed etiam in Deum secundum sacras regulas. . . Sed doctores legum debent praecedere doctores artium et medicinae quia eorum scientia est nobilior ratione subiecti, et maxime in medicina cuius subiectum est homo egrotus. Theologia vero habet subiectum nobilibus caeteris, quia principalis sermo est de Deo, quod patet ex etymologia vocabuli. Si vero unus est doctor utriusque iuris, alter vero tantum Decretorum, tunc debet praecedere habens utrumque gradum, quia duo vincula vincunt unum . . . Secus dicit dominus Petrus de Ancharano hic et in c.1 de parochis (X 3.29.1) in illo,

extensive 'additiones'. They were mostly collections of references to other Roman and canonical sources and authors such as Archidiaconus, Bartolus and some others. To sum up, we may emphasize that Panormitanus in his commentary paid great attention not only to the question of following the laws, but he also developed the doctrine on the precedence of canonists before legists. This was obviously not a new doctrine, but in comparison to earlier writers it was not that elaborated on the margin of this canon.

There are a couple of conclusions one can draw from the described evolution of canonists' interpretation of 'leges non dedignantur sacros canones imitari' cited in Lucius III's decretal. One may generally say that the doctrine on the relation between the two laws founded in the commentaries on *Clerici* was developed over the course of time. The canonists reacted to the writings of their predecessors and expanded their thought. The scope of their commentaries and the amount of additional sources taken into consideration grew. More specific findings come from the substantial value of this doctrine. Firstly, the major result of the reinterpretation of 'leges non dedignantur sacros canones imitari' was the attempt to define the question of law applicable to the respective case. The canonists referred at this point to the proper subject of the case as a criterion for selecting the suitable law, and they argued that canons were in most cases more relevant than civil statutes. Important for them was the status of the litigants in a case because canon law should override civil law for the sake of e.g. *personae miserabiles*. Secondly, also the precedence of canonists over civil lawyers was established. The subject of their knowledge gave them the nobler scholarly position. Both these conclusions resulted from the words of Justinian, who hardly had

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qui satis mediocriter studuisset in una, assumpsisset postea gradum causa honoris in alia prorsus sibi incognita, ut multi sunt legistae, qui doctorantur in canonibus, qui prorsus ignorant, nedum iura canonica, sed etiam modum procedendi in decretis. Et quod deterius est, etiam ipsas rubricas decretalium ignotas habent, tunc enim debet praecedere habens unum gradum, et altiori scientia praefulgens argumentum in l. Nemo Cod. de officio magistri officiorum (Cod. 1.31.2)'.

such intentions when he accepted the application of canons to secular jurisdiction.

The First Century of Jurisprudence on c. Intelleximus

Contrary to *Clerici, Intelleximus* was recognized by canonists early on as an attractive place to discuss the relation between the two laws. It appeared in several decretal collections, but most importantly Alanus Anglicus included it in his compilation, and he was followed by Johannes Galensis who placed it in his *Compilatio secunda* 3.26.3.[32] At the same time, that is around 1210-1215, we find at least three examples of early jurisprudential recognition of doctrinal value of Lucius III's sentence. The first one was the gloss of Alanus to his own compilation, which will be mentioned below in the paragraph on the gloss to *Compilatio secunda*. The other two are less obvious, but they seem to confirm the importance of the maxim. The second one is *Brocarda* of Damasus Hungarus. In rule 77, which stated that secular statutes cannot be applied in the ecclesiastical court, Damasus referred to *Intelleximus* as one of the counter-arguments against this rule and in the 'solutio' he declared that secular statutes could be used in ecclesiastical courts only when they were not contrary to the canons.[33] The third one is *Ordinary gloss* of Johannes Teutonicus to *Decretum*. In the comment to D.10 c.7 he noted that civil laws should not be used in the Church unless there are lacking canons as was the case in *Intelleximus*.[34] All three sources show that canonists early accepted Lucius III's catchy formula of the relationship between two laws.

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[32] Walther Holtzmann, 'Kanonistische Ergänzungen zur Italia Pontificia', QF 38 (1958) 120.

[33] Damasus Hungarus, *Brocardica*, Vat. Borgh. lat. 261, fol. 49r: 'Solutio: non est utendum legibus ubi canonibus contradicunt, alias utendum est, ut di.x. Lege (D.10 c.1)'.

[34] Johannes Teutonicus, *Glossa ordinaria* to D.10 c.7, Admont, SB 35, fol. 16ra, s.v. *Si in adiutorium*: 'Hoc ideo dicit quia non sunt allegande leges nisi in defectum canonum, ut extra. ii. de ecclesiis edificandis Intelleximus (2 Comp. 2.26.3 [X 5.32.1])'.

Only a couple of years later Tancred's *Apparatus,* which determined the main lines of later interpretations of *Intelleximus,* was written. His gloss to *Compilatio secunda* contained the first important notes on the canon and connected it to other important canonical sources.[35] Four glosses are important to shed light on Tancred's interpretation of Lucius III's analogy. First, he referred to his master Alanus and to other important sources. He noted *Authenticum* 6.12.1 as well as the similar *Authenticum* 9.6 and two canonical sources that also used the maxim C.2 q.3 d.p.c.7 and *Clerici*.[36] He provided the word 'canonibus' with the remark copied again from Alanus that in this time the case would be easier to solve due to another ecclesiastical statute in the matter of *novi operis nuntiatio*.[37] Then Tancred made a statement about the use of secular laws on the ecclesiastical forum based on various sources. The solution to the question of applying 'leges' in an ecclesiastical case was the general consent to such a practice as long as 'leges' were not contrary to 'canones'.[38] This rule was founded on the similar openness of the imperial legislation presented in *Authenticum* 6.12.[39] Finally, he confirmed this

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[35] For the essential help in reading the manuscript of Tancred's *Apparatus*, I would like to thank Danica Summerlin and Atria Larson.

[36] Tancred, 2 Comp. 3.26.3, Vatican, Borgh. 264, fol. 93rb and Florence, Biblioteca Laurenziana Plut. IV.sin.2, fol. 112rb, Bamberg, SB can. 20, fol. 89ra, s.v. *dedignantur*: 'Supra ii. q.iii. § Hinc colligitur, in fine (C.2 q.3 d.p.c.7) Aut. ut clerici apud proprium episcopum in fine (Authen. 6.12.1[=Nov. 83.1]). Aut. de ecclesiasticis in fine (Authen. 9.6 [=Nov. 131]) supra de iudiciis Clerici vero lib.i (1 Comp. 2.1.8 [X 2.1.8])'.

[37] Ibid. s.v. *in canonibus*: 'Supple olim secus hodie, infra de novi operis nuntiatione c.i. lib.iii. (3 Comp. 5.15.1 [X 5.32.2]). Alanus'.

[38] See Arella, *Nuntiatio novi operis* 67.

[39] Tancred, 2 Comp. 3.26.3, Vatican, Borgh. 264, fol. 93rb and Florence, Biblioteca Laurenziana Plut. IV.sin.2, fol. 112rb, Bamberg, SB can. 20, fol. 89ra, s.v. *constitutionibus*: 'Et nota leges in causa ecclesiastica posse allegari et secundum eas debere iudicare, ut supra di.x. Si in adiutorium (D.10 c.7) xi. q.iii. Summo opere (C.11 q.3 c.70), xxxiii. q.ii. Historia ecclesiastica (C.33 q.2 c.3) di.liiii. Ex antiquis (D.54 c.9) arg. contra xxxiii. q.ii. Inter haec (C.33 q.2 c.6), xxxii. q.iiii. Nemo (C.32 q.4 c.4), supra ii. q.vi. Non ita (C.2 q.6 c.18). Solutio: Precise dicendum est quod in causis ecclesie indifferenter utendum est legibus sicut canonibus ut hic traditur, nisi canones contradicant, quia tunc non est eis

interpretation by words 'unum ius adiuvat aliud' supported by similar phrase from the constitution proclaiming Justinian's Code.[40] As we can see Tancred interpreted the rule of Lucius III as a very general permission to apply civil law in canon law cases, and he made a series of crucial links to other canons touching upon the same matter.

The other canonists' works from the thirteenth century may be divided into three groups according to the presence of questions related to the relation between the two laws on the margin of *Intelleximus*. The first one consists of works which did not pay any attention to the formula of Lucius III. These texts commented on X 5.32.1 only in the contexts of the title of *Liber Extra* in which it was placed, that is *De novi operis nunciatione*. This group includes *Summa* of Goffredus de Trano, *Apparatus* of Innocent IV and Hostiensis' *Summa aurea*. The second group is made by the works of Bernardus Parmensis. His *Glossa ordinaria* to X 5.32.1 is a repetition of Tancred's *Apparatus* with slight changes in the content and bigger changes in the form. We can say that *Glossa ordinaria* served as a vehicle to transfer Tancred's (and partially even Alanus') interpretation of *Intelleximus*.[41] On the other hand, Bernardus' *Casus* was a very useful source for canonists after the papal decretal was severely abbreviated by Raymund. One of Bernardus' notes to *casus* repeated the canonists' adage about the reciprocal assistance of 'leges' and 'canones'.[42] However, *Casus* served rather as a supplementary source of information about the canon and not as a new way of its interpretation. Finally, in the

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utendum ut x. di. c.i. Ratio querere quoniam: "leges non dedignantur sacros canones imitari", ut in Aut. de clerici aput proprium episcopum in fine (Authen. 6.12.1[=Nov. 83.1])] et supra de iudiciis c.pemult. lib.i (2 Comp. 2.1.8 [X 2.1.8]). Tancredus'. See Pennington, 'Legista sine canonibus' 250.

[40] Ibid. s.v. *adiuvantur*: 'Et ita unum ius adiuvat aliud ut C. de novo codice competendo Hec que, ibi 'Praeterquam si iurisdictione (sic) aliqua adiuventur (Cod., De novo codice componendo 2). Laurentius.'

[41] Bernardus omitted several sources given by Tancred (X 2.1.8; X 5.32.2; C.11 q.3 c.70; C.2 q.6 c.18) and added only one other, that is X 5.26.2.

[42] Bernardus Parmensis, *Casus longi* (Lovanii 1484) X 5.32.1, unfoliated: 'Nota quod leges non dedignantur canones imitari, et econverso canones legibus adiuvantur'.

third group we can find two sources that added to the interpretation of *Intelleximus*. They were *Lectura* of Hostiensis and *Lectura* of Bernardus de Montemirato, to which I will now turn.

The second part of Hostiensis' commentary on *Intelleximus* consisted of four glosses to Lucius III's maxim. First, Hostiensis limited himself to point the other sources in which the maxim was present. Moving forward he explained what meaning the word 'imitari' carried. According to him, secular law needed a support from canon law in cases related to mortal sin, interpretation of faith or divine laws or varying opinions. Furthermore, secular law needed to follow canon law when it lacked a suitable prescription. Then he made this observation: because civil law declared that reference to a custom is a proper means for supplementing law and at the same time canon law had more authority than a custom, it was obvious that canon law might and should be used to fill a civil law *lacuna*. All these examples were founded on the wide basis of legal sources.[43] The third gloss to *principum* contained only two references to sources (to X 5.33.28, that is famous c. *Super specula*, and X 5.39.25).

The fourth gloss was the explanation of the word *adiuvantur* in which Hostiensis readily described the relation between the two laws using the metaphorical language. Civil statutes were put in

[43] Hostiensis, *Lectura* (Argentini 1512) X 5.32.1 fol. 317ra, s.v. *imitari*: 'Ubicumque agitur de peccato mortali supra de praescriptionibus c.finalis (X 2.26.20) vel de interpretatione fidei, vel legis divine, vel etiam diversarum opinionum, ut C. de summa trinitate l.finalis (Cod. 1.1.39) et patet in eo quod lege et nota supra qui filii sint legitimi Per venerabilem § Rationibus (X 4.17.13) supra de restitutione spoliatorum Sepe (X 2.13.18) supra de rescriptis Super literis (X 1.3.20). Et ubicumque deficit ius civile, C. de novo codice componendo l.vnica, ibi, Praeterquam si iuris divisione et cet. (Cod. De novo codice componendo 2) et de institutione confirmando l.vnica § Si que vero ibi, Sin vero pro certis capitulis et cetera (Cod., De novo codice confirmando, 1.4) cum et tunc secundum ipsum etiam ius civile sit ad consimilia vel consuetudinem recurrendum, ff. de legibus l. Non possunt (Dig. 1.3.12) et lege sequente (Dig. 1.3.13) et l. De quibus respon. i. (Dig. 1.3.32) et l. Si de interpretatione (Dig. 1.3.37). Nam et auctorisabilius est ius canonicum quam consuetudo ut patet xi. di. Quid nesciat (D.11 c.11) et c.Ecclesiasticarum (D.11 c.5) et per totum et sequentibus distinctionibus omnibus usque ad vicesimam tertiam (D.11-23)'.

the metaphor in the role of slaves or servants and canons were their masters. When there was a *lacuna* in canon law, canonists might approach civil laws as their servants and take from them a proper argumentation. This metaphor implied, as Hostiensis explained, that there was no possibility of the opposite. Civil laws might neither harm nor constrain canon laws. Imperial law might be used only in the case of temporal argument, whereas in other cases the application of secular statutes had to be approved by the Church to become binding.[44] Hostiensis' interpretation of the papal decretal was clearly focused on highlighting the superiority of canon law. He did it in a couple of ways: by enumerating the cases in which civil law needed canon law, by claiming the importance of canon law for supplementing civil law, by creating—maybe for the first time in the jurisprudence—the metaphor of civil law as a servant of canon law, by underlining the autonomy of canons from

[44] Ibid. s.v. *adiuvantur*: 'Quasi sacris canonibus servientes et infra de privilegiis Super specula in principio (X 5.33.28), simile infra titulo i. c.2 (X 5.33.2). Ideo et ad leges recurrimus tamquam ad ancillas nostras in materiis civilibus et ex eis sumendo argumenta ubi ius non habemus expressum canonicum vel divinum x. di. c.i. ii. (D.10 c.1 and 2) et per totum xxxiii. q.ii. Historiam (C.33 q.2 c.3) et infra titulo c.i. ii. in fine (X 5.33.2) et c.Super specula in principio (X 5.33.28). Sic et ad ministros ipsarum recurrimus, imperando et coercendo quando ipsorum auxilio indigemus ut supra titulo i. c.finalis in fine (X 5.31.18) supra de iudaeis Postulasti (X 5.6.14) et c.Iudaei sive sarraceni § finalis (X 5.6.5) ubi de hoc. Non sic econverso quia nec leges possunt preiudicare canonibus tamquam inferiores, x. di. c.i. in fine, supra de constitutionibus c.i. (X 1.2.1) xxxii. q.iiii. Nemo (C.32 q.4 c.4) xxxiii. q.ii. Inter hoc (sic) (C.33 q.2 c.6) nec ministri ipsarum tamquam inferiores possunt vel debent ministros canonum coercere ut patet in eo quod nota supra de iudiciis Clerici (X 2.1.8) et c.Qualiter (X 2.1.17). Nisi ratione temporalium quo ad ipsas res temporales; nam quantum ad personas aliud dicatur, quod dic ut legitur et notatur supra de maioritate et oboedientia Solite § i. ver. Quod autem sequitur et § Praeterea ver. Sed illa quae preest (X 1.33.6). Ideo etiam legibus utemur imperialibus quia sunt per ecclesiam approbate in talibus; alias autem leges vel statuta laicorum ecclesias vel personas ecclesiasticas non astringunt, ut patet xcvi. di. Bene quidem (D.96 c.1) et in eo quod legitur et notatur supra de constitutionibus Quae in ecclesiarum (X 1.2.7) et c.Ecclesia (X 1.2.10) supra de rebus ecclesiae non alienandis c.finalis (X 3.13.12) supra de solutionibus c.finalis (X 3.23.4) et qui filii sint legitimi Per venerabilem § Rationibus (X 4.17.13).'

civil laws.[45] Again, Justinian's maxim was interpreted to the disadvantage of secular law[46].

The last thirteenth-century commentary to c. *Intelleximus* was *Lectura* of Bernardus de Montemirato also known as Abbas Antiquus.[47] He did not follow the conclusions of Tancred, nor did he copy the reasoning of Hostiensis. His picked a different word to explain, that is 'legalibus' which described the constitutions according to which the newly built chapel should be demolished. Due to that, he focused on a different question than his predecessors. However, the word 'legalibus' was not a word directly connected to Lucius III's rule but it seems justified to link this comment with Justinian's Novel, too. The question Abbas Antiquus asked was of this kind: which law should be applied when secular statutes were summoned in the ecclesiastical forum and, conversely, when canons were applied on the civil forum? He solved this question by a series of scholastic distinctions. If 'leges' are not contrary to 'canones' they can both be applied 'mixtim'. If statutes are contrary to canons but not expressly, they both should be alleged to the limit of their expressed provisions when there is a lacuna. The example Bernardus summoned here was a case from the decretal itself. There occurred a lack of canon law regulation so the ecclesiastical judge ought to look for secular regulations and when he found that Roman law regulated 'novi operis nuntiatio' he should apply it to the case. However, if 'leges' and 'canones' are contrary expressly one should examine whether it is possible

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[45] It seems that there is not established consent about the first use of this metaphor and its force, see André Gouron, 'Le droit romain a-t-il été la "servante" du droit canonique?', *Initium: Revista catalana d'historia del dret* 12 (2007) 231–243.

[46] One may note that Hostiensis' commentary was used by Guido de Baysio along with the reference to X 5.32.1: Guido de Baysio, *Rosarium Decretorum* (Venetiis 1480) D.96 c.1, unfoliated s.v. *concepta*: 'Dicas quod omnes leges que canonibus non obviant intelliguntur esse confirmate et a papa corroborate . . . Leges ergo late super rebus vel personis ecclesiasticis valent et habent vigorem in causis ecclesiasticis, non quia sint late a principe, sed quia sunt a papa confirmate et corroborate, secundum H. et ad hoc nota extra. de novi operis nuntiatione c.i in fine (X 5.32.1)'. See Munier, 'Droit canonique' 953-954.

[47] Arella, *Nuntiatio novi operis* 67-68.

to observe 'leges' without sin. If it is possible, they both should be obeyed on a respective forum. If not, it is impossible to observe a civil statute and the canons had to be kept. Bernardus provided a solid legal foundation for his outline but, interestingly, he referred only twice to the same texts as his fellow canonists and eight times he pointed to other sources.[48] Bernardus' commentary to 'legalibus' was a very useful tool for a judge who faced a problem of lacuna.[49] It was a fair treatment of secular statutes but at the end he also acknowledged the higher and indisputable position of canons. He had this claim more justified on the basis of implicit reading of Justinian's words as they carry a notion of higher position of sacred rules.

All thirteenth-century jurisprudential interpretations of Lucius III's analogy between the two laws were used to defend the higher position of canon law in the legal hierarchy. Canonists did it in various ways, like in Tancred's requirement of accordance of

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[48] Bernardus de Montemirato, *Lectura* (Venetiis 1588) X 5.32.1 fol. 143va, s.v. *legalibus*: 'ff. eodem l.i. (Dig. 39.1.1) ad gl. et ita adde in fine (gl. ad X 5.32.1) quando leges sunt in foro ecclesiae allegande, vel canones in civili, ita distingue: Aut leges sunt contrarie canonibus aut non. Si non sunt contrarie, tunc sunt mixtim allegande leges cum canonibus, ut hic, et argumentum supra de fide instrumentorum Pastoralis (X 2.22.8). Si autem contrarie sunt: aut contradicunt expresse, aut non. Si non contradicunt expresse, stabitur in utroque foro illi iuri, quod expresse totum determinat, ut hic ubi expressis legibus statur super nuntiatione novi operis etiam in re spirituali destruenda. Item in foro civili, ubi expresse canones declarant articulum aliquem, in quo leges nihil statuunt. Expressum exemplum habes infra eodem c.penultimum et ultimum (X 5.33.32-33) et alium in duabus quartis, supra de testamentis Raynutius (X 3.26.16) et c.Raynaldus (X 3.26.18) oppositum argumentum ad hoc supra qui filii sint legitimi Per venerabilem circa medium ubi hoc notavi circa finem per mediam columnam (X 4.17.13). Si vero lex et canones contradicant expresse, aut lex potest sine peccato servari, et tunc statur legi in foro suo, et canoni in suo, supra de testamentis Cum esses (X 3.26.10) et c.Relatum (X 3.26.11). Aut non potest sine peccato servari, et tunc statur canoni indistincte, quia omni constitutioni, consuetudini, et cetera supra de praebendis c.ultimum (X 3.5.38) x. di. Constitutiones (D.10 c.4)'.

[49] Broadly speaking canonists elaborated on the theoretical matters mostly when it comes to practical questions. See Jean Portemer, *Recherches sur les Differentiae juris civilis et canonici au temps du droit classique de l'Eglise* (Paris 1946) 50.

civil statutes as a preliminary condition for their application, in Hostiensis' argumentation for precedence of canon law over secular law or in Abbas' schema limiting the possibility of applying secular law in the Church. They were founded on the reinterpretation of Nov. 83.1 used in the decretal and they are good examples of canonists' theoretical attitude toward secular law.

Late Medieval Canonists on Intelleximus

The *Novella* of Johannes Andreae may be seen as the best recapitulation of the earlier jurisprudential output. His commentary on *Intelleximus* did not add anything relevant to the previous sources but he skilfully mingled what the Ordinary gloss, Hostiensis and Abbas said about the rule established by Lucius III. Similarly, the commentary of Henricus Bohicus was mostly a compilation of Abbas, Hostiensis, Johannes Andreae and Guido de Baysio.

A vast commentary on the canon was written by Petrus de Ancharano. In several parts of his explanation of *Intelleximus* he elaborated on the relation between the two laws. In the fourth part of his *Commentary* he recalled the metaphor of 'leges' as the servants of canons. He stressed that the Church may govern them as her servants. He also explained the source of the greater dignity of canons. As canons were rooted in God's grace and knowledge as a means for ruling the world and preserving the living creatures, they were clearly of higher importance.[50] The seventh part was a broad explanation of the papal order to solve the case 'secundum

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[50] Petrus de Ancharano, *Commentaria* (Bononiae 1581) X 5.32.1 fol. 148ab, num. 4: 'Quarto nota quod leges non dedignantur sacros canones imitari; sunt enim ancillae canonum. Nam et ministris ipsarum imperat ecclesia, de maioritate et obedientia Solite (X 1.33.6) et quod notavit Ioannes Andreae de iudiciis Qualiter secundum eum (X 2.1.17). Ancillas intelligo quo ad illa, quae concernunt conscientiam, et regimen animarum, quo ad temporalia (ubi de peccatorum non agitur) digniores puto sunt. Nam divinitus promulgate pro regimine universi orbis, et pro conservatione rationabilis creature: qua nihil Deo acceptius, et cuius gratia omnia creavit ut l. In pecudum de usuris (Dig. 22.1.28pr) et l.finalis de praescriptione longi temporis (Cod. 7.33.12) de alto stylo, et legum elegantia iudicet, qui eas novit'.

leges et canones'. First, he made an introductory comparison to formally similar legal notions, and then he passed on to discuss the question of hierarchy of the laws. He was probably inspired by Abbas Antiquus but he developed more subtle divisions and admitted to have taken these ideas from Johannes Calderinus. Petrus said that although a civil statute was lower than an imperial a civil law may be used in the ecclesiastical forum only in the dispute between laymen, and if it did not touch ecclesiastical persons or things. It might be also binding for clerics arguing on the civil forum in the preparatory case, but otherwise its application should be very limited. When it came to the statute issued or accepted by the emperor himself it may not be accepted in neither forum if it introduced sin. If the condition was fulfilled, the statute generally should not be applied as long as it regulated spiritual or ecclesiastical matters. In some cases it may be applied, if it was not contrary to canons. But when it was not sinful and regulated temporal issues, Petrus named three examples in which such a statute may be summoned in the ecclesiastical court. According to the attitude of a statute toward canons, it may be either observed in the church (if not contrary to canons) or on the civil forum (if contrary to canons). The third case was the doubtful one in which there was neither contradiction nor accordance between a statute and canons, and there was a *lacuna*. Petrus accepted the doctrine of earlier writers that in such circumstances both a civil statute is observed in the ecclesiastical forum and a canon in the civil one.[51] Afterwards, Petrus examined the

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[51] Ibid. fol. 148b-149a, num. 9-12: 'Tu distingue latius secundum Ioannem Calderinum. Cum queritur, an lex civilis servetur in foro ecclesiastico. Distingue. Aut loquimur de legis inferioris a principe; et non ligat personas, vel res ecclesiasticas, etiam si sit favorabilis ecclesie . . . Et multo magis non tenet, si est preiudicialis persone, vel rei ecclesiastice . . . Si vero non tangit personam ecclesiasticam, vel rem ecclesie: tunc talis lex servatur in foro ecclesie contra laicos ibi litigantes . . . ligat etiam clericum litiganem in foro seculari in pertinentibus ad praeparationem causae; secus si ad decisionem . . . Aut loquimur in lege edita, vel approbata per imperatorem; tunc aut nutrit, vel inducit peccatum, et non servatur in foro ecclesiastico; nec etiam in seculari . . . Si autem non inducit peccatum; si quidem est edita super re spirituali, vel ecclesiastica; et de necessitate non servatur in foro ecclesie. Potest tamen ibi

application of this theory in practice and discussed the procedural cases of a dispute between a layman and a cleric on ecclesiastical and civil forums. Summing up his main lines of interpretation of the maxim in this context we can say that he accepted the doctrinal views of earlier authors but he made also his additions to this doctrine. The canonical divisions of laws became quite sophisticated in this commentary. Most importantly, he is another canonist who took the higher rank of canon law over civil law for granted, but he made some additional explanations of this hierarchy and provided some interesting views on its application in courts' practice.

Franciscus Zabarella discussed parts of *Intelleximus* by formulating a series of 'oppositiones'. He made four reservations to this papal decretal of which three may be considered as meaningful for the reinterpretation of 'leges non dedignantur sacros canones imitari'. The first 'oppositio' was a repetition of the doctrines establishing the rules describing the scope and possibility of using secular statutes in canon law. The second 'oppositio' gave a short solution to a minor question regarding the use of civil statutes favourable for the Church. In the next 'oppositio' Franciscus continued a similar topic and he tried to present the nature of imitation between 'leges' and 'canones'. He mainly followed accepted doctrinal views represented e.g. by the commentary of Petrus described above. He only added some further details. For example, he began with the philosophical

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servari, si non contradicit canonibus sicut sunt leges, quae tractant de ordinationibus, et promotionibus clericorum . . . Si autem est edita super re temporali; tunc sunt tres casus. Primus quin lex concordat canoni. Et tunc servatur lex in foro ecclesie, quia non tamen secundum leges; sed etiam secundum canones iudicatur . . . Secundus casus est, cum contradicit canoni: tunc servatur lex in foro seculari, et canon in foro ecclesiae . . . nisi forum temporale esset de temporali iurisdictione ecclesiae, quia tunc servatur canon . . . Tertius casus, et ultimus est, quando lex non concordat nec contradicit canoni, sed determinat casum dubium a canone non decisum; tunc servatur lex in foro ecclesie, ut hic sicut econverso canon servatur in foro seculari: quando canon determinat casum a lege non decisum . . . Cum nam in casibus ubi leges deficiunt, sit ad similia, et consuetudines recurrendum . . . fortius ad ius canonicum recurrendum est, cum sit auctorizabilius, quam consuetudo'.

argumentation for the higher position of canons. If civil statutes need to follow canons it means in other words that the former are 'principale' and the latter 'accessorium', so the imitation cannot work conversely. Further, he gave the solution in which he described in detail the circumstances in which statutes followed canons and when canons might do the same. When he came to the distinction on 'leges' issued by the emperor or his inferior, he added that these which were inferior were not binding in ecclesiastical affairs even if they were 'iustae'. Similarly, if they did not touch upon ecclesiastical matters and they were 'iustae', they should be kept on the ecclesiastical forum against a layman. To this may be added the first case of the imperial statute which is not sinful and regulates 'res spirituali vel ecclesiastica'— it may be observed in the church not only if it is not contrary to canons, but it has also to be 'aequa'. These small additions also include final remarks. Zabarella said that canon law should be obeyed on the civil forum not only in the case without expressed law, but also when it came to rating various doctrinal opinions. Then he noted some additional points about civilians and their argumentation. At the end of this 'oppositio' he also indicated that part of it was taken from Johannes Calderinus.[52] Zabarella added a little to the earlier

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[52] Franciscus Zabarella, *Commentaria* (Venetiis 1602) X 5.32.1 fol. 103vb-104ra, num. 3: 'Oppositio tertio ad idem: quia si leges debent imitari canones, ut hic, ergo non econverso, ut sit differentia inter principale et accessorium . . . Solutio. Imitatantur canones, non indistincte, sed quandoque, ut quando agitur de peccato . . . vel de interpretatione fidei, vel legis divinae, vel diversarum opinionum . . . et ubi deficit ius civile . . . Ut autem concludas generaliter, cum quaeritur, quomodo leges suffragantur canonibus. Et econverso. Dic, quod aut quaerimus de legibus non imperialibus aut de imperialibus. Primo casu non ligant personas, vel res ecclesiasticas etiam si sint iustae . . . cum similibus praeallegunt multo minus si iniustae . . . Sed si non tangerent personas, vel res ecclesiasticas, et sint iustae, servantur contra laicum in foro ecclesiae . . . Primo casu de necessitate non servatur in foro ecclesiastico, sed servari potest, si est aequa, et canoni non contraria, prout sunt leges, quae tractant de ordinationibus, et promotionibus clericorum, et de monachis, et de rebus ecclesiae non alienandis, et similibus . . . Sic, et econverso in foro seculari debet servari ius canonicum determinans casum lege civili non decisum expresse, vel si sunt opiniones inter legistas . . . Secundo responso . . . Quidam legistae aliter faciant procedendo de similibus ad similia. Per legem non possunt . . . sed minus. Unde

doctrine. He gave some philosophical explanation of canons' precedence and challenged its radical interpretation. He mentioned a couple of times the requirement of justness of civil law and made some other small changes. The doctrinal interpretation of *Intelleximus* was firmly established at his time.

Antonius de Butrio added not much to the earlier commentaries, but he is worth mentioning because he expressed the doctrines bound to *Intelleximus* in a less complex way. If we look for something different in his commentary, we can say that he used different words to describe the same things. For example, he did not speak about the lower status of civil provisions with the word 'ancilla' or 'minister' but 'famulus'. He also noticed that the church used general and imperial laws which were treated as accepted if they were not rejected by the church. Respectively, particular constitutions and statutes were generally not used in the Church, so they were treated as rejected, unless there occured an express acceptation of them.[53] He mainly followed the other authors while discussing the question of applying secular law in the Church, but e.g. he added the reference to Goffredus. His comment is clearer as he did not refer to all doctrinal subtleties emerged in the jurisprudence.

Finally, we come to the most extensive commentary to *Intelleximus*, that is the one written by Nicolaus de Tudeschis. Surprisingly or not, most of its content is a brilliant repetition of what was established by the earlier authors. Panormitanus' main achievement was a nice arrangement of all these doctrinal issues. If one looks for the most intelligible source to grasp them, one may limit himself to examine *Commentaria* of Panormitanus.

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per id, quod dicitur hic in principio canonis et quod . . . Cum similibus secundum Ioannem Calderinum cuius est distinctio.'

[53] Antonius de Butrio, *Commentaria* (Venetiis 1578) X 5.1.32 fol. 86va, num. 3-4: 'Nota quod canones respiciunt legum famulatum. Nota quod canones supplendi sunt secundum legum famulatum ad intellectum in casibus non clare a canone decisis. Alia notabilia non habetis. Oppositio quod ecclesia non arctatur legibus, nec statutis laicorum . . . Solutio. Ecclesia utitur legibus generalibus, et imperialibus: quia tales intelliguntur approbatae eo ipso quod non sunt reprobatae . . . Constitutionibus vero particularibus, et statutis, ecclesia non utitur, et eo ipso censentur talia reprobata, quae non reperiuntur approbata'.

Obviously, he made several corrections to the earlier jurisprudence but he mostly followed the common lines of interpreting *Intelleximus*. Due to that, I will only point here some interesting additions of his authorship.

For Panormitanus from the statement that 'leges' are canons' servants came the conclusion that also the latter should help the former. The reason of this rule came from the emperor who 'nolens volens' had to follow canons. The church, however, never has to follow secular rules, yet she may do so, if she wants to. It was obvious because the emperor was below the pope; the pope could bind the emperor, but the emperor could not do the same. To this Nicolaus added that all civil statutes which were not contrary to canons were accepted on the ecclesiastical forum and in the case of *lacuna* one should refer to them. He said even that it was obvious and that this canon, *Intelleximus*, served as the main argument for such a daily practice. It is the evidence that at least in fifteenth century *Intelleximus* was used to open the possibility of broad application of Roman law in the church in the temporal matters. He also explained the problem of civil statutes detrimental to the church by noting that not every civil statute is prejudicial to the church but only some of them.[54] Panormitanus used also the subordination of the emperor to the pope as an additional argument

[54] Nicolaus de Tudeschis, *Lectura* (Venetiis 1571) X 5.32.1 fol. 174vb, num. 2-4: 'Nota secundo quod leges famulantur canonibus, canones vero debent adiuvari constitutionibus legum. Et est ratio, quia Imperator velit nolit, quosdam canones tenetur sequi et observare Nicolaus de Tudeschis sed non est sic in ecclesia. Necessario enim non tenetur observare leges, sed eas approbat quandoque in auxilium suum, et est ratio rationis, quia Imperator cum sit inferior, potest ligari a papa sed non ligare . . . Nota tertio quod causa ecclesiae debet decidi per ius civile in defectum canonum, omnes enim leges principum non contradicentes canonibus sunt approbatae per ecclesiam, ut patet hic, et ad hoc solet quotidie allegari iste textus. Et idem dicendum est de constitutionibus approbatis per principem, hoc dico propter edita a iurisconsultis, quae fuerunt postea approbata ab imperatoribus . . . Nam et illa debent iura principum dici, quia omnia vestra facimus . . . Nota quarto et tene menti textui quod iura civilia non dicuntur praeiudicialia ecclesiis, quando possunt se habere ad praeiudicium et favorem; et hoc dico, quia licet cautum sit, quod lex imperialis damnosa ecclesiis non sit recipienda'.

in explaining the cases in which canon law had to be observed. He also nicely expressed the argument based on the greater force of canon law than a custom, and he again added that in a doubtful case the emperor himself generally acclaimed the application of canons.[55] As we can see, he repeatedly noted inferiority of the emperor to the pope.

Lectura of Panormitanus is a sum of all doctrinal threads developed in the earlier canon law jurisprudence. His main contribution was the arrangement of this material, but his comment is another confirmation of canonists' interpretation of *Intelleximus* as the strong argument for claims of canon law's superiority to civil law. He underlined the lower status of the emperor a few times, and from this he drew legal conclusions. It seems appropriate to say that 'leges non dedignantur sacros canones imitari' used by the pope to formulate a nice introduction to the solution of just one case in the late twelfth century played a great role for later canonists. From Alanus and Tancred they built on Lucius III's maxim a sophisticated collection of legal doctrines which systematically developed over time. These include: the metaphorical explanation of lower status of civil law, the enumeration of cases in which civil law was obliged to follow canon law, or the legal divisions expressing the possibility of applying civil law in canon law.

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[55] Nicolaus de Tudeschis, *Lectura* (Venetiis 1571) X 5.32.1 fol. 174vb-175ra, num. 5-6: 'cum queritur an et quando debeant observari leges, vel canones in utroque foro, quod aut sumus in materia concernente peccatum, vel interpretatione directa iuris divini, seu in varietate opinionum, et tunc in utroque foro servandus est casus canonis, seu ipse canon, et non lex civilis: quia in istis similibus solus papa habet potestatem, et imperator in concernentibus animam est ipsi papae subiectus, et tenetur suas leges observare, quinimo omnis anima est sibi subdita . . . Si vero sumus extra hos casus. Et tunc aut deficit dispositio iuris civilis, vel variae sunt opiniones, et debet servari canon in utroque foro, argumentum optimum hic. Nam si deficiente lege recurritur ad consuetudinem, vel ad similia . . . fortius debet recurri ad canones, ex quo per eos ille casus est expressus, cum canon sit maioris authoritatis, quam sit consuetudo argumentum a simili di.11 Quis nesciat (D.11 c.8), et imperator generaliter dixit, quod leges non dedignantur sacros canones imitari, ergo in casu dubio de iure civili servandus est canon'.

Summary

The examination of three centuries of canonical interpretation of 'leges non dedignantur sacros canones imitari' contained in two decretals of Lucius III gave the opportunity to claim that the maxim served as an important factor shaping canonists' views on the relation between the two laws. *Clerici* and *Intelleximus* were found interesting enough for canonists to formulate some significant theoretical elucidations. Clearly, we can say that the original meaning of the text, and even its role in the decretals were subject to jurisprudential reinterpretation. The words of the emperor in the pope's letters were first of all taken as an undisputable proof of the lower status of civil law. This opinion was commonly accepted amongst canonists and on this basis they developed further conclusions, three of which are worth recalling.

Canonical jurisprudence defined the hierarchy of law. Although it was not expressly explained, it may be remodelled with the use of a series of particular rules established for the application of civil statutes in the church and canons on the secular forum. The former was partially recognized but only in a limited scope and under precise conditions concerning the subject of the case or concordance with Christian morals. The latter was dictated by the church in selected matters and did not rely on the authority of the secular power but rather on the higher, spiritual aim of canon law. Canonists provided many sources and cases to explain and support a hierarchy of laws.[56]

Furthermore, this hierarchy received also a metaphorical echo in the canonists' claim that civil law is a servant of canon law. The language used by canonists to highlight the status of canon law

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[56] Interestingly, the canonists did not use in their comments to X 2.1.8 and X 5.32.1 the term *fons suppletorius* to describe the role of civil law toward canon law. This term is sometimes connected with Lucius III's decretals (see e.g. Dębiński, 'Church and Roman Law' 96) but it seems that it is rather an example of much later technical language used to grasp the sources available for filling up *lacuna*. Today in the case of *lacuna* in the Roman Catholic Church one should refer to canon 19 of *Codex Iuris Canonici*.

and undermine the status of civil law resulted also from the reinterpretation of the maxim. The attitude of the emperor toward canon law was used as the main argument to defend the dominant position of sacred rules over secular ones.

Finally, canonists argued for the superiority of their discipline over their fellow legists. Employing the discourse we have presented, the canonists explained why they should precede legists and why their subject was nobler and more important.

The confidence about the lower position of civil law rooted in the reinterpretation of the maxim was transmitted over the ages by succeeding generations of canonists. Keeping in mind the extensive amount of legal sources and the complexity of medieval jurisprudence we should not overestimate the role of the two analysed canons. We would rather acknowledge their influence on the understanding of the relation between canon law and Roman law as seen from medieval canonists' perspective.

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Oath-taking in Inquisitions

Henry Ansgar Kelly

When Innocent III outlined the inquisitorial form of criminal trial at the Fourth Lateran Council, he explained how a suspect was to be confronted: the judge was to explain the charges against him and allow him opportunity of making exceptions against them.[1] But the pope did not describe the actual beginning of the trial, what commentators would call the *litis contestatio*, borrowing the term from civil litigation. Furthermore, the commentators imitated him by not discussing it, a practice that extended into the seventeenth century.[2] Trial beginnings were also routinely omitted from court reports, with no charges, oath, or plea recorded.[3]

The usual idea about inquisition as established at the council, following Adhémar Esmein's 1896 article,[4] which I myself have often repeated,[5] is that defendants were not supposed to be put under oath when they responded to the charges, but that soon such oaths were routinely imposed. Esmein pointed out that the oath 'de veritate' was never imposed on the 'accusatus' in the 'accusatio' process.[6] Therefore, the same should be true of the 'inquisitus' in

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[1]Innocent III, *Qualiter et quando* X 5.7.24.

[2]Pointed out by Thomas F. Mayer, *The Roman Inquisition*, 1: *A Papal Bureaucracy and Its Laws in the Age of Galileo* (Philadelphia 2013) 186.

[3]H.A. Kelly, 'Galileo's Non-trial (1616), Pre-trial (1632-33), and Trial (May 10, 1633): A Review of Procedure, Featuring Routine Violations of the Forum of Conscience', *Church History* 85 (2016) 724-761, esp. 742.

[4]Adhémar Esmein, 'Le serment des inculpés en droit canonique', *Bibliothèque de l'École des Hautes Études, Sciences réligieuses* 7 (1896) 231-248.

[5]For example, H. A. Kelly, 'The Right to Remain Silent: Before and After Joan of Arc', *Speculum* 68 (1993) 992-1026, reprinted in *Inquisitions and Other Trial Procedures in the Medieval West* (Variorum Collected Studies 708, Aldershot 2001) III.

[6]Ibid. 237-238: 'Or, dans la procédure accusatoire . . . tout d'abord et pendant longtemps la doctrine canonique n'imposa pas aux accusés le serment de dire la vérité'.

an 'inquisitio', where, as Innocent indicated, 'fama publica' took the place of the 'accusator'.

What first gave me pause about this explanation was a statement by Kenneth Pennington in his recent account of inquisition, which seemed to indicate than an oath was intrinsic to the process: 'The judge would summon witnesses and make a defendant swear that he would respond to questions but not, as is often asserted, that he must tell the truth'.[7] I consider this question in what follows, first examining how Innocent himself speaks about oaths in connection with general and special inquisitions, and then studying the early commentators, summing up findings on the contesting forms, 'dicere veritatem' and 'respondere ad inquisita'. Then I trace the way in which a general-inquisition oath 'de se et aliis' developed into an oath that forced a suspect to incriminate himself before being formally constituted as a suspect. This new procedure became policy in Continental courts, but not in England, contrary to long-standing assumptions.

Innocent III's previous treatments of oaths

Paul Fournier maintained that it was Durandus who first, and wrongly, held that an oath was to be imposed on defendants in a special inquisition. The oath in question was 'de veritate', properly taken by witnesses in general inquisitions 'super statu ecclesiae'.[8] In response, Esmein pointed to earlier commentators, beginning with Roffredus, who said that such defendants were to be sworn.[9] They, however, named a different oath, 'ad inquisita veraciter respondere', given in Innocent III's 1205 decretal, *Cum dilecti*, to be used for special inquisitions, while the same decretal

[7]See Kenneth Pennington, 'The Jurisprudence of Procedure', *The History of Courts and Procedure in Medieval Canon Law*, edd. Wilfried Hartmann and Kenneth Pennington (Washington 2016), 125-159, 143.

[8]Paul Fournier, *Histoire de la procédure criminelle en France et spécialement de la procédure inquisitoire dépuis le xiiie siècle jusqu'à nos jours* (Paris 1882) 76, cited by Esmein 231-232.

[9]Esmein, 'Serment' 233-234.

recognized the other oath, of telling the whole truth, as proper for a general inquisition.[10]

If, however, Pope Innocent had such a distinction in mind, he did not express it clearly. *Cum dilecti*, issued in May of 1205, concerned the bishop of Agde in southern France.[11] On the basis of a 'clamor' against him, that he was guilty of simoniacal dealings, dilapidation, and possession of shipwrecked goods, judges-delegate were appointed to determine if deed corresponded to report. But, according to the 'narratio' of the decretal, instead of investigating the bishop and charging him, the judges began an inquiry into the whole community and put both the bishop himself and the cathedral canons under oath 'to tell them the truth about the status of the church' (omitted by Raymond de Peñafort in X).[12]

When the depositions were written up, including the bishop's confessions, the bishop appealed to the pope; after the depositions were recited in the bishop's presence before the pope, the bishop presented excuses, which he promised to prove.[13] Without stating his reasons, the pope gave judgment that if it were really true that the bishop had made his statements under an oath 'to tell the full and pure truth about the status of the church' (ut super statu ecclesie plenam et meram veritatem diceret), his excuses would not be admissible. If, however, the bishop had sworn, as he claimed he did, 'to respond truthfully to the points of inquiry' (ut ad inquisita veraciter responderet), the excuses should be heard. In taking this second form, the pope continues, 'he would

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[10]Ibid. 234 n.1.

[11]Innocent III, *Cum dilecti* (25 May 1205), 3 Comp. 5.1.5 (X 5.1.18).

[12]Ibid., *pars decisa* in X: 'ideoque tam episcopum quam canonicos iuramenti vinculo adstrinxerunt, ut super statu ecclesie sibi dicerent veritatem'. The passage was kept in 3 Comp.

[13]This section was omitted both in 3 Comp. and X; see complete text in Friedberg and in *Die Register Innocenz' III.* 8: *8. Pontifikatsjahr, 1205/1206, Texte und Indices*, edd. Othmar Hageneder, Andrea Sommerlechner, with the collaboration of Christoph Egger and Rainer Murauer (Publikationen des Historischen Instituts beim Österreichischen Kulturinstitut in Rom; Wien 2001) no. 77(76), pp. 139-140.

not be obliged in virtue of the oath to reply to anything except only to what was being sought (nisi ad quesita)'.[14]

Innocent could easily be seen as saying that either oath could be used for a general inquisition, unless one were to realize that the second oath, replying truthfully to 'inquisita', or 'quesita', implied specific charges against an individual. Let us look at his first *Qualiter et quando* decretal, issued the following year, 1206. It contained all of the text that would appear in the first two-thirds of the Fourth Lateran decretal. But its conclusion dealt, not with special inquisitions, but with general inquisitions 'de statu ecclesiae'.[15] In it he elaborated upon the oath that was to be taken for investigating various wrongdoings in a whole community. Such an investigation corresponded to God's expedition to Sodom and Gomorrah, rather than to the parable of the lord and his dismissed steward. The clergy of the community were to be put under oath 'to tell the inquisitors the whole truth and only the truth, not only about what they knew for sure, but also about what they believed, needed to be reformed in their church, in both head and members, with the exception of secret crimes'.[16] The obvious

[14]Ibid.: 'Et si . . . sub secunda forma iuraverit . . . , quoniam secundum eandem non teneretur ex debito iuramenti nisi ad quesita solummodo respondere, vos excusationes suas . . . audire curetis. Et si eas probaverit, . . . eum . . . absolvatis'. The pope continues: but if he was not able to prove his excuses about dilapidation, sea-salvage, and simony, or if he swore under the first form of oath, according to which there should be no silence about the truth nor mixing of falsity (nec veritatem tacere nec admiscere debuerit falsitatem), the bishop was to be removed from the administration of the church. This difference between the admissibility of hearing excuses was taken to be the chief point of *Cum dilecti*. See Hostiensis, *Commentaria in Decretales Gregorii IX* (5 vols. Venice 1581; reprinted Turin 1965) on X 5.1.18 (5:6A). It fits with the editorial summary of the decretal in X: 'Si is contra quem inquiritur iuravit respondere tantum ad interrogata, post confessionem auditur, volens probare excusationes que confessionem non perimunt sed exponunt; secus, si iuraverit, plenam et meram veritatem dicere', taken from Panormitanus, *Commentaria in Decretales* 5.1.18 [in his *Opera omnia*] (9 vols. Venice 1591-1618) 7.73r.

[15]Innocent III, *Qualiter et quando* (29 January 1206), 3 Comp. 5.1.4 (X 5.1.17).

[16]Ibid.: 'Formam vero iuramenti quam a clericis Novariensibus super inquisitione facienda in hoc negotio recepistis, in similibus volumus observari, ut videlicet jurent clerici quod super his que sciunt vel credunt esse in sua ecclesia reformanda tam in capite quam in membris, exceptis occultis

reason for the last provision was to put quasi-occult crimes off-limits, that is, crimes known to some persons but not yet bruited abroad. *A fortiori*, it would guard against forcing witnesses to reveal their own crimes, especially those known to themselves alone. As with special inquisitions, only publicly known crimes were to be investigated. Secret crimes and sins belonged to the realm of confession to one's parish priest, which the Lateran Council made mandatory once a year in *Omnis utriusque sexus* (X 5.38.12).

Petrus Beneventanus put the 1206 decretal *Qualiter* before the 1205 *Cum dilecti* in the *Compilatio tertia*, making it clear that, of the two oaths discussed in *Cum dilecti,* it was 'jurare dicere plenam veritatem' that was to be used in general inquisitions 'super statu'. Raymund of Peñafort followed suit in the *Liber extra*, and he included the conciliar canon *Qualiter et quando* in its chronological place later in the title, though, as noted, that decree was silent on the oath to be used in special inquisitions; but an obvious inference would be that it should be the other oath treated in *Cum dilecti*, namely 'jurare respondere veraciter ad inquisita'.

What about the oaths taken by *witnesses* in a special inquisition? In the Lateran decree Innocent clearly expected the presiding prelate to try to prove the rumors, if he could, by producing witnesses to the actual guilt of the suspect (now defendant), while allowing him to argue against them and produce his own counter-evidence, as would happen in civil cases, or in the criminal procedure of accusation. We see him doing this in his early decretal *Licet Heli*, issued in December 1199. The case concerned not only fame of simony against the abbot of Pomposa,

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criminibus, meram et plenam dicant inquisitoribus veritatem'. On the use of portions of previous decretals including *Qualiter et quando* in the canons of the Fourth Lateran Council, see Ken Pennington, 'The Fourth Lateran Council, its Legislation, and the Development of Legal Procedure', *The Fourth Lateran Council: Institutional Reform and Spiritual Renewal: Proceedings of the Conference Marking the Eighth Hundredth Anniversary of the Council Organized by the Pontificio Comitato de Scienze Storiche (Rome 15-17 October 2015)*, edd. Gert Melville and Johannes Helmrath (Affalterbach 2017) 41-54.

but also specific denunciations by some of the monks of the abbey. When the abbot objected that the denunciations were not preceded by charitable admonitions, as required, the pope began an inquisition 'ex officio', even though not simply fame but actual proof of the charges had been submitted, namely, the sworn testimony of two of the monks. All the monks, both those for the abbot and against him, were put under oath to explain the full truth as they knew it concerning the charges (ut de propositis plenam quam scirent exponerent veritatem).[17] The oath taken by witnesses resembled that taken in a general inquisition: the witnesses swore to tell the full truth as they knew it. But, whereas in the general inquisition they were to volunteer testimony about faults that need to be corrected, when testifying in a special inquisition they were to tell their knowledge about specific charges against a defendant.

Teutonicus's choice of the ad inquisita oath

It was not Roffredus but the very earliest expositor of the Lateran decrees, Johannes Teutonicus, who first set the matter straight on the oath to be taken by the defendant in a special inquisition.[18] He did indeed make the inference from *Cum dilecti* indicated above. He was very specific about the whole process, which was to be as follows. First, the inquisitor goes to the place where the implicated person lives, so that he can best inquire about his life and fame; he will then cite him, sending him a list of the crimes he is to answer to, so that he may be instructed when he comes to court (et sic scribantur ei crimina pro quibus citatur, ut possit venire instructus), citing the canon *Si primates* from Gratian.[19] If the judge conducts the inquisition entirely 'ex officio suo', he should put the defendant under oath to respond to

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[17]Innocent III, *Licet Heli*, *X* 5.3.31.

[18]Johannes Teutonicus, *Apparatus in Concilium quartum Lateranense*, ed. Antonio García y García, *Constitutiones Concilii quarti Lateranensis una cum commentariis glossatorum* (MIC Series A 2;Vatican City 1981) 173-270. He compiled the commentary shortly after the council finished.

[19]Teutonicus on Const. 8, *Qualiter* 198. According to *Si primates* (C.5 q.2 c.4), primates are to convoke accused bishops to synod, but 'non priusquam eis per scripta significent quid eis opponitur, ut ad responsionem preparati adveniant'.

interrogations (ut respondeat ad interrogata), citing *Cum dilecti*, but confusingly calling it *Cum dilectus*, and saying 'interrogata' instead of 'inquisita' or 'quesita'.[20]

The witnesses to be examined, Teutonicus explains, will take a different oath: they 'will swear about what they know or believe, but will say nothing about hidden sins'. To establish this, he cites *Qualiter*, even though that decretal was speaking of witnesses in a general inquisition volunteering to say what they knew or believed needed correcting, not witnesses summoned to testify on specific charges against a specific person.[21] He justifies this by saying that 'they will not simply swear to respond to questions but they will swear to tell all the truth that they know, whether they are asked or not'.[22]

We note, then, that telling the truth is essential to the special-inquisition oath, just as much as it is required in the oath 'de statu ecclesiae' to tell the truth on what needs reform. The only difference is that in a special inquisition the questions are limited to specific misdeeds established as connected to the defendant by 'publica fama'. Pennington's statement quoted above could therefore be clarified thus: 'The judge would summon witnesses and make a defendant swear that he would "respond [truthfully] to

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[20]Teutonicus on *Qualiter* ed. García 197: 'Si autem iudex ex officio suo inquirat, tunc ipse iudex inducet testes et faciet reum iurare, ut respondeat ad interrogata', citing *Cum dilecti* (5.1.5), calling it *Cum dilectus*, the incipit of the decretal further along in the title (3 Comp. 5.1.7 [X 5.2.2]). Vincentius Hispanus makes the same 'mistake' in his commentary: ed. García, *Constitutiones* 299 at n.7. In both cases, García wrongly identifies the decretal in question as the irrelevant *Cum dilectus* X 5.2.2. As will be seen below, Hostiensis and Durandus also cited *Cum dilectus* when *Cum dilecti* was meant. All this suggests that the form of the decretal as they knew it began something like 'Cum dilectus filius Cisterciensis abbas et dilecti filii P. et R. monachi Fontis frigidi' etc., even though Friedberg and others found no such variant. An Italian manuscript dated 1240 of the *Liber extra* in Munich BSB lat. 26301, fol. 191rb correctly reads *Cum dilecti filii Cisterciensis*.

[21]Teutonicus on the conciliar canon *Qualiter* 198-199, citing the decretal *Qualiter* (3 Comp. 5.1.7 [X 5.1.17]).

[22]Ibid.: 'Et non iurabunt simpliciter respondere ad interrogata, sed iurabunt dicere omnem veritatem quam noverint, sive fuerint interrogati sive non', again citing the earlier decretal *Qualiter*.

questions", but not, as is often asserted, that he must "tell the truth".'

Teutonicus also makes the point that when an inquisitor identifies someone as promoting the inquisition (promovens inquisitionem), the defendant (reus) does not have to take any kind of oath, since it would have the effect of 'instructing' his opponent (adversarius), that is, making his case for him. Rather, the promotor himself must call witnesses, and if he as plaintiff (actor) fails to prove his charge, he is to be punished.[23] In other words, he is to be treated like a failed accuser in the accusation procedure. However, the authority that Teutonicus cites as confirming this, Innocent's 1206 decretal *Cum oporteat*, does not say this; rather, it simply states that, when nothing serious is proved, compurgation is to be ordered for the defendant.[24] Godfrey of Trani (†1245) repeated Teutonicus's position on this point, but it was opposed by Cardinal Hostiensis in his *Summa* (ca.1261). According to Hostiensis, the defendant should take an oath even when there is a promotor, but his reasoning is not evident.[25] It is noteworthy that he characterizes the oath taken, 'ut ad interrogata respondeat', as 'swearing to tell the truth' (jurare dicere veritatem).[26]

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[23]Teutonicus on *Qualiter* ed. García 197

[24]Innocent III, *Cum oporteat* (1 September 1206), 3 Comp. 5.1.6 (X 5.1.19).

[25]Hostiensis, *Summa aurea* (Venice 1574; reprinted Turin 1963), *De inquisitionibus*, no. 6 in fin., col. 1478: 'Sed secundum Goffredum hanc differentiam notabis inter inquisitionem que fit ex officio et illam que fit aliquo prosequente: quia ubi iudex ex officio procedat, faciet iurare illum contra quem procedit, ut super eo de quo inquiritur ad interrogata respondeat, infra eodem Cum dilectus (i.e., Cum dilecti X 5.1.18). Sed quando fit aliquo prosequente, tunc non faciet illum iurare, sed is qui prosequitur probabit, si potest; et si non probaverit, punietur, infra eodem, Cum oporteat (X 5.1.19) et capitulo sequente (Cum dilectus, X 5.1.20). Ego tamen puto quod in utroque cogatur iurare dicere veritatem ut patet in his quae notavi supra eodem sub rubrica proxima § <Et> qualiter [citing his treatment above, no. 5], nec aliquod ius dicit quod non cogatur iurare, imo potius contrarium, supra de probat. Sicut consuetudo et c.Ad nostram (X 2.19.2 and 12)'. Also cited by Esmein, 'Serment des inculpés' 245, omitting references. In my view, Hostiensis's references do not confirm his positions.

[26]We should also note that Hostiensis interprets *Cum dilecti* to mean that in a general inquisition the witnesses can be put under either oath, 'de veritate' or 'ad interrogata' (ed. 1574 no.5 col. 1476).

Durandus's choice of the de veritate oath, as in purgation

When Durandus took note of these questions, he agreed with Tancred, Goffredus, and Roffredus (he does not mention Teutonicus) that the defendant in an inquisition with a promotor did not have to take an oath, because he was not obliged to swear against himself ('quia non tenetur contra se jurare').[27] When, however, the inquisition was entirely 'ex officio', he was bound to swear, and the oath in question turned out to be 'de veritate'. However, he was not thinking of the oath taken by witnesses in a general inquisition 'de statu ecclesiae', as Fournier thought, nor was it the oath taken in civil trials, which was contrasted with 'de calumnia',[28] but rather the oath given to witnesses in special

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[27]Durandus, *Speculum judiciale* (Basel 1574 edition, *Speculum juris*, 2 vols., reprinted Aalen 1975), book 3 part 1, *De inquisitione* § 3 *Viso igitur* no.19 (2:35): 'Inquisitores . . . sine acceptione procedant . . . nec a reo exigant iuramentum, quia non tenetur contra se iurare ut supra de posit. § vii. ver. xix. (citing his treatment at book 2 part 2 *De positionibus* § 7 no. 40, 1:594), sed promovens inquisitionem testes et probationes inducat secundum Tancredum, Goffredum, et Roffredum'.

[28]In civil cases the oath 'de veritate' was said to deal only with knowledge, while another oath, 'de calumnia vitanda', dealt with belief, which in practice was unworkable; as a result, Boniface VIII ordered both oaths to be imposed together: 'Si de calumnia' Sext 2.4.1. See Durandus, book 2 part 2, '*De iuramento calumnie*' § 1 Est autem no.10 (1.571); § 6 Sexto no.10 (1.587) and no.12 (1:588). Another point: the oath 'de calumnia' had multiple aspects, and one of them, 'responding truthfully to questions', resembled the alternative oath discussed in *Cum dilecti*. See Durandus, tit. *De iuramento calumnie* § 4 *Nunc dicamus* (1.577), for the form imposed on the plaintiff in a civil action: 'You will swear not to seek anything by way of calumny but only what you believe and consider to be just; also, that you will tell the truth about what you will be asked and not deny it (quod respondebis veritatem super his de quibus interrogaberis et eam non negabis). Sometimes, in fact, what Teutonicus took to be the special-inquisition oath, as described by Innocent III in *Cum dilecti*, was referred to as an oath 'de calumnia'. For instance, Innocent IV, commenting on the words 'ad inquisita', says: 'Since one who swears 'de calumnia' must only swear to tell the truth to questions, he can excuse his confessions; but a witness, who swears to say whatever he knows, cannot excuse his testimony'. Innocent IV on X 5.1.18 *Cum dilecti*, s.v. *ad quesita*, *In quinque libros Decretalium commentaria* (Venice 1578) fol. 203r: 'Cum iurans de calumnia

inquisitions, since he referred to Innocent's *Licet Heli*.[29] But the reason the defendant swore this oath was that that was what one must do when one was defamed of a crime, as when purgation is ordered.[30]

One would expect the laws cited by Hostiensis, especially the canon *Quoties* of Innocent II, repeated in the *Liber extra*, describing the purgation process, to specify the oath to be taken, but they do not. In *Quoties*, only the process is stated: the suspect is simply to swear that he did not commit the charged offense.[31] But Panormitanus does name the oath in his summary of *Quoties*, which became the heading of the decretal in the printed editions of the *Liber extra*: 'A defamed person against whom the crime cannot be proved should purge himself by an oath "de veritate", while the compurgators swear "de credulitate".'[32]

However, merely indicating that an oath had to be taken by persons established to be suspect and ordered to undergo purgation was hardly sufficient justification for imposing such an oath on a defendant in an inquisition, because in the latter case it went

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tantum iuret de veritate ad interrogata respondere, poterit suas confessiones excusare; testis autem, qui iurat dicere quidquid novit, non potest excusare testimonium suum'.

[29]Durandus, book 3, part 1, *De inquisitione*, § 3 *Viso igitur*, no.24 (2:36): 'cujus iuramenti formam vide supra *De teste*', referring to book 1 part 4 § 4 no. 4, where we read (1:311-312): 'Porro in causa inquisitionis, aut inquiritur super crimine aut super statu ecclesie. Si super crimine, forma iuramenti erit talis, ut super crimine dicat plenem veritatem', citing *Licet Heli*, X 5.3.31 (viz., 'de propositis plenam quam scirent exponerent veritatem').

[30]Durandus, tit. *De inquisitione* § 3 no. 19 (2:35): 'Ubi vero, nullo prosequente, sed ex superioris officio inquiritur, tunc iurabit propter infamiam contra eum ortam ut extra de purgat. canon. c.i. (X 5.34.1 *Nobilis homo*) et c.Quoties (X 5.34.5) et de accusat. Cum dilectus et c.Si consistuerit (X 5.1.18, recte *Cum delicti* and c.12) ubi de hoc, et ii. q.v. Presbyter si et c.Omnibus, ad finem (C.2 q.5 c.13 and c.19)'. *Si constituerit* is irrelevant. See Esmein, 'Serment' 239.

[31]Innocent II, *Quoties*, C.2 q.5 c.17 (cf. X 5.34.5): 'Porro purgationis tenor erit huiusmodi: idem episcopus super sancta evangelia primum iurabit quod . . . neque ipse per se . . . neque alius pro eo . . . pretium receperit. Deinde vero [com]purgatores . . . iurabunt quod, sicut ipsi credunt, verum iuravit'.

[32]Panormitanus, *Comm*. on X 5.34.5 (7.207v): 'Infamatus contra quem crimen probari non potest debet se purgari iuramento de veritate, compurgatores vero de credulitate' (= heading X 5.34.5).

beyond registering a mere denial. It obligated him to tell the truth in response to additional questions about the denied crime.

Heresy in Narbonne: a new oath, de se et aliis, for voluntary self-accusers

Within two decades of the Fourth Lateran Council, the procedure of inquisition was applied to the prosecution of heresy. The judges-delegate appointed by Gregory IX for specific regions were first called 'inquisitores haereticae pravitatis' by him in a letter of 1238.[33] Methods for dealing with heresy were formulated in a council of the ecclesiastical province of Narbonne in 1244. A certain time would be set for persons 'to come forward of their own accord as penitents' and proceed 'to tell the full truth as well about themselves as about others'.[34] Later we hear of witnesses who were 'required to testify generally about themselves and others,'[35] but such a requirement would be appropriate if they were among those who had volunteered to reveal their own offenses.

In the decretal *Ad abolendam* issued by Pope Lucius III in 1184, he directed bishops or archdeacons to go to parishes where there was 'fama' of heretics and seek information from three or more men of sound reputation, or, if it seemed good, to put the whole neighborhood under oath ('totam viciniam jurare compellat').[36] The latter procedure would obviously often mean that guilty persons would be forced to testify, but there was no suggestion that they would be expected to incriminate themselves.

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[33] H.A. Kelly, 'The Fourth Lateran *Ordo* of Inquisition Adapted to the Prosecution of Heresy', *A Companion to Heresy Inquisitions*, ed. Donald Prudlo (Brill's Companions to the Christian Tradition; Leiden 2019) 83-84.

[34] *Council of Narbonne*, chap. 1, ed. Kurt-Victor Selge, *Texte zur Inquisition* (Gütersloh 1967) 60; also ed. Riccardo Parmeggiani, *I consilia procedurali per l'inquisizione medievale (1235-1330)* (Bologna 2011) 24: 'sponte venientibus, penitentibus, et tam de se quam de aliis plenam dicentibus veritatem'.

[35] Ibid. chap. 27 (Selge 67, Parmeggiani 30): 'Testes autem qui generaliter de se et aliis requisiti, semel deposuerint . . . non est necesse ut interim producuntur'. The decretal *Accusatus* of Alexander IV (1252-1261), Sext 5.2.8 §3, also speaks of witnesses who swear to tell the truth 'de se et aliis'.

[36] Lucius III, *Ad abolendam*, X 5.7.9 *pars decisa*.

In Innocent III's procedure for an inquisition 'de statu ecclesiae' in the 1206 decretal *Qualiter et quando*, where all the clergy were to be put under oath, self-incrimination was implicitly excluded by the caveat that there was to be no testimony concerning occult crimes. In the case treated in *Cum dilecti*, where the pope inquired if the bishop of Agde had confessed his crime under an oath 'de statu ecclesiae', we see that Innocent envisaged the possibility of a guilty person confessing to personal crimes during a general inquisition. But we must remember that in this case the crime was not occult, since there was 'fama' of the bishop's guilt, and it was that 'fama' that sparked the inquisition 'de statu ecclesiae'.

To repeat, it was only public crimes that were investigated in both general and special inquisitions. It was a general principle that the Church did not judge secret matters,[37] and, as Johannes Andreae would declare later, 'There is no equity to justify a judge's interrogation of a defendant about secret matters'.[38]

At the next council in the province of Narbonne, which took place at Béziers in 1246, people were told that those who came forward to confess during the 'tempus gratiae' would be spared penalties of death, exile, and confiscation of goods. When they appeared, they took an oath to tell the truth about themselves and others, living and dead.[39] Witnesses did not have to be deposed again, except concerning new circumstances.[40] Confessions and depositions were to be recorded; the oaths were then repeated in

[37]Stephan Kuttner, 'Ecclesia de occultis non iudicat: Problemata ex doctrina poenali decretistarum et decretalistarum a Gratiano usque ad Gregorium PP. IX.', *Acta Congressus iuridici internationalis: VII saeculo a Decretalibus Gregorii IX et XIV a Codice Iustiniano promulgatis, Romae 12 - 17 novembris 1934* (5 vols. Rome 1935-1937) 3:225-246.

[38]Johannes Andreae on X 2.18.2, *In quinque Decretalium libros Novella commentaria* (Venice,1581; reprinted Turin 1963), 2:108A no. 5: 'Nulla ergo equitas potest movere iudicem ut reum interroget de occultis'. For discussion, see H.A. Kelly, 'Inquisitorial Due Process and the Status of Secret Crimes', *Proceedings San Diego* 407-428 (reprinted in *Inquisitions* II) 416.

[39]*Council of Béziers* chap. 4 (ed. Parmeggiani 38): 'Ab illis qui sic citati coram vobis infra tempus comparuerint assignatum, recipiatis iuramenta de mera et plena super facto labis heretice, tam de se quam de aliis, vivis et mortuis, dicenda quam noverint veritate'.

[40]Ibid.

public and the penitents were individually told that there was an inquisition against them, and the charges were explained.[41] We are to conclude, therefore, that a formal inquisition was to be held even for those who had confessed, and that charges would consist of what they had confessed. And, what is important for our present inquiry, the original confessant-witness oath 'de se et aliis' would be repeated.

It is doubtful, however, that such special inquisitions were held for persons who came forth to confess. Probably what happened was that, after being sworn in with the oath 'de se et aliis', the personal crimes that they admitted were treated as if in confession. In other words, after one confessed his offenses, he would be assigned a penance, which he would promise to perform, and then the inquisitor would absolve him of any excommunication he might have incurred, and finally require him to abjure all heresy and swear to oppose heresy.[42]

From what the confessants 'de se' confessed 'de aliis', the inquisitor would summon specific persons for special inquisitions. They would first be invited to confess 'the truth' that had been discovered about them; if they denied it, the charges would be explained and evidence presented, and they would be given a chance to defend themselves.[43] There might be some room for

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[41]Ibid.: 'Iuramenta vero supradicta publice ac presentibus omnibus qui ad confitendum conveniunt recipere procuretis, ut ex forma iuramenti secundum quam exigitur, quilibet tam de se quam de aliis teneatur dicere veritatem. Intelligant singuli quod sit contra ipsos inquisitio, et de quibus; atque ita capitula de quibus inquiritur singulis quasi exposita videantur'.

[42]This is the procedure described in the letter of absolution issued to Pons Grimoard of Castelsarrasin (near Montauban, north of Toulouse) in 1236 by the inquisitors Stephen of St.-Thibéry, OFM, and William Arnold, OP. See Claude de Vic and Joseph Vaissete, *Histoire générale de Languedoc* (15 vols. Toulouse 1872-1892) 8:1015-1016; a French rendering is given by Jean Duvernoy in his rough text and translation of Paris, BNF Doat 22, fols. 1-106: *Cahiers de Bernard de Caux: Agen, Cahors, Toulouse, 1243-1247* (1988), available at http://jean.duvernoy.free.fr/text/pdf/bdecaux.pdf. See p.61, in the midst of Grimoard's depositions of 22-23 January 1244 (pp. 52-64, Doat 22:33v-42v).

[43]*Council of Béziers*, chapters 6-8 (Parmeggiani 39): '6. Illos qui cum sint culpabiles contemnunt comparere infra tempus gratie, aut malitiose supprimunt veritatem, citetis suo tempore nominatim. 7. Eisque si veritatem contra se

doubt about whether they were to be told what the charges were before they were asked to plead guilty. If they were, then the procedure would be in accord with the law—except perhaps for neglecting to establish 'fama publica' before charging them. In any case, there is no record of the oath such defendants took, since, as usual, the actual trials were not recorded.

The oath de se improperly imposed on witnesses and suspects by heresy inquisitors

When the actual practice of inquisitors in the field is examined, it seems clear that they soon developed the policy of summoning whole neighborhoods to testify to their knowledge of heresy. This was in conformity with the decretal *Ad abolendam*, but in a section of the letter that did not make it into canon law, since it was eliminated by Peñafort when he compiled the *Liber extra*. Furthermore, they proceeded to impose the oath 'de se et aliis' on everyone, not only those who wished to clear their own consciences by confessing offenses, but also those who wished simply to reveal the offenses of others, and, finally those who, whether or not they knew they were under suspicion, wished to deny all wrongdoing.

We see this in the case of the Dominican 'inquisitor haereticae pravitatis' Bernard de Caux in his activities in the dioceses of Agen and Cahors, in the provinces neighboring Narbonne of Bordeaux and Bourges respectively, from 1243 to 1245.[44] The same seems to have been true in the vast general inquisition undertaken by Bernard de Caux and John de St.-Pierre in Toulouse in 1245-1246. Just as it was the policy of requiring the guilty and the not-guilty to make an abjuration, so too it appears that everyone swore to testify about self and others.[45]

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inventam confiteri noluerint, exponatis capitula super quam inventi sunt culpabiles, et dicta simul testium publicetis. 8. Ac, datis dilationibus competentibus et defendendi facultate concessa, benigne admittatis exceptiones et repetitiones legitimas eorundem'.

[44]Paris, BNF Doat 22 fol. 1v-71v (Duvernoy, *Cahiers,* pp. 8-116).

[45]See Mark Gregory Pegg, *The Corruption of Angels: The Great Inquisition of 1245-1246* (Princeton, 2001) esp. 58. For the depositions, see Jean-Paul Rehr,

Furthermore, it seems likely that the oath 'de se et aliis' was also imposed upon persons the inquisitors had collected evidence against and intended to prosecute, requiring them to testify against themselves before actually charging them. This can be gathered from the cases of Domina or Na Barèges, wife of Peter Grimoard Sr., and her brother Odon de Barèges.[46]

According to a manual now attributed to Bernard de Caux and John de Saint-Pierre, *Processus inquisitionis*, doubtless compiled in response to an order of Innocent IV dated 20 October 1248,[47] the instructions were considerably more in conformity with the Fourth Lateran rules for special inquisitions than is evident in their own previous practice. According to the *Processus*, persons who come forward to confess are made to abjure their heresy and to swear to tell the truth about themselves and others.[48] But when inquisitors summon a suspect, they specify that he is to 'respond concerning his faith', or 'concerning such-and-such a fault' (ut . . . de fide sua vel de tali culpa compareat responsurus); the inquisitors also declare the cause of the citation, they deny no one his legal defenses, and they do not deviate from the 'ordo juris' except in not revealing the names of witnesses, for which they have an exemption from Pope Gregory IX (which could hardly be

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The Registry of the Great Inquisition at Toulouse, 1245-46: Edition and Translation of Bibliothèque municipale de Toulouse Ms. 609 (2018): http://medieval-inquisition.huma-num.fr. An example of a not-guilty assertor who abjures is no. 0616, Petrona Picrella (fol. 42r); this is one of the rare instances in which the full oath 'de se et aliis' is recorded.

[46]Paris, BNF Doat 22 fol. 43-46 (Duvernoy, *Cahiers* 66-70). For details, see Kelly, 'Fourth Lateran *Ordo*' 91-92.

[47]*Processus inquisitionis* (ca. 1248), ed. Selge, as *Ordo processus Narbonensis* (*Texte* 70-76), following Antoine Dondaine, 'Le manuel de l'inquisiteur (1230-1330)', *Archivum fratrum praedicatorum*, 17 (1947) 85-194, describing Manual 2, 97-101; see Yves Dossat, *Les crises de l'inquisition Toulousaine au xiiie siècle (1233-1273)* (Bordeaux 1959) 167; idem, 'Une figure d'inquisiteur: Bernard de Caux', *Cahiers de Fanjeaux* 6 (1971) 253-272, at 264-266. Selge does not know about Dossat's attribution. The manual is not mentioned by Parmeggiani.

[48]*Processus inquisitionis*, section 2, *Modus abiurandi et forma iurandi* (Selge 71): 'Omnem quemque dum se ad confitendum presentat, facimus abiurare omnem heresim et iurare quod dicat plenam et puram veritatem de se et aliis vivis et mortuis super facto seu crimine heresis et Valdesie'.

the case) and Pope Innocent IV, as well as testimonial letters of cardinals. Thus, they conclude, they proceed with sufficient caution to protect the rights of both defendants and witnesses.[49]

Such was not the case in a manual produced after heresy inquisitors resumed their activity in Languedoc in the 1270s, where the instructions explicitly admitted to the practice of first interrogating suspects under the self-incriminating oath 'de se et aliis' rather than charging them immediately with the offenses they were suspected of having committed. The account begins with the words 'Isto modo procedunt', and it comes at the beginning of Antoine Dondaine's Manual 6, *Doctrina de modo procedendi contra hereticos* (a modern title), compiled some time after 1278.[50] 'Isto modo' is attributed by Yves Dossat to the Dominican inquisitors, Pons du Pouget and Stephen de Gatine, writing between 1271 and 1273.[51] It starts thus:[52]

> This is the way in which inquisitors of the regions of Carcassonne and Toulouse proceed. First the accused or suspect is cited, and when he appears he swears upon the holy Gospels to tell the truth to the fullest of his knowledge concerning the crime of heresy or Waldensianism, both about himself and about others, living and dead. And if he should conceal or deny the truth, he is placed in prison until he confesses.

There seems to be no question of holding an actual trial, a special inquisition, against the suspect: no leveling and explaining of charges, and no attempt to prove them if the suspect/defendant denies them. Rather, all suspects are simply imprisoned until they change their mind and confess.

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[49]Ibid., section 4, *Modus singulos citandi* (72-73), The last part reads: 'Nulli negamus defensiones legitimas, neque a juris ordine deviamus, nisi quod testium non publicamus nomina', etc.

[50]'Isto modo procedat', in *Doctrina de modo procedendi contra hereticos*, ed. Edmund Martène et al., *Thesaurus novus anecdotorum* (5 vols. Paris 1717, reprinted New York 1968) 5.1795-1814 at 1795-1796; see Dondaine, 'Manuel' 108-111, 163.

[51]Dossat, *Crises* 202-204.

[52]*Doctrina*, part 1: *Isto modo procedunt*, col. 1795: 'Isto modo procedunt inquisitores in partibus Carcassonensibus et Tholosanis. Primo accusatus vel suspectus de heresi citatur; qui veniens iurat super sancta evangelia super crimine heresis vel Valdesie tam de se quam de aliis tam vivis quam defunctis dicere plenariam quam scit veritatem. Et si celaverit vel negaverit, in carcere ponitur et detinetur donec fuerit confessus'.

The instructions continue: 'If, however, he tells the truth', meaning that he admits guilt, 'his confession is carefully recorded by a notary public', and he is made to repeat it in the presence of two witnesses, members of a religious order, and to abjure his heresy.[53] That is, a trial is held only after the suspect confesses to a crime, and it consists only of the statement of charges and the confession of guilt. There is no mention of any further oath-taking.

From this we see that there is clearly no concern about following the 'ordo juris'. Persons known or assumed to be suspects are required to swear to tell the truth concerning whatever questions asked of them, not only about the deeds of others but also about themselves, with no establishing of suspicion and no listing or explanation of charges. This is the pattern that will be followed in the future, for instance, in the prosecutions under the Dominican inquisitor Guglielmus Parisius of the Knights Templar beginning in 1307, and, starting around the same time, in the treatment of various kinds of heresy suspects in the south of France under another Dominican inquisitor, Bernardus Guidonis, author of Dondaine's Manual 9, *Practica inquisitionis* (ca. 1324);[54] and also in the episcopal inquisitions undertaken by James Fournier, bishop of Pamiers, beginning in 1318, assisted by the Dominican vice-inquisitor.[55]

De se interrogation substituted for special inquisition

The procedure described above, in which witnesses in a general inquisition were required to testify against themselves as

[53]Ibid.

[54]Bernardus Guidonis, *Practica inquisitionis heretice pravitatis*, ed. Célestin Douais (Paris 1886); Dondaine, 'Manuel'115-17. See especially *Practica* 4.3.2.A.a (pp. 218-19) and 4.3.2.A.e.β (p. 229), and cf. H.A. Kelly, 'Inquisitorial Deviations and Cover-ups: The Trials of Margaret Porete and Guiard de Cressonessart, 1308-1310', *Speculum* 89 (2014) 936-973 at 944-945. Most of Guy's canon-law citations are from the Sext. He never cites either version of Innocent III's *Qualiter et quando*.

[55]*Le registre d'inquisition de Jacques Fournier, évêque de Pamiers (1318-1325)*, ed. Jean Duvernoy (3 vols. Toulouse 1965). See Kelly, 'Right to Remain Silent' 1003-1005.

well as others developed naturally into a similar process when there was no general inquiry but only a single person under suspicion. Instead of being summoned and charged with the suspected crimes in a general inqusition, the suspect is not told of suspicions but simply required to take an oath to tell the full truth to whatever questions will be asked concerning him/herself and others, even when there are no 'others' and no allegations of wrongdoing in the community. It constituted, in effect, a one-person general inquisition, in which any admission of offenses would result in a conviction, without need for an inquisitorial trial, except 'pro forma', to confirm the confession of guilt.

We can see a good example of the process being attempted against the mystic Margaret Porete by the heresy inquisitor Parisius in 1308, the year after his prosecution of the Knights Templar.[56] Considering her to be vehemently suspect of heresy, he summoned her, and without further ado insisted that she take an oath to tell the full truth about herself and others concerning matters that were recognized to pertain to his office of inquisition.[57] When she refused, he kept her in prison for long afterwards, and then, in consulting the University of Paris, he pretended that her refusal came after he had instituted an inquisition against her by charging her and requiring to take an oath to respond truthfully concerning what had been charged and explained.[58]

The practice of forcing suspects to take an oath 'de se et aliis' was fully expounded by Nicholas Eymeric in his *Directorium*

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[56]For these proceedings, see Kelly, 'Inquisitorial Deviations' (the Templars are discussed on 942-944).

[57]Paul Verdeyen, 'Le procès contre Marguerite Porete et Guiard de Cressonessart (1309-1310)', RHE 81 (1986) 47-94, 81: 'Nobis . . . inquisitori heretice pravitatis . . . constat et constitit evidentibus argumentis te Margaretam de Hannonia, dictam Porete, super labe pravitatis heretice vehementer esse suspectam, propter quod citari te fecimus ut compareas in judicio coram nobis; in quo existens personaliter, a nobis [monita es] pluries canonice et legitime ut coram nobis iuramentum prestares de plena, pura, et integra veritate dicenda de te et de aliis super hiis que ad nobis commissum inquisitionis officium pertinere noscuntur'. See Kelly, 'Inquisitorial Deviations' 946.

[58]Ibid. 61: 'cui de dicenda veritate super sibi impositis et expositis ex officii sui debito detulit iuramentum'. Kelly, 'Inquisitorial Deviations' 950.

inquisitorum of 1376.[59] But by the sixteenth century, according to Eymeric's editor, Francis Peña, the oath, given to both witnesses and suspects, had been simplified (but also expanded), and it went like this: 'I swear by God and the cross and the four Gospels that I touch with my hands to tell the truth, and if I do, God help me, but if not, God condemn me'.[60] Peña admits that the practice of putting suspects under oath before they were charged was based on no law, and was regulated only by local custom.[61]

The dropping of the 'de aliis' from the oath seems to have occurred in the previous century. It is missing from the oath that Peter Cauchon repeatedly exacted from Joan of Arc in 1431, claiming to be her ordinary as bishop of Beauvais: that she swear to tell the truth to all that he will ask her about, specficially what concerns the faith.[62]

The undeserved bad reputation of the 'oath ex officio' in England

The only known time that the oath 'de se et aliis' was imposed on witnesses in England with a view to implicating the

[59]Nicholas Eymeric, *Directorium inquisitorum* (1376), ed. Francisco Peña (2 vols. Rome 1578), part 3, *Modus interrogandi reum accusatum*, § 74 (1:286): 'iuratus . . . tam de se quam de aliis dicere veritatem'.

[60]Peña on Eymeric, book 3, scholium 21 (2:133): 'Huius autem iuramenti formula vulgo talis esse solet: "Iuro per Deum et crucem et sacrosancta quatuor Evangelia manibus propriis tacta, me dicturum veritatem: quod si fecero, Deus me adiuvet; sin autem contra, Deus me condemnet".'

[61]Peña commenting on Eymeric, part 3, title *De modo interrogandi reum accusatum* (1:286), scholium 19 (2:130): 'Quamvis in his quae ad praxim attinent nihil sit nominatim a iure cautum: ea enim iudicum prudentiae relinqui solent, et plurimum in his etiam consuetudo singularum inquisitionum sibi vendicat: nihilominus tamen . . . quo ordine . . . haec sint gerenda . . . breviter indicabimus'.

[62]Pierre Tisset, ed., with Yvonne Lanhers, *Procès de condamnation de Jeanne d'Arc* (3 vols. Paris 1960-1971) 1:37-38: 'Ex officio nostro ipsam Iohannam iudicialiter requisivimus quatinus iuramentum in forma debita, tactis sacro-sanctis euvangeliis, prestaret de dicendo veritatem, ut premittitur, super hiis de quibus interrogaretur'. Again, 39: 'Et iterato et vicibus repetitis nos episcopus predictus monuimus et requisivimus eandem Johannam quod in hiis que tangerent fidem nostram iuramentum prestare vellet de dicendo veritatem'. See Kelly, 'Right to Remain Silent' 1012-1013.

witnesses was in the Templar case: for instance, when, in 1309, the bishop of London, joined by two of the papal commissioners interrogated each templar 'tam de seipso tanquam principalis, quam de aliis singularibus personis dicti ordinis tanquam testis'.[63] In a process against suspected Wycliffites in 1382, however, the archbishop of Canterbury, identifying himself as 'inquisitor heretice pravitatis' for the whole province, put Oxford doctors under a new kind of oath, not to tell the truth, but to tell their opinion on propositions that had just been censured: 'de dicendo sentire suum super conclusionibus antedictis'. The archbishop declared that any heretical or erroneous response would be enough to convict them.[64] He does not state that a trial would be required, in which they would be formally charged with what they confessed.

After the Council of Constance, the pope, Martin V, in the bull *Inter cunctas* (1418), mandated a procedure of this sort for prosecuting the followers of Wyclif, whereby suspects would be questioned on a list of condemned propositions before any charges were made.[65] How extensively it was put into effect, at a time when the Lollard threat was dying down, can be argued.

But something of the sort can be seen occurring in the next century when efforts were being made to stem the spread of Luther's ideas. However, it is not clear that responses acquired in this way were used to formulate charges.[66] They seem not to have been in the case of the priest John Lambert in 1532, who in the course of his answers enunciated the correct distinction between

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[63]Helen Nicholson, ed. and trans., *The Proceedings Against the Templars in the British Isles* (2 vols. Farnham 2011) 1.23.

[64]David Wilkins, *Concilia Magnae Britanniae et Hiberniae* (4 vols. London 1737) 3.160-163. See H.A. Kelly, 'Trial Procedures Against Wyclif and Wycliffites in England and at the Council of Constance', *Huntington Library Quarterly* 61 (1999) 1-28 (=*Inquisitions* V) 12-13

[65]See H.A. Kelly, 'Lollard Inquisitions: Due and Undue Process', *The Devil, Heresy and Witchcraft in the Middle Ages: Essays in Honor of Jeffrey B. Russell*, ed. Alberto Ferreiro (Cultures, Beliefs and Traditions 6; Leiden 1998) 279-303, esp. 296-302 (=*Inquistions* VI).

[66]H.A. Kelly, 'Thomas More on Inquisitorial Due Process', EHR 123 (2008) 847-894, 866-870.

proper and improper oaths in inquisitorial proceedings. He objected against judges who:[67]

> sometimes, not knowing by any due proof that such as have to do before them are culpable, will enforce them, by an oath, to detect themselves, in opening before them their hearts.

Such oaths can be legitimately refused, he says: 'I cannot see that men need to condescend to their requests'. But in properly constituted proceedings, it is otherwise, as he states:

> I think it lawful, at the commandment of a judge, to make an oath to say the truth, especially if a judge requireth an oath duly, and in lawful wise; or to make an oath in any other case convenient; and that also for purgation of infamy, when any infamy is lawfully laid against a man.

He was clear about the nature of the judicial system in canon law, twice invoking the principle 'Nemo tenetur prodere se'.[68]

At the time that Lambert made this declaration, the assumption was widespread that English bishops were using the same judicial technique as Continental authorities. For instance, the House of Commons in their *Supplication against the Ordinaries* in 1532 claimed that many persons were summoned 'ex officio', and, with no accusation or fame against them, 'were constrained to answer to many subtle questions and interrogations' and thereby were trapped and convicted.[69] But as yet there was no emphasis on the oath involved in such constraint. The same was true of the similar charges made by the lawyer Christopher St. German in 1533, which would be refuted by Thomas More in the same way as the bishops: none of it was true, no such use was made of pre-arraignment interrogations.

It was only in the seventeenth century and beyond that there was a focus upon the oaths taken in such supposed interrogations and roundly condemned as 'the oath *ex officio*'. A modern

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[67]John Foxe, *Acts and Monuments*, ed. Josiah Pratt (8 vols. 4th ed. London 1877) 5.221.

[68]Ibid. 5.184, 221. For Lambert's case, see Kelly, 'Thomas More' 869-870.The maxim is stated in the Ordinary Gloss to X 2.20.37 *Cum causam* s.v. *de causis*, referring to Gratian, De pen. D.1 d.p.c.87 § 1, who cites St. John Chrysostom's statement, 'Non tibi dico ut te prodas in publicum'. See Richard H. Helmholz, 'Origins of the Privilege Against Self-Incrimination: The Role of the European *Ius commune*', *New York University Law Review* 65 (1990) 962-990 at 967.

[69]Kelly, 'Thomas More' 847-848.

example can be seen in Leonard Levy's book on the Fifth Amendment, in which he gives what purports to be a history of the introduction of the oath 'ex officio' into England, confusing various kinds of oaths along the way.[70] A casual example appears in Sir John Baker's new study of the 'fortuna' of Magna Carta. He says of the Court of High Commission, reflecting the critique of Francis Ashley in 1616: 'In making people answer questions upon the oath 'ex officio', it obliged them to incriminate themselves, contrary to elementary principles of justice'.[71] However, even though there may have been some forced interrogations under Archbishop Whitgift in the 1580s,[72] there was an effort by the judicial authorities of the time to adhere to the principles of the 'ordo juris'.

Let us listen to the reply made in 1593 to similar criticism, by Richard Cosin, the chief ecclesiastical judge of the day:[73]

> [The oath] is not general, either concerning his own or other men's thoughts, words, or works–as very untruly and slanderously is by some given forth–but it hath sufficient certainty upon the certain reference unto articles afore exhibited, which also are then declared, to contain particular deducing and laying forth of such-and-such especial misdemeanors, with some of their pertinent circumstances of time, person, place, and manner.

English practice remained true to the principles of Lateran IV, even after the break with Rome. Citing the decree of the Council, Cosin states:[74]

> If that canon, *Qualiter et quando*, be objected viz., *exponenda sunt ei illa capitula de quibus fuerit inquirendum, ut facultatem habeat seipsum defendendi*, I answer that, in ecclesiastical courts of this realm, this is

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[70]Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (New York 1968; reprint with new preface New York 1986), chapter 2: 'The Oath *Ex Officio*' 43-82. For a critique, see my 'Right to Remain Silent' 994.

[71]John Baker, *The Reinvention of Magna Carta, 1216-1616* (Cambridge 2017) 429. For other questionable views that Baker expresses on the inquisitorial system as practiced in England, see 113-123.

[72]H.A. Kelly, 'Mixing Canon and Common Law in Religious Prosecutions under Henry VIII and Edward VI: Bishop Bonner, Anne Askew, and Beyond', *Sixteenth-Century Journal* 46 (2015) 927-955, 952.

[73]Richard Cosin, *An Apology for Sundry Proceedings by Jurisdiction Ecclesiastical* (2nd ed. London 1593) in three parts, 3.217-218.

[74]Ibid. 222.

> observed: even before the oath is tendered, and after the party hath answered, he hath a copy not only of the heads of the matters objected, but of every particular also'.

According to Thomas More, this was the procedure followed by the bishops in his day. We can observe it in a notable case that occurred not long before his debate with St. German, the Legatine Trial of 1529, conducted as a special inquisition against Henry VIII and Catherine of Aragon. It was only after specific articles had been formulated against their marriage that the king was to be put under oath and required to respond.[75]

Conclusion

We have seen that Innocent III, in his decretal *Cum dilecti* (1205), seemed equally at ease in having public suspects swear to answer truthfully to the suspicions against them (ad inquisita) or implicating themselves after swearing to tell the truth in a general inquisition 'de statu ecclesiae'. But he was very clear that testimony in general inquisitions was to exclude non-public offenses, as in the decretal of 1206, *Qualiter et quando*. In setting out the rules in the conciliar canon *Qualiter et quando* at the Fourth Lateran Council for someone implicated in a crime by 'publica fama', Innocent did not say that he had to swear an oath, but the earliest commentators, beginning with Johannes Teutonicus, assumed that he did, specifically the oath to respond truthfully to the charges, unless another person was promoting the inquisition.

Durandus agreed to both points: the defendant in an inquisition did not have to take an oath when there was a promotor, since no one was required to swear against himself. But if the judge was acting solely 'ex officio', the defendant did have to swear concerning the truth of the charge (de veritate), because of the defamation against him, as in purgation.

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[75] H.A. Kelly, *The Matrimonial Trials of Henry VIII* (Stanford 1976) 95. The same would have been done with Catherine, had she not refused the court. As usual, the actual 'litis contestatio' does not appear in the records.

What the actual practice of the courts was, however, is hard to tell, because of the lack of records or reports. My best guess is that, if the 'ad inquisita' oath had enjoyed some use, it was left by the wayside after Durandus weighed in. We saw above one instance of a 'de veritate dicenda' oath being used in the special inquisition that the French inquisitor Parisius falsely claimed to have initiated against Margaret Porete, which no doubt reflected his usage when he actually brought suspects to trial. He did hold an inquisition against her later, but, as usual, no details were recorded.[76] The same is true in the case of another suspect arrested in connection with Porete, Guiard of Cressonessart. When he did finally take the oath 'de se et aliis' and confessed new crimes and was convicted, no specifics were given.[77] In the Joan of Arc case, however, we have a rare look at an actual trial beginning. Bishop Cauchon asked the advice of his assessors how to continue after the previous proceedings had been criticized by a Rota judge, John Lohier, and there was some difference of details on the oath to be sworn. Many wanted jurists to be consulted. The theologian John Beaupère wanted it restricted to what Joan knew for sure, excluding dubious matters and questions of law,[78] while others wanted it limited to the trial (ad processum), but one specified 'and the faith' (ad processum et fidem).[79] She finally agreed to swear to tell the truth about everything 'concerning your trial' (dicere veritatem de omni illo quod tangit processum vestrum), and that is how she was sworn.[80] One could perhaps see it as swearing 'dicere veritatem ad inquisita'.

The 'de se et aliis' oath developed from a reasonable formula, administered to persons who voluntarily confessed to their own crimes and wished to detect others, into an all-purpose method of forcing persons to confess what they have done wrong, said wrong, or even thought wrong. It was this practice of imposing a

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[76]Kelly, 'Inquisitorial Deviations' 953-958.
[77]Ibid. 959-960.
[78]Tisset, *Procès de condamnation* 1.188: 'In hiis de quibus certa est et que sunt de facto, respondere tenetur veritatem; in hiis autem in quibus nesciret veritatem respondere aut quod juris esset, si petat dilacionem, danda est eidem dilacio'.
[79]Ibid. (John de Nibat).
[80]Ibid. 190.

self-incriminating obligation upon persons, before establishing any reasonable probability of guilt, that made the 'serment des inculpés' such an odious feature of criminal law. That is, it was forced upon 'inculpés' before they were officially arraigned as 'inculpés'.

It was, and still is, assumed that the same abuse was practiced in England, but the contrary seems to have been the case, at least officially. Protestant London followed canon law, while Catholic Rome did not, in requiring charges to be justified and explained before requiring a sworn response.

In assessing the polemics against the 'oath *ex officio*', John Henry Wigmore stated that an oath taken in 'ex officio' proceedings would be 'wholly lawful' if presented 'on Innocent III's conditions about '*clamosa insinuatio* and *fama publica*'.[81] But is this true? Or, if true, is it right? The question of why a person had to take an oath to respond to a rumor or private denunciation, when he did not have to do so when facing an accuser, was not really confronted, let alone answered. The principle invoked by Durandus, 'Non tenetur contra se jurare', was clearly violated by this practice. In English law the plea of 'Not guilty' ('Est in nullo inde culpabilis') could be made by a guilty person without fear of perjury; it was taken simply to mean, 'Volo contendere'.[82] In an inquistion, it was ostensibly not so. But, practically speaking, if a defendant, after swearing to respond truthfully to charges, or to tell the truth concerning them, were to deny them and subsequently be found guilty by proofs, he would be convicted only of the charged crime and not of perjury. If, however, he really did forswear himself, he would have God to anwer to. Exercising his right not to betray himself put an undue burden on his conscience.

It might seem that the question was confronted and resolved in modern canon law. The 1917 *Codex* prohibited the administration

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[81]John Henry Wigmore, 'The Privilege Against Self-Incrimination; Its History', *Harvard Law Review* 15 (1901-1902), 610-637, 617.
[82]Kelly, 'Right to Remain Silent' 996.

of an oath 'de veritate dicenda' in a criminal case.[83] Cardinal Gasparri gave no precedent for this rule,[84] but undoubtedly 'a definite forerunner' was the decree of Pope Benedict XIII in council or synod of the province of Rome (covering central Italy) in 1725.[85] In the decree, *Reprehensibile judicari non debet*, the pope says that he believes that the policy of judges and other officials, in some secular and church courts, of commanding those accused of crimes to swear an oath 'de veritate dicenda' before examining them, had become a standard practice (*inolevisse*) without any law ever mandating it.[86] Henceforth, following the procedure of many well-regarded tribunals, he prohibits the taking of oaths by defendants in criminal inquisitions ('per reos sic criminaliter inquisitos'). The reason given, however, was not that it violated the rights of the accused, but rather that it was ineffective, since defendants routinely denied all guilt ('qui ut plurimum patrata a se negant delicta'), and the sacred nature of oaths demanded that it cease ('ne illa penitus exigantur, sacri ipsa juramenti ratio postulet ac suadeat').

However, ideas of due process in connection with defendant oaths had recently been brought to the fore. In 1698, Pope Innocent XII commissioned the advocate Francesco Memmi to investigate the matter, and he produced a treatise condemning the pre-interrogation oath.[87] He considered it an extreme form of torture

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[83]Codex 1917 c.1744: 'Iusiurandum de veritate dicenda in causis criminalibus nequit iudex accusato deferre'. Cf. *Codex* 1983 c.1728 §2: 'Accusatus ad confitendum delictum non tenetur, nec ipsi iusiurandum deferri potest'.

[84]*Codex iuris canonici Pii X Pontificis Maximi iussi digestus* (New York 1918).

[85]Eugene James Moriarity, *Oaths in Ecclesiastical Courts: An Historical Synopsis and Summary* (The Catholic University of America Canon Law Studies 119; Washington 1937) 33-34.

[86]Benedict XIII, *Reprehensibile*, Concilium Romae (1725), tit.13 cap.2 (Mansi 34.1842): 'Stylum itaque in quibusdam curiis saecularibus et ecclesiasticis, nullo unquam jure praeceptum, inolevisse perpendimus, ut judices, sive eorum notarii aut scribae, reos criminali facinore accusatos examinaturi, juramentum ab his praestari jubeant de veritate dicenda'.

[87]Franciscus Memmius, *De iuramento veritatis dicendae in causis criminalibus reis non praestando* (Rome 1698) (non vidi; there is a copy in the Biblioteca Giuridica of the University of Pisa). See Helen Silving, 'The Oath', *Yale Law Journal* 68 (1959-9) 1329-1390, 1527-1577 at 1345.

inflicted upon defendants, which provoked them to commit perjury.[88]

Memmi also held the purgation oath to be suspect.[89] An obvious corollary would be that oaths should not be imposed on suspects not only before preliminary interrogations, but not even after they had been charged and had the charges explained to them. This was the stage at which defendants were originally sworn (which continued to be the practice in England).

In forbidding oaths for defendants and other pressures upon them to confess, the twentieth-century canons, whatever the motivations behind them, reinstated the privilege against self-incrimination as it existed before the invention of inquisitorial procedure, at least in the accusation process, if not in canonical purgation.

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[88]Memmi, summarized by Silving 1346-1347.
[89]Ibid. 1347.

The Golden Age of Episcopal Elections 1100-1300

Kenneth Pennington

Almost fifty years ago Robert L. Benson published a book on elections in the Roman Catholic Church.[1] A few years later, he wrote an essay that complemented his larger work.[2] Benson noted that from the beginning of Christian communities election was an important element in the selection of a bishop. The early church viewed the episcopal office as a position in which the entire Christian community had a stake. Although his letter had no influence or tradition in later ecclesiastical thought, Pope Leo I (440-461) summed up the consensus of the late antique church when he wrote to the bishops of Vienne that 'those who lead us must be elected by all'.[3] The sentiment must have been widespread in the early Christian world, but it entered medieval canonical jurisprudence only through a forged papal letter.[4]

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[1] *The Bishop-Elect: A Study in Medieval Ecclesiastical Office* (Princeton 1968).

[2] 'Election by Community and Chapter: Reflections on Co-Responsibility in the Historical Church,' *The Jurist* 54 (1971) 54-80. For the general development in England, Katherine Harvey, *Episcopal Appointments in England, c. 1214-1344: From Episcopal Election to Papal Provision* (Church, Faith, and Culture in the Medieval West; Farnham 2014).

[3] PL 54.1296: 'Qui est praefuturus est omnibus ab omnibus eligatur'. See Peter Norton, *Episcopal Elections 250-600: Hierarchy and Popular Will in Late Antiquity* (Oxford Classical Monographs; Oxford 2007) 43-44. Also for the late antique, Paul Christophe, *L'Élection des évêques dans l'Église latine au premier millénaire* (Histoire; Paris 2009); Andreas Thier, 'Procedure and Hierarchy: Models of Episcopal Election in Late Antique Conciliar and Papal Rule Making', *Episcopal Elections in Late Antiquity* (Arbeiten zur Kirchengeschichte 119; Berlin 2011) 541-554 and other essays in that volume. Francesi Zaccaria, P*articipation and Beliefs in Popular Religiosity: An Empirical-Theological Exploration among Italian Catholics* (Leiden-Boston 2010) 195; Luca Badini Confalonieri, *Democracy in the Christian Church: An Historical, Theological and Political Case* (London 2012) 104.

[4] Pseudo-Anicitus, *Bonorum operum* (*De ordinatione*) (JL †57) 'Ipse qui illis omnibus preesse debet, ut ab omnibus illis eligatur et ordinetur'; *Decretales Pseudo-Isidorianae et Capitula*, ed. Paul Hinschius (Leipzig 1863) 120.

Another text of the period was even more important. In a letter Pope Celestine I in 428 declared that: [5]

> (Nullus invitis)No bishop should be given to an unwilling flock. (Cleri plebis) The consent and desires of the clergy, laymen, and senate (ordo) are required.

Leo's and Celestine's letters have led historians to emphasize the role of the people and clergy of a diocese in the election of bishops in the early Middle Ages and their right to consent. It was a key text for ecclesiastical elections, and Celestine's letter burrowed itself deeply into later canonistic jurisprudence. It was included in 59 pre-Gratian canonical collections, and Gratian placed it into his *Tractatus de electione*. He divided the first two sentences into two parts. He extracted *Cleri plebis* from the letter and inserted the remaining text of *Nullis invitis* in Distinction 61 c.13. He placed the short sentence beginning with *Cleri plebis* in Distinction 63 c.26. Gratian also deleted the ambiguous word 'ordinis' in *Cleri plebis*, which had several different possible meanings in this context when it was written in 428 but had no meaning for Gratian and his readers in the twelfth century.

Without a doubt Gratian must have intentionally made these editorial changes. There is not a single pre-Gratian collection in which Celestine's letter is preserved in that way. Every known pre-Gratian canonical collection keeps the two sentences *Nullus invitis* and *Cleri plebis* united in the text of Celestine's letter.[6] No known canonical collection has the text 'Cleri—requiritur' as a separate canon. In the twelfth-century manuscripts the new 'canon' read:[7]

Gratian did not include this text in his *Decretum*. Burchard of Worms, *Decretum* 1.28 and 11 other pre-Gratian collections included it.

[5] 'Nullus invitis detur episcopus', PL 67.276D; Gratian D.61 c.13 and D.63 c.26: 'Nullus invitis detur episcopus (D.61 c.13); cleri, plebis et ordinis consensus et desiderium requiratur (D.63 c.26)'.

[6] E.g. Burchard of Worms, *Decretum* 1.7, *Collection in Three Books* 2.1.3, Ivo of Chartres, *Decretum* 5.61, *Collectio Tripartita* A.1.41.2 and Panormia 3.7.

[7] St. Gall, SB 673 p. 25a = Sg; Paris, BNF nov. acq. 1761 fol. 64ra = P is the base manuscript; Barcelona, Archivo del la Corona, Ripoll 78, fol. 75ra = Bc; Admont, SB 23, fol. 67r = Aa; Florence, BN 402 fol. 12ra = Fd; Brindisi, Biblioteca Annibale de Leo A.1 fol. 37vb = Bm; Biberach, Spitalarchiv B.3515 fol. 56vb = Bi; Bremen, BU a.142 fol. 37ra = Br; Durham, BC C.III.1

<inscription> *Vnde Celestinus papa ait*.
<rubric> Plebi non est eligere, set electioni consentire.
<text> Cleri plebis consensus et desiderium requiratur.[8]

<Inscript.> papa ait *om*. Sg
<rubric> plebis FdBcAaGdMcMeMkPfSb, pleƀ BiBmHlKaPd, electioni *om*. Du, electionis Pd, Plebi—consentire *om*. Sg
<text> Cleri] et *add*. Sg$^{pc?}$, plebis PBcFdSg : plebisque AaBiBmBrDuErHlGtKaMcMeMkPdPfSb,

Gratian's radical editing of the text had a purpose that was inimical to the electoral rights of religious persons and laypeople in a diocese. In its form after Gratian's editing, Celestine's original letter, *Nullus invitis*, provoked much discussion about whether a cleric from outside the cathedral chapter could be legally elected if a minority of canons opposed the stranger (alienus, extraneus) and, even more importantly, if there was a worthy candidate in the cathedral chapter. In its original form, *Nullus invitis*'s primary focus was on the right of the clergy and people of the diocese to consent and participate in the election of a bishop.[9] When Gratian extracted the second sentence from Celestine's letter and placed it in Distinction 63 c.26 the papal norm for religious and lay participation was softened by detaching it from the norm that a bishop should not be given to an unwilling flock.[10] Then, most significantly, Gratian provided

fol. 75vb = Du; Erlangen, BU 342 fol. 61rb =Er, Gent, BU 55 fol. 70va = Gd; Heiligenkreuz, SB 43 fol. 53 ra =Hl; Munich, BSB lat. 4505 fol. 55va = Mc; Munich, BSB lat. 13004 fol. 77ra = Me; Munich, BSB lat. 28161 fol. 53ra = Mk; Cologne, Dombibliothek 127 fol. 61rb; Paris, BNF lat. 3884 I, fol. 76vb = Pf; Paris, BNF lat. 14317 fol. 51vb = Pd; Salzburg, SB a.XI.9 fol. 65ra =Sb.

[8] Bc fol. 75ra, Aa fol. 67r, Bm^{ac} fol. 47vb, Br fol. 37ra, Gd fol. 70va, Mc fol. 59va, Me fol. 77ra, Pd fol. 51vb have a gloss in the margin citing the complete text of the *Nullus invitis* in Burchard: B.i.Nullus invitis (invitus Mc), B. Nullus Br (Burchard of Worms 1.7).

[9] For another view of Gratian's purpose, see Thibault Joubert, 'L'Élection épiscopale dans le Décret de Gratien: Un exemple de tradition canonique', *Studia canonica* 49 (2015) 357-378.

[10] Gratian also deleted the word 'ordine' that had an ambiguous meaning for him or which he did not understand. The editorial change resulted in 'The consent and desires of the clergy and laymen are required' ('Cleri plebis consensus et desiderium requiratur').

this orphaned short text with a rubric that gave his interpretation of canon's meaning: 'The people do not elect but consent to the election'.[11] No pre-Gratian canonical collection had a rubric defining *Nullus invitis* as meaning that the people could not elect and could only consent. Master Gratian's rubric took the clergy and people out of the electoral body. This editing and manipulation of the text is possible, if not conclusive evidence that Gratian was keenly interested in the procedure and process of episcopal elections.[12] That interest would place him and his origins in a cathedral and not in a monastery.[13] More certainly, Gratian composed his rubric to define what had become standard electoral practice for electing bishops in the first half of the twelfth century: limiting episcopal electoral bodies to the members of cathedral chapters. In any case, no later canonist quibbled with Gratian's interpretation of the short text. Gratian's rubric with which he established a new norm in canonical jurisprudence resided non-contested in his *Tractatus de electione*.

In the second half of the twelfth century the decretists paid no or little attention to Gratian's new canon with its rubric. At the end of the twelfth century, Huguccio wrote that the canon was

[11] D.63 c.24, rubric: 'Plebi non est eligere set electioni consentire', Paris, BNF nov. acq. lat. 1761, fol. 64ra. It is noteworthy that the St. Gall 673 manuscript omitted this rubric. If St. Gall represents a form of the earliest version of Gratian's *Decretum*, then his thinking did emerged gradually.

[12] There is a growing consensus now that Gratian probably became a bishop; see Pennington, 'La biografia di Graziano, il Padre del diritto canonico', RIDC 25 (2014) 25-60 at 49-59 and 'The Biography of Gratian, the Father of Canon Law', *A Service Beyond all Recompense: Studies Offered in Honor of Msgr. Thomas J. Green*, ed. Kurt Martens (Washington D.C. 2018) 359-391.

[13] Giovanna Murano has revived the theory that Gratian was a Benedictine monk on very shaky evidence, see her 'Graziano e il *Decretum* nel sec. XII', RIDC 26 (2015) 61-139, especially at 82-83. She argues since a large number of Gratian manuscripts ended up in Benedictine libraries that the order must have sought out his *Decretum* to honor one of their own. Careful analysis of her list of manuscripts reveals that some of them did not arrive into Benedictine libraries until after the twelfth century, e.g. St. Omer, SB 191 and 454. More significantly, however, even if Gratian were a Benedictine, I do not think the entire order would have 1. known about or 2. organized such a plan.

not necessary except for laying down two norms: the consent of the people ought to be asked for to avoid scandal, and the people may never retract their consent. In any case, he concluded that the people have absolutely no rights in an episcopal election.[14]

The people's loss of status in the church is not surprising. As the structure of the church evolved and had become more complex, the rights of the people came into conflict with the rights of the ecclesiastical hierarchy, of the religious in a diocese, of the canons of the cathedral chapters, of the archbishop, and, most importantly, of the bishop of Rome. It was a conflict in which the people (populus) were bound to lose status in a church that had become even more dominated by the clergy. Much has been written about how the selection of bishops migrated from the people to the clergy, to the cathedral chapter, to the papacy.

In the last and vulgate recension of his *Decretum* ca. 1140 Gratian included a text from the Second Lateran Council, 1139 near the end of his 'Tractatus de electione'. Gratian had already cited a canon that Pope Innocent II in the St. Gall version of the *Decretum* (ca. 1132) but did not include the text of the canon. Atria Larson has convincingly argued that Innocent II may have promulgated the canon at a Lateran synod held in 1133 or perhaps even at the synod in 1130. Larson points out that conciliar canons were often repeated almost word for word during the 1120's and 1130's. This fact led her to conclude that the Second Lateran canon had textual roots in early conciliar legislation.[15] In all the pre-vulgate versions of the *Decretum* Gratian provided a rubric that stated:[16]

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[14] E.g. Huguccio, D.63 c.24 s.v. *Cleri plebisque consensus et desiderium requiratur*: 'Vt electione et facienda et facta consensus plebis debet exigi ut uitetur scandalum et nequam fiat retractatio, etc. ut viii. q.i. Licet (c.15). Alias non uidetur multum necessarius cum populus nil iuris habeat in eligendo'. Munich, SB 10247, fol. 71va and Lons-le-Saunier, Archives départementales du Jura 16, fol. 86va.

[15] Atria A. Larson , 'Early Stages of Gratian's *Decretum* and the Second Lateran Council: A Reconsideration', BMCL 27 (2007) 21-56.

[16] D.63 d.p.c.34: 'Nunc autem sicut electio summi pontificis non a cardinalibus tantum, immo etiam ab aliis religiosis clericis auctoritate Nicolai

> Just like the election of the pope who must be elected not only by the cardinals but, according to the authority of Pope Nicholas, also by other religious clerics, so too in an episcopal election the canons and the other religious clergy should participate in the election as Pope Innocent established in a general synod in Rome.

Although Gratian left vague the rights of other religious in his earlier recensions, in the vulgate Gratian defined his final conclusion in his rubric: 'Without the advice of religious men the canons of the episcopal church may not elect the bishop'.[17] The text of the canon that Gratian inserted into his final recension was even more specific:[18]

> If an election were held that excluded the religious so that it was held without their consent and agreement, the election was not valid.

In the early thirteenth century Johannes Teutonicus noted in his Ordinary Gloss to the Lateran canon that if the advice of the clerics was not sought, the election was invalid; if they gave their advice but not their consent, the election was valid.[19] What is unstated, however, but understood, is that only the canons of the cathedral chapter could vote in an election of a bishop. The other clerics of the diocese could be present, should give their consent, and should render their advice.

Bernardus Papiensis was the first jurist to write a tract on election just before the Third Lateran Council, which underlines the importance of episcopal elections in the institutional life of the church. There were three subjects that compelled twelfth-century jurists to abandon their commentaries on the standard law books for a brief time and write tracts on narrow subjects:

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pape est facienda, sic et episcoporum electio non a canonicis tantum, set ab aliis religiosis clericis, sicut in generali sinodo Innocentii papae Rome habita constitutum est'.

[17] D.63 c.35 Rubric Gratiani: *Absque religiosorum uirorum consilio canonici maioris ecclesiae episcopum non eligant*.

[18] D.63 c.35: 'Quod si exclusis religiosis electio facta fuerit, quod absque eorum consensu et conuenientia factum fuerit, irritum habeatur et uacuum'.

[19] Johannes Teutonicus, to D.63 c.34 s.v. *assensu*: 'Videtur quod non tantum consilium religiosorum, set etiam consensus ipsorum requirendus est, et ita videtur quod religiosorum personae faciant partem in electione . . . et satis potest dici quod nisi consilium ipsorum fuerit requisitum quod nulla sit electio. Si tamen fuit habitum consilium et non consensus, tenet electio'.

marriage, procedure, and elections. These literary genres were aimed at practical problems and reflect what jurists thought demanded clear and concise explanations. As Bernardus put it at the beginning of his tract, ‘One achieves glory when one wraps an opinion with many and perceptive words’. He explained, however, his purpose was different, even though ‘in difficult matters it is safer to listen than to speak’. He then proceeded to write a short treatise on all ecclesiastical elections from archdeacons to the pope. [20] Bernardus dealt with three broad subjects: the power and authority to elect, the quality of the person elected, and the form of the election. The Third Lateran Council (1179) defined Bernardus’ second subject in canon three: A bishop must be thirty years old, born in a legitimate marriage, lived a worthy life, and possessed of distinguished knowledge.[21] Perhaps the most interesting passage in Bernardus’ treatise is the quotation from the Pseudo-Anicitus letter, ‘He who presides over all, should be elected and installed by all’.[22] As we have seen that text was transmitted by only a few canonical collections. Gratian did not quote it; nor did any other canonist before Bernardus. His most likely source was Burchard of Worms’ *Decretum*.[23] The canonists knew that Gratian did not take texts from Burchard, and they littered the margins of

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[20] Bernardus Papiensis, ‘De electione’, *Summa decretalium ad librorum manuscriptorum fidem cum aliis eiusdem scriptoris anecdotis*, ed. Theodor Laspeyres (Regensburg 1860, reprinted Graz 1956) 307: ‘Quamquam plerique multimode laudis gloriam assequantur, qui brevem sententiam multis et perspicuis verbis explicuerunt . . . et licet in re obscura tutius esset alios audire quam dicere . . . de electione . . . enucleare intendo’. Fabrice Delivré, ‘Les lois du genre: Summae, Practicae et élection des évêques en Occident (XIIe-XVe siècle)’, RHD 94 (2016) 62-78.

[21] Third Lateran Council c.3: ‘Nullus in episcopum eligatur, nisi qui iam trigesimum annum aetatis egerit et de legitimo matrimonio sit natus, qui etiam vita et scientia commendabilis demonstretur’, ‘Concilium lateranense III 1179’, edd. Atria A. Larson and Kenneth Pennington CODG 128-129.

[22] Bernardus Papiensis, ‘De electione’ 309: ‘ille qui praeest ab omnibus, quibus praeest, sit eligendus’.

[23] See above note 4. The other possible source would have been the *Panormia* 3.10. Hugh of St. Victor quoted the passage in his treatise *De sacramentis christiane fide* PL 176.430D.

Gratian's *Decretum* with references to the texts in Burchard that Gratian omitted.[24] Burchard was easily available. There were numerous Burchard manuscripts in Italy at the end of the twelfth century.[25] To the 'doubtful question' whether clerics from the city and villages should be present, Bernardus thought they should be present and cited the Second Lateran canon to prove that they should be. These clerics outside the cathedral chapter could 'advocare', which meant to advise or counsel, but did not specify exactly what their rights were in an election.[26]

Pope Innocent III summoned the clergy to Rome for the Fourth Lateran Council in 2015. Canons 23, *Ne pro defectu*, and canon 24 *Quia propter electionem* dealt with the issue of ecclesiastical elections.[27] Canon 25, *Quisquis electioni*, forbade secular participation or interference. The people and the religious clergy disappear as issues in the canons. In *Ne pro defectu* Innocent mandated that a bishop must be elected within three months of a vacancy and unless there was a just impediment the local chapter loses its electoral rights. The rights devolve to the chapters' immediate superior. The pope determined in *Quia propter electionem* that although there were many different practices for holding elections, the election should conform to the three forms of election that canonists named 'per scrutinium, per conpromissum', or 'per inspirationem' but was vague about what constituted the electoral body and what the role of the electoral body was. He stated that the election should be held when those persons who 'wanted, ought, and could conveniently take part' are present.

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[24] See Phillip Lenz's essay in this volume pp. 158-164 et passim.

[25] Kéry 133-155.

[26] Bernardus Papiensis, 'De electione' 309-310: 'mihi taliter videtur respondendum quod episcopalis ecclesiae clerus abbates et alios ecclesiarum praelatos sive civitatis sive villarum, et capellanos civitatis saltem maioris ad electionem episcopi debeant advocare, illos videlicet qui episcopo specialter rationem reddere tenentur et eorum viritim est exquirendus consensus . . . Ad haec cum religiosi clerici, sicut praedictum est, electioni futuri pontificis debeant interesse, ut di. lxiii. Obeuntibus (2nd Lat. D.63 c.35)'.

[27] 'Concilium lateranense IV 1215', CODG 151-204 at 179-180.

In his gloss to *Ne pro defectu* Johannes Teutonicus (ca. 1217) raised the question of electing someone outside the cathedral chapter. He argued that if a worthy candidate could be found in the chapter, he should be elected. If, however, the chapter elected an 'extraneus' the election was valid, but the electors sinned.[28] Johannes then raised the issue of the number of votes needed to elect a candidate from the chapter. Although Johannes normally championed the principle that the greater number of votes should always prevail against zeal and authority, on the issue of electing a worthy candidate from the chapter, he argued that even two votes in favor of the local candidate should win an election.[29]

Damasus Hungarus (1217) inserted Pope Innocent III into the discussion with an intriguing gloss to ca. 23 *Ne pro defectu*, that the pope held a 'disputation' on whether a minority of two could elect a candidate from the cathedral chapter against the votes of the majority who wanted to elect a person from another church.

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[28] Johannes Teutonicus (ca. 1217), 4th Lateran c.23 (4 Comp. 1.3.8 =X 1.6.41) sub verbo: *idonea ipsius*, Firenze, Biblioteca Laurenziana Santa Croce IV sin. 2 fol. 255v, ed. Antonio Garcìa y Garcìa*, Constitutiones Concilii quarti Lateranensis* (1981) 210: 'Hic precipitur metropolitano ut de eadem ecclesia eligat. Set nonne ad metropolitanum deuoluitur idem ius quod habuit capitulum? Set capitulum poterat elegisse extraneum . . . Ego credo quod capitulum non potest eligere alium de iure, quamdiu est dignus inter eos ut . . . lxi. di. . . . c.Nullus <invitis detur episcopus>. Si tamen omnes conueniunt in extraneum, tenet electio, licet ipsi peccauerint eligendo. Tamen propter tale delictum non cassatur electio'. Vincentius Hispanus repeated Johannes gloss years later in his commentary on the *Decretals of Gregory IX*, *Apparatus* to X 1.6.41 s.v. *idonea ipsius*, Paris, Bibliothèque nationale de France lat. 3967, fol. 22ra.

[29] Johannes Teutonicus (ca. 1217), *Dudum*, (3 Comp. 1.6.7 =X 1.6.22) sub verbo: *solum plures* ed. Pennington (1981) 59: 'Hic patet quod ubi disparitas est in numero eligentium, non requiritur de meritis electorum . . . ubi bono zelo quidam contradixerunt, tamen quia numerus fuit ex altera parte, fuit pro numero iudicatum . . . H<uguccio> dixit cum hec tria considerentur in electione, numerus, zelus, auctoritas, ubicumque ex istis duo conueniunt, preiudicant tertio . . . Tu dicas quod semper numerus preualet zelo et auctoritati, nisi numerus in modico excederet, tunc conferrem zelum uel auctoritatem cum numero . . . nec enim recurrendum est ad dignitatem, nisi cum par numerus est hinc inde . . . similiter dico quod ad zelum non est decurrendum nisi cum par uel fere par numerus est hinc inde. jo'.

Innocent concluded, according to Damasus, that if the local candidate were worthy, the minority of two votes would prevail.[30]

The pope and Johannes Teutonicus were on the wrong side of this issue. Within a few years the majority of canonists, led by Tancred of Bologna († 1226) concluded that an 'extraneus' could be legitimately elected by the 'maior et sanior pars' of the cathedral chapter. If the chapter elected a 'extraneus' even though a worthy candidate existed in the chapter, the election was valid—provided that the candidate was not 'malus'.[31] Bartholomaeus Brixiensis rejected the opinions of Johannes and Vincentius and endorsed Tancredus' position in his gloss to *Nullus invitis detur episcopus*.[32] That remained the standard norm in canonical jurisprudence that was approved by the Roman curia as Guido de Baysio noted ca. 1300.[33]

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[30] Damasus Hungarus (ca. 1216), *Apparatus t*o c. 23 *Ne pro defectu* s.v. *vel alterius ecclesie,* ed. Antonio Garcìa y Garcìa*, Constitutiones Concilii quarti Lateranensis* (1981) 430 and Firenze, Biblioteca Laurenziana III sin. 6, fol. 101v: 'Si in illa ecclesia ydoneus non est, ut lxi di. Nullus inuitis <detur episcopus>, (c.13) uidetur tamen quod maior pars capituli possit renuntiare illi iuri et eligere de alia ecclesia, licet in illa ydoneus inueniatur . . . Set Papa Innocentius ita interpretatus est illa iura in quadam disputatione quod minor pars potest contradicere maiori parti uolenti de alia ecclesia, si uelit ostendere quod in eadem ecclesia sit ydoneus, etiam si duo tantum sint in minori parte'.

[31] Tancred of Bologna (1220), *Apparatus* ad 3 Comp. 1.6.4. (X 1.6.19) *Cum nobis*, sub verbo: *uos qui due partes,* Vat. Lat. 1377, fol. 159v: 'Ego dico quod electio a maiori et saniori parte capituli facta siue de eadem siue non, semper preualet nisi aliud impediat sicut expresse probatur . . . ad illa iura que dicunt quod de ecclesia propria fiat electio et non de aliena ex quo in ea reperitur idoneus . . . Respondeo: licet ita debeat electio fieri, si tamen aliter fiat, ualet quoniam optimus et melior omnibus eligi debet . . . et tamen si aliter fiat, tenet electio, dummodo non sit malus'.

[32] Bartolomeus Brixiensis (1250), *Additio to Glossa ordinaria* to D.61 c.13 (*Nullus invitis*) s.v. *civitatis:* 'Quidquid dicat Ioannes eius opinio non servatur de electione minoris partis de eadem ecclesia. Vnde cum totum capitulum facere videatur, quod sit a maiori parte capituli . . . tenebit electio extranei, ut dicit Tancredus . . . quia multa fieri non debent, tamen facta tenent . . . tamen sufficit si bonus eligatur'.

[33] Guido de Baysio, *Rosarium* (1495) D.61 c.13: 'Joannem sequitur Vincentius pro quibus facit optime, sed opinio Bartolomaei ab omnibus hodie approbatur et sic seruat curia'.

The last step in the evolution of the norms of procedure for -episcopal elections was a decretal of Pope Boniface VIII in which he declared that when an episcopal election was invalid or had not been held because of the negligence of the chapter, the right of election then devolved to the archbishop.[34] In all other cases of a disputed election, however, the pope had the right to appoint the bishop. Although Boniface did not call these cases, 'causae maiores', that is what disputed elections became in canon law. It was the first step in the gradual disappearance of elections in the church.

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[34] Boniface VIII *Quanquam in casu negligentiae* VI 1.6.18 (1299): 'In casu negligentiae . . . ecclesia cathedrali vacante . . . eligendi potestas ad superiorem proximum devolvatur . . . cum eligunt scienter indignum . . . eligendi potestate priventur: non ad dictum superiorem sed ad Romanum Pontificem potestas eadem devolvetur'.

La cultura teologica di Giovanni d'Andrea

Andrea Padovani

Una storia del diritto che voglia allinearsi ai progressi delle altre discipline 'lato sensu' umanistiche deve oggi tentare di ricostruire, più che sia possibile, il pensiero dei giuristi che maggiormente contribuirono al progresso della scienza legale. Nel corso di oltre centocinquant'anni numerosi studi hanno evidenziato l'apporto di canonisti e civilisti allo sviluppo del pensiero giuridico che caratterizza il mondo occidentale. Molti lavori hanno avuto ad oggetto specifici istituti cogliendo in essi l'apporto sensibile delle idee professate dai maestri dell'*utrumque ius* in storica continuità, pur tra vivaci discussioni e contrapposizioni. Ricerche bio-bibliografiche accurate hanno, per altro verso, contestualizzato nel tempo e nello spazio la produzione di scritti giuridici prodotti in età medievale, cogliendo rapporti di dipendenza, tra un autore e l'altro, nell'intreccio di scuole diffuse per tutta l'Europa. Resta, a mio parere, ancora un lavoro da fare, non meno faticoso ed impegnativo: quello di portare alla luce gli influssi culturali cui si ispirarono i singoli giuristi, perché nessuno studioso vive isolato, ma in fecondo colloquio con le dottrine—filosofiche e teologiche, innanzitutto—diffuse ai loro tempi.[1]

In linea con questa premessa, il presente lavoro intende evidenziare la cultura teologica del più grande tra i canonisti medievali, Giovanni d'Andrea, di cui alcuni saggi recenti ci hanno lasciato un accurato ritratto nel fervido mondo della scuola padovana e bolognese della prima metà del Trecento.[2] Per

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[1] Cf. Andrea Padovani, '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.)*', cur. Maria Gigliola Di Renzo Villata (Milano 2013) 81-84; idem, *Dell'alba al crepuscolo del commento: Giovanni da Imola (1375 ca. -1436) e la giurisprudenza del suo tempo* (Studien zur europäischen Rechtsgeschichte 303; Frankfurt am Main 2017) xii.

[2] Orazio Condorelli, 'Dalle *Quaestiones Mercuriales* alla *Novella in titulum de*

limitare il campo della ricerca—che altrimenti rischierebbe di dilatarsi oltre misura—ho concentrato la mia attenzione ai commenti sul titolo *De Summa Trinitate et fide catholica* condotti sul *Sextus* (1303) e sulla *Novella* al *Liber Extra* (1311-38) nonché sui suoi apparati ordinari aggiungendo un 'excursus' al titolo *De haereticis* delle Clementine. Nei testi sopra indicati ho tentato di raccogliere in veste sistematica alcuni temi evidenziando lo sviluppo diacronico del pensiero di Giovanni d'Andrea, peraltro segnalato dallo stesso canonista, laddove—ad esempio, nel proemio alla *Novella in Sextum*—egli si propone di perfezionare quanto aveva scritto 'parvulus' nell'apparato alla medesima compilazione.[3] Proprio nell'intento di operare una selezione per argomenti di ampio respiro sotto il profilo teologico-dogmatico, ho trascurato di soffermarmi sulle molte citazioni di Padri della Chiesa che arricchiscono i commentari. Per un motivo, principalmente: perché non è ancora possibile accertare se quei rinvii scaturiscano veramente da una lettura diretta degli autori nominati o siano solo l'eco di informazioni tratte per altra via (florilegi o notizie tralatizie). Pur entro i limiti che mi sono assegnato confido che questa prima indagine—certo meritevole d'essere ampliata in varie direzioni—costituisca un contributo non irrilevante non solo alla conoscenza del maggiore tra i canonisti medievali, ma dei quadri intellettuali diffusi a metà del Trecento.

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regulis iuris', RIDC 3 (1992) 125-171; idem, 'Giovanni d'Andrea e dintorni: La scuola canonistica bolognese nella prima metà del secolo XIV', RIDC 23 (2012) 91-145; Giovanna Murano, 'Giovanni d'Andrea (1271-1348)', *Autographa*, 1.1: *Giuristi, giudici e notai (sec. XII-XVI* med.) cur. Giovanna Murano con la collaborazione di Giovanna Morelli. Indici a cura di Thomas Woelki (Bologna 2012) 44-49; Andrea Bartocci, 'Giovanni d'Andrea (*Johannes Andreae de Bononia*) (Bologna?, 1271 ca.-ivi, 7 luglio 1348)', DGI 1.1008-1012 con estesa bibliografia.

[3] *Novella Ioannis an. super sexto decreta* (Venetiis: Philippus Pincius Mantuanus, 1.iii.1499, ISTC ia00633000) 2ra;
leggibile http://daten.digitale-sammlungen.de/~db/0005/bsb00054200/images/

La fede in Dio, unico principio: Sua semplicità e ineffabilità

'Quia fides est exordium nostrae reparationis . . . prius de ea praemittit [tit. *De Summa Trinitate et fide catholica* (X 1.1)]', avverte la glossa sub verbo 'credimus' di Bernardo da Parma. Ma cosa si deve intendere per 'fede'? Nella *Novella* Giovanni d'Andrea rinvia senz'altro all'Ostiense che, nella *Summa aurea*, aveva ripreso, estendendola, la definizione offerta dalla glossa ordinaria:[4]

> [fides est] voluntaria certitudo absentium infra scientiam et supra opinionem constituta. Scientia enim habet cognitionem, opinio dubitationem. Inter haec duo fides media est.

Le parole di Enrico da Susa paiono riprendere la *Summa sententiarum* diffusa sotto il nome di Ugo da San Vittore (1096 ca.-1141).[5] Ascritta sotto la sua paternità da Giovanni di Salisbury,[6] appare già, tuttavia, nel *Tractatus theologicus* di Ildeberto di Lavardin (1056-1133).[7]

Poiché il contenuto della fede cristiana è espressa nel Credo, la riflessione si estende ad analizzare la struttura del Simbolo più antico, quello apostolico. Esso si compone—osserva Giovanni d'Andrea nella *Novella in Decretales*—di dodici articoli 'ex parte causae efficientis' (per l'apporto dato alla sua composizione da ognuno dei dodici apostoli) o, altrimenti, 'ex parte causae naturalis' (secondo l'opinione comune dei teologi) di quattordici articoli. Se la divisione in dodici articoli risale alla glossa,[8] quella in quattordici era già nell'Ostiense (peraltro citato

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[4] Henrici a Segusio (Hostiensis), *Summa* (Coloniae 1612) 5. La glossa alla rubrica dopo 'cognitionem' conclude: 'fides vero non'.

[5] Cf. Hugo de S. Victore, *Summa Sententiarum*, PL 176.43 che così spiega: 'supra opinionem, quia plus est credere quam opinari; infra scientiam, quia minus est credere quam scire'.

[6] Ioannes Saresberiensis, *Metalogicon*, ed. John B. Hall auxiliata Katharine S.B. Keats-Rohan (CCCM 98; Turnholti 1991) IV.13, pp. 151-152: 'Unde magister Hugo. Fides est voluntaria certitudo absentium supra opinionem infra scientiam constituta'.

[7] Cf. PL 171.1068-1069.

[8] Ad rubr.: 'secundum quosdam Theologos, sunt duodecim articuli fidei propter duodecim Apostolos'. La glossa, oltre al Simbolo apostolico aveva ricordato il Niceno ('symbolum maius quod cantatur in Missa') e quello di

da Giovanni: 'de hoc per Hosti. in summa huius tituli § Quot et qui'). Nella sostanza, quest'ultimo costituisce il paradigma tenuto presente dal canonista bolognese: con una specificazione, però, non irrilevante (sebbene trascurata dal d'Andrea): perché Enrico da Susa chiarisce che l'ulteriore distinzione tra i dodici articoli (sei 'ad divinitatem pertinentes' e sei 'ad humanitatem') nonché la partizione in quattordici è tratta da Ugo di St. Cher (†1263) che, in effetti, commentando il libro III delle Sentenze di Pietro Lombardo, scrive:[9]

> Circa secundum, quaeritur de numero articulorum... Item quaeritur, quot sint articuli, et dicitur communiter quod XIIII. Sed probatur quod tantum XII. Nam Symbolum Apostolorum sufficienter continet articulos . . . Item videtur quod plures sint quam XII... Dicimus quod XIIII sunt articuli, ad quos omnes alii reducuntur, septem quae pertinent ad divinitatem et septem ad humanitatem, quae in symbolo Apostolorum distinguuntur.

Su questo punto si esprimerà anche s. Tommaso nel commento in III Sent. d.25 q.1 a.2, co. e nella *Expositio super primam Decretalem ad Archidiaconum Tudertinum*: ma, a quanto pare, senza incidere significativamente sul testo redatto da Giovanni d'Andrea.[10] 'Se, riguardo all'eternità di Dio, Giovanni segue,

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Atanasio: 'tertium' che però 'potest appellari quartum, et ita sunt modo quatuor sicut quatuor evangelistae'. Testo davvero oscuro. Meglio si esprime, nella *Expositio de Symbolo Apostolorum*, Uguccione da Pisa, *De dubio accentu, Agiographia, Expositio de Symbolo Apostolorum*, cur. Giuseppe Cremascoli (Spoleto 1978) 228-229: 'Item notandum quatuor esse symbola: primum quod apostoli composuerunt . . . secundum quod synodus Nicena composuit . . . tertium quod synodus Costantinopolitana composuit et cantatur in missa . . . quartum quod in Prima dicitur, scilicet Quicumque ab Athanasio'. Per quest'ultimo si v. Andrea Padovani, 'Il titolo *De Summa Trinitate et fide catholica* (C.1.1) nell'esegesi dei glossatori fino ad Azzone: Con tre interludî su Irnerio', *Manoscritti, editoria e biblioteche dal medioevo all'età contemporanea. Studi offerti a Domenico Maffei per il suo ottantesimo compleanno*, curr. Mario Ascheri, Gaetano Colli con la collaborazione di Paola Maffei. Indici analitici di Andrea Bartocci, III (Roma 2006) 1116-1119.

[9] Brugge, BM 178 fol. 85vb-86ra. Cf. Kent Emery, Joseph P. Wawrykow, *Christ among the medieval Dominicans: representations of Christ in the texts and images of the Order of Preachers* (Notre Dame 1998) 137, 17.

[10] In particolare l'Aquinate non si esprime sulla 'coniunctio' tra 'conceptio' e 'nativitas', apertamente negata da Giovanni. Sulla sua scia si porrà Gilles Bellemère, *Praelectiones* (Lugduni 1548) ad X 1.1.1 fol. 13vb. Intorno alla enumerazione degli articoli si v. anche Giovanni Duns Scoto, in III Sent., dist.

nuovamente, l'Ostiense, poco dopo, quando si tratta di esporre le parole 'unum universorum principium', egli riferisce il pensiero di Egidio Foscherari, espresso nella perduta lettura al primo libro delle Decretali di Gregorio IX.[11] Il primo principio—aveva asserito il maestro—non può essere altro che increato 'quia alias iretur in infinitum' nella catena causale. Inoltre, supponendo che Dio abbia cominciato ad essere nel tempo, anziché atto puro dovremmo dirlo, piuttosto, potenza. Quel primo principio, inoltre—aveva osservato Egidio—non può darsi che unico:[12]

> quia si ponis plura principia, aut concordia, aut contraria. Secundo casu alterius creatum alterum destrueret: si concordia aut inequalia et tunc imperfectum principium faceret imperfecta... si aequalia et omnipotentia, ergo non essent principium.

Sembra che in questi passi il Foscherari tenesse presente—fin quasi a una ripresa, qua e là, letterale—s. Tommaso, *Summa contra Gentiles,* II. XXXIV e in II Sent. d.1 q.1 a.1 s.c.3.[13] Il tema dovette comunque essergli noto per la presenza, a Bologna, di sette catare che rinnovavano un dualismo, di antica ascendenza manichea, esposto da quel *Liber de duobus principiis* che aveva trovato buona diffusione al tempo di Egidio.[14] 'Dicit Egy.'

25, q. 1. Di suo Johannes Andreae, *Novella* (Venetiis 1581) ad X 1.1 fol. 7rb n.34) aggiunge una riduzione in versi del Simbolo apostolico (*incipit*: 'Unius esse Dei patris et potentia rerum / conditio dantur Petro'; *explicit*: 'coelestem sortem tu fortis nate Matthia') proposta da altri innominati. Non mi è riuscito di rintracciarne la paternità.

[11] Le *Reportationes Egidii super Decretalibus* appaiono nella biblioteca di Giovanni Calderini: Maria Cochetti, 'La biblioteca di Giovanni Calderini', *Studi medievali*, 19 (1978) 1001, 208. Di quest'opera, a differenza di altre che si ricorderanno in seguito, si può essere certi che pervenisse al discepolo e figlio adottivo direttamente dalla biblioteca di Giovanni d'Andrea.

[12] Johannes Andreae, *Novella* ad X 1.1.1 fol. 8ra, n.17

[13] Cf. anche S.Th. 1. q.11 aa. 3-4; q.103 a. 3; *De potentia*, q. 3.6 co.; *Contra Gentiles* 1.42.

[14] Cf. Antoine Dondaine, *Un traité néo manichéan du XIII siècle: Le Liber de duobus principiis suivi d'un fragment de rituel Catare* (Roma 1939). Lo scritto, composto in latino nei pressi del lago di Garda, verso il 1240, è oggi disponibile anche in traduzione italiana: *La cena segreta: Trattati e rituali catari* cur. Francesco Zambon (Milano 1997) 127-258. Ma la bibliografia sarebbe, in merito, assai ampia. Per la presenza catara a Bologna si v. Lorenzo Paolini, *L'eresia catara a Bologna fra XIII e XIV secolo*, 1: *L'eresia catara*

soggiunge Giovanni d'Andrea 'quod propter hoc principaliter emanavit hoc concilium contra quosdam hereticos, qui negabant visibilia et corporalia a Deo creata'.

Subito dopo, accingendosi a trattare della semplicità di Dio, Giovanni d'Andrea è costretto a misurarsi, nuovamente, con la dottrina dell'Ostiense:[15]

> Deus . . . simplex dicitur quia in eo nec diversitas partium consistit, nec pluralitas proprietatum: unde Philosophus dicit secundum Host. hic in summa, eo. § I. Sed ubi hic dicat ad literam nescio, quod ipsum principium, quod est Deus, non est contentum sub genere, nec sub diffinitione, neque subest demonstrationi: expers est qualitatis, quantitatis, quotitatis, ubi, quando et motus nec est aliquid sibi simile, nec communicans nec contrarium. Dixit etiam Aristoteles, quod prima causa superior est narratione nec deficiunt linguae a narratione, nisi propter narrationem causae ipsius, quoniam ipse est super omnem causam: et non narratur nisi per causas secundas, quae illuminantur a lumine prioris causae, quod est, quoniam prima causa non cessat illuminare suum causatum et ipsa illuminatur a lumine suo, quoniam ipsa est lumen et supra quod non est lumen. Cuius dictum Io. evan. corroborat dicens 'Erat lux vera quae illuminat omnem venientem in hunc mundum' (Io. 1.9).

Il lungo brano, qui riprodotto, offre qualche spunto di riflessione perché—così pare di capire—posto di fronte alla citazione di Enrico da Susa, Giovanni avrebbe controllato (o fatto controllare) gli scritti di Aristotele in cerca della sua precisa collocazione. Senza trovarla: ciò che a noi moderni appare del tutto naturale, dato che il passo non appartiene al filosofo greco ma è tratto dal *Liber de causis* (o *Liber Aristotelis de expositione bonitatis purae*)[16] composto a Bagdad nel IX secolo e tradotto in

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alla fine del duecento (Istituto Storico Italiano per il Medio Evo, Studi storici 93-96; Roma 1975).

[15] Johannes Andreae, *Novella* ad X 1.1.1 fol. 9ra nn.94-95 che riproduce Henricus de Segusio, *Summa* 14rb ad X 1.1.1, però con omissione delle parole comprese tra 'ergo ipsa divina essentia . . . / . . . infra, eo. damnamus, § Cum ergo veritas'.

[16]Cf. *Le Liber de causis: Édition établie à l'aide de 90 manuscrits avec introduction et notes par* Adriaan Pattin o.m. (Leuven, s.d.) 59; Pierre Magnard, Olivier Boulnois, Bruno Pinchard, Jen-Luc Solère, *La demeure de l'etre: Autour d'un anonyme: Étude et traduction du Liber de causis* (Paris 1990) 48 v. 57-58. Sull'uso del passo, Andrea Padovani, 'The Metaphysical Thought of Late Medieval Jurisprudence', *The Jurists' Philosophy of Law from Rome to*

latino da Gerardo da Cremona. Questo abile montaggio di testi di provenienza diversa, in cui Proclo gioca un ruolo decisivo, fu costantemente considerato come l'espressione teologica ultima della *Metafisica* di Aristotele. Per quale motivo Giovanni d'Andrea non rintracciasse il passo riferito dall'Ostiense nel *corpus* aristotelico diffuso ai suoi tempi resta pertanto difficile da spiegare. Il *Liber de causis* figura tra le opere possedute da Giovanni Calderini;[17] ma non sappiamo se esso pervenisse al figlio adottivo proprio dalla biblioteca del maestro. Ad ogni modo, se anche Giovanni d'Andrea non aveva una conoscenza puntuale, approfondita delle opere aristoteliche o attribuite allo Stagirita,[18] egli poteva almeno rivolgersi ad un qualche collega docente 'in artibus' che sicuramente—per la grande notorietà e diffusione del *Liber*—gli avrebbe dato la risposta cercata. È vero che dubbi intorno alla paternità aristotelica del *Liber de causis* erano già in qualche modo affiorati in s. Alberto Magno e molto più in s. Tommaso;[19] ma sebbene quest'ultimo avesse riscontrato, nello scritto (commentato nel 1272), tratti d'ispirazione 'platonici',[20] ciò non valse ad eliminarlo dal novero delle opere

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the Seventeenth Century, edd. Andrea Padovani and Peter G. Stein (A Treatise of Legal Philosophy and General Jurisprudence 7; Dordrecht 2007) 74.

[17] Cochetti, 'La biblioteca' 972, 49, XXVI.

[18] Nel corso dei commenti qui esaminati Giovanni d'Andrea cita assai di rado gli scritti dello Stagirita, a differenza di quanto avverrà da parte di alcuni giuristi posteriori: Giovanni da Legnano e Baldo degli Ubaldi su tutti. Certo, le opere del filosofo greco—qualunque, poi, ne fosse la provenienza—erano ben rappresentate nella biblioteca di Giovanni Calderini (cf. Cochetti, 'La biblioteca' 971-73). Il passo che si legge nella *Novella* a *Damnamus* (X 1.1.2) fol. 10va, n.11: 'Proprium secundum Aristotelem et Porphyrium, quod conversim praedicatur de re, et ei naturaliter inest, ut in animalibus risibile de homine, in divinis essentia de persona' dipende da *Anicii Manlii Severini Boethii in Isagogen Porphyrii*, 1.04.12. Sarà ripreso alla lettera in Antonius de Butrio, *Commentaria* (Venetiis 1578) fol. 8ra n.9 ad loc. cit. e in Aegidius Bellamerae, *Praelectiones* fol. 16va, ad loc. cit.

[19] Albertus Magnus, *De causis et processu universitatis a prima causa*. Ed. Winfried Fauser (*Alberti Magni Opera omnia*, XVII.2; Münster 1993) 59: 'David Iudaeus quidam ex dictis Aristotelis, Avicennae, Algazelis et Alfarabi congregavit'.

[20] Grazie alla traduzione della *Elementatio theologica* di Proclo, da poco (1268) disponibile nella traduzione latina di Guglielmo di Moerbecke. Ma

tradizionalmente ascritte ad Aristotele. Ciò che avverrà solo dalla seconda metà del secolo XIV in poi e fuori d'Italia.

La somma Trinità: essenza, sostanza, persone

La memoria delle antiche dispute sulla Trinità, delle eresie fiorite nei primi secoli della Chiesa, impongono a Giovanni d'Andrea alcune preliminari precisazioni terminologiche:[21]

> Si enim ad divinam essentiam habeatur respectus quasi matematice, id est abstracte, non reducta consideratione ad personas, sic est essentia. Si consideremus concrete habito respectu ad personas, sic est substantia, quia in qualibet persona substat et est tota . . . Si utroque modo: quasi in consideratione universali, sic est natura: quia naturale est divinae essentiae quod sit una et quod in ea sint personae: simplex tamen est impartialis et indivisibilis.

Una annotazione marginale, nelle edizioni a stampa delle *Clementinae*,[22] rinvia al *Liber Sententiarum* di Pietro Lombardo (I dist. 8) e ai relativi commenti dei 'theologi scholastici', nonché alla *Summa theologiae* di s. Tommaso, ove la materia è trattata 'in multis quaestionibus'. Il punto di partenza è in effetti costituito proprio dal Lombardo che al luogo indicato, 1, così esordisce:

> Nunc de veritate, sive proprietate, sive incommutabilitate atque simplicitate divinae naturae, sive substantiae sive essentiae agendum.

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l'Aquinate tiene presente anche il *De divinis nominibus* di Dionigi, di cui il lemma 'la causa prima è superiore ad ogni narrazione'—rinviante alla ineffabilità del primo principio—è tratto caratteristico , analizzato da Tommaso nel commento al *Liber* medesimo (prop. 6). Cf. su tutto Tommaso d'Aquino, *Commento al Libro delle cause*, cur. Cristina D'Ancona Costa (Milano 1986) 68-94 con estesa bibliografia ancora ampliata in [Anonymus] *Liber de causis: Das Buch von den Ursachen* (Hamburg 2003) 131-154. Per Alberto Magno e Tommaso si v. almeno Henri-Dominique Saffrey, 'L'État actuel des Recherches sur le *Liber de causis* comme source de la Métaphisique au Moyen Âge', *Die Metaphysik im Mittelalter: Ihr Ursprung und ihre Bedeutung: Vorträge des II. Internationalen Kongress für Mittelalterliche Philosophie. Köln 31.8-6.9.1961*, curr. Paul Wilpert e Willehad Paul Eckert (Miscellanea medievalia: Veröffentlichungen des Thoma-Instituts an der Universität Köln, 2; Berlin 1963) 269, 273, 279-280.

[21] Johannes Andreae, *Clementinae Constitutiones* (Venetiis 1600) ad Clem. 1.1.1 s.v. *omnibus*.

[22] Ibid.

Ora, non v'è dubbio che s. Tommaso, in più luoghi, indugi sul significato dei termini 'natura', 'substantia', 'essentia', 'persona' riferiti a Dio, trinità di persone nell'unica sostanza;[23] ma nel passo del canonista bolognese—peraltro espresso in veste squisitamente tecnica—di tomista v'è poco o nulla. Penserei, piuttosto, alla ripresa di un tema caro alla riflessione di Scoto, centrata sulla distinzione formale. Per il francescano scozzese più cose o più perfezioni sono distinte formalmente quando concettualmente l'una è irriducibile all'altra, mentre 'in re', o 'in natura', è assurdo che esistano separatamente[24]. Così, l'unica essenza divina va distinta dalla trinità delle persone: l'una e le altre, però, lungi dall'escludersi a vicenda, si coimplicano nel mistero della vita o della natura trinitaria. Nella prospettiva scotista la distinzione formale consente, appunto, di distinguere le tre persone divine dall'essenza comune. L'unità astratta—quella che viene colta, ad esempio, dalle scienze matematiche—e la pluralità sono superate—in Scoto, come in Giovanni d'Andrea—nella sintesi dell'unità vivente che non perde nulla della sua semplicità quando comprende in sé il vario e il plurimo.

Del valore di questa apertura al pensiero di un critico severo di s. Tommaso, quale fu Duns Scoto, mi occuperò più avanti. Qui occorreva almeno accenarvi, quasi 'ratione materiae', al fine di mantenere la coerenza e la continuità dell'esposizione in sede di trattazione del dogma trinitario.

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[23] Cf. almeno In I Sent. d.8 q.3 a.3, exp.: 'natura vel substantia sive essentia . . . sumuntur hic pro eodem'; S.Th. I q. 29 aa. 1-2; a. 3, resp.: 'persona . . . significat id quod est perfectissimum in tota natura, scilicet subsistens in naturali natura. Unde, cum omne illud quod est perfectionis, Deo sit attribuendum, eo quod eius essentia continet in se omnem perfectionem, conveniens est ut hoc nomen persona de Deo dicatur'. Sul problema si era soffermato diffusamente s. Agostino, *De Trinitate*, l. VII (opera presente nella biblioteca di Giovanni Calderini. Già posseduta da Giovanni d'Andrea?).

[24] Sul tema esiste un'ampia bibliografia. Per una introduzione cf. Efrem Bettoni, *Duns Scoto filosofo* (Milano 1966) 125-126; Etienne Gilson, *Giovanni Duns Scoto: introduzione alle sue posizioni fondamentali* (Milano 2008) 250-60. Per il passo riferito sopra, si v. di Scoto, *Oxoniensis* I d.4 q.2 n.4.

Generazione del Figlio e spirazione dello Spirito Santo

Altre questioni affrontate da Giovanni d'Andrea, intorno alla generazione del Figlio da parte del Padre ('si pater alium filium genuisset'),[25] la sua incarnazione ('quod in instanti conceptionis perfectus fuit [Christus] homo et fuit anima rationalis infusa')[26] e il tempo in cui era opportuno che ciò accadesse, dipendono tutte, più o meno strettamente, da s. Tommaso.[27]

La spirazione dello Spirito Santo, contemplata dal c. 2 *Fideli* del secondo concilio di Lione (1274)—poi inserito come unico canone al titolo *De Summa Trinitate et fide catholica* del *Liber Sextus* (VI 1.1.1)—è così definita contro gli errori dei Greci: 'Spiritus Sanctus aeternaliter ex Patre et Filio, non tamquam ex duobus principiis, sed tamquam ex uno principio, non duabus spirationibus, sed unica spiratione procedit'.

La glossa di Giovanni d'Andrea al *Sextus*, redatta entro il 1303, non insiste su questo punto che, viceversa, il canonista bolognese approfondirà nella Novella, composta a seguito di successive *additiones* redatte tra il 1338 e il 1342[28]. Che lo

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[25] Johannes Andreae, *Clementinae Constitutiones* ad Clem. 1.1.1 s.v. *fidei*: un altro Verbo sarebbe 'per omnia similis . . . cum genito', sicché 'aliud superfluum et nugatorium fuisset'. La cosa deve considerarsi inconcepibile e sconveniente per Dio, sia sotto il profilo strettamente teologico (e qui si cita s. Anselmo, *Cur Deus homo*, I.10, opera posseduta dalla biblioteca di Giovanni Calderini: Cochetti, 'La biblioteca' 987, 117, X; 989, 121, I. Sempre con l'interrogativo di cui alla n. precedente). Cf. *S. Anselmi Cantuariensis Archiepiscopi Opera omnia*, II, ad fidem codicum recensuit Franciscus Salesius Schmitt o.s.b., (Roma 1940) 67), che filosofico (Aristotele, *Phys*., 184 b, 12 22): 'frustra fit per plura quod potest fieri per pauciora'.

[26] Johannes Andreae, *Clementinae Constitutiones* s.v. *simul unitas*, ad Clem. 1.1.1. Cf. Johannes Andreae, *Novella* ad X 3.41.8, fol. 222va n.1: 'Christus veram habuit animam'.

[27] Nell'ordine, *Contra Gentiles* 4.13; In I Sent. d.7 q.2 a.2 qc.1 s.c.1; S.Th. I q.41 a.5 resp. ('in divinis non potest esse nisi una tantum filiatio'). Sull'anima assunta da Cristo: S.Th. III q.6 aa.3-4 (espressamente citato); sul tempo del suo ingresso nel mondo: S.Th. III q.1 aa.5-6, resp. (espressamente citato).

[28] Cf. Stephan Kuttner, 'The Apostillae of Joannes Andreae on the Clementinae', *Études d'histoire du droit canonique dédiées à G. Le Bras*, I (Paris 1965) 196, 200-201, 394-396; Kenneth Pennington, 'Johannes Andreae's Additiones to the Decretals of Gregory IX', ZRG Kan. Abt. 74

Spirito Santo—è detto qui—proceda dal Padre e dal Figlio come *ex duobus principiis* si potrebbe sostenere sulla base di Aristotele, poiché 'actus sunt suppositorum'[29] e pertanto 'secundum plurificationem suppositorum habetur plurificatio actuum'.

Ora, la stessa posizione del problema e la sua soluzione (la plurificazione degli atti dipende sia dai 'supposita agentia' che dalla 'ratio agendi': qui, però, una, sicché 'unica erit actio') sono tratte—come ammette Giovanni d'Andrea—da Jean Lemoine, ripreso alla lettera.[30] Postille del canonista bolognese rinviano a Pietro Lombardo, *Liber I Sententiarum*, dd. 11 e 12 (precisamente d. 11 4-5; d. 12 per totum) nonché a S.Th. I q.36 aa.2 e 4.

Le appropriazioni trinitarie

Posto ed accolto il dogma dell'unità e della semplicità divine pur nella trinità delle persone, l'incessante desiderio del fedele di rischiarare in qualche modo l'inaccessibile mistero non può arrestarsi. È s. Agostino a proporre, nel *De Trinitate*, una via che dalle facoltà dell'anima—nella quale è impressa l'immagine e la somiglianza col suo Creatore (Ge. 1.26-7)—tenta di risalire alle

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(1988) 346-347.

[29] Il rinvio s'intende fatto a *Metaph*. 981 a 17. L'espressione ricorre in S.Th. I q.36 a.4 ad 7^{m} ('actus referuntur ad supposita') ed appare poco oltre, q. 39 a.5 ad 1^{m} q.40 a. 1 ad 3^{m}. Osservo che s. Tommaso, già in I Sent. dist.11 a.4 aveva affermato che 'pater et filius possunt dici duo spiratores sicut spirantes'. La proposizione viene condannata nel *Tractatus contra errores fratris Iohannis de Montesono ordinis praedicatorum Parisii condemnatos* (19.9.1398). Cf. *Petri Lombardi Episcopi Parisiensis Sententiarum libri IIII . . . per Ioannem Aleaume Parisien. Theologiae professorem pristino suo nitori nunc primum vere restituti . . .* (Parisiis 1539) 599.

[30] Cf. Jean Lemoine, *Liber Sextus* (Paris 1535) fol. xiva n.5. Sul punto, più estesamente, Andrea Padovani, '*Il titolo* De Summa Trinitate et fide catholica nel *Liber Sextus* di Bonifacio VIII', *Le culture di Bonifacio VIII. Atti del Convegno organizzato nell'ambito delle Celebrazioni per il VII Centenario della morte, Bologna, 13-15 dicembre 2004* (Ministero per i Beni e le Attività Culturali. Comitato Nazionale VII centenario della morte di Bonifacio VIII; Roma 2006) 80-84.

proprietà di ciascuna persona divina. La dottrina delle appropriazioni consente, così, di 'formare un'idea, più chiara che sia possibile, delle persone trinitarie nelle loro effettive distinzioni', così caratterizzando con maggior bellezza e accessibilità le attività procedenti da Dio. 'Quantunque, infatti, tutte le proprietà e le opere divine siano comuni alle tre persone, pure ciascuna di esse ha una speciale somiglianza e affinità col carattere particolare di questa o quella persona e trova in essa la sua espressione personificata, il suo speciale rappresentante'[31]. La Glossa ordinaria s.v. *simplex omnino* ad X 1.1.1 recita, pertanto:

> Et pone quasi simile in anima, cuius substantia simplex est: et tamen tria reperiuntur in anima. Intellectus qui preconcipit: ratio que discernit et memoria que conservat. Intellectus preconcipiens Patri primo operanti comparatur. Ratio discernens comparatur Filio, qui est sapientia Patris, disponens omnia in coelo et terra, memoria conservans comparatur Spiritui Sancto, qui omnia bona corroborat et confirmat.

Il testo di Bernardo da Parma è sostanzialmente riprodotto dall'Ostiense nella *Summa aurea,* con l'aggiunta 'secundum T. et Io.', così proseguendo:[32]

> Vel dic quod memoria attribuitur Patri, intelligentia Filio, voluntas Spiritui Sancto. Sicut enim tria predicta sunt in anima et idem sunt cum ipsa in substantia, sic in deitate sive divina maiestate tres personae sunt et eadem substantia et sicut Pater generat Filium et Spiritus Sanctus ab utroque procedit, sic memoria est mater intelligentiae et voluntas ab utraque procedit secundum Hug. Car. qui sequitur Aug. Inveni tamen no. super Genesi quod intellectus attribuitur Patri, voluntas Filio, memoria Spiritui Sancto. Intellectus nempe generat voluntatem et Pater Filium: memoria ab utroque . . . procedit et Spiritus Sanctus ab utroque . . . sicut illa gl. plenius manifestat.

Giovanni d'Andrea, nella *Novella in Primum Decretalium,* rinvia parola per parola a questo passo di Enrico da Susa le cui fonti,

[31] Cf. Andrea Padovani, *Perché chiedi il mio nome? Dio, natura e diritto nel secolo XII* (Torino 1997) 43; Jean Châtillon, '*Unitas, aequalitas, concordia vel connexio*: Recherches sur les Origines de la Théorie Thomiste des Appropriations (*Sum. Theol.*, I, q. 39, art. 7-8)', *St. Thomas Aquinas 1274-1974 Commemorative Studies*, ed. Armand A. Maurer (Toronto 1974), ora in *D'Isidore de Séville à saint Thomas d'Aquin: Etudes d'histoire et de théologie* (London 1985), XIV 337-379.

[32] Henricus de Segusio, *Summa*, ad X 1.1.1 fol. 13ra n.1.

tuttavia, risultano di non semplice identificazione.[33] La sequenza 'Pater—memoria', 'Filius—intelligentia', 'Spiritus Sanctus—voluntas' sarebbe pervenuta all'Ostiense per il tramite di Ugo di St. Cher (Hug. Card.). Che essa sia da ascrivere in origine a s. Agostino è certamente esatto: [34] e sarà proprio l'autorità del vescovo d'Ippona ad assicurarle larghissima diffusione e quasi incontrastata prevalenza tra gli autori medievali.[35] Per parte sua, tuttavia, Ugo di St. Cher propone una serie di appropriazioni—'in primo [*sc*. Patre] potentia, in secundo [*sc*. Filio] sapientia, in tertio [*sc*. Spiritu Sancto] bona voluntas, sive benignitas'[36] che, tra grandi discussioni, era stata originalmente avanzata da Abelardo.[37]

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[33] Johannes Andreae, *Novella* ad X 1.1.1 fol 9ra, n.91: ma con omissione delle fonti citate da Enrico, 'T. et Io.'. Il testo di Giovanni è riprodotto in una 'additio' marginale anche nella edizione giuntina delle Decretali di Gregorio IX, (Venetiis 1600).

[34] Agostino, *De Trinitate* ll. XIV-XV.

[35] A cominciare da Isidoro di Siviglia, *Etymologiae* 7.4.1. Si ritrova, tra altri, in Hincmari Archiepiscopi Rhemensis *ex Sanctis Scripturis et orthodoxorum dictis Collectio de una et non trina Deitate, Sancta videlicet et inseparabilis Trinitatis unitate ad repellendos Gothescalci blasphemias eiusque naenias refutandas* PL 125.515-516; nelle *Sententiae* della scuola di Laon e in Pietro Lombardo (Marcia Colish, *Peter Lombard* [2 vols. Brill's Studies in Intellectual History 41; Leiden-New York-Köln 1994] 1.124, 358, 366-67); in 'Garnerius Lingonensis *Sermones in Festa Domini et Sanctorum, sermo* 22, PL 205.713; più avanti in s. Bonaventura, In II Sent. d.16 a.1 q.1; in Nicolò da Lira, *gl. in Genesim* 'Et creavit Deus hominem ad imaginem et similitudinem suam'. La elencazione potrebbe essere ancora più lunga.

[36] 'Reverend. in Christo Patris et Domini Domini Hugonis de Sancto Charo, S.R.E. Tituli S. Sabinae Cardinalis primi de ordine S. Dominici, in Postillam super Genesim prologus', Hugonis de S. Charo *S. Romanae Ecclesiae Tituli S. Sabinae Cardinalis primi ordini Praedicatorum* t.1 n.n. (Lugduni 1645). Nel commento *in Epistolas omnes D. Pauli, Actus Apostolorum, Epistolas septem canonicas, Apocalypsim B. Ioannis* t.7 61va. Ugo propone invece le appropriazioni 'Pater—unitas', 'Filius—aequalitas', 'Spiritus Sanctus—concordia' desunte da s. Agostino. *De vera religione* 8.13 e poi diffuse dalla scuola di Chartres. Cf. Padovani, *Perché* 44-46.

[37] Nelle *Theologiae* come nel commento all'epistola ai Romani. Sebbene fondata su passi delle Sacre Scritture, la dottrina del maestro di Le Pallet suscitò da subito vivacissime reazioni, culminate nella condanna pronunciata alla sinodo di Sens (1140). Ciononostante, essa conobbe ampia diffusione. La

La prima serie ricordata dall'Ostiense: 'Pater—intellectus', 'Filius—ratio', 'Spiritus Sanctus—memoria' e la seconda: 'Pater—intellectus', 'Filius—voluntas', 'Spiritus Sanctus—memoria', pongono altri problemi. Quest'ultima, a quanto asserisce Enrico da Susa, sarebbe proposta da un commento al libro della Genesi:

> et licet unius sit illa [Trinitas] naturae, tres tamen in se dignitates habet, nempe intellectum, voluntatem et memoriam... Nam sicut ex Patre generatur Filius, ex Patre Filioque procedit Spiritus Sanctus, ita ex intellectu generatur voluntas et ex hiis ambobus procedit memoria.

In effetti, essa appare nei *Dicta Albini de imagine Dei* o *De dignitate conditionis humanae libellus sive de imagine Dei sive dicta beati Albini levitae super illud Geneseos 'Faciamus hominem ad imaginem et similitudinem nostram'* che si vuole attribuito ad Alcuino.[38] E tra gli scritti di Alcuino—*Commentariorum in Ecclesiasticum libri decem*[39]—il passo ricorre nuovamente sebbene, altrove, ascritto falsamente a s. Ambrogio.[40] La dottrina esposta conobbe una certa diffusione: sarà ripresa, ad esempio, nello ps. agostiniano *De spiritu et anima liber unus* (ca. 1180)[41] e nella *Summa Duacensis* (1231-

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bibliografia, in merito è assai ampia. Mi limito a ricordare i lavori di Raymond M. Martin, 'Pro Petro Abelardo: Un plaidoyer de Robert de Melun contre s. Bernard', *Revue des Sciences Philosophiques et Théologiques*, 12 (1923) 309-333; Jean Jolivet, 'Sur quelques critiques de la théologie d'Abélard', *Archives d'histoire doctrinale et littéraire du Moyen Age*, XXX (1963) 11-41; idem, *Arts du langage et théologie chez Abélard* (Paris 1969) 302, 346; David E. Luscombe, *The School of Peter Abelard: The Influence of Abelard's Thought in the Early Scholastic Period* (Cambridge 1969) 116-119, 187, 254, 263, 303; Michael Schmaus, Alois Grillmeier, Leo Scheffczyk, Michael Seybold, *Handbuch der Dogmengeschichte*, 2.1b: *Trinität in der Scholastik*, von Franz Courth (Freiburg-Basel-Wien 1985) 40-46; Alberto Cozzi, *Manuale di dottrina trinitaria* (Brescia 2009) 491-93. Lo stesso s. Tommaso vi fece ricorso: S.Th. I q.39 a.7, resp.; q.45 a.6 ad 2^{m}; II.II q.14, a.1 c.; In I Sent. d.31 q.1 a.2 c.; d.34 q.2, a.1 c; *De veritate*, q.7 a.3 c. Cf. Châtillon, 'Unitas' 359-360, 374-379.

[38] Wilhelm Heil, 'Alcuin', *Theologische Realenzyklopädie* (Berlin-New York 1978) 2.271.

[39] PL 109.874 ad Eccli. 17.

[40] *De dignitate conditionis humanae libellus*, PL 17.1105-1106.

[41] PL 40.805-806.

1236).[42]

L'appropriazione della memoria allo Spirito Santo appare—come s'è visto—anche nella serie che l'Ostiense avrebbe tratto da 'T. et Io.': sigle alle quali dovrebbero corrispondere i nomi di Tancredi e di Giovanni Teutonico per i quali, tuttavia, non sono finora riuscito a rintracciare precise corrispondenze testuali.[43] Analogamente mi sfuggono testimonianze esplicite intorno alla terna 'intellectus', 'ratio', 'memoria': ma per quanto riguarda i primi due termini non si andrà lontano dal vero ipotizzando l'influsso di dottrine neoplatoniche comunque diffuse nel secolo XII. È infatti l'intelletto a generare il 'logos-ratio', dunque il Figlio. La stessa memoria, che s. Agostino attribuisce al Padre è perenne e fecondo atto d'intelligenza che genera la ragione universale.

La varietà delle attribuzioni alle persone divine non deve sorprendere. Lo stesso Ostiense, al termine della sua rassegna, scrive: 'et licet supradicti videantur sibi contradicere, tamen consideratis diversis respectibus nullatenus contradicunt' sicché, a qualunque dottrina ti appoggerai—afferma—non errerai. Nella Trinità, infatti, la circuminsessione (pericoresi) consente, sulla base dell'unità di essenza, la compenetrazione degli attributi, senza mescolanza tra le persone ('in Deo omnia sunt unum, ubi non obviat relationis oppositio').[44]

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[42] *La 'Summa Duacensis' (Douai 434): Texte critique avec une introduction et des tables publié par* Palémon Glorieux (Textes Philosophiques du Moyen Age, 2; Paris 1955) 20-21.

[43] Non ha dato frutti la lettura dell'apparato del Teutonico esibito in *Constitutiones Concilii quarti Lateranensis una cum Commentariis glossatorum*, ed. Antonio García y García (MI, Series A 2; Città del Vaticano 1981) 187-191. Puramente di taglio giuridico i commenti, ivi contenuti, di Vincenzo Ispano e Damaso. Riguardo a Tancredi, brancolo nel buio.

[44] Così s. Anselmo, *Monologion* 48, dopo aver detto che il Padre è memoria e il Figlio intelletto, soggiunge che il Figlio può essere designato come memoria del Padre—memoria di memoria—e il Padre sapienza e memoria increata. Cf. anche s. Tommaso, *De veritate*, q.7 a.3 ad 3^{m}: 'non est inconveniens aliquid appropriari diversis personis ratione diversa, sicut donum sapientiae appropriatur Spiritui Sancto inquantum est donum: omnis enim doni principium est amor; sed appropriatur Filio inquantum est sapientia. Similiter etiam memoria appropriatur Patri inquantum est principium intelligentiae; secundum autem

La pluralità delle forme nell'anima

Dalla 'psychologische Trinitätslehre' all'analisi della struttura dell'anima umana il passo può essere agevole. La glossa di Giovanni d'Andrea a Clem. 1.1.1—che riprende il primo decreto del concilio di Vienne—intende illustrare le motivazioni teologiche e filosofiche che, nel 1311-1312, condussero alla condanna, in quanto eretica, della dottrina secondo la quale 'substantia animae rationalis sive intellectivae vere et per se humani corporis non sit forma'. Tale asserto, già sostenuto, nei circoli oxoniensi (ove si era giunti, nel 1277, addirittura alla proibizione d'insegnare la tesi opposta, dell'unità della forma sostanziale nell'anima),[45] prima della pronuncia conciliare era stato vigorosamente ribadito, da ultimo, contro s. Tommaso, da Pietro di Giovanni Olivi. La condanna, a Vienne, della dottrina della pluralità delle forme troncò di netto la discussione sul punto, pur senza nominare il francescano francese.

Questi, in estrema sintesi, aveva affermato che solo la potenza vegetativa e sensitiva sono direttamente forma del corpo mentre l'intellettiva, ad esse superiore, le include integrandole. Le tre forme, realmente distinte, si porrebbero come parti di un tutto, analogamente alle membra di un corpo che, ciascuna operando per sé, non mettono a pericolo l'unità dell'insieme organico.[46]

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quod est quaedam potentia appropriatur Filio'. Determinante il pensiero di s. Agostino, *De Trinitate* 7.

[45] Tullio Gregory, in *Storia della filosofia diretta da Mario Dal Pra* (Milano 1975-1976) 6.88-89. Richard Fishacre e Robert Kilwardby vi appaiono sostenitori, entrambi, della pluralità delle forme: cf. Inos Biffi, *Figure medievali della teologia* (Vol. 1; Milano 1992) 231, 270. Per un inquadramento del problema cf. Sofia Vanni Rovighi, 'Alberto Magno e l'unità della forma sostanziale nell'uomo', *Studi di filosofia medievale, II, Secoli XIII e XIV* (Milano 1978) 19-39.

[46] Efrem Bettoni, *Le dottrine filosofiche di Pier di Giovanni Olivi: Saggio* (Pubblicazioni dell'Università Cattolica del S. Cuore, n.s., 73; Milano 1959) 334-351. La dottrina dell'Olivi è ovviamente respinta, in base alla presa di posizione conciliare, da Franciscus Zabarella, *Lectura* (Lugduni 1557) 179 [*rectius* 139]rb, n.5 ad X 1.6.34: 'anima intellectiva in homine . . . sub se

Per motivare le ragioni che, nel 1311-1312, hanno giustificato il rifiuto di tali asserzioni, Giovanni d'Andrea riprende in sostanza—ma spesso anche alla lettera—S.Th. I q.76 a.1 come egli stesso ammette in chiusura della lunghissima gl. *intellectivae*: 'curiosus qui hoc plenius disquaerere vellet, videat in Summa san. Tho., parte I q.76 in prin. Io. And.'[47]

In conformità al modello, espressamente citato, la trattazione procede dall'assunto che è l'uomo, proprio nella sua costituzione di anima e corpo, a conoscere—e non la sola anima: 'hic homo intelligit'. Né l'anima può essere intesa come motore del corpo e da esso distinta come il timoniere rispetto alla nave, ma—appunto—come forma che tutto lo compenetra. Ove si negasse questo asserto, l'incarnazione sarebbe stata inutile: Cristo avrebbe rivestito un corpo senz'anima; né, infine, potrebbe darsi resurrezione finale, quando l'anima—per qualche tempo distaccata dal corpo—riacquisterà la condizione perfetta che le spetta in quanto forma ordinata al composto cui inerisce per natura.

Resta da aggirare lo scoglio posto da Aristotele (III *de anima*, 430 a 20) laddove questi afferma che l'intelletto attivo è 'separato'. Con s. Tommaso, Giovanni risponde che lo Stagirita ha inteso tale carattere separato nel senso che l'intelletto non è atto di un qualche organo fisico (come l'occhio per la vista, la mano per il tatto, ecc.) ma, appunto, facoltà distinta da esso.

Se, infine, si obiettasse che l'anima, come *quid* sussistente, non può essere ugualmente forma del corpo, occorrerebbe notare che la forma dell'anima intellettiva è diversa dalle altre forme, non sussistenti per sé. La sua peculiarità risiede, infatti, nel comunicare il proprio essere alla materia ad essa soggiacente.

Ora, che questa esposizione possa essere utilizzabile—come

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continet perfectionem anime sensitive et vegetative, nec in homine est nisi una anima'.

[47] Le conclusioni raggiunte a Vienne sono ribadite da Johannes Andreae, *Novella* ad X 3.41.8 s.v. *anima*: 'haeretica iudicatur opinio quae habet, quod substantia animae rationalis, vel intellectivae per se et essentialiter non sit humani corporis forma. De sensitiva et vegetativa non dubitatur, ut ibi [gl. in Clem. 1.1.1 s.v. *intellectivae*] satis scripsi'.

lascia intendere Giovanni d'Andrea—per confutare le dottrine di Pietro Olivi, è altamente problematico. Certo, il francescano francese aveva negato che l'anima intellettiva possa unirsi al corpo come forma, essendo essa stessa composta di materia e di forma. Inoltre, la tesi dell''intelletto motore del corpo', definita da s. Tommaso 'posizione platonica'[48] e potenzialmente idonea a supportare la dottrina della pluralità delle forme, non figura—a quanto mi risulta—in Pietro Olivi; piuttosto, è richiamata dall'Aquinate in sede di confutazione dell'averroismo professato da Sigieri come, appunto, risulta da S.Th. I q.76 aa.1-3 e da *Contra Gentiles* 2.57.[49]

In definitiva, la glossa di Giovanni d'Andrea prende sì lo spunto dalla condanna conciliare della pluralità delle forme sostenuta, in ultimo, dall'Olivi: ma il suo obiettivo pare piuttosto la confutazione dell'averroismo riproposto da Sigieri e professato ampiamente a Bologna nei primi decenni del Trecento.[50] La

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[48] Italo Sciuto, 'Le passioni dell'anima nel pensiero di Tommaso d'Aquino', *Anima e corpo nella cultura medievale*: *Atti del 5 Convegno di studio della Società Italiana per lo Studio del Pensiero Medievale, Venezia 25-28 settembre 1995*, curr. Carla Casagrande e Silvana Vecchio (Millennio Medievale 15, Atti di convegno; Tavarnuzze 1999) 74-76. Cf., ivi, Leonardo Sileo, 'La definizione aristotelica di anima nel dibattito della prima metà del Duecento' 32-49.

[49] Esplicito *De unitate intellectus* 3.66 : 'quidam vero videntes quod secundum viam Averrois sustineri non potest quod hic homo intelligat, in aliam diverterunt viam et dicunt quod intellectus unitus corpori ut motor'.

[50] Le figure di spicco sono quelle di Taddeo ed Antonio da Parma che, del brabantino, riprendono le tesi fondamentali esposte nel *De anima intellectiva*. Cf. Celestino Piana, *Nuove ricerche su le Università di Bologna e di Parma*, (Spicilegium Bonaventurianum 2; Quaracchi, Florentiae 1966) 7; Sofia Vanni Rovighi, 'Gli averroisti bolognesi', *Studi di filosofia medievale*, 2: *Secoli XIII e XIV* Vita e pensiero; Milano 1978) 222-244 a 233; Eugenio Garin, *Storia della filosofia italiana* (3 voll. Piccola biblioteca Einaudi 80; Torino 1967) 1.175-176; Alessandro Ghisalberti, 'Fine ultimo e conoscenza intellettiva: Una questione della scuola averroista bolognese del sec. XIV', *Dalla prima alla seconda Scolastica: Paradigmi e percorsi storiografici*, cur. Alessandro Ghisalberti et al. (Collana Philosophia 28; Bologna 2000) 120-142; idem, 'Felicità terrena e beatitudine eterna: L'intelletto come cifra della scuola filosofica bolognese tra il Duecento e il Trecento', *Praedicatores/Doctores: Lo Studium generale dei frati Predicatori nella cultura bolognese tra il '200 e il*

stessa insistenza con la quale Giovanni—sulla scia testuale di s. Tommaso—agita lo spettro della corruzione dell'anima col corpo non può adattarsi a Pietro Olivi, a quanti l'hanno preceduto o seguito. Vero è, infatti, che proprio il francescano francese, opponendosi alla dottrina tomista dell'intelletto forma del corpo per sé, afferma che esso non potrebbe essere né libero né separabile dal corpo cui inerisce, così perdendo la propria immortalità.

Tra Tommaso e Scoto

La sostanziale, prevalente dipendenza di Giovanni d'Andrea dalla teologia tomista non impedì al canonista bolognese di aprirsi verso altri e diversi orizzonti speculativi: scotisti, in particolare, come già s'è avuto occasione di rilevare in sede di analisi della gl. *omnibus* ad Clem. 1.1.1. Poco più avanti, nella gl. *doctorum,* padre Celestino Piana segnalò la prima citazione di

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'300, cur. Roberto Lambertini (Memorie Domenicane n.s. 39; Firenze 2010) 59-74; Irene Zavattero, 'La *Quaestio de felicitate* di Giacomo da Pistoia: Un tentativo di interpretazione alla luce di una edizione critica del testo', *La felicità nel medioevo*: *Atti del Convegno della Società Italiana per lo Studio del Pensiero Medievale (S.I.S.P.M.), Milano 12-13 settembre 2003*, curr. Maria Bettetini e Francesco D. Paparella (Textes et études du Moyen Âge 31; Louvain-La-Neuve 2005) 355-409. Contro gli averroisti bolognesi le critiche vennero anche dalla sponda scotista: Roberto Lambertini, 'La teoria delle *intentiones* da Gentile da Cingoli a Matteo da Gubbio: Fonti e linee di tendenza', *L'insegnamento della logica a Bologna nel XIV secolo*, curr. Dino Buzzetti, Maurizio Ferriani, Andrea Tabarroni (Studi e memorie per la storia dell'Università di Bologna n.s. 8; Bologna 1992) 277-351 a 307 e n.107. Per Sigieri di Brabante si v. almeno, per quanto ci riguarda, Filippo Mignini, 'Anima e corpo negli scritti di Sigieri di Brabante', *Anima e corpo* 65-72. Ampia panoramica delle posizioni tenute dalle varie scuole di pensiero in Celestino Piana o.f.m., 'La controversia della distinzione fra anima e potenze ai primordi della scuola scotista (1310-1330 c.)', *Miscellanea del Centro di Studi Medievali: Pubblicazioni dell'Università Cattolica del S. Cuore* n.s. 58 (1956) 67-167. Notevole il passo, contenuto nella gl. *intellectivae*, che recita: 'licet aliqui dixerint hanc unionem [*sc*. intellectus et corporis] esse per speciem intelligibilem: quae duplex habet subiectum intellectum possibilem et phantasmata', perché richiama (pur non citandolo) Averroé, commento al III *De anima*, 5, VI², 148 c).

Giovanni Duns Scoto in ambiente bolognese.[51] In realtà, il rinvio agli scritti del francescano scozzese risulta colà piuttosto vago e tutto sommato poco incisivo sul piano dell'argomentazione scientifica: 'Io. Scoti super 4° sent.' (da integrare con: 'd.2, q.1'). Una più puntuale conoscenza del pensiero del Dottore Sottile emerge nella successiva gl. *informans gratia*, laddove si tratta della nozione di virtù e della sua implicazione nel concetto di grazia. Per molti teologi—afferma il canonista bolognese—questa si identifica con l''habitus charitatis', dato che entrambe—grazia e carità—compiono le medesime operazioni. Non v'è dono, infatti, maggiore della carità. A sostegno di questa tesi essi adducono il *De Trinitate* (15.18) di s. Agostino. È, questa, la posizione di Scoto: 'caritas est excellentissimum donum Dei'.[52]

Altri, invece, dicono che la grazia è abito fondato (fundatus) nell'essenza dell'anima e che la carità è abito diverso che si fonda (fundatur) nella volontà. Qui si ode la voce di s. Tommaso il quale, rifiutando la posizione appena sopra esposta, afferma: 'gratia comparatur ad voluntatem ut movens ad motum'.[53]

L'argomento è ripreso e approfondito da Giovanni d'Andrea nella successiva gl. *sanctorum ac doctorum modernorum*: altre sono le virtù teologiche—fede, speranza, carità—altre quelle morali: giustizia, fortezza, temperanza, prudenza. Mentre intorno alla natura infusa delle prime regna l'accordo tra i teologi moderni, così non accade per le seconde. S. Tommaso e i suoi seguaci—ricorda Giovanni—sostengono che le morali sono infuse da Dio al pari delle teologali.[54] Le morali acquisite, infatti,

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[51] Celestino Piana, 'Gli inizi e lo sviluppo dello Scotismo a Bologna e nella regione Romagnolo-Flaminia (sec. XIV-XVI)', *Archivum Franciscanum Historicum* 40(1947) 49-80 a 75.

[52] Duns Scotus, *Ordinatio*, III d.34 q.un. Ove, appunto, si rinvia al passo del *De Trinitate*.

[53] S.Th. I.II q.110 a.4 ad 1^m^. Ma cf. In II Sent. d.26 a.4 ad 5^m^: 'non oportet quod gratia sit idem quod caritas, quamvis caritas nunquam possit esse sine gratia'; S.Th. I.II q.110 a.3 resp.: 'quidam posuerunt idem esse gratiam et virtutem secundum essentiam sed differre solum secundum rationem'.

[54] Cf. *De virtutibus* q.5 a.4, resp. Per una rassegna delle posizioni fondamentali dell'Aquinate, in materia, v. Odon Lottin, *Morale fondamentale*

non ordinano di per sé all'ultimo fine—l'unione dell'uomo a Dio nella perfetta carità. È pertanto necessario che intelletto e volontà siano guidati dallo Spirito Santo verso il fine soprannaturale cui siamo destinati.

Chi si oppone a questa visione sostiene, viceversa, che le morali acquiste sono sufficienti a perfezionare l'uomo per raggiungere il fine ultimo. Esse, pertanto, non sono realmente distinte dalle teologali e cardinali in quanto congiunte alla carità ch'è forma di ogni virtù.[55] S. Tommaso ha inutilmente duplicato la serie delle virtù morali in acquisite ed infuse, così violando—nota la glossa di Giovanni d'Andrea—il principio fisico 'frustra fit per plura ecc.'[56] Vero è, piuttosto, che:[57]

> per virtutes morales acquisitas potest homo cum theologicis finem suum acquirere sine moralibus infusis. Proprium enim est charitati nos Deo ultimo fini coniungere.

La carità, come afferma s. Agostino, è la 'rectissima affectio' che ci congiunge a Dio;[58] le virtù teologiche infuse, pertanto, non hanno bisogno dell'infusione delle altre virtù morali.

(Bibliothèque de Théologie. série 2, Théologie morale 1; Paris-Tournai-New York-Rome 1954) 360, 394, 406-408.

[55] Cf. Scotus, *Ordinatio* d.26 q.un.; la posizione di Scoto sulle virtù infuse ed acquisite si precisa anche altrove, dd.34-36.

[56] Cf. Ibid. III d.34 q.un.: 'pluralitas specierum non videtur ponenda sine necessitate'. E poco oltre: 'non videtur igitur aliqua necessitas ponendi aliquos alios habitus ab illis qui sunt virtutes theologicae, intellectuales et morales'. La confutazione del pensiero di s. Tommaso è chiara: 'Ergo per fidem est aliquid proportionatum secundo [*sc*. Spiritui Sancto] et primo [*sc*. virtuti], igitur si per habitum proportionatur potentia sibi ipsi, per idem sufficienter proportionatur Spiritui Sancto ut alii moventi. Non igitur propter istam rationem oportet ibi necessario ponere alios habitus'. Vale la pena ricordare che il c.d. 'principio di economia' non è invocato solo da Ockham e dai suoi seguaci. Lo ritroviamo in un domenicano critico di s. Tommaso e vicino a posizioni scotiste come Durando. Cf. Maria Teresa Beonio Brocchieri Fumagalli, *Durando di S. Porziano: Elementi filosofici della terza redazione del 'Commento alle Sentenze'* (Pubblicazioni della Facoltà di lettere e filosofia dell'Università di Milano 53, Sezione dell'Istituto di storia della filosofia 17; Firenze 1969) 65 e 89.

[57] Johannes Andreae, Clem. 1.1.1. s.v. *sanctorum ac doctorum modernorum*.

[58] *De moribus Ecclesiae*, I.11. Il passo di Agostino è citato dall'Aquinate anche a S.Th. II.II, q. 23, a. 3, co., ma piegato a sostegno della propria tesi.

Anche la riflessione sugli effetti del battesimo, innestata dalle parole della decretale:[59]

> nos autem attendentes generalem efficaciam mortis Christi . . . opinionem secundam, quae dicit, tam parvulis quam adultis conferri in baptismo informantem gratiam et virtutes . . . sacro approbante concilio duximus eligendum.

ripropone posizioni scotiste. Asserisce infatti Giovanni d'Andrea che se le virtù morali fossero infuse ai fanciulli battezzati, lo sarebbero anche agli adulti: ma un adulto battezzato non si sente sobrio, prudente, temperato o giusto più di quanto lo fosse prima di ricevere il sacramento. Di fatto, la virtù morale è un abito inclinante sul piano della natura che, in un adulto vizioso, continua ad esercitare, se non corretta, i suoi effetti perversi. Scoto propone questo punto di vista sempre nell'*Ordinatio* III, d. 36 ribadendo che 'non semper iustificatus habet habitus virtutum moralium', pur ricevendo le virtù teologali[60].

La glossa di Giovanni d'Andrea s'arresta a quest'ultima conclusione, senza curarsi di riferire l'opinione contraria di s. Tommaso.[61] Il pensiero dell'Aquinate, tuttavia, aveva già ispirato la composizione della gl. *opiniones* (ad Clem. 1.1.1) sempre in merito al battesimo, ma per una questione che presentava minori difficoltà: se, insomma, il sacramento del lavacro conferisca la grazia informante anche ai fanciulli. Nella risposta, affermativa,

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[59] Clem. 1. 1. 1 in fine.

[60] Cf. Marilyn McCord Adams, 'Scotus and Ockham on the Connection of Virtues', *John Duns Scotus: Metaphysics and Ethics*, edd. Ludger Honnefelder, Rega Wood, Mechthild Dreyer (Studien und Texte zur Geistesgeschichte des Mittelalters 53; John Duns Scotus; Leiden-New York-Köln 1996) 499-522 a 509. L'accesa discussione, tra tomisti e scotisti, scaturita su questo punto, è estesamente riferita da Lucas Wadding in Duns Scotus, *Opera omnia* (12 voll. in 16; Lugduni 1639) vol. 7.2:836-848): 'Tempore Concilii Viennensis erat actu controversia inter thomistas et scotistas de infusione moralium: ergo de illa nihil voluit determinare Concilium' che, in merito, volle usare 'modo loquendi indefinito de infusione virtutum'. Delle morali, evidentemente, perché riguardo alla infusione delle teologali entrambe le parti erano d'accordo. Durando di S. Porziano aderirà, sul punto specifico, alle posizioni di Giovanni Scoto menzionate da Giovanni d'Andrea. Cf. Lottin, *Morale fondamentale* 469.

[61] Per la quale si può v. almeno S.Th. I.II q.63 a.3 r. e q. 65, a. 3.

il canonista afferma che ciò accade 'quoad habitum', sebbene non ancora 'quoad usum'. Sostenere il contrario—confondendo in tal modo le nozioni di abito e di atto—negherebbe ai piccoli l'accesso alla beatitudine eterna. Per un approfondimento del tema Giovanni rinvia il lettore al commento di Tommaso in IV Sent. d.4 e alla S.Th. III qq.68 e 69.[62]

S. Girolamo

Chi si attendesse di trovare, nello *Hieronymianus*—composto da Giovanni d'Andrea tra il 1334 ed il 1346 a segno dell'intensa devozione verso s. Girolamo[63]—una larga messe di riflessioni teologiche, resterebbe deluso. Di fatto, è proprio l'inclinazione intellettuale di questo Padre, poco o nulla attratto dalla speculazione teologico-filosofica e dall'indagine teoretica, a limitare in partenza il campo di osservazione. Le discipline che lo Stridonense predilige sono la critica filologica, la ricerca storica, l'analisi testuale. Al più, nelle epistole—soprattutto quelle indirizzate alle figlie spirituali—traspare uno spirito moraleggiante severo, di intonazione ascetica che il canonista Giovanni d'Andrea evidentemente apprezza. Gli unici spunti di elevato contenuto teologico-dogmatico li troviamo in quella *Diffinitio fidei symboli et Niceni concilii* (*incipit*: 'Mihi quidem fidelissime papa Laurentii ad scribendum...'; *explicit*: '… cum spiritu sancto gloria et imperium in secula seculorum')[64] ch'è in realtà di Rufino d'Aquileia, sebbene a lungo ritenuta opera di s. Girolamo.[65]

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[62] Di fatto, la gl. *opiniones* risulta essere un composto di passi tratti, quasi alla lettera, da S.Th. III q.69 a. 6, resp. Si cf. pure In II Sent. d.26 a. 4.
[63] Cf., in merito, l'elegante saggio di Condorelli, 'Giovanni d'Andrea e dintorni' 126-127.
[64] Come Condorelli, 'Giovanni d'Andrea e dintorni'125 n.98 ho usato l'edizione incunabola Coloniae, Conrad Winters de Homborch, 9 viii 1482 (ISTC ia 00627000) consultabile on line a http://tudigit.ulb.tudarmstadt.de, fol. 34ra.
[65] E come tale stampata, ad es., ad Oxford, 17 xii 1478 (ISTC ir 00352000). Già la PL 21.335-386 attribuisce lo scritto a Rufino. Si v. oggi Tyranni Rufini *Opera*, ed. Manlio Simonetti (CCSL 20; Turnhout 1961) 127-182.

Per il resto, i passi di carattere strettamente teologico-dogmatico—intorno alla Trinità o a Cristo—si riducono, nello *Hieronymianus*, a poca cosa. Lo stesso può dirsi dei rinvii agli scritti di Girolamo contenuti nella *Novella in Primum Decretalium*, titolo *De Summa Trinitate et fide catholica*, laddove Giovanni d'Andrea rimanda il lettore alla consultazione dello *Hieronymianus*.[66] Rilievo, questo, non privo di interesse, perché se è vero che il canonista bolognese attese alla stesura della *Novella in Decretales* tra il 1311 ed il 1338, bisogna ritenere che almeno il commento ad X 1.1 fosse composto nella sua versione definitiva, a noi pervenuta, ben dopo il 1334, con lo *Hieronymianus* in avanzato stato di composizione e già strutturato nelle sue linee fondamentali.

L'eresia

Com'è noto, il c. *Damnamus* (X 1.1.2) riferisce estesamente la dottrina di Gioacchino da Fiore che aveva accusato Pietro Lombardo di avere professato, riguardo alla Trinità, 'non tam trinitatem, quam quaternitatem'.[67] Il *casus* di Bernardo da Parma s'era limitato ad una riesposizione del testo conciliare senza apportare nulla di propriamente nuovo sotto il profilo teologico.

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[66] Johannes Andreae, *Novella* X 1.1.1. Si v. ad es., i lemmi *incarnatus* (fol. 8va n.47: 'vide pulchre in Hie. ad Paulam et Eustochium, C'); *resurgent* (n.55: 'de celeritate resurrectionis vide Hie. ad Alex., B cum concor.'); *poenam* (n.58: 'vide pulchre Hiero. ad Heliodorum, D et ad Pamma. et Oce., B'); *nisi sacerdos* (n.61: 'sine sacerdote Pascha celebrari non potest dicit Hie. ad Evagrium, C'); *infi.* (fol. 8vb n.84: 'in Hiero. v.c. B super omnia'); *potentiam* (n.85: 'vide in Hiero. 3 cap., D et ad Oce., i. B). Per temi diversi si v. i lemmi *tres sunt ordines* (fol. 9rb-9va n.110: 'Hiero . . . hoc dixit propter Paulam incontinentem, Eustochium virginem et Paulinam coniugatam, vide ad Pammachium, secunda B.'); *ibi virgines* (loc. cit.: 'ut dicit Hierony. ad Paulam et Eustochium, C', peribit genus humanum si omnes sunt virgines, responde ut Hiero. super Philomena, C'), ecc. C'è da chiedersi se sia a questo tipo di *signa* che si riferisce Giovanni d'Andrea nel prologo, fol. 2va n.4: 'aliquibus moralibus insertis, que certo signo in illis tantum fiendo facile cognoscentur, ut sic deinceps studenti non sit necessarium librorum numerositatem evolvere, cui brevitas hic collecta offert sine grandi sui labore, quod queret'.

[67] Cf. Colish, *Peter Lombard* 1.246.

Prendendo spunto dalle parole 'substantia, essentia seu natura divina . . . non est generans, neque genita nec procedens', il glossatore duecentesco aveva chiarito che 'ad intelligentiam personarum in trinitate . . . nomina quaedam sunt essentialia, quaedam personalia, quaedam notionalia' distinguendo analiticamente il valore semantico di ciascun termine. Ciò che, da parte sua, aveva già fatto Stephan Langton nella sua glossa *in quattuor libros Sententiarum*, presto imitato da altri maestri parigini tra l'ultimo scorcio del secolo XII e i primi del seguente: il cancelliere Prevostino da Cremona e Pietro Capuano.[68]

Della 'querelle' tra Gioacchino e Pietro Lombardo—evidentemente non più attuale—Giovanni d'Andrea si sbriga, nella *Novella*, abbastanza brevemente;[69] e altrettanto fa riguardo al valore dei 'nomina', tema che, invece, attirerà l'interesse, quasi centocinquant'anni dopo, di Antonio da Budrio.[70]

Scarsa attenzione il canonista bolognese dedica anche all'eresia di Amaury de Béne, sprovveduto interprete di Giovanni Eriugena, sul quale ben più estesamente s'era soffermato—e vedremo presto per quali tramiti—l'Ostiense (citato solo di sfuggita da Giovanni d'Andrea).[71]

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[68] Cf. Luisa Valente, *Logique et théologie: Les écoles parisiennes entre 1150 et 1220* (Paris 2008) 341, 343-344. Il punto di partenza è, per tutti, Pietro Lombardo, I d.34 che però non usa, esplicitamente, i tre termini poi proposti da Stephan.

[69] Johannes Andreae, *Novella* ad X 1.1.2 fol.10rb nn.1-2; 11ra nn.42-43 s.v. *non est generans*: quasi che 'de trino et uno trinitatem et unitatem in trinitate scrutari temeritas est, credere pietas', con riferimento a Pietro Lombardo, I dist.2 c.1 che cita s. Bernardo, *De consideratione*, 4.11, PL 182.799 e s. Agostino, *De Trinitate*, 1.3.5: 'nec periculosius alicubi erratur, nec laboriosius aliquid quaeritur, nec fructuosius aliquid invenitur'. Questo passo del vescovo d'Ippona è riferito anche in S.Th. I q.31 a.2. Giovanni d'Andrea propone, da ultimo, anche *Tullius de creatione mundi*: 'parentem huius universitatis invenire difficile est et ex quo quis invenerit, vulgo exponere nefas est'. Il riferimento è a Marci Tullii Ciceronis *Timaeus*, II: opera che, nel Medio Evo, fu talora ricordata col titolo *De creatione* (o *De essentia*) *mundi*. Sia il Lombardo che quest'ultima opera compaiono nella biblioteca di Giovanni Calderini (Cochetti, 'La biblioteca' 994, 145; 969, 41, VII).

[70] Antonius de Butrio, *Commentaria* ad X 1.1.2 fol. 8rb-vb nn.21-24

[71] Cf. Padovani, *Perché* 207-210.

'Iste §'—aveva scritto Enrico da Susa—'non fuit expositus neque tactus ab aliquo magistrorum'. Di più: la dottrina di Amaury non era stata nemmeno esposta in concilio altrettanto analiticamente quanto quella di Gioacchino da Fiore. 'Et pour cause', dato che, dell'eretico parigino—notava l'Ostiense—sopravvivevano ancora alcuni discepoli 'quorum nomina adhuc honestius est supprimere quam specialiter nominare'. A rimediare tale difetto di conoscenza intorno agli errori di Amaury, per il quale:

> omnia sunt deus; quod primordiales cause que vocantur idee . . . creant et creantur, cum tamen secundum sanctos idem sunt quod deus; quod . . . post consummationem seculi erit adunatio sexuum, sive non erit distinctio sexus

era sopraggiunto in aiuto 'Oddo episcopus Tuscu. a quo habuimus hanc doctrinam': vale a dire, Eudes de Châteauroux, vescovo di Tivoli-Frascati dal 1244 al 1273, già professore e cancelliere dell'università parigina, che nel 1225 era stato presente alla condanna, nel concilio di Sens, di Amaury e che Enrico ebbe occasione di incontrare più volte.[72]

Sempre nuove eresie, però, crescono in seno alla Chiesa cattolica. S'è appena visto contro quali errori sia diretto il c. *Damnamus*. Tra questo e il c. *Ad nostram* (20) del concilio di Vienne—poi recepito a Clem. 5.3.3—corrono all'incirca novanta anni: eppure, tra l'uno e l'altro esiste almeno un collegamento, ben rilevato dagli storici che si sono occupati dell'eresia medievale. Ad essi non è infatti sfuggito il nesso sotterraneo che collega non solo le dottrine divulgate a Parigi da Amaury e quelle che si propagarono tra le Beghine del Nord Europa (condannate dal c. *Ad nostram*), ma ancora le affinità correnti tra le credenze di queste ultime (prossime alle sette del Libero Spirito) e le attese

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[72] Cf. Alexis Charansonnet, *L'Université, l'État et l'Église dans les sermons du cardinal Eudes de Châteauroux (1190?-1273)* (Thèse, Université de Lyon 2—Louis Lumière, Faculté de Géographie, Histoire, Histoire de l'Art, Tourisme, dir. N.Bériou, 2.10.2001): theses.univ_lyon2.fr/documents/lyon2/2001/charansonnet_a#p=o&q=Sens&a (ult. cons. 10.12.2015).

suscitate dagli scritti di Gioacchino da Fiore.[73]

Trattandosi di questioni attinenti alla teologia sarà dunque opportuno analizzare, in breve, il pensiero espresso da Giovanni d'Andrea nella glossa ordinaria alle Clementine: sebbene proprio lì, a *primo videlicet*, il canonista affermi di volere esprimersi 'apertius mere canoniste'.[74] Nella rassegna degli errori imputati, in concilio, agli eterodossi—possibilità, in primo luogo, per l'uomo di vivere in tale stato di perfezione da non richiedere l'aiuto della grazia, né il sostegno del digiuno e della preghiera—Giovanni si attiene, nell'ordine, a S.Th. I q.100 a.2; III q.7 a.11, resp. (ad sensum), S.Th. II.II q.147 a. 4, S.Th. I.II q.109 a.10, S.Th. III q.21 a.3, ogni volta traendo da queste fonti—ma anche dal Decreto—i passi che riprendono il pensiero dei Padri: Crisostomo, Girolamo, Agostino.[75]

Dalla asserita perfezione di vita guidata dallo Spirito gli eretici deducono la libertà di agire senza obbedire ai precetti della Chiesa o della gerarchia. La finale beatitudine è raggiungibile—asseriscono—già su questa terra, ove il fedele può godere della visione di Dio: affermazioni false e fallaci, ribatte Giovanni d'Andrea, che a proprio sostegno invoca l'autorità della S.Th. II.II q.104 (ad litteram), S.Th. I q.12 a.11, co. (ad sensum) e dell'Aquinate in IV Sent. dist.49 q.2, 7.[76]

Poiché la pratica della virtù é non solo inutile, ma segno dell' imperfezione di chi ancora non si è congiunto a Dio, uomini e donne rivendicano la propria libertà sessuale a esclusione—curiosamente—del bacio 'cum ad hoc natura non inclinet'.[77] Per

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[73] Cf. almeno Herbert Grundmann, *Movimenti religiosi nel Medioevo. Ricerche sui nessi storici tra l'eresia, gli Ordini mendicanti e il movimento religioso femminile nel XII e XIII secolo e sulle origini della mistica tedesca* (Bologna 1974) 303-372; Grado G. Merlo, *Eretici ed eresie medievali* (Bologna 1989) 129-38): ma la bibliografia, in merito, è estesissima.

[74] Johannes Andreae, *Glossa ordinaria* ad Clem. 5.3.3 s.v. *primo videlicet*.

[75] Ibid. s.v. *perfectior* e s.v. *secondo quod ieiunare*.

[76] Ibid. s.v. *ecclesie* e s.v. *libertas*. Passi dai quali, nuovamente, sono tratte le citazioni di s. Agostino e s. Paolo. Solo nella gl. *libertas* Giovanni d'Andrea aggiunge (a quanto pare, di suo) il riferimento alla glossa ordinaria a Tim. 6.

[77] Di tale libertà—in parte realmente pretesa, in parte, forse, immaginata dagli inquisitori—si trova traccia nelle eresie di Gerardo Segarelli e Dolcino, in

confutare tali errori il canonista bolognese cita prima Macrobio riferito da Cicerone nel *Somnium Scipionis*[78] e poi s. Agostino, *De Trinitate* 12.14.22: qui, apparentemente, senza appoggiarsi a s. Tommaso, che tuttavia viene richiamato di seguito—S.Th. II.II q.154 a. 4—nella gl. *septimo*, riguardo alla morale sessuale.

L'ultima pratica ereticale condannata dal concilio di Vienne—l'ostinato rifiuto di 'assurgere' all'elevazione del Santissimo Corpo di Cristo, perché sarebbe impensabile discendere dalle altezze della contemplazione e indugiare sulla passione di Gesù—viene liquidata con riferimento a s. Agostino, *Enarratio in Ps.* 97 e S.Th. III q.25 aa.1-2.

Conclusioni

L'itinerario di ricerca fin qui compiuto ha restituito l'immagine di un Giovanni d'Andrea capace di misurarsi adeguatamente con la materia teologica sebbene—com'è noto—nella gl. *primo videlicet* ad Clem. 5.3.3 egli avesse scritto che:

> Item puto dicere quod in declarandis infrascriptis erroribus loquar apertius mere canoniste, quia in sacra pagina licet modicum studui sub ipso excellentissimo doctore Io. de Parma ordinis Praedicatorum, per cuius doctrinam, Deo duce, iste clarescent.

Le scarse notizie che abbiamo su Giovanni da Parma non consentono di stabilire quando Giovanni d'Andrea ne fu allievo.

Italia e a fine Duecento. Cf. almeno Raniero Orioli, *L'eresia a Bologna fra XIII e XIV secolo. II. L'eresia dolciniana* (Istituto Storico Italiano per il Medio Evo. Studi storici, 93-96; Roma 1975) 23; idem, *Fra Dolcino. Nascita, vita e morte di un'eresia medievale* (Milano 1983) 27. Alle affermazioni degli eretici ribatte Giovanni d'Andrea (gl. *septimo*) che, di questo passo, ci si dovrebbe astenere dal digiunare, dal pellegrinare, dal credere Dio uno e trino 'ad que non inclinat natura'.

[78] L'elencazione delle virtù esibito da Cicerone vantava una antica tradizione, avviata fin da Martino. Cf. Hermann Kantorowicz-William W. Buckland, *Studies in the Glossators of the Roman Law. Newly discovered Writings of the Twelfth Century* (Reprint of the ed. Cambridge 1938 with the addenda et corrigenda by Peter Weimar; Aalen 1969) 53; Padovani, *Perché* 254. L'opera figura nella biblioteca di Giovanni Calderini (Cochetti, 'La biblioteca' 973, 54, I-II). Ricorrono nella glossa s.v. *libertas* di Giovanni citazioni da I Cor. 9.26-27; 13.4-7; II Cor. 12.7 e Rom. 7.21.

Si sa solo che il frate domenicano fu consulente dell'Ufficio dell'Inquisizione a Bologna nel 1304-1305;[79] diviene baccelliere (1308-1309) e poi maestro di teologia a Parigi nel 1313-1314 assumendo, al ritorno, la carica di lettore a Bologna nel 1315 ove, due anni dopo, torna ad occuparsi di inquisizione.[80] Qui era ancora nel 1321, testimone ad un processo con Erveo Nédellec, Guglielmo di Alnwick e lo stesso Giovanni d'Andrea.[81] In assenza di precisa documentazione, si può solo supporre che il già maturo canonista apprendesse teologia da Giovanni da Parma dopo il 1315,[82] dal momento che egli ricorda il maestro già insignito della dignità dottorale (sub ipso excellentissimo doctore): ciò che potrebbe spiegare l'assenza di significative riflessioni teologico-dogmatiche nell'apparato al *Sextum* (1305). Tracce dell'insegnamento del domenicano sembrano farsi piuttosto evidenti nelle opere posteriori, la *Novella in primum*

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[79] *Acta S. Officii Bononie ab anno 1291 usque ad annum 1310*, curr. Lorenzo Paolini e Raniero Orioli (Fonti per la storia d'Italia 106; Roma 1982-1984) 2.607 n.820; 2.556 n.763; 2.558 n.764.

[80] Celestino Piana, *Chartularium Studii Bononiensis S. Francisci (saec. XIII-XVI)* (Analecta Franciscana 11; Ad Claras Aquas-Florentiae 1970) 369 n.3. Con lui collabora il *decretorum doctor* Superanzio da Cingoli, allievo di Giovanni d'Andrea, per il quale si v. Orazio Condorelli, 'Un giurista dimenticato dello Studio bolognese: Superanzio da Cingoli', RIDC 5 (1994) 247-290; idem, 'Cura pastorale in tempo di interdetto: Un *consilium* ferrarese di Uberto da Cesena, Superanzio da Cingoli e Giovanni d'Andrea', *Proceedings Catania 2000* 683-697, anche in RIDC 16 (2005) 79-98. In entrambi i saggi si rileva la competenza del canonista in materia ereticale.

[81] Olga Weijers, *Le travail intellectuel à la Faculté des Arts de Paris: Textes et maîtres (ca. 1200-1500), J. (à partir de Johannes D.)*, (Studia Artistarum, Études sur la Faculté des arts dans les Universités médiévales 11; Turnhout 2003) 138; Celestino Piana, 'Nuovo contributo allo studio delle correnti dottrinali nell'Università di Bologna nel sec. XIV', *Antonianum* 23 (1948) 221-254 a 237; idem, *Nuove ricerche* 227; idem, *Gli inizi* 52; *Beiträge zur Geschichte der Philosophie und Theologie des Mittelalters: Texte und Untersuchungen* herausg. Michael Schmaus, 42 (Münster 1971) 666; Brian Lawn, *The Rise and Decline of the Scholastic Quaestio disputata*: *With Special Emphasis on its Use in Teaching of Medicine and Science* (Education and Society in the Middle Ages and Renaissance 2; Leiden-New York-Köln 1993) 55.

[82] Murano, 'Giovanni d'Andrea' 44 ritiene, al contrario, che l'insegnamento del frate domenicano ebbe luogo verso il 1285.

Decretalium (redatta, come sappiamo, in lungo arco di tempo) e nell'apparato alle *Clementinae*, ove s. Tommaso viene espressamente chiamato 'doctorem meum'.[83]

L'ammirazione per l'Aquinate[84] e la devozione verso il suo interprete Giovanni da Parma non impediscono, tuttavia, a Giovanni d'Andrea, di aderire su alcuni punti—trattati proprio nella glossa alle Clementine (1322)—al ben diverso pensiero di Duns Scoto. Se, come pare probabile, egli non ne lesse gli scritti (che ancora non figurano nella biblioteca di Giovanni Calderini) dovette attingerne, almeno, notizia precisa, seppur limitata ad alcuni punti: da Pietro Aureoli, docente a Bologna nel 1312 o da quel Guglielmo di Alnwick, ivi docente dal 1321 (quando incontra Giovanni d'Andrea) al 1323, e in precedenza 'socius' del maestro scozzese a Parigi?[85]

Per il resto, la voce di altri autori giunge più flebile: proprio a cominciare da s. Girolamo, cui Giovanni dedica lo *Hieronymianus*. Sull'onda dell'avversione nutrita dallo Stridonense per Origene, maestro prima tanto amato ed ammirato, poi ripudiato, il d'Andrea scrive:[86]

> item Origenes omnibus melior in bonis, peior in malis. Multi tamen aliquos eius discipulos pessimos multa venenosa sub ipsius nomine

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[83] Johannes Andreae, ad Clem. 5.3.3 s.v. *quarto*. Che qui si tratti dell'Aquinate è rivelato dalle citazioni di s. Agostino e s. Paolo che si rinvengono nel commento in IV Sent. dist.49 q.2 a.7. La fedeltà di Giovanni d'Andrea al pensiero di s. Tommaso è segnalata, su altri punti, da Orazio Condorelli, '*Prudentia in iure*: La tradizione dei giuristi medievali (prime ricerche)', *Phronêsis-Prudentia-Klugheit: Das Wissen des Klugen in Mittelalter, Renaissance und Neuzeit*: *Il sapere del saggio nel Medioevo, nel Rinascimento e nell'età moderna: Matthias Lutz-Bachmann zu seinem 60. Geburtstag*, curr. Alexander Fidora, Andreas Niederberger, Merio Scattola (Textes et Études du Moyen Âge 68; Porto 2013) 137-201 a 197-200.

[84] Le cui opere sono ben rappresentate nella libreria di Giovanni Calderini: Cochetti, 'La biblioteca' 995, 161-66.

[85] Piana, *Chartularium*, 116*, 127*.

[86] *Hieronymianus* 46rb. Il passo figura nelle *Excerptiones patrum collectanea. Flores ex diversis, quaestiones et parabolae*, PL 94.552 (*De luminaribus Ecclesiae*) già attribuite a Beda, ma non anteriore al sec. VIII. Così Henri-Marie De Lubac, *Esegesi medievale: I quattro sensi della Scrittura*, I.1 sez. V 17. *Scrittura ed Eucarestia* (Henri De Lubac, *Opera omnia* cur. Elio Guerriero; Milano 2006) 225.

> edidisse testantur.

Immediatamente prima si legge, a proposito di s. Agostino:

> Augustinus episcopus volans per montium cacumina quasi aquila et que in montium radice fiunt non considerans multa celorum spacia terrarumque situs et aquarum circulum claro sermone pronunciat.

Pare qui di rintracciare una risposta indiretta all'amico Petrarca che, a differenza di Giovanni, riteneva il vescovo d'Ippona superiore a Girolamo;[87] alla lode per l'eleganza dello stile fa da contrappeso la pretesa scarsa sensibilità di Agostino verso le questioni di ordine pratico, più interessanti all'occhio di un canonista. Tutto sommato, in effetti, le citazioni dagli scritti del vescovo d'Ippona non sono così numerose come sarebbe lecito attendersi, soprattutto in materia trinitaria.

I principali autori di riferimento, per Giovanni d'Andrea, in materia teologica, restano dunque s. Tommaso e Duns Scoto. Il primo, certo, più del secondo, al quale, tuttavia, è riservato uno spazio e un'attenzione non irrilevanti. Nell'intreccio di così varie ispirazioni Giovanni si può dire un eclettico, a patto di liberare il termine dalle connotazioni negative che solitamente l'accompagnano. Al suo tempo il canonista non fu il solo a tentare di accostare i due maggiori esponenti della scolastica duecentesca, per tanti versi distanti nei presupposti filosofici e teologici. Il carmelitano Gerardo da Bologna (†1317) conferisce al suo 'tomismo' una marcata impronta 'scotista'; con altre sottolineature e in diverse direzioni si può dire lo stesso di Durando da S. Porziano (†1334). Pietro Aureoli, del quale così poco sappiamo intorno al suo soggiorno bolognese, nel suo senso pratico rifiuta di aderire ad entrambe le scuole di pensiero attingendo con grande libertà ad ogni fonte che gli consente di costruire il suo universo intellettuale:[88] ciò che forse lo avvicina più di ogni altro interprete alle scelte operate da Giovanni d'Andrea.

Ad ogni modo, e nel complesso, l'attenzione riservata da quest'ultimo al dato teologico-dogmatico resta di gran lunga

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[87] Cf. Condorelli, 'Giovanni d'Andrea e dintorni' 120-121.

[88] Cf. Georges De Lagarde, *La naissance de l'esprit laïque au déclin du moyen age, 2: Secteur social de la Scolastique* (2nd ed. Louvain-Paris 1958) 276.

superiore a quella mostrata dai canonisti che lo precedettero: Goffredo da Trani, Sinibaldo de' Fieschi e Guido da Baisio, per non citare che i più celebri. A eccezione, evidentemente, di Enrico da Susa, come ritengo di avere rilevato a sufficienza nelle pagine precedenti. Tra i contemporanei, gli può essere accostato almeno Jean Lemoine: ma questi e l'Ostiense sono entrambi cardinali (il Lemoine addirittura dottore di sacre scritture) mentre Giovanni è un laico: sicché appare ancor più sorprendente la competenza e l'interesse dimostrati verso la teologia.

Quanti, tra i canonisti, verranno dopo di lui, non ne uguaglieranno, in tale ambito, la dottrina. Non Francesco Zabarella, pure lui cardinale (ma solo dal 1411), che nel titolo *De Summa Trinitate et fide catholica* si adegua quasi parola per parola alla *Novella* di Giovanni:[89] non, ancora, Antonio da Budrio, che tiene costantemente sott'occhio il medesimo modello.[90] Per parte sua Gilles Bellemère, che pur dimostra notevole interesse verso le tematiche scientifiche, al c. *Firmiter* (X 1.1.1) scrive:[91]

> scias quod hec Decretalis et sequens per plures theologos commentate sunt, quorum decisioni non intendo... Nec dicta theologorum hic examinabo: quia non esset aliud nisi animas canonistarum simpliciter involvere atque confundere.

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[89] Cf. Andrea Padovani, *Dall'alba al crepuscolo del commento* 63-67.

[90] Bastino qui solo alcuni esempi: intorno al simbolo degli Apostoli, Antonius de Butrio, *Commentaria* ad X 1.1.1 fol. 6ra n.15); alla eternità e all'immensità di Dio (6va n.4); la Sua ineffabilità (con dipendenza dall'Ostiense, ripreso da Giovanni d'Andrea ad X 1.1.1: 6va n.4; 7ra n.26); il Suo essere increato (6vb n.15 con citazione indiretta di Egidio Foscherari); riguardo all''unitas collectiva' delle persone trinitarie (8ra n.10); l'indimostrabilità della fede (per cui si cf. 6vb n.17 con Johannes Andreae, *Novella* ad X 1.1.1 fol. 8vb n.81). In questo caso Giovanni d'Andrea pare dipendere in qualche modo dal prologo della *Summa* di Guglielmo d'Auxerre ('Nihil certius fide et ita fides, cum nihil habeat certius se, probari non potest'). Cf. Biffi, *Figure medievali* 201. Il rapporto tra fede e scienza è d'attualità ai tempi di Giovanni. Si v. Beonio Brocchieri Fumagalli, *Durando di S. Porziano* 3-28.

[91] Aegidius Bellamerae, *Praelectiones* fol. 14rb. Jean Lemoine, nel prologo al *Liber sextus* si esprime in maniera simile: in quanto pratica, 'haec facultas non debet exponi theologice nec philosophice nisi inquantum facit ad praxim ad quam est haec scientia reducenda, ne omnia dicantur in omnibus, sed quilibet sit suis terminis contentus'.

rimandando pertanto all'Ostiense e alla *Novella*, nonché ad Innocenzo IV, ove serva. E prosegue:

> ex eadem causa omittam dicta Collectarii, maxime quia tenent per quinque magnas chartas et ultra, que videre potes per Thomam in commento istarum duarum decretalium.

In realtà, la lunga e prolissa trattazione di Johannes Gaufredi (1344-1349) in poco o nulla dipende dalla esposizione di Tommaso ad X 1.1.1 e 2. L'Aquinate è effettivamente ed ampiamente citato dal canonista francese: ma su questioni che poco hanno a che fare con la tradizione esegetica accumulatasi sulle due decretali. Se non mi sbaglio, Giovanni d'Andrea è menzionato solo una volta per ricordarne la dipendenza dall'Ostiense riguardo alla 'lex naturae'.[92] Quanto al resto, il discorso verte sugli angeli e le loro gerarchie, sulla giustizia e la misericordia, la predestinazione e il giudizio finale. Sempre indulgendo su questioni curiose che sembrano collocarsi all'interno di una certa deteriore casuistica di cui si farà banditore—di lì a non molto—Jean Gerson.[93]

La grande stagione della riflessione teologico-dogmatica—anche in coloro che ritengono di continuare sulla via tracciata da s. Tommaso—sta per spegnersi lentamente. Il modello offerto da Giovanni d'Andrea—pur nei suoi limiti—resterà insuperato.[94]

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[92] Johannes Gaufredi, *Collectarius iuris* ad X. 1.1 (Lugduni 1514) fol. VIIrb n.39.

[93] Etienne Delaruelle, Edmond-René Labande e Paul Ourliac, *La Chiesa al tempo del Grande Scisma e della crisi conciliare (1378-1449)*, ed. italiana cur. Giuseppe Alberigo (Storia della Chiesa dalle origini ai nostri giorni14.2; Torino 1971) 636.

[94] Evidente, soprattutto, nella trascuratezza mostrata riguardo all'ecclesiologia: materia sulla quale, viceversa, si esprimerà, con eccezionale competenza ed originalità di pensiero, Francesco Zabarella nei dibattiti che accompagnarono le ultime fasi del Grande Scisma. Con lui dev'essere ricordato anche Antonio da Budrio, per il quale si v. Orazio Condorelli, 'Antonio da Budrio e le dottrine conciliari al tempo del concilio di Pisa', RIDC 27 (2016) 79-158.

Spiritualis Uterus: The Question of Forced Baptism and Thomas Aquinas's Defense of Jewish Parental Rights

Matthew A. Tapie[1]

On June 23, 1858, Pope Pius IX ordered police of the Papal States to remove a six-year-old Jewish boy, Edgardo Mortara, from his home, in Bologna. Edgardo had been secretly baptized by his Christian housekeeper after allegedly falling ill as an infant. Since the law of the Papal States required that a person baptized must be raised Catholic, Inquisition authorities forcibly removed Edgardo from his parents' home and transported him to Rome in order that he receive a Christian upbringing.[2] 'Worldwide protests followed. Thousands of people—from American protesters to the French emperor Napoleon III—demanded the child's return.'[3] Along with assurances that the boy would be well taken care of, Pius IX insisted, *Non possumus*.

Controversy over the Mortara affair in the United States emerged once more, in January 2018, with the publication of Dominican theologian Romanus Cessario's essay defending Pius IX's decision.[4] In order to forestall anti-Catholic sentiment in reaction to an upcoming film based on David Kertzer's 1997 book on the Mortara case, Cessario argues that the separation of Edgardo from his Jewish parents is what the current Code of Canon Law, and Thomas Aquinas's theology of baptism,

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[1] I would like to thank Jennifer Hart Weed, Gavin D'Costa, Adam Gregerman, Eugene Fisher, Kenneth Pennington, Michael Anthony Novak, Thomas Humphries, Stephen Okey, John Pawlikowski, and William Mattison III, for reading drafts of this paper.

[2] David Kertzer, *The Kidnapping of Edgardo Mortara* (New York 1998).

[3] Kertzer, 'The Doctored "Memoir" of a Jewish Boy Kidnapped by the Vatican', *The Atlantic* (April 2018).

[4] Romanus Cessario, 'Non Possumus', *First Things* (February 2018) 55-58. Cessario's piece first appeared online in January. Cessario's essay is a review of the English translation of Edgardo Mortara's memoir, *Kidnapped by the Vatican? The Unpublished Memoirs of Edgardo Mortara* (San Francisco 2017).

required.[5] If one accepts the Catholic Church's teaching on the efficacy of baptism, Pius IX's decision is not only just, it is an act of piety, and strength.

In Cessario's view, one must look beyond the human pathos of the Mortara case to see that what was required by the law of the Church, and the Papal States, concerned the deeper realities of the power and permanence of baptism, and the logical, political consequences of receiving this sacrament. Cessario's argument is as follows:[6]

1. An infant in danger of death can be baptized licitly even against the will of non-Catholic parents. Cessario cites the 1983 *Codex iuris canonici* 868, and explains that § 2 affirms that 'an infant of Catholic parents or even of non-Catholic parents is baptized licitly in danger of death even against the will of their parents.'

2. Baptism seals a person with an indelible spiritual mark that configures a person to Christ.

3. The law of the Church and the civil law of the Papal States require that legitimately baptized children receive a Catholic education (expressed today in the *Codex iuris canonici* 868 § 2).

4. Therefore, Pius IX was right to relocate Edgardo from his family and raise him Catholic.

Cessario appeals to Aquinas's theology of baptism in the second premise of his argument but does not cite to a text. He is likely referring to Aquinas's discussion of baptism in the *Tertia Pars* of the *Summa theologiae*. For Cessario, if one conceives of the Mortara case as a kidnapping, one has fallen victim to modern indifference to theological claims, and anti-Catholic prejudice.[7]

Outraged scholars and writers criticized Cessario's essay. Some charged that the essay damaged Catholic-Jewish relations.[8] Others criticized theological aspects of Cessario's argument, and

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[5] *Codex Iuris Canonici* (Vatican City 1983).

[6] For the facts of the case see Kertzer, 'Doctored "Memoir".

[7] Cessario, 'Non Possumus' 55-56.

[8] Archbishop Charles J. Chaput, 'The Mortara Affair, Redux', *Jewish Review of Books* (January 2018).

a few of these authors cited Aquinas's teaching against forced baptism of Jewish children.[9]

Cessario and his critics appeal to Aquinas's teaching to argue for and against Pius IX's decision to remove Edgardo Mortara. However, this contemporary debate has overlooked the fact that the question of Aquinas's teaching on forced baptism was at the center of a rather extensive theological exchange between the Mortara family, and the Vatican's papal counsel, in 1858.

Soon after Edgardo was abducted, the Mortara family, with the assistance of the Jewish community in Rome, submitted a formal document (referred to as *Pro-memoria* and *Syllabus*) that argued that the child must be returned because the Church, according to Aquinas, prohibits baptizing children of unbelievers without the consent of their parents. The Mortara family's document appealed to the same teachings in Aquinas cited by critics of Cessario. Yet the Vatican's refutation also appealed to Aquinas's teaching in order to defend the decision to separate Edgardo from his parents.[10] The Vatican agreed with part of the Mortara's argument.

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[9] Rod Dreher, 'The Edgardo Mortara Case', *The American Conservative* (January 2018); Michael Sean Winters, 'Fr. Cessario's Edgardo Mortara Essay Is Inexcusable', *National Catholic Reporter* (January 2018). Some cited Aquinas's teachings in their criticism of Cessario. See Nathaniel Peters, 'Grace Builds Upon and Doesn't Destroy Nature: On First Things, Baptism, and the Natural Family', *Public Discourse* (January 2018); Holly Taylor Coolman, 'The Vatican Kidnapped a Jewish Boy in 1858. Why are we still talking about it?' *America Magazine* (January 2018); Robert Miller, 'The Mortara Case and the Limits of State Power: *First Things* Should Disavow Fr. Cessario's Defense of Pius IX in the Mortara Case', *Public Discourse* (January 2018); Kevin Madigan, 'We Cannot Accept This: A response to Romanus Cessario's "Non Possumus",' *Commonweal* (January 2018).

[10] The Mortara plea and the Vatican's refutation were the basis of Sharon Stahl's doctoral dissertation, Sharon Stahl, *The Mortara Affair, 1858: Reflections of the Struggle to Maintain the Temporal Power of the Papacy* (Saint Louis University Ph.D. Dissertation 1987). The Mortara document appeals to all of the places in Aquinas's corpus in which he treats forced baptism: II.II 10.12, and *Quodlibet* 2, as well as III 68.10. Stahl, *The Mortara Affair* 49. *Brevi cenni e riflessioni* is an abbreviated title for the document that contains the Vatican's response to the case. The Vatican Secretary of State, Cardinal Giacomo Antonelli (1806-1876), distributed the reply to papal nuncios, church representatives, and friends of the Church throughout Europe who were requesting that the Vatican help them

The church has always been against forced conversions. But the papal counsel argued that even an unlawful baptism is valid, and cites Aquinas as authority for this position:[11]

> The Angelic Doctor, while he shows with judgments and authority that Jewish children should not be baptized against the wishes of their parents, demonstrates, as equally in the places cited in the *Pro-memoria* and in the *Syllabus*, that if there should be baptisms conferred to such children, that baptism is confirmed and valid, and that for this reason these sons should not be left in the power of the parents is more certain than certain.

According to the papal counsel, failing to distinguish between the issue of lawful and valid baptism is the weakness in the Mortara's argument. Although Aquinas is against baptism of Jewish children against the will of their parents he also teaches that such baptisms are nevertheless valid, and that these children should not be left in parents' custody.[12] According to the papal counsel, Aquinas teaches that the children of infidels may not be baptized without their parents' consent because if they are baptized it is valid and they are then the responsibility of the Church.

Aquinas is the central authority for both parties to the dispute. His teaching is cited as the basis for arguments for and against the return of Edgardo to his family. The interpretation of Aquinas's teaching in the exchange between the Mortara family and the Vatican concerned two key questions. The first is whether Aquinas holds that forced baptism is lawful. The Mortara's argued that Aquinas is against baptizing children of unbelievers without the consent of parents. The papal counsel agreed but claimed this point was irrelevant to the case because Edgardo had already received a

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mount a defense of Pius IX's decision. Kertzer, *Kidnapping* 146. The Vatican's document is entitled, 'A brief explanation and reflections on the pro-memoria and syllabus humbly presented to His Holiness, Pope Pius IX, concerning the baptism confirmed in Bologna on the child Edgardo, son of the Jews Salomone and Marianna Mortara.' The documents can be found in Fondo Pio IX, oggetti vari, n. 1433, "Mortara Edgardo"; and Archivio Vaticano, Segretario di Stato, anno 1864, rubrica 66, fascile 1, 2, 3. I make use of Stahl's translations.

[11] Stahl, *The Mortara Affair* 100. The text in Aquinas to which the papal counsel refers is *Summa theologica* II.II 10.12: '[Jews] would lose the rights of parental authority over their children as soon as these were Christians.' I discuss this text in part two of this essay.

[12] Ibid. 97.

valid baptism. The second question is whether Aquinas teaches that forced baptism of a child of unbelievers is nevertheless a valid baptism.

In this essay, I show that the contemporary debate on the Mortara affair, as well as the dispute on Aquinas's teaching between the Mortara family and the Vatican's papal counsel, can only be understood in the context of medieval debates among canonists and theologians on what constitutes valid baptism, and whether forced baptisms are lawful. Aquinas's teaching against forced baptism of Jewish children must be read in context of these debates, and with attention to the structure of the parts of his articles in his *Summa theologiae*.[13] In the light of these contexts, it becomes clear that Aquinas defended Jewish parental rights as a *spiritualis uterus*, or spiritual womb, rooted in the order of the natural law, against a rather organized effort among mid-thirteenth-century French Dominicans to justify theologically forced baptism of Jewish children. Indeed, the same theological arguments in support of forced baptism of Jewish children that Aquinas argued against would eventually breach the wall of the Church's custom against this practice in the exceptions to forced baptism of Jewish children articulated by Pope Benedict XIV in 1747, and assumed by Pius IX in 1858.

The essay is organized in two parts. First, I clarify the above key questions concerning unlawful and valid baptism by setting the questions in the context of medieval and early modern canon law on forced baptism of Jews. In the second section, I analyze Aquinas's teaching against forced baptism of Jewish children in the context of thirteenth-century disputes on whether Jewish parental rights can be overridden by theological claims for the advantages of the Christian faith.

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[13] My English translations are based upon the Benziger edition of the *Summa Theologica,* trans. Fathers of the English Dominican Province (New York 1947). Latin texts of Aquinas are from the editions collected and edited by Enrique Alarcon, ed. 'Corpus Thomisticum' (Universitas Studiorum Navarrensis 2000-2018).

Medieval and Early Modern Canon Law on Forced Baptism

In his classic book, *The Anguish of the Jews*, Edward Flannery observed, 'the practice of forced baptisms opened a new and depressing chapter in the histories of Jewry and Christendom.'[14] Jewish children were seized and baptized against their will in ninth-century Lyon.[15] Jews were forcibly baptized by Christian mobs on their way to the First Crusade in 1096. According to Aviad M. Kleinberg, 'forced baptism of children was a constant source of anxiety for Jewish communities throughout the ages.'[16]

The policies on forced baptism of Jews produced in the seventh century by the Toledo councils of Visigoth Spain shaped how theologians and canonists viewed the question of forced baptisms for centuries. Although scholars debate the motivations behind the councils, it is clear that after the conversion of King Reccared, in 587, Visigoth kings are concerned to eradicate the 'superstition' and 'inflexible perfidy' of the Jews.[17] In 613, King

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[14] Edward Flannery, *The Anguish of the Jews: Twenty-Three Centuries of Antisemitism* (2nd ed. New Jersey 2004) 70. Susan White, 'Baptism', *A Dictionary of Jewish-Christian Relations,* edd. Edward Kessler and Neil Wenborn (New York 2008) 47.

[15] Aviad M. Kleinberg, 'Depriving Parents of the Consolation of Children: Two Legal *Consilia* on the Baptism of Jewish Children', *De Sion exibit lex et verbum domini de Hierusalem: Essays on Medieval Law, Liturgy and Literature in Honour of Amnon Linder* (Cultural Encounters in Late Antiquity and the Middle Ages 1; Turnhout 2001) 129-144 at 129. See also Cecil Roth, 'Forced Baptism in Italy: A Contribution to the History of Jewish Persecution', *Gleanings: Essays in Jewish History, Letters, and Art* (New York 1967) 240-263. Benjamin C.I. Ravid, 'The Forced Baptism of Jewish Minors in Early Modern Venice', *Italia: Studi e ricerche sulla cultura e sulla letteratura degli ebrei d'Italia* 13-15 (2001) 259-301, Martha Keil, 'What Happened to the "New Christians"? The Viennese Gererah of 1410/11 and the Forced Baptism of the Jews', *Jews and Christians in Medieval Europe: The Historiographical Legacy of Bernhard Blumenkranz*, edd. Philippe Buc, Martha Keil, and John Tolan (Turnhout 2015) 97-114.

[16] Kleinberg, 'Depriving Parents' 129.

[17] Flannery, *Anguish of the Jews* 75. See Roth for the discussion of the motivation of the Jewish policies of Visigoth rulers. The councils, which were a mix of national assembly and Church synod, articulated policies on forced baptism of Jews in the context of what Amnon Linder has referred to as

Sisebut (r. 612-621) issued an ultimatum that Jews of the kingdom either convert or be expelled from the country.[18]

That these forced baptisms were viewed as a problem is indicated by the fact that Toledo IV, presided over by St. Isidore of Seville (ca. 570-636), legislated directly against the practice, and decreed that kings who ruled cruelly could be excommunicated.[19] Isidore explicitly condemned Sisebut because 'he no doubt had zeal but not knowledge, compelling by force those whom one must urge by reasons for faith.'[20] Toledo IV was convoked on December 5, 633 by King Sisenand, and addressed the consequences of Sisebut's campaign of forced baptism. In particular, Canon 57 of Toledo IV, citing Romans 9:18, famously condemned the practice:[21]

> [O]n the Jews, however, thus did the Holy Synod order, that no one should henceforth be forced to believe, *God hath mercy on whom he will and whom he will hardeneth*; such men should not be saved unwillingly but willingly, in order that the procedure of justice should be complete; for just

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'statewide and state-controlled conversion.' Amnon Linder, *The Jews in the Legal Sources of the Early Middle Ages* (Detroit 1997) 484. Norman Roth, *Medieval Jewish Civilization: An Encyclopedia* (New York 2003). Visigoth kings sought a Catholic kingdom, as stated in Toledo VI c. 3: 'No one not a Catholic may remain in the kingdom, and all future kings, under pain of anathema, must enforce this law.' Regarding Visigoth kings' concerns with perfidy, and superstition, see Roth's list of anti-Jewish policies of the Toledo councils, including Toledo III c.14. Roth, *Jews, Visigoths, and Muslims in Medieval Spain* (Leiden 1994) 32. See also the essays in *Jews in early Christian Law: Byzantium and the Latin West, 6th-11th Centuries*, edd. John Tolan et al. (Religion and Law in Medieval Christian and Muslim Societies 2; Turnhout: Brepols, 2014) especially Rachel Stocking, 'Forced Converts, "Crypto-Judaism," and Children: Religious Identification in Visigothic Spain' 243-265.

[18] According to one report, 90,000 Jews were converted. Flannery, *Anguish of the Jews* 70-71; 75.

[19] Roth, *Jews, Visigoths* 18.

[20] Cited in Flannery, *Anguish of the Jews* 75.

[21] C.57 cited in Linder, *Jews in the Legal Sources* 486: 'De iudaeis autem hoc praecepit sancta synodus nemini deinceps ad credendum vim inferre, *cui enim vult Deus miseretur et quam vult indurat*; non enim tales inviti salvandi sunt sed volentes, ut integra sit forma iustitiae; sicut enim homo proprii arbitrii voluntate serpenti obediens periit, sic vocante gratia Dei propriae mentis conversione homo quisque credendo salvatur. Ergo non vi sed liberi arbitrii facultate ut convertantur suadendi sunt non potius inpellendi.

> as man perished obedient to the serpent out of his own free will, so will any man be saved—when called by the divine grace—by believing and in converting his own mind. They should be persuaded to convert, therefore, of their own free choice, rather than forced by violence.

However, perceived problems emerged in the aftermath of these forced baptisms. It was alleged that forcibly converted Jews would continue to practice Judaism.[22] That baptized persons would leave the faith undermined the Christian faith. In response to this problem, canon 57 stated that those who had been baptized by force must remain Christian:[23]

> Those, however, who were formerly forced to come to Christianity (as was done in the days of the most religious prince Sisebut), since it is clear that they have been associated in the divine sacraments, received the grace of baptism, were anointed with chrism, and partook of the body and blood of the Lord, it is proper that they should be forced to keep the faith even though they had taken it under duress, lest the name of the Lord blasphemed and the faith they had undertaken be treated as vile and contemptible.

Additionally, canon 60 applies this policy to forcibly baptized children on the logic that newly baptized Christians must receive a Christian education:[24]

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[22] Ibid. 488, c.59: 'Many who were formerly elevated from being Jews to the Christian faith are now blaspheming Christ not only by being known to be practicing Jewish rites but even by daring to operate abominable circumcisions; concerning these men, the Holy Council decreed as follows, with the advice of the most pious and most religious prince our lord Sisenand the King, namely that such transgressors should be reformed and recalled to the veneration of the Christian dogma by the episcopal authority'.

[23] Ibid. 486, c.57: 'Qui autem iam pridem ad christianitatem venire coacti sunt, sicut factum est temporibus religiosissimi principis Sisebuti, quia iam constat eos sacramentis divinis adsociatos et babtismi gratiam suscepisse et chrismate unctos esse et corporis Domini et sanguinis extitisse participes, oportet ut fidem etiam quam vi vel necessitate susceperunt tenere cogantur, ne nomen Domini blasphemetur, et fidem quam susceperunt tenre cogantur, ne nomen Domini blasphemetur, et fidem quam susceperunt vile ac contemtibilis habeatur'. Linder explains that Toledo IV had dealt with 'the existence of crypto-Jews, formally baptized and recognized Christians, alongside communities of non-baptized and openly practicing Jews. The council condemned on principle any forced baptism and refused, on strong theological grounds, any compromise on the indelible nature of baptism once it had been duly performed'.

[24] Ibid. 488, c.60: 'Iudaeorum filios vel filias, ne parentum ultra involvantur errore, ab eorum consortio separari decernimus deputatos aut monasteriis aut christianis viris ac mulieribus Deum timentibus, ut sub eorum conversatione

> [Baptized] sons and daughters of the Jews should be separated from the company of their parents in order that they should not become further entangled in their deviation, and entrusted either to monasteries or to Christian, God-fearing men and women.

Flannery concisely summarizes the policy:[25]

> Baptized children, according to the conceptions of time, were the dominion of the Church civically as well as spiritually. . . in cases where the children of unbaptized Jews had been baptized, the children were to be taken from them for Christian education.

The Council's attempt to deal with Siseburt's forced conversions therefore established the legal precedent of requiring forcibly converted Jews to remain Christian, and removing baptized Jewish children from their parents. The same Council that rejected forced conversions of Jews also had implied that a forced baptism of either adults or children is nonetheless a valid baptism. It is important to add a caveat about the impact of these canons. The issue of forced baptism was acute in Spain, but the legal status of Jews varied depending upon geography. Enforcement of anti-Jewish legislation depended upon the will of local rulers. Forcible conversion of Jews was condemned repeatedly by numerous popes, as indicated by the well-known letter of Gregory IV (r. 827-844), which cites the prohibition of the practice in canon 57 of Toledo IV. Nevertheless, papal statements also indicate that popes thought baptized Jews must live as Christians.[26] For example,

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cultum fidei discant atque in melius instituti tam in moribus quam in fide proficiant.

[25] Flannery, '*Anguish of the* Jews' 76. Flannery remarks, in a footnote, that 'Many theologians of today, more attentive to the subjective dispositions requisite for the sacrament, would question the validity of Sisebut's forced baptisms.' Norman Roth also summarizes what became the standard position after Toledo IV: 'This became, in fact, the canonical position on compulsory baptism: force ought not to be used, but once baptized, a Christian must remain a Christian. This had less to do with the will of the baptized person than with the fact that baptism is a sacrament, which takes effect even if not done in accord with the rules (for instance, by a layperson in extreme situations, or by compulsion).' Roth, 'Church and Jews', *Medieval Jewish Civilization: An Encyclopedia*, ed. Norman Roth (London 2003) 162-172 at 169. Flannery, *Anguish of the* Jews 76.

[26] Edward A. Synan, *The Popes and the Jews in the Middle Ages* (New York 1965) 60.

Pope Hadrian I (772-795) rejected Canon 8 of the Second Council of Nicaea (787) that stated that baptized Jews who return to practicing Judaism ought to be rejected by the Church.[27]

By the twelfth-century, the policy of Toledo IV became established as canon law.[28] Gratian included three canons from Toledo IV in Distinctio 45 of his *Decretum*.[29] D.45 became the text on which jurists based their discussions of the legality of Jewish conversions for centuries. That questions remained is indicated by the fact that the prohibition against forced baptism was repeated by a number of popes in the twelfth century. One of those papal statements, *Sicut Iudaei*, was finally included into decretal collections. The decretal was variously attributed to Pope Alexander III (†1181) or to Pope Clement III (†1191). After Johannes Galensis had placed it in *Compilatio secunda* 5.4.3 (ca. 1210-1215), Raymond de Peñafort edited it and entered it into the *Decretals of Gregory IX* (X 5.6.9) where it became the general law of the Church.[30] The policy that those who were baptized under duress must keep the faith was not always enforced. Some popes allowed Jewish converts to return to their religion.[31] Pope Alexander II (1061-1073), permitted all Jews baptized by force during the First Crusade of 1096 to return to practicing Judaism.[32]

According to Kenneth Pennington, a crucial problem the jurists would take up was the question of whether forced baptisms

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[27] Ibid.

[28] Roth, *Jews, Visigoths* 21: 'Although originally applied to Jews of the Visigoth period, the inclusion of this text in the later *Decretals* made this a binding rule of canon law. While no Jews should be forced to baptism, once baptized, even by force, he must remain a Christian.'

[29] The *Decretum* contains a letter of Gregory IV, which refers to Toledo IV. Norman Roth, *Jews, Visigoths, and Muslims in Medieval Spain: Cooperation and Conflict* (Medieval Iberian Peninsula Texts and Studies 10; Leiden 1994)

[30] The *Decretum* does not include previous 'tolerant' policies on the Jews. See Kenneth Pennington, 'The Law's Violence against Medieval and Early Modern Jews', RIDC 23 (2012) 23-44 at 33. See also Pennington, 'Gratian and the Jews', BMCL 31 (2014) 111-124 at 116.

[30] Edited by Shlomo Simonsohn, *The Apostolic See and the Jews: Documents: 492-1404* (Vol. 1; Studies and Texts 94; Toronto 1988) 51-52.

[31] Roth, 'Church and Jews' 168.

[32] Flannery, *Anguish of the Jews* 76.

were nevertheless valid.[33] Baptized persons were expected to fulfill their obligations to observe the Christian faith, but did this obligation apply to forcibly baptized persons?[34] The rationale of the obligation that falls upon the baptized is explained well by Edward Synan:[35]

> Theologians early taught that baptism must be held to leave ineffaceable traces, analogous in the order of the spirit to the ineffaceable brands and tattoos of slaves and soldiers . . . the permanence of its effect is absolute.

The consequence of the indelible character of baptism is that an obligation falls upon the baptized to carry out the duties prescribed by the Church. The text of Toledo IV canon 57 (cited in D. 45) states that if Jews were baptized, they could be coerced to remain Christians. Since the canon is not clear what constituted a valid baptism, jurists sought a definition. According to Pennington, Gratian's successors developed a more flexible doctrine, and created a distinction between 'conditional' and 'absolute coercion'.[36] The Italian canonist, Huguccio of Pisa (†1210) established the legal basis for determining a valid baptism in his influential *Summa* on the Decretum (c.1188).[37] In a gloss on Toledo IV he explains what constituted consent of a Jew to baptism by distinguishing between absolute, and conditional coercion. 'Absolute coercion' is where the victim did not consent to baptism at all.[38] Canonists thought absolutely coerced baptisms were without effect because there was no assent.[39] However, a

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[33] Pennington, 'Law's Violence' 28-29.
[34] Synan, *The Popes and the Jews* 55.
[35] Ibid. 55.
[36] Pennington, 'Gratian and the Jews' 116.
[37] Kleinberg, 'Depriving Parents' 130-131.
[38] Huguccio cited in Pennington, 'Gratian and the Jews' 118: 'I distinguish between absolute and conditional coercion: if anyone is baptized by absolute coercion, for example if one person tied him down and another poured water over him, unless he consents afterwards, he ought not to be forced to embrace the Christian faith.'
[39] Ibid. Huguccio held that even an absolutely coerced baptism could be valid if the recipient gave posterior consent but his view was not accepted.

second form of coercion is where the recipient gives nominal assent in order to avoid harm. Huguccio explains:[40]

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

Thirteenth-century jurists found Huguccio's definition of conditional coercion persuasive. According to Flannery, 'canonists were of the opinion that whoever did not openly manifest his opposition to baptism at the very moment of its administration was not truly forced, *vere coacti,*—even if death itself awaited such opposition—and was therefore validly baptized, incurring all the rights and duties of Christian life.'[41] The validity of conditionally coerced baptisms would be elevated by Pope Innocent III's decretal, *Maiores* (1201), which discussed baptism of infants, the insane, the comatose, and those baptized under duress.[42] Innocent argued that conditionally coerced baptisms imprint an indelible character on the recipient; absolutely coerced baptisms do not.[43] Nearly all of the canonists adopted this distinction between conditional and absolute coercions.[44] They concluded that a forced conversion or baptism of a Jew was 'valid if bestowed under only moderate terror.'[45]

These coerced-but-valid baptisms raised legal issues, including questions about the validity of coerced baptisms of

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[40] Huguccio, *Summa* to D. 45 c. 5 s.v. *associatos unctos corporis Domini*, Lons-le-Saunier, Archives departmentales du Jura 16, fol. 61v, Admont, Stiftsbibliothek 7, fol. 61v, Vat. lat. 2280, fol. 44r: 'Si vero coactione conditionali quis baptizetur, puta: te verberabo vel spoliabo bel interficiam vel leda, nisi baptizeris, debit cogi ut fiedem teneat, quia per talem coactionem de nolente efficitur quid volens, et volens baptizatur. Voluntas enim coacta voluntas est et volentem facit, ut xv. q.i. Merito (C.15 q.1 c.1)'. Mario Condorelli, *I fondamenti giuridici della tolleranza religiosa nell'elaborazione canonistica dei secoli XII-XIX: Contributo storico-dogmatico* (Milan, 1960) 152-153.

[41] Flannery, *Anguish of the Jews* 76.

[42] Kleinberg, 'Depriving Parents' 132.

[43] Ibid.

[44] Ibid.133.

[45] Walter Pakter, *Medieval Canon Law and the Jews* (Abhandlungen zur rechtswissenschaftlichen Grundlagenforschung 68; Ebelsbach 1988) 317.

Jewish adults, servants, and children below the age of twelve.[46] Canonists and theologians debated whether to baptize Jewish children against the will of their parents in the thirteenth century. On June 6, 1242, the Order of Dominican Preachers publicly burned cartloads of books seized from Parisian Jews:[47]

> Within a year of this conflagration, the Preachers turned their attention from Jews' symbolic roots to their real branches, their children.

Particularly in northern France, theologians sought conversion of children. As Pakter observes, there was 'a well-organized movement to baptize Jewish children.'[48]

Throughout the late Middle Ages, forced baptism of Jews by Christians remained a threat to Jewish families.[49] From the fourteenth to the eighteenth-century, jurists continued to debate forced Jewish conversion.[50] The debate was, in part, motivated by those who 'hoped that if they could not persuade Jews by reason, they could persuade their children by force.'[51]

In her study of forced baptism in Rome from the sixteenth to the nineteenth century, Marina Caffiero demonstrates that two letters of Pope Benedict XIV (†1758) mark a decisive turning point in the debate.[52] Benedict's letters defined a question on which theologians before the mid-eighteenth century had failed to

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[46] Pennington, 'Law's Violence' 34.
[47] Pakter, *Medieval Canon Law and the Jews* 322.
[48] Ibid. 326.
[49] Pennington, 'Law's Violence' 34.
[50] Ibid. 43.
[51] Pakter, *Medieval Canon Law and the Jews* 329.
[52] Marina Caffiero, *Forced Baptisms*: *Histories of Jews, Christians, and Converts in Papal Rome*, trans. Lydia G. Cochrane (Berkeley-Los Angeles-London 2012) 46; originally published as *Battesimi forzati: Storie di Ebrei, Cristiani e converti nella Roma dei papi* (Rome 2005). *Lettera a Monsignor Archivescovo di Tarso Vicegerente sopra il Battesimo degli Ebrei o infanti o adulti* (28 February 1747); and *Lettera della Santità di Nostro Signore Benedetto Papa XIV a Monsignor Pier Girolamo Guglielmi Assessore del Sant'Officio sopra l'Offerta fatta dall'Avia Neofita di alcuni suoi Nipoti infanti Ebrei alla Fede Christiana* (15 December 1751). The two letters were translations of the bulls *Postremo mense* and *Probe te meminisse*, published in Latin on the same dates. Caffiero, *Forced Baptisms* 46. See also Pennington, 'Law's Violence' 40-43.

agree.[53] Benedict observed that the baptism of Jewish children, and similar events 'happened too often in Rome and outside of Rome.'[54] In response to these cases, he wrote two letters on baptism in 1747, and ruled that minor children should never be baptized without consent of parents. On this point, Benedict cites Aquinas in II.II 10.12, and even points out that Aquinas's teaching was accepted by the canonists over the opinion of Duns Scotus: 'it has never been the usage of the Church to baptize the children of Jews unless such is the will of the parents.'[55]

However, Benedict added a list of exceptions based on two hypothetical cases: a Christian who finds a Jewish infant in danger of death; and a Jewish child found alone in the city outside the ghetto.[56] Regarding the danger of death exception, Benedict said such baptisms were 'without a doubt a praiseworthy and meritorious thing.'[57] Ambiguity concerning what constituted danger of death meant that the decision was made by the Christian doing the baptizing. Regarding a child found alone, or 'abandonment,' the Pope ruled that although Jews enjoy 'patria potestas' over their children, such rights are lost in cases of abandonment. Other exceptions state that Jewish children could be baptized in the following circumstances: if the Jewish parents were absent, and their guardians consented; if the Jewish father commanded it, even if the mother were unwilling; or if a Jewish convert to Christianity made 'offering' of a Jewish family member to the Church. Benedict ruled that Jewish converts had the right to

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[53] Caffiero, *Forced Baptisms* 46.
[54] Pennington, 'Law's Violence' 41.
[55] Edward Flannery, 'The Finaly Case', *The Bridge: A Yearbook of Judaeo-Christian Studies* (Vol. 1. New Jersey 1955) 307. Flannery also says that Benedict XIV's rule that a child validly baptized must be removed from his family and be brought up Christian is 'a view of long standing.' He states that there are references to this in Toledo IV and in Aquinas, but he does not specify a text in Aquinas.
[56] Caffiero, *Forced Baptisms* 51.
[57] Ibid.

'offer' their relatives on the basis of the legal principle, 'favor fidei'.[58] This meant that:[59]

> if the mother converted, the children could be baptized even if the father were unwilling; if the grandfather converted, and the child's father died, the child could without a doubt, be baptized against its mother's wish.

Benedict XIV based these exceptions, including the 'offerings,' on the legal principle of 'favor fidei'. The exceptions essentially overthrew the prohibition on forced baptism of Jewish children, not to mention adults. Such forced baptisms would not only be considered lawful and valid, but also praiseworthy:[60]

> Should a Christian find a Jewish child in danger of death, he will certainly do something praiseworthy and most pleasurable to God by procuring eternal health for the child through baptismal water.

Benedict's exceptions established what Caffiero refers to as 'the birth of a new jurisprudence.'[61] The letters formed a 'minor summa' on the baptism of Jews, which had great influence because the letters responded to specific cases. The rules also:[62]

> opened the way to possible abuses (as in fact happened) and to quite broad, dubious, and subjective interpretations.

Benedict's XIV's rulings on the topic remained the operating canon law on the matter throughout the nineteenth century. In practice, this meant that if authorities in the Papal States were informed about such a baptism, the police removed the Jewish child from the parents' home and sent it to the House of the

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[58] Pakter, *Medieval Canon Law and the Jews* 319. Kleinberg says this teaching can be traced to Raymond Penafort's *De Iudaeis*. Kleinberg, 'Depriving Parents' 135. According to Kenneth R. Stow, 'favor fidei' was an umbrella principle that expressed the idea of the good of Church and state; it protected a wide array of legal and theological needs. The principle had enormous legal force. Stow, 'The Cruel Jewish Father: From Miracle to Murder', *Studies in Medieval Jewish Intellectual and Social History: Festschrift in Honor of Robert Chazan*, edd. David Engel, Lawrence H. Schiffman, Eliot R. Wolfson (Journal of Jewish Thought and Philosophy, Supplements 15; Leiden 2012) 245-278.

[59] Pennington, 'Law's Violence' 42.

[60] Cited in Flannery, *Anguish of the Jews* 76.

[61] See Caffiero, *Forced Baptisms* chapter 2.

[62] Caffiero, 51. Caffiero's work confirms Pennington's view that Benedict's exceptions to forced baptism of Jewish children is the 'loophole' that led to the Mortara affair. Pennington, 'Law's Violence' 43.

Catechumens.[63] Throughout the decades of the nineteenth century, the largest number of forced baptisms were Jewish women and children family members related to a male Jewish convert. There were:[64]

> innumerous cases of conversions of children and youngsters torn forcibly from their parents and families by guards who entered the ghetto at all hours of the day and night and took them to the House of the Catechumens.

Those who came to the House of Catechumens were overwhelmingly Jewish males, and after converting, the men were required by the Church to offer their Jewish dependents and/or descendants as converts as well.[65] As Kertzer notes: [66]

> In the three and a half years from the middle of the 1814 through 1818, Church authorities sent the police into the Roman ghetto on twenty-two different occasions, always at night, to extract Jews by force and take them to the House of the Catechumens. In that brief period alone, the police took seventeen married women, three fiancées, and twenty-seven children.

Young children were often baptized against the will of the Jewish mother:

The case of Ezekiel Piatelli, a thirty-three-year-old man from the ghetto who, in early 1818, came to the House of the Catechumens is typical.[67] When asked by the rector if he was

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[63] Kertzer, 50. Some of the many known cases of forced baptisms of Jews include Perla Mesani, mentioned in Pennington, 'Law's Violence' 41; and in David Kertzer's chapter on forced baptism in *The Popes Against the Jews: The Vatican's Role in the Rise of Modern Anti-Semitism* (New York 2002), see the following cases: Perla Bises, 50; the newborn daughter of Abram Castiglione, 52; the baptism of a dying Jewish man, named Sabato Pavoncello 53; and baptisms that broke up family include Sabato Rosselli and family 54; Ezekiel Piatelli and family 56; Pellegrino Toscano and family 57.

[64] Giancarlo Spizzichino, 'The Ghetto and the Authorities: A Difficult Coexistence' *Et Ecce Gaudium: The Roman Jews and the Investiture of the Popes*, ed. Daniela Di Castro (Rome 2010) 17. The House of the Catechumens was founded by Pope Paul III in 1543 and was designed to take in both Jews and Muslims, but most residents were Jews. Kertzer, *Popes against the Jews* 38-59.

[65] Kertzer also reports a case where a Jewish grandfather that converted offered his Jewish granddaughter against the will of her father. The girl was seized and baptized against the will of the parents. A Jewish convert could offer family members who were not direct dependents. Kertzer, *Popes Against the Jews* 58-59.

[66] Kertzer, *Popes Against the Jews*, 55.

[67] Ibid. 56.

married, and had children, Ezekiel reported that he had a wife, and two small children, a three-year-old, and an infant, born three months before. Within four hours of Ezekiel's arrival, the police entered the ghetto and delivered the wife and her two children to the Catechumens. The children were baptized three days after they arrived; the mother was baptized four months later.

Jewish grandchildren were also baptized against the will of their parents because the child had been offered by a grandfather or another member of the family who had converted.

To summarize this section on forced baptism of Jews in medieval and early modern canon law, an illegal or illicit baptism is baptizing a recipient under absolute coercion—against express will and protest of the potential recipient or parents of the recipient. Such baptisms were thought to be invalid. Conditional coercion however, was legal, and its effects permanent. However, conditional coercion was a broad category that included an array of coercive measures which might move a person's will to consent. The exceptions of Benedict XIV expanded the legal category of lawful coercions to include absolutely coerced conversions against the Jews of the Roman ghetto. These coercive baptisms against the will of the person or the parents were nonetheless considered valid baptisms. Taken together, the definition of conditional coercion accepted by many canonists, and the list of exceptions applied to children and family members of Jews by Benedict XIV, removed the teeth from the prohibition in Gratian's *Decretum* D.45 against forced baptisms.

Given the dominance of Benedict's edicts, Caffiero says Benedict's contribution 'cannot be taken to have been merely a formalization of preexistent, traditional doctrine.'[68] On the debate over forced baptism, most Italian canonists had come to accept that Jews should not be converted in this manner.[69] In Caffiero's view,

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[68] Caffiero, *Forced Baptisms* 46.

[69] Pakter *Medieval Canon Law and the Jews* 330: 'Even as the Counter-Reformation took hold, the papacy determined that the safest way to deal with the traditional remnant of Jews was not to baptize their children, but to expel them or to exile them internally in ghettos across Europe.' Pope Pius V expelled Jews from the Papal States in 1569. The Jews of Bologna were expelled the same year.

Benedict's XIV's letters 'were used to transcend tradition . . . in particular the authority of St. Thomas, who forbids baptism *invitus parentibus*.'[70] As Kenneth Stow has observed, 'favor fidei' overthrew centuries-old guarantees forbidding forced baptism.[71]

As is clear from the numerous appeals to Aquinas in the contemporary discussion on the Mortara affair, and in the 1858 exchange between the Mortara family and the Vatican, Aquinas addressed the topic of forced baptism of Jewish children. He did so in *Summa theologiae* II.II 10.12; III 68.10; and *Quodlibetales Questiones* 2.4.2. We turn now to an analysis of these texts with attention to their thirteenth-century context.

Aquinas's Defense of Patria Potestas against Thirteenth-Century Theologies of Forced Baptism

During Aquinas's lifetime, European Jewry faced increasing pressure to convert to Christianity. The First Crusade represented a first stage in the development of a tendency in maturing western Christendom of confronting and converting Jews. In the mid-thirteenth century, the missionizing effort would fully mature into a systematic effort to convert Jews, or 'the first truly serious Christian proselytizing campaign among the Jews'.[72] The efforts to convert the Jews were driven by a number of factors:[73]

> What emerges most strikingly, is that this mid-thirteenth-century effort breaks new ground in the seriousness of the commitment to win over Jews to the Christian faith.

This missionary strategy was new.[74] Notorious anti-Semitic friars of Aquinas's time include Nicholas Donin, a Jewish convert to

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[70] Caffiero, *Forced Baptisms* 46; Kleinberg, 'Depriving Parents', 145.

[71] Stow, 'The Cruel Jewish Father' 266.

[72] Robert Chazan, *Daggers of Faith: Thirteenth-Century Christian Missionizing and Jewish Response* (Berkeley-Los Angeles 1989) 1.

[73] Chazan, *Daggers* 3.

[74] See Pim Valkenberg and Henk J.M. Schoot, 'Thomas Aquinas and Judaism', *Aquinas in Dialogue: Thomas for the Twenty-First Century*, edd. Jim Fodor and Frederick Christian Bauerschmidt (Directions in Modern Theology; New York 2004) 47-66 at 49; See also John Y.B. Hood, *Aquinas and the Jews* (Philadelphia 1995).

Christianity who lived during the first half of the thirteenth century and attacked the Talmud, claiming it was not to be tolerated by Christian society.[75] Pope Gregory IX sent letters to monarchs and ecclesiastical leaders across Christendom that included thirty-five accusations against the Talmud that Chazan thinks were likely composed by Donin. The papal letters sent by Gregory IX reflect elements of Nonin's accusations:[76] Jews 'are not content with the Old Law, which God gave to Moses in writing'; and they 'affirm that God gave another law that is called Talmud'; and this Talmud 'contains matter that is so abusive and so unspeakable that it arouses shame in those who mention it and horror in those who hear it'; and the Talmud 'is said to be the chief cause that holds the Jews obstinate in their perfidy'.[77] Gregory IX ordered the confiscation of the Talmud, which he referred to as an 'unspeakable book,' and the primary cause of Jewish 'perfidious obstinacy.'[78] Aquinas, on the other hand, argued that Jewish rites are to be tolerated[79] and that the Jews should be allowed to observe their rites on account of the good that is caused:[80]

> Thus from the fact that the Jews observe their rites, which, of old, foreshadowed the truth of the faith which we hold, there follows this good—that our enemies bear witness to our faith, and that our faith is

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[75] See Flannery *Anguish of the Jews* 104.

[76] Gregory IX's letters are published in Simonsohn, *Apostolic See and the Jews* 1.172 (June 9, 1239) letter to the Archbishops of France: 'ipsi enim, sicut accepimus, lege veteri quam Dominus per Moysen in scriptis edidit non contenti . . . affirmant legem aliam quae Talmud . . . in qua tot abusiones et nefaria continentur quod pudori referentibus et audientibus sunt horrori . . . haec dicatur esse causa praecipua quae Iudaeos in sua tenet perfidia obstinatos'. Also letters 1.171 no. 162 (June 9, 1239) to William of Auvergne, Bishop of Paris; 1.173 no. 164 (June 20, 1239) letter to the king of Portugal.

[77] Robert Chazan, *From Anti-Judaism to Anti-Semitism: Ancient and Medieval Christian Constructions of Jewish History* (New York 2016) 137.

[78] Pakter, *Medieval Canon Law and the Jews* 322. Benjamin Z. Kedar, 'Canon Law and the Burning of the Talmud', BMCL 9 (1979) 79-82 noted that Gregory's successor, Innocent IV, had a far less expansive view of the pope's right to judge Jews.

[79] II.II 10.11 ad 1-3. Alexander of Hales also defended toleration of Jewish rites. See *Church, State, and the Jew in the Middle Ages*, ed. Robert Chazan (Library of Jewish Studies; New York 1980) 44-45.

[80] II.II 10.11.

> represented in a figure, so to speak. For this reason they are tolerated in the observance of their rites.

Aquinas's teaching on Jews therefore occurred during the same period in which the first systematic Christian proselytizing campaign was born.[81] The campaign included a focus on children. 'Toward the end of [Aquinas's] career there was . . . new pressure for taking Jewish children from their parents so that they might be given a Christian upbringing.'[82] Aquinas was well aware of what might be called, the rising tide of theological arguments that could erode the Church's custom against forced baptisms of Jewish children, and reframe such acts as lawful.

Aquinas explicitly addresses the question of whether or not children of Jews should be baptized against their parents' will in II.II 10.12, written in 1271 or early 1272, near the end of his life. The article is entitled 'Should the children of Jews or other unbelievers be baptized against their parents' wishes?' In Aquinas's view, 'the custom of the Church' is against forced baptism, including children of unbelievers.[83] However, at first glance, it seems Aquinas adopts the precedent of Toledo IV canon 60, which teaches that an unlawful baptism of a child of unbelievers is nevertheless valid, and results in the removal of the child from the parents.[84] Indeed, the papal counsel interprets

[81] See Jeremy Cohen, *The Friars and the Jews: The Evolution of Medieval Anti-Judaism* (Ithaca, N.Y. 1982); For a brief discussion of the question of Aquinas's relation to the broader Dominican mission to the Jews, see Schoot and Valkenberg, 'Thomas Aquinas' 48-51. I have argued elsewhere that although Aquinas thinks ceremonial Mosaic Law is fulfilled by Christ in economically supersessionist terms, Aquinas also teaches that the election of the Jews, and the ceremonial law, are ongoing 'prerogatives' from God, even after Christ's passion. Matthew Tapie, *Aquinas on Israel and the Church: The Question of Supersessionism in the Theology of Thomas Aquinas* (Eugene, OR 2014).

[82] Edward Synan, 'Review of John Hood, *Aquinas and the Jews*', CHR 82 (1996) 550-551.

[83] Aquinas sees D.45, in III 68.10 as representative of the view that forced baptism is against the custom of the Church: 'Et ideo contra iustitiam naturalem esset si tales pueri, invitis parentibus, baptizarentur'.

[84] The *Decretum* echoes Toledo IV canon 60 in Part 2, C.28 q.1 c.11. See Chazan, *Church, State, and the Jew* 24.

Aquinas to teach precisely that parents lose their rights over their children if they are baptized:[85]

> Saint Thomas himself asserts that the Church had the custom to baptize the sons of the infidels against the wishes of the parents, and, among other reasons, says that since the parents would lose each right on the sons who would be passed to the authority of the Church by force of the Baptism. However, wrong would be done to the Jews, if their children were baptized without their consent, because they would lose the right of paternal power over their children now Christians.

Here, the counsel is paraphrasing the text of the 'sed contra' in Aquinas's article in II.II 10.12. Aquinas's text reads:[86]

> Now it would be an injustice to Jews if their children were to be baptized against their will, since they would lose the rights of parental authority over their children as soon as these were Christians.

However, such a misinterpretation of Aquinas's position is due to inattention to the dialectical style and structure of Aquinas's arguments. In the spirit of the 'disputatio', Aquinas carefully lists the positions on either side of the question before providing his own answer. The 'sed contra' can easily be mistaken for Aquinas's own position because the 'sed contra' typically represents something close to Aquinas's position. However, it is inadequate on its own since he may only agree with part of it.[87]

In fact, it seems that the argument Aquinas places in the 'sed contra' is the preferred legal argument of the day. Pakter says the inviolability of 'patria potestas' was the preferred legal argument against baptism of Jewish children as late as Innocent IV (†1254). The position of the contrary argument is against forced baptism of Jewish children, but the answer also seems to assume the legal consequences of coerced but valid baptisms in the thirteenth

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[85] Stahl, 'The Mortara Affair' 100.

[86] II.II 10.12: 'Fieret autem Iudaeis iniuria si eorum filii baptizarentur eis invitis, quia amitterent ius patriae potestatis in filios iam fideles. Ergo eis invitis non sunt baptizandi'.

[87] 'Sometimes it is a simple quotation of an authority, while at other times it offers the sketch of an argument, but rarely more than a sketch. In a few cases it offers an argument that is no closer to Aquinas's final view than the objections.' Frederick Christian Bauerschmidt, 'Reading the Summa Theologiae', edd. , 11-12.

century since it states that parents would lose their rights over the children once these are baptized. As Kleinberg observes:[88]

> The deliberations on the nature of consent in baptism affected the legal situation of the child baptized without parental consent by creating a frame of mind that saw baptism, however achieved, as an almost irreversible act.

Canonists and popes assumed that a coerced baptism of an adult or a child of unbelievers was nevertheless valid.[89] The argument in the 'sed contra' seems to reflect this view.

But this is not Aquinas's position. The contrary argument expresses the preferred position against forced baptism of Jewish children, and Aquinas's position is similar to this but it is also different. Aquinas's position is similar in that he is also against forcibly baptizing children of unbelievers, and views it as an injustice against Jews. His answer is different in that he establishes the rights of the parents in the natural law, and a theology of baptism that stresses the importance of human consent.

Aquinas's answer is in the body of the article, which begins with *respondeo dicendum*; his answers also appear in his replies to the objections, which come last. It is only in the *respondeo*, and the replies to objections, that one can determine Aquinas's answer to a question:[90]

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[88] Kleinberg, 'Depriving Parents' 133.

[89] 'In the case of minors, coercion and assent were irrelevant; all minors were considered Christians after baptism.' Pakter, *The Medieval Canon Law and the Jews* 318. Kleinberg explains that the distinction between conditional and absolute coercion was not an abstract concept. 'In a letter of 1277 Pope Nicholas III ordered that Jews converted under threats of death be forbidden to revert to Judaism. Many of the said Jews, writes the pope, 'fearing death at the hands of the aforementioned Christians, though not absolutely and precisely coerced, accepted baptism. The pope ordered that those who persisted in their Judaizing be treated as heretics. Some twenty years later, Boniface VIII in the decretal *Contra Christianos* echoes the same words, asserting that those baptized under threats of death, but not absolutely and precisely coerced fall under inquisitorial jurisdiction.' Kleinberg 'Depriving Parents' 133.

[90] Aquinas II.II 10.12: 'Respondeo dicendum quod maximam habet auctoritatem Ecclesiae consuetudo, quae semper est in omnibus aemulanda. Quia et ipsa doctrina Catholicorum doctorum ab Ecclesia auctoritatem habet, unde magis standum est auctoritati Ecclesiae quam auctoritati vel Augustini vel Hieronymi vel cuiuscumque doctoris. Hoc autem Ecclesiae usus nunquam

I answer that, the custom of the Church has very great authority and ought to be observed in all things, since the doctrine of Catholic doctors receives its authority from the Church. Hence we ought to abide by the authority of the Church rather than by that of an Augustine or a Jerome or of any doctor. Now it was never the custom of the Church to baptize the children of the Jews against the will of their parents, although at times past there have been many very powerful catholic princes like Constantine and Theodosius, with whom most holy bishops have been on most friendly terms, as Sylvester with Constantine, and Ambrose with Theodosius, who would certainly not have failed to obtain this favor from them if it had been at all reasonable. It seems therefore hazardous to repeat this assertion, that the children of Jews should be baptized against their parents' wishes, in contradiction to the Church's custom. There are two reasons for this custom. One is on account

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habuit quod Iudaeorum filii invitis parentibus baptizarentur, quamvis fuerint retroactis temporibus multi Catholici principes potentissimi, ut Constantinus, Theodosius, quibus familiares fuerunt sanctissimi episcopi, ut Sylvester Constantino et Ambrosius Theodosio, qui nullo modo hoc praetermisissent ab eis impetrare, si hoc esset consonum rationi. Et ideo periculosum videtur hanc assertionem de novo inducere, ut praeter consuetudinem in Ecclesia hactenus observatam, Iudaeorum filii invitis parentibus baptizarentur. Et huius ratio est duplex. Una quidem propter periculum fidei. Si enim pueri nondum usum rationis habentes Baptismum susciperent, postmodum, cum ad perfectam aetatem pervenirent, de facili possent a parentibus induci ut relinquerent quod ignorantes susceperunt. Quod vergeret in fidei detrimentum. Alia vero ratio est quia repugnat iustitiae naturali. Filius enim naturaliter est aliquid patris. Et primo quidem a parentibus non distinguitur secundum corpus, quandiu in matris utero continetur. Postmodum vero, postquam ab utero egreditur, antequam usum liberi arbitrii habeat, continetur sub parentum cura sicut sub quodam spirituali utero. Quandiu enim usum rationis non habet puer, non differt ab animali irrationali. Unde sicut bos vel equus est alicuius ut utatur eo cum voluerit, secundum ius civile, sicut proprio instrumento; ita de iure naturali est quod filius, antequam habeat usum rationis, sit sub cura patris. Unde contra iustitiam naturalem esset si puer, antequam habeat usum rationis, a cura parentum subtrahatur, vel de eo aliquid ordinetur invitis parentibus. Postquam autem incipit habere usum liberi arbitrii, iam incipit esse suus, et potest, quantum ad ea quae sunt iuris divini vel naturalis, sibi ipsi providere. Et tunc est inducendus ad fidem non coactione, sed persuasione; et potest etiam invitis parentibus consentire fidei et baptizari, non autem antequam habeat usum rationis. Unde de pueris antiquorum patrum dicitur quod salvati sunt in fide parentum, per quod datur intelligi quod ad parentes pertinet providere filiis de sua salute, praecipue antequam habeant usum rationis'.

> of the danger to the faith. Children baptized before they have the use of reason, afterwards when they come to perfect age, might easily be persuaded by their parents to renounce what they had unknowingly embraced; and this would be detrimental to the faith. The other reason is that it is against natural justice. For a child is by nature part of its father: thus, at first, its body is not distinct from its parents, so long as it is in its mother's womb; and later on after birth, and before it has the use of its free-will, it is in the care of its parents, which is like a spiritual womb, for so long as man has not the use of reason, he differs not from an irrational animal; so that even as an ox or a horse belongs to someone who, according to the civil law, can use them as he wishes, as his own instrument, so, according to the natural law, a son, before coming to the use of reason, is under his father's care. Hence it would be contrary to natural justice, if a child, before having the use of reason, were to be taken away from its parents' custody, or anything done to it against its parents' wish. As soon, however, as it begins to have the use of its free-will, it begins to belong to itself, and is able to look after itself, in matters concerning the Divine or the natural law, and then it should be induced, not by compulsion but by persuasion, to embrace the faith: it can then consent to the faith, and be baptized, even against its parents' wish; but not before it comes to the use of reason. Hence it is said of the children of the fathers of old that they were saved in the faith of their parents; whereby we are given to understand that it is the parents' duty to look after the salvation of their children, especially before they come to the use of reason.

In my analysis of Aquinas's answer, I want to first discuss the reason behind Aquinas's statement that children can be baptized only with consent of parents, and how this consent relates to the question of a valid baptism. I then discuss the reasons Aquinas says baptism against the will of the parents is unlawful by examining his replies to the objections in the article.

First, Aquinas argues that children do not have the use of reason, and thus cannot consent to baptism. Before the child has use of reason, it can be baptized only if the parents will this. Once the child reaches the age of reason, it can consent to the faith.

This notion of the consent of parents assumes the entire discussion of voluntary action and faith that Aquinas takes up elsewhere in the *Summa theologiae*. That faith depends in part upon the will is evident in Aquinas's argument for why Jews are not to be compelled to the faith: 'Jews . . . are by no means to be compelled to the faith, in order that they may believe, because to

believe depends on the will'.[91] Indeed, a 'conversion' brought about under threats of punishment or death lacks the assent of the believer, which comes from God moving the person by grace:[92]

> Two things are required for faith. First, that the things which are of faith should be proposed to man: this is necessary in order that man believe anything explicitly. The second thing required for faith is the assent of the believer to the things which are proposed to him . . . faith, as regards the assent which is the chief act of faith, is from God moving man inwardly by grace.

Aquinas's theology of baptism consistently places emphasis on the importance of God's grace without losing sight of the necessity of the intention of the recipient. A genuine conversion includes the recipient's free-will:[93]

> God does not justify us without ourselves, because while we are being justified we consent to God's justification by a movement of our free-will. Nevertheless, this movement is not the cause of grace, but the effect; hence the whole operation pertains to grace.

Indeed, the acceptance of the faith on the part of recipient is a matter of the will, which is an essential part of a valid baptism.[94] Aquinas writes, 'Therefore on the part of the one baptized, it is necessary for him to have the will or intention of receiving the sacrament'.[95] When Aquinas discusses the intention of the minister, whom he thinks acts in the person of the Church, he also

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[91] II.II 10.8: 'Ad secundum dicendum quod Iudaei, si nullo modo susceperunt fidem, non sunt cogendi ad fidem. Si autem susceperunt fidem, *oportet ut fidem necessitate cogantur retinere*, sicut in eodem capitulo dicitur'.

[92] II.II 6.1: 'Ad fidem duo requiruntur. Quorum unum est ut homini credibilia proponantur, quod requiritur ad hoc quod homo aliquid explicite credat. Aliud autem quod ad fidem requiritur est assensus credentis ad ea quae proponuntur . . . fides quantum ad assensum, qui est principalis actus fidei, est a Deo interius movente per gratiam'.

[93] I.II 111.2 ad 2: 'Deus non sine nobis nos iustificat, quia per motum liberi arbitrii, dum iustificamur, Dei iustitiae consentimus. Ille tamen motus non est causa gratiae, sed effectus. Unde tota operatio pertinet ad gratiam'.

[94] II.II 10.8 ad 3: 'Ad tertium dicendum quod, sicut vovere est voluntatis, reddere autem est necessitatis, ita accipere fidem est voluntatis, sed tenere iam acceptam est necessitatis'.

[95] III 68.7: 'Et ideo ex parte baptizati requiritur voluntas, sive intentio, suscipiendi sacramentum'.

states that a baptism without the intention of the recipient is invalid:[96]

> [T]he minister of a sacrament acts in the person of the whole Church, whose minister he is; while in the words uttered by him, the intention of the Church is expressed; and that this suffices for the validity of the sacrament, except the contrary be expressed on the part either of the minister or of the recipient of the sacrament.

A baptism without intention of the recipient requires rebaptism:[97]

> If an adult lack the intention of receiving the sacrament, he must be rebaptized.

For baptism of infants, the intention of the recipient is declared when parents make the profession of faith on behalf of the child. For the same reason that the will of the adult must be respected in baptism, the will of the child before reason, which is implied by the parents, must be respected in baptism of children. On Aquinas's terms, a forced baptism without the intention of the parents is an invalid baptism. This, in part, is why Aquinas holds that before the child has use of reason, it can be baptized only if the parents will this.

Although Aquinas also teaches that Jews who have received the faith on their own ought to be compelled to keep it, the nature of the person's reception of the faith is key.[98] A convert could be compelled to keep the faith only if that person genuinely converted to the faith, i.e. received the faith on their own. Aquinas's view of the role of the human will in salvation undermines the accepted view among canonists that 'conditional coercion' of unbelievers is a valid baptism. Aquinas's view of faith and baptism makes clear that if there is no consenting will, there is no baptism. As Jennifer

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[96] III 64.8 ad 2: 'Et ideo alii melius dicunt quod minister sacramenti agit in persona totius Ecclesiae, cuius est minister; in verbis autem quae proferuntur, exprimitur intentio Ecclesiae; quae sufficit ad perfectionem sacramenti, nisi contrarium exterius exprimatur ex parte ministri et recipientis sacramentum'.

[97] III 68.7 ad 2: 'si in adulto deesset intentio suscipiendi sacramentum, esset rebaptizandus'.

[98] II.II 10.8 ad 2: 'Ad secundum dicendum quod Iudaei, si nullo modo susceperunt fidem, non sunt cogendi ad fidem. Si autem susceperunt fidem, oportet ut fidem necessitate cogantur retinere, sicut in eodem capitulo dicitur'.

Hart Weed has argued in two important essays, Aquinas thinks any forced conversion is not an actual conversion:[99]

> [T]he idea of a forced conversion would be incoherent from Aquinas's perspective, since conversion presupposes the freedom of the will of the person of the prospective convert. Aquinas states explicitly that it is the person who subjects himself (*subiiciunt*) to Christs' sacraments who obtains grace . . . A coerced baptism is not a case in which the convert submits himself; it is the person doing the coercing who is substituting his or her will for the will of the convert.

Weed's analysis indicates that the Mortara family interprets Aquinas correctly when they insist that intent is crucial for a baptism to be valid and when they argue that forced baptism is invalid baptism precisely because it lacks intent of the parents. As several of the Dominican theologians cited in the Mortara's Syllabus ask, 'Who's will is the will of the child?'[100] In so far as Aquinas's teaching is concerned, the Mortara family's argument that a forced baptism is invalid is correct.

I now want to discuss the reasons Aquinas thinks forced baptism of Jewish children is unlawful. Before explicating his answer on this point, it is helpful to return once again to a discussion of the historical context, as well as a closer reading of the function of objections in an article.

The debate among canonists and theologians in Aquinas's time was not on whether a forced baptism could be considered valid but whether forced baptisms could be considered lawful. The pressure to baptize Jewish children occurs in context of tension between civil law and canon law, and doubts about binding ruling in cases

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[99] For this discussion of voluntary action and faith in Aquinas see the work of Jennifer Hart Weed, 'Aquinas on the Forced Conversion of the Jews', *Jews in Medieval Christendom: "Slay Them Not"*, edd. Kristine T. Utterback and Merrall L. Price (Études sur le Judaïsme Médiéval 60; Brill 2013) 129-146; and 'Faith, Salvation, and the Sacraments in Aquinas: A Puzzle Concerning Forced Baptisms', *Philosophy, Culture, and Traditions* 10 (2014) 95-110. Thomas does not mention Huguccio's distinction between conditional coercion and absolute, but he does use the term 'coactione absoluta' (absolute force), with regard to conversion once, and in his commentary on Galatians ch. 6 l. 3, referring to Jews in the New Testament that persuaded others to be circumcised but 'not by absolute force.' He never uses 'coactione conditionali'.

[100] Stahl, 'The Mortara Affair' 64-68; 69-70.

of conflicting opinions.[101] The issue of Jewish parental rights, in particular, took on significance after Innocent and Clement's decretals recognizing marriages become-mixed had gained acceptance.[102] Canonists disagreed over the legitimacy of baptizing Jewish children in these contexts. Pennington observes that:[103]

> [a] significant issue was the fate of Jewish children in families in which one of the parents became Christian or in which the parents did not convert, but in which a child had been baptized.

Gratian incorporated two canons from Toledo IV dealing with this problem, first *Iudei qui chrstianas* (C.28 q.1 c.10), concerning a child with one Jewish parent, and second, *Iudeorum* (C.28 q.1 c.11), dealing with involuntary baptism of children with two Jewish parents.'[104] The texts involved conflicts between Christian theology, and the Roman legal tradition of 'patria potestas', which concerned 'a core of rights and moral obligations to protect the interests of the minor child.'[105]

A classic case decided in 1229 by Pope Gregory IX illustrates the conflict that was debated during Aquinas's lifetime. The case revolved around the status of a Jewish child. A Jewish father in Strasbourg converted to Christianity leaving his devout Jewish wife and four-year old son. Gregory ruled against the Jewish mother and awarded custody to the newly converted father on the basis of both 'patria potestas', and 'favor fidei', understood as 'the greatest advantage to the Christian faith.'[106] 'It became a benchmark for deciding the rights of father, mother, and child for centuries'.[107]

When he commented on Gregory IX's decretal Hostiensis argued that although the mother had multiple rights to have custody, the newly-converted father's single right of 'patria

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[101] Chazan, *Church, State, and the Jew in the Middle Ages* 27.
[102] X 4.14.4; X 5.6.9. See Pakter, *Medieval Canon Law and the Jews* 319.
[103] Pennington, 'Law's Violence' 30.
[104] Pakter, *Medieval Canon Law and the Jews* 318.
[105] Ibid. 315.
[106] Ibid. 319. Kleinberg, 'Depriving Parents' 135.
[107] Pennington, 'Gratian and the Jews' 119.

potestas' was the deciding factor. He vigorously defended the pope's decision.[108]

The Dominican Raymond de Peñafort included Gregory's appellate decision *Ex literis tuis* in the *Decretals* (X 3.33.2). The pope's statement about 'patria potestas', however, created a problem that perplexed jurists: could a Jewish mother who converted to Christianity be awarded custody *against* the parental rights of a Jewish father? If so, the father's 'patria potestas', would be in conflict with the 'favor fidei'.[109] Kleinberg points out that the main problem that needed to be addressed was not the child's consent or lack thereof, but the infringement upon the rights of the (unwilling) parents. The debate concerning forced baptism in Aquinas's age was therefore focused on the question of whether the principle of 'favor fidei' could override 'patria potestas'.

Various opinions on this question circulated in the medieval academic world. French Dominican William of Rennes (ca. 1259) who was followed by Vincent of Beauvais (d. 1264) argued in his commentary on Raymond de Peñafort's *Summa de casibus* that Jewish children can be removed from their parents:[110]

> But whether they could take their children away and baptize them? I answer: They cannot take away adults unless they have willingly agreed to

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[108] Hostiensis, *Lectura* (Strassburg 1512) fol. 131rb to X 3.33.2 s.v. non suspectum: 'Solutio: dicimus quod Iudei habent filios in potestate, et hec sola ratio pro patre facit. Pro matre vero plura faciunt'. Hostiensis listed five reasons the wife's rights could prevail but did not in the end.

[109] Pakter, *Medieval Canon Law and the Jews* 320. Kleinberg,'Depriving Parents' 135.

[110] William of Rennes, gloss to *Summa de casibus* (Rome 1603) 33a s.v. *aspertatibus*: 'Sed numquid possunt auferri eis filii eorum ad baptizandum? Respondeo: adulti non debent nisi consenserit sponte baptizari, nec etiam paruuli per illos qui non sunt domini eorum. Sed si vere dominis serui Iudaei sunt, sicut credo, ut extra eodem Etsi Iudaeos (X 5.6.13) et 23 q.8 Dispar (c.11) . . . credo quod principes quorum sunt serui Iudaei possunt eis auferre filios paruulos absque omni iniuria, cum illi in filiis non habeant potestatem tanquam serui. Et sicut iidem principes possent eosdem paruulos tanquam mancipia sua aliis dare, vel vendere in seruitutem, invitis parentibus, ita possent eos offerre ad baptismum, et in hoc mererentur. Dum tamen non facerent propter compellendos hoc modo parentes ad fidem, sed propter saluandos pueros per fidei sacramentum, ad cuius susceptionem sufficit quod non inueniat obicem contrariae voluntatis'.

> be baptized. They cannot take away their children if they are not the lords over them. But if truly Jews are slaves to their lords as I believe . . . credo that princes of Jewish slaves can take their children without any injury, since they are slaves Jewish parents do not have any power over their children. Princes can give their children just as he can give his servants (mancipia) to others, or sell them into slavery, so too they may offer them to baptism even if the parents are unwilling. When princes do so they gain merit for saving the children through the sacrament of the faith, provided that they would not compel the parents to convert to the faith.

Rennes's argument was repeated in the writings of other Dominicans.

As is clear in the 'respondeo' cited above, Aquinas is aware of the institution of 'patria potestas'. He thinks the Jews do not belong to the spiritual authority of the Church and argues against the practice of forcibly baptizing Jewish children.[111] In II.II 10.12, the objections that Aquinas posed include a number of arguments made by theologians of his time. Indeed, several of the theological points made in the objections are premises assumed by the 'new jurisprudence' established by Benedict XIV, and implemented by Pius IX. Because of this connection between the theological rationale underlining the objections, and the theological rationale for the exceptions to forced baptism issued by Benedict XIV, it is worth citing the objections at length.

The first objection of article 12 seems to have aspects of Gregory IX's 1229 case in mind. The objection can be referred to as the argument that '*unbelief in parents is grounds for severing parental rights*'. Since unbelief of a parent is grounds for abrogation of the parental rights, the children of Jews can be removed from both parents (or perhaps baptized by authority of the converted parent). Aquinas cites C.28 q.1 c.4 and c.5 as authority for the position. He summarizes the position thus:[112]

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[111] II.II10.9 ad 2; 12.2.

[112] II.II 12.8 obj. 1: 'Videtur quod pueri Iudaeorum et aliorum infidelium sint baptizandi parentibus invitis. Maius enim est vinculum matrimoniale quam ius patriae potestatis, quia ius patriae potestatis potest per hominem solvi, cum filiusfamilias emancipatur; vinculum autem matrimoniale non potest solvi per hominem, secundum illud Matth. XIX, *quod Deus coniunxit homo non separet*. Sed propter infidelitatem solvitur vinculum matrimoniale, dicit enim apostolus, I ad Cor. VII, *quod si infidelis discedit, discedat, non enim servituti subiectus*

> It would seem that the children of Jews and of other unbelievers ought to be baptized against their parents' will. For the bond of marriage is stronger than the right of parental authority over children, since the right of parental authority can be made to cease, when a son is set at liberty; whereas the marriage bond cannot be severed by man, according to Matthew 19:6: "What . . . God hath joined together let no man put asunder." And yet the marriage bond is broken on account of unbelief: for the Apostle says (1 Corinthians 7:15): 'If the unbeliever depart, let him depart. For a brother or sister is not under servitude in such cases': and a canon [C.28 q.2 c.2] says that if the unbelieving partner is unwilling to abide with the other, without insult to their Creator, then the other partner is not bound to cohabitation. Much more, therefore, unbelief abrogates the right of unbelieving parents' authority over their children: and consequently their children may be baptized against their parents' will.

The objection is that since an unbelieving spouse can be grounds for severing the marriage bond, unbelief in parents is grounds for severing parental rights. Aquinas disagrees: [113]

> In the marriage bond, both husband and wife have the use of the free-will, and each can assent to the faith without the other's consent. But this does not apply to a child before it comes to the use of reason: yet the comparison holds good after the child has come to the use of reason, if it is willing to be converted.

Parental rights are not like marriage since parental rights are not based on the will. Since parental rights are not based on the will, such rights cannot be terminated by unbelief. Here, Aquinas protects the rights of unbelieving parents against an argument that unbelief invalidates rights over their children. His reply also seems to undermine the claim that unbelief in one parent is grounds for transferring custody of that parent's children to a converted spouse. Aquinas's argument therefore calls into question the legal concept of 'offerings', which afforded a parent or family member who converted to Christianity the right, based in part on the notion

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est frater aut soror in huiusmodi; et canon dicit quod si coniux infidelis non vult sine contumelia sui creatoris cum altero stare, quod alter coniugum non debet ei cohabitare. Ergo multo magis propter infidelitatem tollitur ius patriae potestatis in suos filios. Possunt ergo eorum filii baptizari eis invitis' followed by further justifications.

[113] II.II 10.12 ad 1: 'in vinculo matrimoniali uterque coniugum habet usum liberi arbitrii, et uterque potest invito altero fidei assentire. Sed hoc non habet locum in puero antequam habeat usum rationis. Sed postquam habet usum rationis, tunc tenet similitudo, si converti voluerit'.

of the favor of the faith, to “offer” children, and even adult family members, to the Church.

The second objection can be referred to as *the argument of the danger of everlasting death*. The argument is that it would be a sin to *not* baptize children of unbelievers since these children are in danger of everlasting death. Since they are in danger of everlasting death, they can be taken away from their parents and baptized:[114]

> Further, one is more bound to succor a man who is in danger of everlasting death, than one who is in danger of temporal death. Now it would be a sin, if one saw a man in danger of temporal death and failed to go to his aid. Since, then, the children of Jews and other unbelievers are in danger of everlasting death, should they be left to their parents who would imbue them with their unbelief, it seems they ought to be taken away from them and baptized, and instructed in the faith.

Aquinas replies by arguing that one should not violate civil law in order to rescue someone who has been legally condemned, no one ought to break the order of the natural law, in which a child is in the custody of its father, in order to rescue it from everlasting death.

The third objection can be referred to as *the argument of Jewish servitude*.[115] The argument is that since slaves are under their master’s power, so are unbelievers under the power of kings and princes. Since children of slaves are also slaves, they are under the full authority of the prince. No injustice would be done to them if they were baptized against the will of their parents. Similar arguments based on servitude of the Jews is made by both Rennes and Scotus.[116] Aquinas rejects this position also, and argues that

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[114] II.II 10.12 obj. 2: ‘Praeterea, magis debet homini subveniri circa periculum mortis aeternae quam circa periculum mortis temporalis. Sed si aliquis videret hominem in periculo mortis temporalis et ei non ferret auxilium, peccaret. Cum ergo filii Iudaeorum et aliorum infidelium sint in periculo mortis aeternae si parentibus relinquuntur, qui eos in sua infidelitate informant, videtur quod sint eis auferendi et baptizandi et in fidelitate instruendi’.

[115] II.II 10.12 obj. 3: ‘Praeterea, filii servorum sunt servi et in potestate dominorum. Sed Iudaei sunt servi regum et principum. Ergo et filii eorum. Reges igitur et principes habent potestatem de filiis Iudaeorum facere quod voluerint. Nulla ergo erit iniuria si eos baptizent invitis parentibus’.

[116] That Rennes’s wrote during Aquinas’s lifetime means John Y. B. Hood was correct when he speculated about precursors to Duns Scotus’s position, Hood, *Aquinas and the Jews* 89: ‘We know that twenty years after Aquinas’s death

although Jews are in a state of servitude, this does not exclude them from the divine and natural law.[117]

The fourth objection can be referred to as *the argument of God's ownership of children*. The argument is that since all persons belong more to God than to a carnal father, it is not unjust if Jewish children are baptized against their parents will:[118]

> Further, every man belongs more to God, from Whom he has his soul, than to his carnal father, from whom he has his body. Therefore it is not unjust if Jewish children be taken away from the parents, and consecrated to God in baptism.

Aquinas rejects this reasoning as well and states that though a child does belong more to God than to a carnal father, the child must be brought to God through reason, and through the care of his parents. The human person is directed to God by reason; and it is through reason that a person comes to know God:[119]

> Hence a child before having the use of reason, by the natural order is directed to God by the reason of its parents, whose care it is naturally subjected, and it is according to their direction that directs the child in all matters divine.

The fifth objection can be referred to as *the argument that failing to baptize is sinful*.[120] Baptism, not preaching, is most effective at achieving salvation. If a preacher fails to preach it is a threat to him because he has been entrusted with the duty of preaching. Likewise, those who could baptize a Jewish child, and do not do it are therefore also in danger; and even guilty of sin. Aquinas rejects this position as well. He argues that the guilt of

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Duns Scotus openly advocated forced baptism of Jewish children. It seems reasonable to presume Scotus had precursors'.

[117] II.II 10.12 ad 3: 'Ad tertium dicendum quod Iudaei sunt servi principum servitute civili, quae non excludit ordinem iuris naturalis vel divini'.

[118] II.II 10.12 obj. 4: 'Praeterea, quilibet homo magis est Dei, a quo habet animam, quam patris carnalis, a quo habet corpus. Non ergo est iniustum si pueri Iudaeorum carnalibus parentibus auferantur et Deo per Baptismum consecrentur'.

[119] II.II 10.12 ad 4: 'Unde puer, antequam usum rationis habeat, naturali ordine ordinatur in Deum per rationem parentum, quorum curae naturaliter subiacet; et secundum eorum dispositionem sunt circa ipsum divina agenda'.

[120] II.II 10.12 obj. 5: 'Ergo multo magis, si pueri Iudaeorum damnentur propter defectum Baptismi, imputatur ad peccatum eis qui potuerunt baptizare et non baptizaverunt'.

not baptizing a child falls solely with the parents, and not on a Christian:[121]

> [T]o provide the sacraments of salvation for the children of unbelievers pertains to their parents. Hence it is they whom the danger threatens, if through being deprived of the sacraments their children fail to obtain salvation. Hence it is they whom the danger threatens, if through being deprived of the sacraments their children fail to obtain salvation.

The objections in Aquinas's article indicate that there were a number of rather sophisticated legal and theological arguments circulating in the middle of the twelfth-century that sought to override Jewish parental rights. Some of the positions appeal to canon law, and are expressed by theologians such as Rennes, de Beauvais, and Scotus. Aquinas thinks these teachings are dangerous theological innovations that threaten to overturn the custom of the Church and are contrary to the order of the natural law. Since the position that appeals to the Decretum is the first objection, it can safely be assumed Aquinas thought it was the strongest objection in 1271 or 1272.

In his *respondeo*, he also marshals the 'very great authority' of the custom of the Church:[122]

> The custom of the Church has maximum authority and must to be observed in all matters, since the doctrine of Catholic doctors has its authority from the Church. Hence we are more subject to the authority of the Church rather than to that of Augustine or Jerome or any other doctor.

His answer is that it would be dangerous to introduce this practice when for centuries it had not been the Church's custom to baptize Jewish children against their parents' wishes. Aquinas suggests we consider Pope Sylvester I and Bishop Ambrose. Given their close friendship with Roman Empire, these men certainly would have

[121] II.II 10.12 ad 5: 'Providere autem pueris infidelium de sacramentis salutis pertinet ad parentes eorum. Unde eis imminet periculum si, propter subtractionem sacramentorum, eorum parvuli detrimentum salutis patiantur'.

[122] II.II 10.12: 'Respondeo dicendum quod maximam habet auctoritatem Ecclesiae consuetudo, quae semper est in omnibus aemulanda. Quia et ipsa doctrina Catholicorum doctorum ab Ecclesia auctoritatem habet, unde magis standum est auctoritati Ecclesiae quam auctoritati vel Augustini vel Hieronymi vel cuiuscumque doctoris'.

called for legislation mandating this practice, if it were in accord with reason:[123]

> And so it seems dangerous to bring forward this assertion again about baptizing the sons of Jews even if their parents are opposed, as it is contrary to the custom of the Church previously observed, that the children of the Jews were baptized although their parents were opposed.

Then he goes on to give two reasons for the Church's position. First, Aquinas describes the rationale behind the custom against baptizing the children of Jews against the will of their parents, which concerns public perceptions of the Church. If adults known to have been associated with Christianity subsequently return to Judaism it would be detrimental to the Christian faith.

The second reason, which takes up the majority of the *respondeo*, is that baptizing Jewish children against the will of their parents would be 'Alia vero ratio est quia repugnat iustitiae naturali' (repugnant to natural justice). Natural justice was the equivalent of natural law.

Aquinas then elaborates upon why this assertion is contrary to natural justice by showing that a child is part of parents by nature:[124]

> For a child is by nature part of its father: thus, at first, it is not distinct from its parents as to its body, so long as it is in its mother's womb; and later on after birth, and before it has the use of its free-will, it is under the care of its parents, which is like a spiritual womb.

According to the natural law, a child is by nature not distinct from its parents. The child is by nature part of its parents when the body of the child is enfolded or contained (continetur) within its mother's womb. Yet a child is by nature part of its parents in another sense. And Aquinas once again uses 'continetur' to specify the natural relation of the child to its parents. After being

[123] II.II 10.12: 'Et ideo periculosum videtur hanc assertionem de novo inducere, ut praeter consuetudinem in Ecclesia hactenus observatam, Iudaeorum filii invitis parentibus baptizarentur'.

[124] II.II 10.12: 'Filius enim naturaliter est aliquid patris. Et primo quidem a parentibus non distinguitur secundum corpus, quandiu in matris utero continetur. Postmodum vero, postquam ab utero egreditur, antequam usum liberi arbitrii habeat, continetur sub parentum cura sicut sub quodam spirituali utero'.

born, a child is still a part of its parents in that it is 'continetur' within the care of its parents, which is like a 'spiritual womb'. According to the natural law, children are under the care of their parents as long as they cannot look after themselves. Aquinas also reinforces this natural law argument with an analogy from civil Roman law: In the same way that an irrational animal such as an ox can belong to someone by civil law, likewise, a child before it obtains the use of reason, is under the care of its father according to the natural law.[125]

Aquinas's discussion then spells out the consequences of this teaching that 'patria potestas' is in the order of the natural law. Not only is forced baptism of children of unbelievers contrary to the natural law, but so is taking children away from parents' custody:[126]

> Hence it would be contrary to natural justice, if a child, before having the use of reason, were to be taken away from its parents' care, or to have anything done to it if the parents are unwilling.

When he refers to a child being taken away, he uses 'subtraho' (to take away, steal), which Aquinas also uses to explain that theft and robbery derive their sinful nature through the taking being involuntary on the part of the person from whom something is taken.[127] Forced baptism and stealing children from parents are both contrary to natural justice.[128] For Aquinas, kidnapping is a

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[125] II.II 10.12: 'Vnde sicut bos vel equus est alicuius ut utatur eo cum voluerit, secundum ius civile, sicut proprio instrumento; ita de iure naturali est quod filius, antequam habeat usum rationis, sit sub cura patris'.

[126] II.II. 10.12: 'Unde contra iustitiam naturalem esset si puer, antequam habeat usum rationis, a cura parentum subtrahatur, vel de eo aliquid ordinetur invitis parentibus'.

[127] II.II 66.4: 'Et ideo furtum et rapina ex hoc habent rationem peccati quod acceptio est involuntaria ex parte eius cui aliquid subtrahitur'.

[128] For a discussion of the conceptual origins of the idea of natural rights as these relate to the natural law tradition from 1150 to 1250 see Tierney, *The Idea of Natural Rights* 44. See also Jean Porter's helpful discussion of Aquinas's view of natural right as an objective order of equity established by nature, as an expression of God's wisdom. Jean Porter, *Natural and Divine Law: Reclaiming the Tradition for Christian Ethics* (Grand Rapids 1999) 273.

mortal sin for which the pain of death should be inflicted.[129]

Through the metaphor of 'spiritualis uterus' or 'spiritual womb', Aquinas merges the Roman institution of 'patria potestas' with the theological concept of the natural law, providing a robust defense of Jewish parental rights. And since the demands of natural justice, for Aquinas, are expressions of God's wisdom, Jewish parental rights are from God.

Aquinas addresses the question once again in his *Quodlibetales* 2.4.2 debated in Paris sometime in 1268-1272.[130] Question 4 of part II states that at the session:[131]

> whether the children of Jews are to be baptized when their parents are unwilling. Thus infidels and Jews do not have paternal rights over their children. Therefore, their children should be baptized when their parents are unwilling.

The text of the miscellaneous question is almost identical to II.II 10.12.[132]

Aquinas addresses the topic a third time in his *Summa* at III 68.10, in the context of his discussion of the sacrament of baptism, written in months before December 1273, before he stopped work.[133] The article seems a condensed version of QDL 2.4.2 and II.II 10.12, but with a different authority cited in the contrary

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[129] II.II 66.6 ad 2: 'et de plagio, quod est furtum hominis, pro quo quis morte punitur, ut patet Exod. XXI'.

[130] Cited hereafter as QDL. Torrell says that questions I-VI and XII come from the period 1268-1272, but beyond this it is difficult to situate them with certainty. Jean-Pierre Torrell, *Saint Thomas Aquinas,* Vol. 1, *The Person and His Work* (Revised ed. Washington D.C. 2005) 337.

[131] QDL 2.4.2: ' videtur quod pueri Iudaeorum sint baptizandi invitis parentibus. Sic ergo infideles et Iudaei non habent ius paternae potestatis in suos filios; possunt ergo eorum filii baptizari eis invitis'.

[132] QDL 2.4.2: 'Dicendum, quod maximam auctoritatem habet Ecclesiae consuetudo, quae semper est in omnibus aemulanda: quia et ipsa doctrina Catholicorum doctorum ab Ecclesia auctoritatem habet; unde magis est standum consuetudini Ecclesiae quam vel auctoritati Augustini vel Hieronymi, vel cuiuscumque doctoris'.

[133] The *Tertia Pars* was probably begun in Paris in 1271-1272, and Aquinas wrote it until December 1273 in Naples, which is the date he stopped writing. Torrell, *Person and Work* 333.

arguments. He sets Gratian's D.45 well known prohibition of forced conversions:[134]

> There is a contrary argument in the Decretum Dist. xlv, a canon from the council of Toledo which states: the holy synod commands concerning Jews that henceforward none of them be compelled to believe through violent force (vis): for such are not to be saved against their will, but willingly, that their righteousness may be without flaw.

Aquinas leaves out most of the argumentation we have seen in his other treatments of the subject.

In the 'respondeo', Aquinas counters objections by arguing, as he did in II.II 10.12, that children either have the use of reason or they have not. If they have reason they can judge for themselves the things that are of divine or natural law, and so can even receive baptism or contract marriage against the will of their parents.

Another difference between Aquinas's discussion in III 68.10 and II.II 10.12 is the order of the objections. Aquinas cites a different first objection, which may indicate that by 1273, Aquinas thought the argument of the danger of everlasting death had become more influential. Again, Aquinas thinks that the first objection is usually the strongest argument against his position. It seems, therefore, that both canon law justifications for abrogating parental rights of Jews (II.II 10.12 ad 1), and the argument based on everlasting death (cited in both II.II 10.12 ad 1, and III 68.10 ad 1), are the most prominent arguments set forward for overriding Jewish parental rights.

Indeed, the argument of the danger of death is a premise in the Benedict XIV's policy, which asserts it is praiseworthy if a Christian were to baptize a Jewish child near death against the will of their parents. Pius IX's decision regarding Edgardo Mortara was an implementation of Benedict XIV's teaching on when forced baptism is lawful. Such a premise is likely behind the

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[134] QDL 2.4.2: 'Sed contra est quod in decretis, dist. XLV, ex Concilio Toletano, sic dicitur, "de Iudaeis praecepit sancta synodus nemini deinceps ad credendum vim inferre, non enim tales inviti salvandi sunt, sed volentes, ut integra sit forma iustitiae".' Gratian placed three canons treating Jews in D.45 c.3-5, the most important being canon 57 of Toledo IV that discussed the coerced conversion of Jews to Christianity.

current canon law that Cessario cites, which allows for a necessity argument.[135]

As explained above, Aquinas states in the 'sed contra' of II.II 10.12, that Jewish parents would lose the rights of parental authority over their children as soon as these were Christians. The papal counsel appeals to this text in its argument against the Mortara Syllabus, that Edgardo cannot be returned to his parents. But after a reading of Aquinas's teachings in the context of the scholastic genre of the disputed question, it is clear that the citation of a 'sed contra' is a proof text for their position, and not Aquinas's view. The problem with this reading of Aquinas is that it misinterprets the 'sed contra' for Aquinas's answer to the question in II II 10.12, and reads the statement out of the context of the rest of his teaching on the intention of the minister and the recipient for a valid baptism. The reading also ignores his teaching that baptism of an infant against will of parents, even to save it from spiritual death, is considered a dangerous innovation against the custom of the Church, and an attack on the natural law. When Aquinas is read in historical context, it is clear that he argued against theological and legal arguments quite similar to Cessario's, which assume that 'higher loyalties' to the Christian faith override the parental rights of unbelievers.

Cessario's Argument as another Theology of Forced Baptism against the Custom of the Church

Cessario's position, as well as the current canon he cites, assumes that baptism of a child against the will of its parents in the case of an infant in danger of death is lawful and valid. In so far as Aquinas's teaching is concerned, the baptism of Edgardo Mortara, or any child against the will of the parents, is not valid, lawful, or praiseworthy, but a dangerous innovation contrary to the custom of the church and the natural law. Aquinas consistently rejected

[135] Not all agree. John W. Robertson, 'Canons 867 and 868 and Baptizing Infants against the Will of Parents,' *The Jurist* 45 (1985) 631-638, who concluded 'it is more difficult to justify baptizing an infant, even in danger of death, when the parents (or those who take their place) are opposed'.

the legal and theological arguments that attempted to justify these violent and sinful acts. When Aquinas's teaching is considered in the context of thirteenth-century theological arguments for forcibly converting Jewish children, it is clear that he defended Jewish parental rights in a Christian culture that took Christian missionizing of the Jews very seriously.[136] He did so by working to overcome what seemed to many jurists as a perceived conflict between the Christian faith and rights: the Roman legal institution of 'patria potesta's versus the legal principle of the priority of the Christian faith. Kleinberg describes this view, which is expressed in Benedict XIV's exceptions to forced baptism: 'Since there can be no higher goal than defending and promoting Christian faith, other considerations must give way to this basic policy.'[137] In a similar spirit, Cessario asks:[138]

> Should putative civil liberties trump the requirements of faith? . . . the honor we give to mother and father will be imperfect if we do not render a higher honor to God above.

Cessario admits the case pits Christian against Jew, but he thinks the more important and deeper lesson is that the Mortara affair highlights something Jewish and Christian communities share:[139]

> Jews and Christians alike pledge a higher loyalty that they honor in ways that seem incomprehensible to the world. It is a secularist denial of those higher loyalties that threatens both synagogues and Church.

Several Catholic thinkers also emphasize this human versus supernatural theme, insisting that a materialistic view prevents one from seeing the deeper reality of the abduction. The Italian Church historian, Vittorio Messori, examines Mortara's personal archive and also defends the abduction.[140] Catholic theologian Roy Schoeman claims the case:[141]

> sits at crossroads of the greatest social transformation of modern times: from a fundamentally religious view of the world to a fundamentally

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[136] Jeremy Cohen, *The Friars and the Jews*.
[137] Kleinberg, 'Depriving Parents' 135.
[138] Cessario, 'Non Possumus' 58.
[139] Ibid.
[140] Vittori Messori, *Kidnapped by the Vatican? The Unpublished Memoirs of Edgardo Mortara* (San Francisco 2015).
[141] Schoeman, Foreword to Messori, *Kidnapped by the Vatican?* vii.

> materialistic one. Those two views can lead to diametrically opposed conclusions about the Mortara case.

Anna Momigliano observes that both Cessario and Messori are:[142]

> making a larger theological argument—about divine doctrine trumping human morality, and about religion taking precedence over civil rights.

Schoeman assumes that the objective truths of the Catholic faith include the idea that parental rights are abrogated by the effects of baptism:[143]

> If, however, one accepts the teachings of the Church about the effects of the sacraments and the conditions for eternal salvation, might one not conclude that the pope had not only the right, but also the duty, to do as he did?

Aquinas does not accept the simplistic dichotomy of higher loyalties to God versus human law. Aquinas explicitly argues against the claim that it is necessary to baptize children of unbelievers even against the will of the parents in order to save them from everlasting death. His teaching, therefore, denies the rationale for the exceptions to forced baptism of Jewish children articulated in Benedict XIV's letters, and adopted by Pius IX. Indeed, the care that Jewish parents provide their children is not only an aspect of civil law, but it is also a 'spiritualis uterus' in the order of the natural law, which is an expression of God's wisdom and will.

It is deeply misleading to cite Aquinas as theological support for the forced baptism of Mortara since Aquinas stands on the side of a tolerant tradition that defends the rights of Jewish parents. Cessario's argument stands in line not with Aquinas but with a French anti-Semitic Dominican tradition represented by William of Rennes and Vincent de Beauvais. His essay is another theology of forced baptism against the custom of the Church.

Saint Leo University.

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[142] 'Some Catholics Still Defend the Kidnapping of Edgardo Mortara', *The Atlantic.com* (January 2018).
[143] Schoeman, 'Foreword' ix-x.

Half a Century of Research on the First Papal Decretals (to c. 440)

David d'Avray[1]

A review article can be useful when contributions to a field are not only numerous but also too widely scattered for a specialist in the field, but not on that particular theme, to hold them easily before the mind. Articles and books on early papal decretals are scattered in more than one sense. They have appeared in a large number of journals not closely connected in theme, as well as in a recent burst of books, and they have come out of several different historiographical and national scholarly traditions. The object of all this research, on the other hand, can be tightly defined: the emergence of a tradition of papal decretals. The aim of the survey that follows is to bring these books and articles within a common frame. To list some high-points of the recent work: in answer to the question 'what was the first decretal' there are scholarly answers by Christian Hornung, Alberto Ferreiro, Dominic Moreau and Yves-Marie Duval. For the key pontificate of Innocent I there is the unpublished thesis of Malcolm Green. On the development of papal power and ideology, key names are Walter Ullmann, Geoffrey Dunn, George Demacopoulos and Kristina Sessa. For the setting in late Roman imperial governmental culture, the compressed comments by Caroline Humfress can hardly be bettered.

In her book Caroline Humfress puts the spotlight on a legal mentality around the papacy in a broad context of the pervasive influence of late Roman legal training:[2]

> The papal *scrinium* … developed its own style of epistolary communication, using arguments developed from scripture, from the writings of key ecclesiastics, and from Roman jurisprudence. This type of activity suggests that at least some of the personnel who staffed the

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[1] I am indebted various scholars for help in preparing this, above all to Geoffrey Dunn, Conrad Leyser and Ken Pennington.

[2] *Orthodoxy and the Courts in Late Antiquity* (Oxford 2007) 211-212.

> papal offices were capable of appropriating the bureaucratic rhetoric of the imperial chancellery [combined with traditional Christian epistolary conventions] … Individual bishops of Rome, at least from the mid-late fourth century onwards, also made a paradigmatic use of civil law techniques in order to justify their pontifical sentences. … The techniques of the first papal decretalists were, of course, exactly the same as those employed in the drafting of imperial rescripts. The Pope, by means of his decretals, responded to the questions of bishops who found themselves in difficulties concerning either the judicial organization of the church or the application of substantive principles of *ius ecclesiasticum*. In this context, the elaboration of a law specific to the church was achieved through the same mechanisms as the elaboration of late Roman Law itself.

Humfress's whole book shows the pervasive influence of this legal culture.

The First Decretals

It is worth noting that Humfress is comfortable with the term 'decretal' as applied to to papal documents of the decades around 400. As will be reported below, Geoffrey Dunn takes a different view (though he is on the whole in sympathy with Humfress' general interpretation), but he seems to be in a minority here, and we do need a term for the new kind of papal letters that seems to be modelled on imperial rescripts. For convenience, it will be used below when discussing scholars who regard the term as unproblematic.

As will become clear, the subject of early decretals has become much 'hotter' in recent decades, not only or even mainly through argument about terminology. For a distilled version of the state of research before the flood of new studies—which do not supersede it so much as add new perspectives and dimensions—one may turn to Jean Gaudemet's work, which may stand for several of different studies by this great historian of church law in late Antiquity.[3] Chapter three is devoted to papal decretals of the fourth and fifth century and is a fine

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[3] *Les sources du droit de l'église en Occident du IIe au VIIe siècle* (Paris 1985).

compressed summary.[4] Gaudemet stays on the sidelines of the argument about which pope first issued a surviving decretal, Damasus or Siricius (below the arguments for the primacy of Siricius are deemed preferable). He discusses the concept of a decretal, noting that the terminology was imprecise in this early period. The substance is recognizable though: local problems are pushed up to the pope who formulates rules and lets the local authorities apply them to the concrete cases. Often sets of problems are sent together, and the response, 'without being a "code" . . . constitutes a guide for the day to day actions of the pastor'.[5]

The characteristics of a decretal and the history of the genre in the period that concerns us (through to the start of Leo I's pontificate) get a full and detailed treatment by Detlev Jasper in Jasper and Horst Furhmann.[6] Jasper develops a convincing ideal-type of a decretal: the debt to Roman imperial *responsa*, the preambles or *arengae*, the relation of decretals to conciliar canons (equality of authority achieved in the fifth and sixth centuries) their legal force – the 'dispositive' part, their sources (biblical texts, canons of Nicaea, sometimes previous decretals), papal concern for their wider distribution via the immediate recipients. He offers a succinct analysis of the three small collections which seem to have been compiled long before the three larger collections (*Frisingensis Prima*, *Dionysiana*, *Quesnelliana*) which are the first to have survived in their original form.[7] The five or six decretals in question where these very early collection where these early small collections are concerned—three of Innocent I, one of Zosimus, and two of Celestine I—are conveniently listed by Jasper.[8] Equally valuable

[4] Ibid. 57-64.
[5] Ibid. 63-64.
[6] *Papal Letters in the Early Middle Ages* (History of Medieval Canon Law; Washington, D. C. 2001)7-41.
[7] For the whole sequence of canon law collections up until into the twelfth century, historians can turn to Kéry.
[8] Ibid. 23; In the new version of Jaffé's register of papal letters, JH[1] 665, 675, 691, 745, 821, 823.

are sections dedicated to the decretals of Innocent I and Celestine I, indicating which letters survive in which canon law collection.[9] These early small collections do not include the letter which Jasper and probably a majority of scholars continue to regard as the first decretal JH[1]605, Pope Siricius's *Directa ad decessorem*, to Himerius of Tarragona.

Jasper rejects the argument that a surviving decretal *Ad Gallos episcopos* of pope Damasus (366-384) should be considered the first surviving decretal, rather than Siricius's decretal of 385.[10] The priority of Damasus's letter has had and still has serious defenders, among the Charles Pietri, who gives a detailed analysis of the letter and does not hesitate to call it 'la première décrétale.'[11] Jasper's reasons for rejecting this theory look strong to me, but the debate about this Damasus document will not go away. Yves-Marie Duval makes a serious effort to present the letter as a decretal issued under Damasus. Interestingly, Duval thinks that Jerome himself was behind it, drafting for Damasus, rather as a modern speech writer does for a head of state.[12] Even if Duval is right, however, it should be noted that in one key respect at least *Ad Gallos episcopos*, whoever the author, is less important than Siricius's *Directa ad decessorem*, because the *Ad Gallos episcopos* did not enjoy a large reception in subsequent centuries in the West, while *Directa ad decessorem* was widely diffused.

The primacy of Siricius's *Directa ad decessorem* is unequivocally endorsed by Klaus Zechiel-Eckes who stays close to Detlev Jasper's definition of a decretal. Zechiel-Eckes defines a decretal as 'an answer of the bishop of Rome, interpreting the law or when necessary making it, to a question from or report by

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[9] Jasper, *Papal Letters* 35-38.
[10] Ibid. 28-32.
[11] Pietri, *Roma Christiana: Recherches sur l'Église de Rome, son organisation, son politique, son idéologie de Miltiade à Sixte III (311-44)* (2 vols. Bibliothèque des Écoles Françaises d'Athènes et de Rome 224; Rome 1976) 1.764-772.
[12] Duval, *La décrétale Ad Gallos episcopos: son texte et son auteur, texte critique, traduction française et commentaire* (Supplements to Vigiliae Christianae 73; Leiden 2005) see especially131, 137-138.

a bishop.'[13] He points out that 'So far as content is concerned, problems of discipline or questions relating to the structure of the Church are central—rarely dogmatic controversies—so that a legalistic and often peremptory discourse characterizes the style of these documents.'[14] 'In their structure, the early decretals to a considerable extent conform to Roman official and imperial documents in letter form'. [15] Zechiel-Eckes probably did not mean that these structural features mark decretals out from all other papal letters. He notes the 'repeated use of words of command and comments that 'All these features of Roman official documents reappear in the early decretals, especially in the preambles with their extensive explanations of policy which are characteristic of the decretals of popes from Siricius to Leo I'.[16] He also stresses that an important genre marker of early decretals was the command that they be further distributed.[17] The date of the first 'decretal' is thus a matter for debate primarily among historians of late Antiquity, while the contents of Siricius's decretal matter not only for their own time but for the whole period up to Gratian's *Decretum* in the twelfth century. Early medievalists too therefore have something to learn from the detailed commentary on the decretal in Christian Hornung.[18] In addition to the interpretation of the individual chapters, there is a substantial introduction to the style and form of the decretal. Following Jasper and others he emphasizes the debt to the

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[13] Zechiel-Eckes, *Die erste Dekretale. Der Brief Papst Siricius' an Bischof Himerius von Tarragona vom Jahr 385 (JK 255)* (MGH Studien und Texte; Hannover 2013) 3.
[14] Ibid. with n.12.
[15] Ibid. 3-4.
[16] Ibid. 4: 'decrevimus, iubemus' oder 'statuimus' are given as examples.
[17] Ibid. 5 n.20: where he cites Carl Silva-Tarouca, 'Beiträge zur Überlieferungsgeschichte der Papstbriefe des 4.-6.. Jahrhunderts', *Zeitschrift für katholische Theologie* 43 (1919) 467-481, 657-696 at 628-630 and *Acta conciliorum oecumenicorum*, edd. E. Schwartz and J Straub (Strassburg-Berlin 1914-1984) XXXX.
[18] *Directa ad decessorem: Ein kirchenhistorisch-philologischer Kommentar zur ersten Dekretale des Siricius von Rom* (Jahrbuch für Antike und Christentum, Ergänzungsband Kleine Reihe 8; Münster 2011).

imperial chancery, and gives supplementary evidence for this intuitively plausible conclusion. Hornung notes a change of gear however from the ninth chapter of the decretal on: the decretals in this second half have no 'narratio' and their discourse is reminiscent of synodal canons.[19] So Hornung's suggestion is that chapters 9-14 were based on canons of a Roman synod, added to the responses to the questions from Himerius. He thinks it likely that the record of the synod was worked over by the papal chancery (which, he also believes, may well have existed by this time.[20]

A different view of the decretal's significance is taken by Alberto Ferreiro.[21] Like Geoffrey Dunn (on whom see below) Ferreiro tends to minimize the intended force of the decretal and its significance generally. Against Detlev Jasper, he argues that:[22]

> initially the decretal was directed only at the church in Hispania and Gallia. … Siricius nowhere said that his decrees were to be promulgated to the universal church, East and West. All his directives to Himerius regarding its dissemination are confined to Hispania and (southern) Gallia.

Jasper had pointed to the word 'universorum': 'all our brothers', but Ferreiro counters that:[23]

> context demands that *universorum* was a provincial reference to Hispania and Gallia only, and beyond. Administratively Himerius was hardly in a position to carry out the distribution of the decretal to the universal church.… Since the teaching, according to Pope Siricius, was already known in East and West there would be no need to promulgate it elsewhere.

Perhaps one can reconcile the positions of Ferreiro on the one hand and Jasper and Hornung on the other. The following formula narrows the gap between their views: Siricius thought his decisions were binding generally ('statuta sedis apostolicae . . . nulli sacerdotum . . . ignorare sit liberum') but in practical

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[19] Ibid. 73.

[20] Ibid. 73-74. Hornung updated his high estimate of the importance of the letter to Himerius in 'Siricius and the Rise of the Papacy', *The Bishop of Rome in Late Antiquity*, ed. Geoffrey D. Dunn (Farnham 2015) 57-72.

[21] 'Pope Siricius and Himerius of Tarragona (385): Provincial Papal Intervention in the Fourth Century', *Bishop of Rome* 73-85.

[22] Ibid. 81.

[23] Ibid. 83.

terms he wanted Himerius to distribute the decretal to neighboring dioceses only.[24] It goes without saying that Siricius's views of the weight of apostolic 'statutes' cannot be taken as evidence for general consensus in the West.

Ferreiro's move to cut the decretal to Himerius down to size actually includes considerations tending to emphasis the precocity of 'Petrine' claims. He points out that 'earlier Roman pontiffs … had developed the link between the see of Rome and Matthew 16: 18-19, where Jesus designates Peter as the "rock" of the church' and that 'by 354 the feast of the "birth of Peter's chair" was added to the western liturgical calendar'.[25] The paper cannot therefore be neatly aligned with the school of 'minimizers' of papal authority in late Antiquity. His aim is to caution against extravagant generalisation on the basis of the letter to Himerius. However it may be with his argument, it should not detract attention from the unsolicited demand for papal decisions, the extent of which was manifested not only by letters asking for answers from the pope, but also by the private collections of such answers put together in the fifth century.

The whole broad problem of the genesis of papal legislation is thoughtfully addressed by Dominique Moreau.[26] In the debate

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[24] Note the comment of Charles Pietri, *Roma Christiana*: *Recherches sur l'église de Rome, son organisation, sa politique, son idéologie de Miltiade à Sixte III (311-440)* (2 vols. Bibliothèque des Ecoles Françaises d'Athènes et de Rome 224; Rome 1976) 2.1053-1054: 'Himère reçoit la charge d'informer son diocèse, les prélats de sa province et aussi ceux de la Carthaginoise, de la Bétique, de Lusitanie et de Gallécie, tout l'Espagne chrétienne . . . Le style, la diplomatique de la lettre appuient cette déclaration d'authorité. Batiffol déja, Getzeny, Caspar ont relevé le fermeté des expressions pontificales—*jubemus, diximus, decernendum, censemus, mandamus, decernimus*—et aussi l'usage d'un vocabulaire emprunté à la chancellerie officielle, *relatio, responsum'*.

[25] Ferreiro, 'Pope Siricius' 83.

[26] Moreau, '*Non impar conciliorum extat auctoritas:* L'origine de l'introduction des lettres pontificales dans le droit canonique', *L'Étude des correspondances dans le monde Romain de l'antiquité classique à l'antiquité tardive: Permanences et mutations*: *Actes du XXXIIe colloque international de Lille 20-21-22 novembre 2008*, edd. Janine Desmulliez, Christine Hoët-van

about whether Siricius's letter to Himerius or the earlier letter by pope Damasus 'ad Gallos episcopos' should be regarded as the first surviving papal decretal, Moreau supports what seems now to be the more general view that the Damasus letter cannot usefully be called a decretal, since it is not included in any of the principal canon law collections, whereas the letter of Siricius to Himerius is in 18 collections prior to the seventh century. Nonetheless Moreau implies that the letter to Himerius did not come out of nowhere. Survival statistics 'should not be elevated to the status of dogma'; Siricius was replying to a letter that had been sent to Damasus; and the *Liber pontificalis* attributes to Damasus a *constitutum* concerning the whole Church. A letter from a Roman synod 'composed in accordance with the rules of Civil [i.e. imperial] rescripts and intended to be diffused as widely as possible' may not count as a decretal, because it is thoroughly theological and included in hardly any canon law collections, but it is still a kind of forerunner. The elements of the papal decretal system were already falling into place in Damasus's day, and Moreau feels able to say that 'the pontificate of Damasus appears to be the true point of departure for the development of the bishop of Rome's legislative powers'.[27]

Moreau rightly separates the question 'when was the first decretal' from the question: 'when were the first collections of papal decretals'—even though the questions are connected, in that inclusion in a recognizable canon law collection is—for purposes of historical analysis—a strong criterion for qualification as a decretal. This sounds circular, but in fact the reasoning is helical. Siricius's letter to Himerius is the start of a recognizable genre of letters making rulings with the expectation that they will be passed on to and applied by others in addition to the recipients, and in which dogma is secondary; when groups of letters most of whom meet these criteria are collected together with non-dogmatic conciliar canons, we have another, overarching genre containing the first; if these collections include

Cauwenberghe, Jean-Christophe Jolivet (Travaux et Recherches; Lille 2010) 487-506.

[27] Ibid. 496-498.

a minority of letters which don't really fit the criteria (i.e., they are about pure dogma – not even the disciplinary enforcement of it), their inclusion means that they can be regarded as decretals at the point of reception into one of these collections.

Moreau argues that one has to wait until the second quarter of the fifth century for such collections.[28] There would seem to have been three (or conceivably four) of them, identifiable as blocks within later collections.[29] The compilation of papal decretals may have begun as reaction to a collection compiled by African bishops to help them in the argument with the papacy known as the 'Apiarius affair':[30]

> The sovereign pontiffs perhaps thought that the time had come to elevate their own instructions to the rank of true canonical texts, to make them the equal of synodal ordinances.

Following Hubert Mordek, Moreau wonders whether Leo the Great may have been behind one of these early collections, the so called *Epistolae decretales*, either at the start of his own pontificate or earlier, when he was an influential deacon.[31] We will see that Geoffrey Dunn suggests something similar in his essay 'Collecti Corbeiensis'.

Innocent I

It is an obvious point but one worth stressing that the decretal collections can only begin after the first decretal has started a genre. Innocent I is the most important source of early papal law. Once we reach his pontificate we are unequivocally dealing with a genre. Fortunately, his letters have been well studied in recent decades, above all by Malcolm Green, Walter Ullmann, and Geoffrey Dunn, who has in hand an edition of Innocent's letters and who has produced a string of articles about them at a prodigious rate.

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[28] Ibid. 500, 506.
[29] Ibid. 500 n.65.
[30] Ibid. 499.
[31] Ibid. 499, 502.

Currently the only monographic study of Innocent I is the high quality but unpublished thesis by Malcolm R. Green.[32] He provides a sustained analysis of some of Innocent's key decretals and deserves close scholarly attention, especially where he makes a contribution not available elsewhere in print. So far as the letters relating to Thessalonica are concerned, the contributions of Green's thesis have been superseded to some extent by Geoffrey Dunn's articles, reviewed below. Green shows Innocent's moving towards a new system of vicariates through which the bishop of Rome would rule the Western empire and, in the East, Illyricum. The establishment of a vicariate by which the bishop of Thessalonica represented the authority Rome was not just a Roman power-grab: Thessalonica sought power over Illyricum and needed legitimation.[33]

As for the West, Green's thesis provides a detailed analysis of the rules set out in the letter to Victricius of Rouen (JH[1] 665) but also as noted earlier an illuminating comparison with a letter sent by Siricius to the bishops of Africa (JH[1] 610).[34] On the whole Innocent follows his predecessor very closely 'copied verbatim', but Green draws attention to some important additions. Disputes are to be settled by the bishops of the province and by nobody outside it, apart from the bishop of Rome. Green sees here a reaction to the prestige that Ambrose had lent to the see of Milan. The rebuttal of the argument that marriage to a widow contracted before baptism does not ban a man from a clerical career is new (Innocent must be answering the view that baptism wipes the slate clean, so that the normal 'bigamy' rules, banning twice-married men from a clerical career, do not apply). In another addition, Innocent spells out the conditions under which rebaptised Novatians and Donatists (this is now Green understands 'Montenses') may be allowed back into the Church. Innocent I gives a new rulings about the obligation to remain unmarried of monks who join the clergy (who could normally be

[32] 'Pope Innocent I: The Church of Rome in the early Fifth Century' (Oxford University D.Phil. thesis, 1973).
[33] Ibid. 47, 50.
[34] Ibid. 100-104.

married), and about women who take the veil or who have said they would do so but who subsequently get married (those who had not taken the final step are treated more leniently), and against *curiales* joining the clergy. He explains the latter ruling by the unsuitability of recruiting men who have laid on games etc. but also by the likelihood that they would be recalled to their secular duties, under the stringent rules of the late Empire. Green's contribution shows that these things were to the forefront of Innocent's mind, as he added them to his predecessor's 'template'. Green rightly says that 'the growing importance of the monastic movement in the West' is reflected in the ruling about monks.

Green's summary of the letter to Exsuperius of Toulouse (JH[1] 675) is worth quoting as it gives a clear idea of the 'responsa' method in action.[35]

> 1.'What is to be done about deacons or priests who have begotten children after ordination?' To this Innocent replies by reminding Exsuperius both of the testimony of Scripture and of Siricius's letter to Himerius, that those who have thus shown themselves incontinent should be deposed from office. There follows Scriptural justification for this rule, much as in the letter to Victricius. Since it is possible that Siricius's letter did not reach some churches, some clerics will have an excuse for their lack of continence. In such cases they may keep their orders, but may not rise to higher office.
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> 2. 'To those who after baptism have lapsed into evil ways is penitence or communion to be denied if they request it when dying?' Innocent observes here a difference between the harsher ancient practice during persecutions and the milder one that has prevailed since. Both are justified in their time, the harsher, which granted penitence but not communion, because it kept men from falling away, the milder, granting communion also, because it may save them from eternal destruction.
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> 3. What now of those who after baptism have held civil office, involving the ordering of torture or capital punishment?' No firm ruling has been handed down in this case, observes Innocent. Scripture informs us that the civil power is the servant of God for the punishment of the wicked. All we can do, therefore, is to accept that such actions are sometimes necessary, and leave the justice or injustice of each case for God to decide.

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[35] Ibid. 105-106.

> 4. A further question: 'why do Christian men repudiate their adulterous wives, when women continue to live with their unfaithful husbands?' Innocent replies that the Christian religion condemns equally the adultery of either sex. However, it is not in practice so easy for a woman to accuse her husband, as for a man to accuse his wife, for proof is harder to obtain. When proof is forthcoming, however, communion will be denied in exactly the same way.
> 5. 'What of those who after baptism demand punishment or death for an offence before the chief magistrates?' The chief magistrates, replies Innocent, never grant such a request without a preliminary hearing; the case is then remitted to judges for decision, and sentence is pronounced accordingly. The prosecutor is therefore blameless, when a malefactor is punished.
> 6. 'Next, may a divorced person remarry?' A categorical 'No' is Innocent's answer. Both parties in the remarriage are equally guilty of adultery in such cases, and are to be denied communion.
> 7. Finally, the Scriptural canon is requested by Exsuperius, and Innocent appends the required list.

Innocent does not tell Exsuperius to pass the letter on to others, Green comments, but adds that:[36]

> it is noteworthy how Innocent expects Siricius' letter to be known and obeyed without question. The only excuse for disobedience to it is ignorance, and even that is to be punished. The claims of the Roman see are not therefore forgotten here, though they are kept in the background.

The problem of clerics ordained by the heretic Bonosus are addressed in JH[1] 691, to the bishops of Illyricum. The interpretation by Geoffrey Dunn should be compared with Green's summary of Innocent's stated views:[37]

> 1) ordination by a heretic conveys no honour; 2) the rule of the Roman church is that lay communion only be granted to returning heretics, while those who have lapsed from the catholic Church must undergo penance first; 3) Anysius and the synod of Capua did agree to accept Bonosus' ordinees, as did the Nicene fathers in the case of the Novatians, but these were temporary expedients, dictated by the necessities of the time and recognized as such. The ancient and apostolic rule observed by the Roman church and transmitted to those accustomed to hear her was as Innocent has stated; 4) those ordained by force, if they are proved to have immediately returned to the Church without exercising clerical functions, are to be dealt with as the Illyrians see fit. And as a general rule he

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[36] Ibid. 107.

[37] Ibid. 108-109; Dunn, 'Innocent I and the Illyrian Churches on the Question of Heretical Ordination', *Journal of the Australian Early Medieval Association* 4 (2008) 65-81.

> recommends them to see that exceptional measures do not become established practice.

Dunn took the view that for Innocent the ordinations by the condemned heretic were invalid, so the ban on re-ordination was not a ban on repeating a sacrament but a consequence of wrongdoing.[38] It is significant that Green, with his close knowledge of Innocent's mind and writings, did not find so definite a view of the problem of reordination as Dunn later would. Here I find Green's reading more convincing.

Green is also worth reading on Innocent I's letter to Decentius of Gubbio (JH[1] 701), and its stress on conformity to Roman practice.[39] Like Dunn later, he emphasizes that Innocent I is here writing as the metropolitan bishop of central and southern Italy. This makes the requirement of liturgical conformity much less dramatic: Innocent I is not as might first appear claiming that 'the entire body of the liturgy and church order was handed down intact from the first generation of Christians'.[40] Green plausibly suggests that Innocent I was reacting against the liturgical influence of Milan. He does point out that 'in at least one point, the position of the kiss of peace during the Eucharist, the usage Innocent criticizes is not an innovation at all, but the preservation in a local church of a custom which had been reformed at Rome'; and even if the letter is in a sense defensive (against Milan):[41]

> the implications of Innocent's words go further. For the whole of the West Rome is declared to be *caput institutionum*, the source and point of reference for every aspect of church order.

Power and ideology

The remaining studies to be considered are mostly concerned with tracing the bishop of Rome's efforts to assert his power, and the development of an ideological framework for it. Within that broad framework one may discern a substantial difference in emphasis. On the one hand, Walter Ullmann

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[38] Dunn, 'Innocent I' 70.
[39] Green, 'Pope Innocent I' 114-116.
[40] Ibid. 115.
[41] Ibid. 116.

analyses the letters of Innocent I, Zosimus, Boniface I and Celestine I as key stages in the creation of a papal ideology. On the other hand, Geoffrey Dunn, Kristina Sessa, and George Demacopoulos tend to minimize the extent of papal power (though not, in Demacopoulis's case, the extent of papal claims). Dunn seems to draw a line after the pontificates of Siricius, Innocent I, and Zosi-mus. He is not convinced that they were claiming universal religious power and tends to suggest that their letters offered advice rather than issuing commands, except in the bishop of Rome's own religious back yard. (It should be said that the interest of Dunn's papers far transcends his argument about the limitations of papal power.) From Boniface on, things begin to change. Sessa seems to have reached similar views independently, though in her monograph everything is seen in the light of its relation to 'household management'. Demacopoulos argues that popes talked big when they were at their weakest. We should note this divergence between his interpretation and those of Sessa or Dunn, in that Demacopoulos does not minimize papal claims, as opposed to actual power. Thus he is half way between them and Ullmann.

Ullmann deals in detail with Innocent I, Zosimus and also with two other popes whose decretals fall within the scope of this survey, Boniface I and Celestine I.[42] He is very interested in decretals but mostly from the point of view of ideology and its projection by the papacy. With Innocent I he focuses on the claims to power, and especially on what he calls Innocent's 'conquest' (Bezwingung) of History, by which he means that History was made to fit the pope's ideological claims.[43] Ullmann makes several points about Innocent: the style of his official language set the tone for centuries of decretals; the logical structure of his decretals was contagious and copied; the decretals themselves had long-term influence on canon law collections, including Gratian; and a particular conjunction of circumstances favored their assertion of papal power: the

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[42] Walter Ullmann, *Gelasius I. (492-496)* (Päpste und Papsttum, 18; Stuttgart 1981) 35-60

[43] Ibid. especially 40.

imperial rescript model and imperial weakness in the West while secular power shifted to Constantinople (together with other factors whose significance in this context is not quite so evident to me, such as Latin bible translation). Moving to Zosimus, Ullmann makes the fair point that the resistance he encountered did not prevent his ideas entering the canon law tradition.[44] His successor Boniface I intensified the association between his office and St Peter as keeper of the keys, with an eye on Constantinople's growing influence, back-projecting Petrine doctrine onto past historical facts.[45] Celestine I stated that the people should be taught, not followed, a claim which particularly and perhaps dispropor-tionately interested Ullmann because at the back of his mind no doubt lay his grand synthesis of a growth of a 'descending theme' up until the thirteenth century, with the papacy ruling subjects— followed by a contrasting 'ascending theme', in which power is derived from below, from citizens.[46]

By far the most prolific writer on what most other historians have called early papal decretals is Geoffrey D. Dunn. They are incisive and clear, advancing strong theses which inevitably encourage debate, but these are always based on evidence and well-constructed arguments. A thread running through these papers is the argument that the earliest papal decretals were not 'legislation', at least at the time when they were issued—for he agrees that later—around the middle of the fifth century even—they came to be regarded as legislation. The implicit question which his various papers address is: how far back do papal claims to rule the Church go and how early on did they have any traction with bishops outside Rome's metropolitan area? His answer is: later than most scholars have thought, by about half a century. For Dunn, the glass is always half empty.

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[44] Ibid. 37-46.
[45] Ullmann, *Gelasius* 48-55.
[46] Ibid. 56-60.

The (late) Emergence of Papal Decretals

Dunn suggests that Himerius had only been asking for counsel rather than an authoritative ruling:[47]

> While some argue that Siricius's letter was a definitive and binding ruling, and therefore an example of legislative or executive primacy, this is not the only way to interpret it. This is how Siricius saw his own position, but Himerius seems to have been asking for advice about how the Roman bishop would proceed or for information about how Rome handled similar situations, at least as far as I read the letter, so that he could make his own decision, rather than asking Rome to make the decision for him.

We do not have Himerius's letter, so do not know how he framed it. One should note that Dunn does not disagree with what has been a fairly standard assumption: that Siricius's wording seems to imply that he regards his ruling as authoritative, and not just for Tarragona;[48] Dunn's main concern is a letter of Innocent I to bishops who had been at a synod of Toledo. He contrasts the tone with that of Siricius: in this letter Innocent does not:[49]

> assert himself as the successor of Peter or make claims about what Petrine authority meant. . . . Although he was offering an opinion it was not one that he expected could be disregarded. . . . A Roman bishop could issue what appear to be binding directives to other churches (but Innocent

[47] Dunn, 'Innocent I and the First Synod of Toledo', *The Bishop of Rome in Late Antiquity*, ed. G. Dunn (Farnham-Burlington VT 2015) 89-107 at 95-96.

[48] Cf. also Dunn, 'The Bishop' 106. The wording of the letter, with key phrases italicised, as printed (without Italics) in Zechiel-Eckes, *Die erste Dekretale* 114: 'Nunc fraternitatis tuae animum *ad* servandos canones et *tenenda decretalia constituta* magis ac magis incitamus, ut haec, quae ad tua consulta rescripsimus, in omnium coepiscoporum nostrorum perferri facias notionem, et non solum eorum, qui in tua sunt diocesi constituti, sed etiam ad uniuersos Carthaginienses, ac Baeticos, Lusitanos atque Gallicos uel eos, qui uicinis tibi conlimitant hinc inde prouinciis, haec, quae a nobis sunt salubri ordinatione disposita, sub litterarum tuarum prosecutione mittantur. At *quamquam statuta sedis apostolicae uel canonum uenerabilia definita nulli sacerdotum domini ignorare sit liberum*, utilius tamen et pro antiquitate sacerdotii tui dilectioni tuae esse admodum poterit gloriosum, si ea, quae ad te speciali nomine generaliter scripta sunt, per unanimitatis tuae sollicitudinem in uniuersorum fratrum nostrorum notitiam perferantur, quatenus et quae a nobis non inconsulte, sed prouide sub nimia cautela et deliberatione sunt salubriter constituta, intemerata permaneant'.

[49] Dunn, 'Innocent I' 106-107.

> certainly did not engage in language to imply that he had), but without a sufficient mechanism to enforce it, such directives were little better than personal opinions.

Dunn is right that Roman bishops had no real enforcement mechanisms.

In tune with his minimalist motif, Dunn takes issue with, probably, most scholars about the emergence of decretals as a genre, arguing that:[50]

> the term decretal reflects more of an interpretative attitude of those who later collected the letters of the Roman bishops than of the authors themselves, at least at the start of the fifth century . . . the earliest of these letters from Roman bishops were not decretals, even though this is how they are preserved and were later regarded, but simply letters, and even as letters they are not necessarily to be considered *decreta* but rather statement of opinion . . . where those opinions were expected to be accepted by the recipient.

He focuses on two letters of Zosimus but clearly thinks his conclusions are more generally applicable. Dunn argues that Innocent I's letter to Victricius of Rouen should not be regarded as a decretal, and that perhaps it was just a statement of opinion, though it and other early letters of the same kind were preserved and later regarded as decretals. On the other hand, Dunn himself draws attention to language that sounds very authoritative: it was to be a rule book (liber regularum) to be distributed to other bishops and a 'didascalicum atque monitorem'—a set of instructions and a prompter, as if Rome had the script to be followed. In his discussion of Zosimus's letter to Hesychius of Solin (JH[1] 745), he argues that the letter:[51]

> was not written by Zosimus as a binding directive but as an explanation of the church's law, based on tradition, which was binding.

but this hardly does justice to Zosimus's language:[52]

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[50] Dunn, 'The Emergence of Papal Decretals: the Evidence of Zosimus of Rome', edd. Geoffrey Greatrex and Hugh Elton, *Shifting Genres in Late Antiquity* (Farnham-Burlington VT 2015) 81-92 at 81 and 85.

[51] Ibid. 92.

[52] PL 67.262-263: 'Hoc autem specialiter, et sub praedecessoribus nostris, et nuper a nobis interdictum constat, litteris ad Gallias Hispaniasque transmissis, in quibus regionibus familiaris est ista praesumptio'.

> It is clear that this in particular, both under our predecessors, and recently by ourselves, has been forbidden, in letters sent to Gaul and Spain, regions where this presumption is familiar.

Dunn is right of course, as already noted, that popes had no enforcement mechanism—'there are no statements about what failure to comply would elicit from Rome' in Zosimus's letter to Hesychius of Solin'.[53] He does a service furthermore by directing our attention to heterogeneity in the letters included in the earliest canon law collections: the letter to Hesychius is quite different in genre and 'setting in life' from the other letter discussed in detail, 'Ex relatione'. He is also right to direct our attention to inclusion in a canon law collection as a way of defining a 'decretal', irrespective of the original character of the letter.[54]

A Marriage Case

Dunn's general tendency to accentuate the difference between the early fifth century and later periods of papal history comes out again in his article that reinterprets a fifth-century anticipation of the 'Martin Guerre' problem: a spouse is captured, missing, and believed killed, the other spouse remarries, then the missing person returns.[55] In this case we know even the names: Ursa was the wife who went missing, Fortunius her husband, and Restituta the second wife. Innocent wrote to Probus, 'a high-ranking member of the most prominent senatorial, aristocratic, Christian family in Rome'.[56] Dunn thinks this was because Innocent had some personal link with Probus, not because the latter had some official standing in a marriage case as a secular official. Dunn is arguing against the view that

[53] Dunn, 'Emergence' 89.

[54] In this paper Dunn may not have had access to the discussion of a decretal's characteristics by Klaus Zechiel-Eckes (it appeared in 2013 the year when the conference on which *Shifting Genres* was based took place), but Dunn would probably continue to differ.

[55] 'The Validity of Marriage Cases of Captivity. The Letter of Innocent I to Probus', *Ephemerides Theologicae Lovanienses* 83 (2007) 107-121.

[56] Ibid. 120.

'Probus was the civil official who would have been responsible for implementing the bishop's decision': the civil (secular) law had nothing to do with the case because it regarded the marriages of captives as invalid ipso facto. Innocent would have known this, Dunn says, so when he notes that Ursa has not been cast out by a 'divortium' he cannot be talking about a Roman civil law divorce but an ecclesiastical divorce on grounds of adultery. Innocent I was not bothered about the secular law, whose assumptions about marriage and captivity he does not recognize. Innocent I's ruling would have restored Ursa's status in the Christian community and might have led to Fortunius's excommunication, so could have had a practical effect.[57] One might add, though Dunn doesn't, that if Fortunius was a dependent of Probus, the latter might have acted as an informal enforcer.[58]

Marriage and the Clergy

There is no indication that Ursa's husband was a cleric, but much of what the first papal decretals have to say is about the married clergy. We need to remember that celibacy in this period meant celibacy, sexual abstinence, within marriage. According to the ideal blueprint, a cleric would marry young and could have normal sexual relations with his wife as he worked his way up the clerical 'cursus honorum', but before becoming deacon the couple would have to decide if they were prepared to give up sex. If so, he could continue on his upward trajectory. By contrast with the later Byzantine system for bishops, the cleric and his wife did not separate and live apart. The clerical marriage is understandably an important theme in early decretals. Dunn

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[57] Ibid. 109-120.

[58] An alternative interpretation to Dunn's will be set out in the chapter on marriage in my forthcoming *Papal Jurisprudence, c. 400: Sources of the Canon Law Tradition* (Cambridge 2020). Dunn himself leaves the reader a little confused: he wrote on p. 118 that 'I think we can take it that Innocent accepted divorce on the grounds of adultery as legitimate, even though, as we have noted above, he indicated that only death dissolved a marriage'.

detects a shift of emphasis between Siricius and Innocent I.[59] They both stress that the clergy—though only from deacons upwards in the hierarchy—should give up sex, and also stress the incompatibility of second marriages with clerical status, but with Innocent the emphasis seems to have shifted to the latter issue, clerical status and second marriages. The reason for the shift may have been a divergence of views between, on the one hand, Ambrose of Milan, who thought that a marriage while a pagan counted so that a widowed man who remarried after baptism could not enter the clergy, and, on the other, Jerome, who thought that baptism wiped the slate clean so that the pagan marriage did not count towards the total. Innocent I may have been reacting against Jerome's view. Questions of the legal rights of children from a marriage before baptism may have been an issue in the background.

The ecclesiastical hierarchy

Arguably, both the rule against second marriages and the celibacy rule were ways of marking hierarchy. The 'one marriage' rule marked out the clergy from the general run of the laity, and the celibacy rule marked out deacons, priests and bishops from the lower ranks of the clergy.[60] Several of Dunn's papers elucidate the character of this ecclesiastical successor of the Roman system.[61] There was a 'cursus honorum' to slow down progress through the clerical ranks at Rome. The aim seems to have been 'to prevent the inexperienced and untested

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[59] 'Clerical Marriage in the Letters of Late Antique Roman Bishops' *Men and Women in the Early Christian Centuries*, edd. Wendy Mayer and Ian J. Elmer, (Early Christian Studies 18; Strathfield NSW 2014) 293-313.

[60] Mary Douglas, 'A Feeling for Hierarchy', *Mary Douglas: A Very Personal Method. Anthropological Writings drawn from Life*, ed. Richard Fardon (Los Angeles 2013) 15-36 for reflections on this type of society.

[61] Geoffrey Dunn, 'Deacons in the Early Fifth Century: Canonical Developments in Rome under Innocent I', in *Diakonia,* Diaconiae*, Diaconato. Semantica e Storia nei Padri della Chiesa. XXXVIII Incontro di studiosi dell'antichità cristiana* (Studia Ephemeridis Augustinianum, 117; Rome 2010) 331-340.

from reaching the episcopate' (p. 339). The diaconate could be a direct route to the episcopate, despite the apparent implication of Siricius's letter to Himerius that the presbyterate was a necessary intermediate stage. Dunn suggests that it was not, and that Innocent I himself may have moved from deacon to bishop of Rome. Another important point made *en passant* (p. 339) is that the 'digamy' or 'bigamy' ban applied to all the clergy, not just to priests.[62]

Dunn sets out to establish the setting in life of this letter.[63] It has been interpreted as a general set of ecclesiastical rules but Dunn suggests that it focused only on problems that Victricius had brought to him: specifically, problems with other bishops in his diocese.[64] The bishops of the diocese were split in their attitudes to asceticism, clerical celibacy and the cult of relics, Victricius and his side approving of it.[65] They were apparently in the minority. This may have brought suspicion of Priscillianism (a movement held to have heretical ideas of an ascetic colour) upon him, and his turning to Innocent I was a pre-emptive strike. Innocent I's letter stresses the requirement that episcopal appointments be approved by the metropolitan bishop, and the hope may have been that this would give Victricius the control he needed. Innocent is referring to the ordination of bishops, not of other clerics, Dunn's evidence being the rubric in the *Dionysiana* and the forerunner text from Nicaea, canon 6. Dunn notes though that Innocent does not repeat Nicaea's rules about the role of the other bishops of the province in choosing a new bishop. 'Is that to be presumed, or has there been an attempt to strengthen the power of the metropolitan by making his consent the only essential one?'[66] Innocent does repeat Nicaea's rule

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[62] Ibid. 339.
[63] Geoffrey Dunn, 'Canonical Legislation on the Ordination of Bishops: Innocent I's Letter to Victricius of Rouen', *Episcopal Elections in late Antiquity*, ed. Johan Leemans (Arbeiten zur Kirchgeschichte 119; Berlin 2011) 145-166.
[64] Ibid. 148.
[65] Ibid. 154.
[66] Ibid. 156.

(canon 4) that one bishop alone should not ordain another bishop. In a particularly insightful passage, Dunn draws attention to problems of application to actual elections that neither the Council of Nicaea nor Innocent's letter addressed, e.g. 'what if an absent suffragan bishop objected, would that veto the ordination?'[67] Dunn thinks that the emphasis on confirmation by the metropolitan made other questions about the electoral procedures superfluous (but this does not seem so evident to me). Dunn goes on to discuss obstacles to a clerical career, starting with the ban on men in government service joining the clergy, the rationale being that there was a danger of the emperor summoning them back to their former role. Here Innocent is in line with a Roman Council held under Siricius.[68] Dunn argues strongly that Innocent is talking about civil rather than military service: Victricius had formerly been a soldier and had suffered a lot for rejecting his military oath.[69] This isn't a ban on service by former soldiers. Dunn ends with a brief discussion of the 'bigamia' rule (marriage to a widow, or marriage after being widowed), as an obstacle to a clerical career, but does not explore its symbolic rationale.[70]

Dunn examines the rules about clerical hierarchy and the rate of progress through the ranks—which was not to be too fast.[71] But the rules do not tell us everything about what happened in practice: notably, promotion from deacon to bishop.

Gaul

In addition to tackling general themes, Dunn explores the relationship between key areas of the collapsing empire and Innocent and his successors, who may have provided a welcome element of continuity and order in an increasingly chaotic

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[67] Ibid. 159.
[68] Ibid. 160, this would be JH[1] 610.
[69] Ibid. 161.
[70] For which see d'Avray, *Medieval Marriage: Symbolism and Society* (Oxford 2005) chapter 3.
[71] Dunn, 'The Clerical *cursus honorum* in the Late Antique Roman Church', *Scrinium* 9 (2013) 132-145

world.[72] Exsuperius was the addressee of one of Innocent I's best known letters. This paper gives it a setting in life, in a Gaul that was just undergoing the early stages of the imperial Roman system's dissolution, though that outcome would not perhaps have seemed likely at the time. This account of the context is especially valuable in that the letter of Innocent I conveys no sense of the political and social crisis at Toulouse in the background. Before discussing the letter, Dunn argues speculatively but persuasively that Exsuperius was in some way responsible for saving Toulouse from capture by barbarians in 409, and that he also carried out to an impressive degree the more traditional episcopal task of feeding the poor to alleviate famine. The letter to Innocent I can be more directly connected in Dunn's view with a different kind of problem facing Exsuperius, namely a strong 'anti-ascetic' movement unfavorable to the (recent) rule that deacons and priests must give up sex. Dunn thinks that Exsuperius wrote to Innocent I to get ammunition he could use against his anti-ascetic opponents. His argument involves a chain of inferences and a little speculation, but it seems plausible.

The governance of the Gallic Church

The story of Rome's relations with the Gallic church as told by Dunn continues into the pontificates after Innocent I.[73] This is a theme to which Dunn would return: conflicts between episcopal sees aggravated by personalities and by the intervention of pope Zosimus. A deep structural cause was the principle that ecclesiastical boundaries were supposed to mirror the boundaries of imperial administration, coupled with changes in the latter boundaries. First the imperial Prefecture and then the governor-ship of the Viennensis moved to Arles, giving its

[72] Dunn, 'Episcopal Crisis Management in Late Antique Gaul: The Example of Exsuperius of Toulouse', *Antichthon* 48 (2014) 126-143.
[73] Dunn, 'Zosimus and the Gallic Churches', *Religious Conflict from Early Christianity to the Rise of Islam*, edd. Wendy Mayer and Bronwen Neil (Arbeiten zur Kirchengeschichte 121; Berlin 2013) 169-185.

bishop a claim to enhanced authority as metropolitan: but Zosimus gave its bishop Patroclus too much extra authority, harking back to an imperial administrative unit from the days before Diocletian, and demoting metropolitan jurisdictions in the process. Zosimus invoked a questionable account of the missionizing of the region by Trophimus to legitimate his changes. Dunn sets out to analyse the conflict in language from Otomar J. Bartos and Paul Wehr,[74] with some Weber thrown in (there is a brave attempt to summarise the latter's ideas in a six line paragraph!) so for instance:[75]

> we can identify political conflict for the resource of power in Gaul between Constantine III and Honorius … and the incompatible value of local versus Roman focus. Since armies were involved, we are talking about violent coercion …The agitation of Patroclus of Arles to upgrade his church to metropolitan status at the expense of Simplicius of Vienne was a rivalry based upon Patroclus' feeling of injustice at the incompatible goal of both churches wanting the power and prestige of metropolitan status . . . . Zosimus succeeded in uniting the hitherto disparate Gallic bishops into conflict solidarity against him. They believed that neither the Roman bishop nor Patroclus had the *Geltung* to order such a change.

Dunn looks at a corner of the hornet's nest stirred up in Gaul by Innocent I's successor Zosimus, whose reorganisation of southern Gaul under bishop Patroclus of Arles's authority provoked a reaction from, among others, Hilary of Narbonne.[76] This study enhances understanding of a nexus of disputes already touched on more than once. The paper is about a letter from Zosimus to Hilary (JH^1.738, Old Jaffé 332 (127)) setting the latter straight. Dunn criticises earlier interpretations of the background. Zosimus was not acting as a pawn in a plan of Flavius Constantius (a dominant political figure in the West at that time), nor an anti-Pelagian hostile to Zosimus because the latter was soft on Pelagianism. Dunn thinks (as did Erich Caspar) that the cause of the trouble was the power given to Patroclus of Arles by Zosimus, as discussed below (Dunn (2015), 'Placuit

[74] *Using Conflict Theory* (Cambridge 2002).
[75] Ibid. 183-184.
[76] Dunn, '… Quid habuerit antiqua consuetudo: Zosimus of Rome and Hilary of Narbonne', RHE 110 (2015) 31-53.

…'), but there was some reason for this extension of Arles's power, or at least, a reason for some of the extension. As a general principle ecclesiastical authority structures mirrored the structures of civil government; as the Praetorian Prefect had moved there from Trier, and the governor from Vienne, perhaps Arles was due a promotion. But Patroclus was put over an area which had not been a civil province since the third century, before Diocletian's reorganisation. Furthermore, back then Narbonne, not Arles, had been the principle see in the area. Zosimus legitimated the change by reference to a certain Trophimus who converted the area and was based at Arles. The whole story or much of it may be mythical and was quite probably concocted by Patroclus. Dunn, as he is wont to do, emphasizes aspects of Zosimus's intervention other than exercise of papal authority: his appeal to ancient custom as the justification of the change and to the multitude of fellow bishops who had endorsed the decision.[77] Zosimus, he states, 'did not want to over-emphasize claims to apostolic authority'.[78] At the same time, Dunn notes:[79]

> Zosimus's claim that the more recent boundaries were something set up by Rome and that the Gallic bishops accepted that this was Rome's creation. The implicit argument is that if Rome set up the ecclesiastical structure originally through Trophimus, Rome could just as easily have changed it and then changed it back again.

Dunn is commendably ready to present considerations that go against the general drift of his views.

Dunn reinterprets Zosimus's drastic reorganisation of the ecclesiastical government of Southern Gaul.[80] As noted earlier—there is naturally some retracing of steps in Dunn's papers—Zosimus gave a quite new prominence to the see of Arles, under bishop Patroclus, and some earlier scholars have believed that

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[77] Ibid. 49-50.
[78] Ibid. 50.
[79] Ibid. 48.
[80] Dunn, 'Placuit apostolicae (Ep. 1) of Zosimus of Rome and the Ecclesiastical Reorganization of Gaul', *Journal of Early Christian Studies* 23 (2015) 559-581.

Patroclus helped get Zosimus elected. Dunn is sceptical about that and inclines to think that Patroclus had proposed the reorganisation to Zosimus's predecessor Innocent I and that the new pope was dealing with unfinished business. In tune with his general interpretation of papal letters in this period, Dunn argues that Zosimus was not 'legislating' the proposal concocted by Patroclus, 'but offering his considerable support and endorsement to this idea'. As we have seen, the idea was to put Arles and Patroclus over an area going back to a civil unit from before the reorganisation by Diocletian, the former province of Gallia Narbonensis, with a possibly mythical missionary being invoked to help legitimate this. This was bound to be controversial, and was. Certainly, there were grounds for expanding Arles's authority. As already noted, there was a general principle that ecclesiastical units should mirror civil units, and Arles had become much more important. The Praetorian Prefect had moved there from Trier, and the governor from Vienne. That would justify some kind of promotion to primatial status, say over the Viennensis, but the apparent demotion of the sees of Narbonne and Aix en Provence from primatial status was radical. The new arrangement also obliged any cleric from the newly defined area of Arles' authority to obtain a letter from Patroclus before travelling to Rome. As often in his articles, Dunn ends by suggesting that the bishop of Rome was not 'granting' new rights but supporting claims put forward by Patroclus.[81] Honest scholar as he is, though, Dunn notes that 'We have to deal with the fact that [with regard to the restructuring of the Gallic hierarchy and demotion of metropolitans] Zosimus did start off with the forceful verb *iussimus* and go on to refer to *apostolicae sedis statuta*. At first glance this might suggest the Roman bishop acting as legislator. No doubt it suited Zosimus to be so regarded and to act as though he were in such a position as to issue such orders'.[82]

An important and insightful paper covers some of the same ground as earlier papers by Dunn on Zosimus and Gaul, but

[81] Ibid. 579.
[82] Ibid. 580.

clarifies the conflicts and also identifies deep roots of problems in ecclesiastical governance around 400.[83] More clearly than before, Dunn shows who lost out from Zosimus's promotion of Patroclus bishop of Arles:[84]

> Patroclus wanted to have the sole right to ordain other bishops in his own province of Viennensis, demoting Simplicius of Vienne from the shared role established at the synod of Turin, not to mention Proculus of Marseilles also in the same province with his personal metropolitan status (although it was exercised principally in a neighbouring province), but also stripping Hilary of Narbonne, metropolitan of Narbonensis Prima, and Remigius of Aix-en-Provence, metropolitan of Narbonensis Secunda, of their rights to ordain bishops within their own provinces.

Furthermore, as noted above, travel by clerics outside the new province would have to be approved by Patroclus. Much of the remainder of the paper will also be familiar to *aficionados* of Dunn's publications but there is a new specific focus and a new attention to the underlying structural problem. The specific focus is the letter *Multa contra* to bishops Proculus of Marseilles and Simplicius of Vienne. The letter rebukes them for not accepting his new arrangement. Dunn stresses the flimsiness of Zosimus's historical justification of his changes.[85] Perhaps the most important contribution of the paper, however, is that it pinpoints the structural difficulties that arose out of the effort to make the ecclesiastical hierarchy match the civil one. This was bound to create tensions because the civil hierarchy was not static. The move of the Praetorian prefect's base from Trier to Arles created tensions between the latter see and Vienne, the metropolitan see where the governor was based. A complicated temporary compromise was worked out but then the governor too moved to Arles. At that point a reordering was indeed in the cards, but when it demoted two existing metropolitan jurisdictions it was bound to create resentment. The ambition of Patroclus and probably Zosimus helped to aggravate the situation, but the

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[83] Dunn, 'The Ecclesiastical Reorganisation of Space and Authority in Late Antique Gaul: Zosimus' Letter *multa contra* (JK 334 = J^3 740'), *Journal of the Australian Early Medieval Association* 12 (2016) 1-33.
[84] Ibid. 26.
[85] Ibid. 30-31.

whole principle that civil and ecclesiastical structures should mirror each other was a problem if only because the former would not stay still.

Italy

The metropolitan structure of Gaul was an intractable problem, but in Italy the pope himself was the metropolitan, and had a better idea of the facts on the ground. Dunn analyses Innocent's handling of a boundary dispute between bishops near Rome.[86] The bishop of Tivoli had been accused of trying to enlarge his diocese at the expense of a neighbouring bishop by celebrating the Eucharist in the latter's territory. Dunn reads this as a warning to the bishop of Tivoli: he must either withdraw his claim or defend it. Here he disagrees with Charles Pietri who had interpreted the letter as a decision against the Bishop of Tivoli (with the possibility of appeal to the pope). Dunn argues that Innocent I had not been passing a definitive sentence but giving a suggestion or warning, and—*contra* Caspar—that if the bishop wanted to defend his action, it would be before the provincial synod (over which Innocent would preside of course) rather than before the papal chair.[87] The letter should not be called a decretal because it was not a definitive judgement but also because it was not addressed as a response to the complainant – so Dunn is holding to a fairly strict and technical sense of 'decretal' here.

Dunn zooms in on the granularity of Innocent's authority near home.[88] Innocent I's letter to the Bruttians gives us, as Dunn says, 'the first real glimpse of how the Roman bishop operated as metropolitan (as opposed to his operation as "primate" or "patriarch") beyond what was acknowledged at Nicaea'.[89] Rejecting as 'baffling' Peter Brown's interpretation of it, Dunn

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[86] Dunn, 'The Letter of Innocent I to Florentinus of Tivoli', *Journal of the Australian Early Medieval Association* 6 (2010) 9-23.
[87] Ibid. 18-19.
[88] Dunn, 'The Development of Rome as Metropolitan of Suburbicarian Italy: Innocent I's *Letter to the Bruttians*', *Augustinianum* 51 (2011) 161-190.
[89] Ibid. 181.

points out that this was a response to a complaint about the sexual wrongdoing of priests, not a bishop.[90] The complaint came from a lay government 'enforcer'. Contra Brown, there is no reason to think he was retired.[91] Apparently this government man, an 'agens in rebus', had been scandalized that presbyters had been begetting children and thus breaking the celibacy rule (sexual intercourse in marriage to stop after becoming deacon). Dunn thinks this man had already brought the case to local bishops, who had claimed not to know about the celibacy rule. Innocent makes it clear that he doesn't believe them. He is not dealing with an appeal because there had been no trial or judgement. This was an ad hoc intervention by 'the leading bishop of the area', rather than an implementation of conciliar decisions about metropolitans.

Another window into papal management of the see's own metropolitan area is opened by Dunn.[92] It is a characteristic Dunn paper in that it sets out to explicate a letter not adequately understood before. Dunn is sceptical about the possibility of answering all the questions that arise with regard to this letter but has a coherent narrative to offer. The setting is Apulia, within Rome's metropolitan area. A priest called Modestus had hopes of being made a bishop but it had come to Innocent's knowledge that he might have earlier done penance. If so, far from being promoted to the episcopate, he should be stripped of his priestly ministry. The three bishops to whom the letter is addressed had the task of investigating the truth about the putative penance, and of removing him from office if the suspicion was born out. Innocent I is not taking the trouble to involve a synod of bishops, so this 'seems to be a small increment in the authority of Rome as metropolitan church'.[93] There is an important discussion of the rule, going back to the Council of Nicaea, that performance of

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[90] Ibid. 184.
[91] Ibid. 182-183.
[92] Dunn,'Innocent I's Letter to the Bishops of Apulia', *Journal of Early Christian Studies* 21 (2013) 27-41.
[93] Ibid. 33.

penance constituted a bar to ordination. Dunn points out some exceptions and explains them.

The unruffled and confident tone of Innocent I's letters can make it hard to remember that this was the time when Rome was sacked by Alaric's Visigoths. One of Dunn's papers tries to work out what he was trying to do behind the calm surface of his correspondence to manage with the crisis.[94] It is only tangentially relevant to the theme of this survey, as it does not deal with papal letters, but it gives a more concrete image of the author of a large number of the letters that would later be included in decretal collections: Innocent I, whom we otherwise know mainly from what his own letters reveal of the man behind them. Dunn argues that, in the years preceding the sack of Rome by Alaric, Innocent I did what he could, given his role. Asked to allow pagan sacrifices, he probably agreed on condition that they were conducted in private. This was as good as saying 'no', but less damaging from a public relations point of view, given the well-justified anxiety of the Roman population. He also went on a mission to Ravenna to try to broker an agreement between Alaric and the emperor Honorius. We have no evidence that Innocent I had based himself in Ravenna.

Ravenna

Ravenna, because it was the seat of what was left of imperial government, constitutes a special case. Dunn turns his attention to it.[95] As so often, Dunn takes a letter, puts it in context, and tries to elucidate the contents. In this case, JH[1].750 = Old Jaffé 345, he has to remain agnostic about some aspects of the contents. The letter is transmitted in a number of canon law collections, including up-dated versions of the *Dionysiana* but

[94] Dunn, 'Innocent I, Alaric, and Honorius. Church and State in Early-Fifth-Century Rome', *Studies of Religion and Politics in the Early Christian Centuries*, edd. David Luckensmeyer and Pauline Allen (Early Christian Studies 13; Strathfield, NSW 2010) 243-261.

[95] Dunn, 'Zosimus and Ravenna: Conflict in the Roman Church in the Early Fifth Century', *Revue d'études augustiniennes et patristiques* 62 (2016) 1-20.

not the original collection of decretals. Dunn rejects a misleading view suggested by some rubrics that it was addressed to the clergy *of* Ravenna. As he reconstructs the context, a group of Roman priests had gone to Ravenna, to complain to the emperor about something, probably to do with Zosimus's handling of the Pelagian crisis. Zosimus is writing to a second group of Roman clergy, consisting of deacons as well as priests, who are to convey an excommunication to the first group. The letter manifests strong opposition 'to the idea of state intervention in the running of ecclesiastical affairs in Rome'.[96] Unlike most of the papers by Dunn just surveyed, this study lays no particular emphasis on the limits of papal authority, though the events in question suggest vulnerability to imperial intervention.

Papal letters and Illyricum Orientale

Some of the most interesting early decretal letters relate to Illyricum Orientale, an ecclesiastical province whose place in the overall ecclesiastical governmental scheme was far from clear. Dunn examines the bishop of Rome's relation to this ecclesiastical unit centering on Thessalonica, in the late fourth and early fifth centuries, focusing on Innocent I's first letter, to Anysius bishop of Thessalonica.[97] His starting point is the fourth century principle, which will by now be familiar, that ecclesiastical hierarchy should map on to the hierarchy of secular government. Illyricum Orientale in the modern Balkans was betwixt and between the eastern and western halves of the Roman Empire, but, after a survey of recent scholarship, Dunn concludes that it did not get detached definitively from the West as a civil unit until 392 or perhaps 395.[98] Before 395, Dunn concludes (as had others, 'Siricius saw Illyricum very much as part of his ecclesiastical *prouincia*'.[99] He continues:[100]

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[96] Ibid. 18.
[97] Dunn, 'Innocent I and Anysius of Thessalonica', *Byzantion* 77 (2007) 124-148.
[98] Ibid. 131-132.
[99] Ibid. 135.

> The fact that Anysius and his fellow bishops had turned to Milan rather than to Rome in 392 for support in the deposition of Bonosus . . . would indicate that the churches of eastern Illyricum, although western, did not see themselves at that point as having Rome as their necessary or only court of appeal.

Ambrose's powerful personality being a strong counter-attraction:[101]

> The fact that Ambrose eclipsed the bishops of Rome may be one of the reasons why, together with the transfer of Illyricum to the East from 392, Siricius sought to preserve and reassert Rome's traditional sphere of influence over the churches of eastern Illyricum.

After the transfer of this part of the empire to the East, a papal vicariate would however only emerge piecemeal, with:[102]

> Roman bishops only gradually but increasingly trying to preserve all of Illyricum as part of their ecclesiastical orbit, by delegating slowly some of their responsibilities to the bishop of Thessalonica to exercise on their behalf.

That was a policy that was understandable given the uncertainty about whether Illyricum Orientale might return to the Western sphere. What was Innocent I's contribution to this process? Aspects of this question are answered in a number of Dunn's papers, but the specific argument of this one is that Innocent I thought he was following in the footsteps of his predecessors but actually went beyond them:[103]

> <Innocent> granted to Anysius [bishop of Thessalonica] more sweeping responsibility as head of the Illyrian churches … than Siricius had . . . simply believing that he was only repeating what Anastasius, Siricius and Damasus had previously [*sic*] . . . This mistaken belief then became fixed in the papal mind, as Sixtus III and Leo I's statements about granting certain authority to . . . Rufus' successor in Thessalonica reveal.

Dunn ends characteristically by arguing that Innocent's claim to grant what he did was based on precedent, rather than on Petrine authority:[104]

> Nowhere did he assert that he or they were acting because they were the successor of St Peter or had universal primacy.

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[100] Ibid. 135-137.
[101] Ibid. 138.
[102] Ibid. 139.
[103] Ibid. 144-145.
[104] Ibid. 146.

The pope's claim that he is successor of St Peter and that he exercised universal primacy would later become typical of papal decretals. On the other hand there is no evidence to suggest that fear of Constantinople's influence was behind the letter.

Dunn offers another densely argued reinterpretation of papal relations with Illyricum Orientale, an area that continued to look to Rome in ecclesiastical matters after it had been transferred politically to Constantinople's half of the empire.[105] Engaging in close argument with previous scholars, Dunn sets out to make the following points 1. On becoming pope, Innocent delegated more authority to the bishop occupying the see of Thessalonica (Anysius) than his predecessors had done. As he argued in a previous essay, Dunn thinks this may have been in error, and that Innocent may have been unaware of the change, believing he was just following precedent.[106] Dunn qualifies this conclusion as less than certain in that he entertains the possibility that Innocent I granted the same as Siricius before him.[107] But then Dunn says without qualification that:[108]

> While Siricius had asked Anysius only to act in the bishop of Rome's place in giving approval to the election of new bishops, what Innocent envisaged was the role of appeal judge.

2. When bishop Anysius of Thessalonica died, and was succeeded by Rufus, the latter received the same powers as his predecessor, and without the time lag some have suggested.
3. In legitimating his right to delegate this authority, Innocent does not here invoke his claim to be St Peter's successor as head of the Church.
4. Innocent and his predecessors saw their authority as geographically limited, in a way that would later be described as patriarchal, and not as universal.[109] In proposing this Dunn courageously opposes himself to the massive authority of Erich Caspar, whose reading of a letter of Innocent to the patriarch of

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[105] Dunn, 'Innocent I and Rufus of Thessalonica', *Jahrbuch der österreichischen Byzantinistik* 59 (2009) 51-64.
[106] Dunn, 'Innocent I and Anysius'.
[107] Dunn, 'Innocent I and Rufus' 53 n.7.
[108] Ibid. 62.
[109] Ibid. 60.

Antioch he disputes—in fact his whole view of the papacy in this period is very different from Caspar's.

5. In establishing the bishop of Thessalonica as his vicar, Innocent I was not motivated by alarm at encroachment by Constantinople.

This is one of Dunn's more speculative papers, with inferences dependent on other inferences.[110] The argument that Innocent I does not invoke Petrine authority is perhaps the most important one to take away.

Relations with Illyricum Orientale were complicated by heresy. In another essay Dunn sets out to explicate Innocent I's letter xvii (JH^1.691 = Old Jaffé, 303 (100), *Magna me gratulatio*), proposing that it falls in a sequence of correspondence which previous scholars have failed to reconstruct.[111] Letter 16 (JH^1 685, *Superiori tempore, si*) had recommended that clerics who had supported the heretic Bonosus but repented should be allowed to continue their ministry provided that they had been ordained before his condemnation. Dunn postulates a subsequent, lost, letter from the bishops of Illyria raising the matter of clerics who had been ordained by Bonosus after his condemnation. According to Dunn, the former bishop of Thessalonica Anysius (or Anisius) had been in the habit of re-ordaining and reinstating them. The bishops had asked for confirmation that this was permitted. Innocent I had returned a negative answer. They had returned to the charge to try and change his mind, and letter 17 was his answer, in which he expressed magisterial astonishment that they had not listened to him. Dunn's reading of the substance of the answer is that it was wrong to reordain and reinstate them. Dunn also thinks that Innocent I denied the validity of the heretical ordinations.[112] So they were not actually ordained, but by accepting the (invalid) heretical ordination they made themselves unworthy of a future, valid, orthodox ordination. The

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[110] See e.g. the middle paragraph on p. 63, beginning 'Is there any evidence'.

[111] Dunn, 'Innocent I and the Illyrian Churches on the Question of Heretical Ordination', *Journal of the Australian Early Medieval Association* 4 (2008) 65-81.

[112] Ibid. 70.

apparently parallel case of returning Novatian heretics was not a good analogy. The reordinations of Anysius could however be accepted as special cases in a difficult situation: but they should definitely not become the norm. Dunn also plays down the significance of this letter as an instance of growing papal power. He does not think that the bishops were necessarily looking for orders to follow, rather than for advice, and takes the view that in his answer Innocent I was attempting to persuade, rather than dictating. It is the same with the cases involving individuals discussed at the end of the letter: Innocent I is not giving orders. In this paper Dunn is reacting to the views of scholars of earlier generations, Erich Caspar and Charles Pietri, who saw the letter as a confident assertion of papal authority. Reaction can sometimes lead to overstatement in the opposite direction. But Dunn's comments are in line with his general minimalist interpretation of the bishop of Rome's position in the early fifth century.

Dunn deals again with Innocent I's relations with Eastern Illyricum, politically part of the Eastern Empire but ecclesiastically under Rome.[113] The article concentrates on the case of Bubalius and Taurianus, clerics possibly from Crete but in any case from the Illyricum region.[114] They had been accused of some crime, and condemned at the local level. The holder of the papal vicariate at Thessalonica had not permitted an appeal, according to Dunn, but they appealed anyway. Dunn speculates that they forged a letter giving them permission to appeal and argues strongly that Bubalius forged letters from Innocent purporting to uphold their appeal.[115] When it all came out Innocent I endorsed the local decision. Dunn sees the significance of the letter in the assertion by the Illyrian Churches of the right 'not to have matters appealed to Rome if they did not

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[113] Dunn, 'The Church of Rome as a Court of Appeal in the Early Fifth Century: The Evidence of Innocent I and the Illyrian Churches', JEH 64 (2013) 679-699.

[114] Letter 18 (JH[1] 693, PL 20.357-359, *Mora coepiscoporum*).

[115] Dunn, "Church of Rome' 694-695.

want'.[116] Earlier Dunn noted that this right to decide what could be appealed had been delegated by Innocent I.[117] He also comments that the letter 'provides evidence of just how limited any such claims [to universal primacy] were in the early years of the fifth century'.[118] It is his view, set out in a number of papers, that Innocent I's power over Illyricum was that of a 'patriarch', though the word seems not to have been used. We should note Dunn's remark that:[119]

> while it is the argument of this article that *ep.* xviii [the one about Bubalius and Taurianus] is not an example of Innocent involving himself uninvited by Rufus in the affairs of the Illyrian churches, it is more than possible that *ep.* xvi [on men ordained by Bonosus] is such an example.

Letter 16 is also discussed in the paper.[120] It deals with clerics ordained by the heretical bishop Bonosus. Dunn's reading is that while Innocent agreed with the Illyrians that:[121]

> any ordination that Bonosus had performed after his condemnation was invalid, those individuals invalidly ordained (i.e. ordained by him after his schism) could never become eligible for ordination after that.

Innocent I and heresy

Several other papers by Dunn deal with heresy. He argues several theses about a letter of Innocent I to a bishop Lawrence, in JH[1] 715.[122] There are different views about where to identify Lawrence's see, but Dunn thinks Siena is the most probable hypothesis (Caroline Humfress had proposed Senj in modern Croatia), in which case the letter illustrates how Innocent I dealt with bishops in his own metropolitan area and does not tell us anything about claims to universal authority. It is a letter about how to deal with heretics, namely the Photinians. The rubric of the letter in the canon law collection of Dionysius Exiguus seems

[116] Ibid. 696.
[117] Ibid. 685.
[118] Ibid. 697.
[119] Ibid. 686.
[120] Innocent I no. 16 (JH[1] 685, *Superiori tempore, si*).
[121] Dunn, 'Church of Rome' 687.
[122] Dunn, 'Innocent I's Letter to Lawrence: Photinians, Bonosians, and the *Defensores Ecclesiae*', JTS 63 (2012) 136-155.

to identify them with the followers of Bonosus. Dunn does not think there is any surviving evidence to support the identification. Through an evident error of inattention, Dunn puts the date of Dionysius's Decretal collection about a century late, but his scepticism is independent of that slip.[123] Dunn also thinks it difficult to reconstruct what the Photinians believed. He quotes Innocent I as saying that they 'deny that Christ [is] God, born from the substance of the Father before time' and notes that he links their denial of Christ with that of the Jews.[124] Dunn rightly points out that it is not Innocent's way to go deep into theological detail. The last part of the article deals with the 'defensores ecclesiae' who figure in the letter. Dunn seems to accept Humfress's definetion of a 'defensor' as a 'permanently mandated 'professional' advocate capable of acting for the Church in all legal cases'.[125] He disagrees with her suggestion that Innocent proposed to lend Lawrence his own 'defensores' to deal with the heretics. Instead, Innocent advised Lawrence to get his own local civil authorities to act on the basis of what had already been decided at Rome.

Dunn deals in greater detail with Innocent's Letter 16, discussed above.[126] More than any previous scholar, Dunn distinguishes between the message of this relatively little studied letter and that of the famous *Magna me gratulatio* (JH[1] 691). Letter 16 too is dealing with the fall-out from the condemnation of Bonosus as a heretic, but it is about bishops ordained before the condemnation, whereas Letter 18 is about the reordination of the invalidly ordained. Dunn provides an invaluable chrono-

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[123] Ibid. 136 and 137 lines 6-7 and 30.
[124] Ibid. 143.
[125] Ibid. 145 and quoting Humfress, 'A New Legal Cosmos: Late Roman Lawyers and the Early Medieval Church', *The Medieval World*, edd. Peter Linehan and Janet L. Nelson (London 2003) 557-575 at 572.
[126] Dunn, 'The Letter of Innocent I to Marcian of Nis', *Saint Emperor Constantine and Christianity: Book of Abstracts: International Conference Commemorating the 1700th Anniversary of the Edict of Milan, 31 may-2 june 2013*, ed. Dragiša Bojović (2 vols. Nis 2013) 2.319-338.

logical reconstruction of the correspondence about the Bonosus affair.[127]

In another essay Dunn looks at social theories about the construction of identity by exclusion, then turns to Innocent I's interest in heretics, as a religious out-group *par excellence*, and uses the theme of the volume as a springboard for an overview of all the different heresies Innocent dealt with.[128] He argues that Innocent I's 'concern was not with the underlying theology . . . but with the church's reaction to those who belonged to such groups'.[129] Identifying heretics and schismatics was a way of defining the Christian community, but Innocent I's approach 'was not punitive but remedial'.[130] In his letter to Victricius of Rouen he says that Novatians baptised within the sect can be received back with just a laying on of hands, although those who had left the true Church for the sect and been rebaptised would have to do penance. Dunn speculates that the bishop of Rouen was asking about Novatians, and another sect called the Mountaineers [Montanists?], because these movements had spread to his parts. Towards Priscillianists in Spain he favored a soft-line also. With none of the foregoing does Innocent I go into the content of the heresy. Only with Pelagians does he do that. But he hardly ever uses the word 'heresy' about them, and keeps the door open if they want to repent. Bonosians, the next group considered, are the subject of earlier papers by Dunn. He makes another brave attempt to spell out all Innocent I's intentions with the help of his own logical reasoning. Innocent I's support for John Chrysostom and the consequent temporary break with Constantinople, Antioch and Alexandria is briefly rehearsed, Dunn noting that Innocent does not refer to 'a schism as such'.[131] Innocent's sternest reaction is to the 'Photinians', whose

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[127] Ibid. 323-324.

[128] Dunn, 'Innocent I on Heretics and Schismatics as Shaping Christian Identity', *Christians Shaping Identity from the Roman Empire to Byzantium: Studies Inspired by Pauline Allen*, edd. G. Dunn and Wendy Mayer (Supplements to Vigiliae Christianae 132; Leiden 2015) 266-290.

[129] Ibid. 268.

[130] Ibid. 269.

[131] Ibid. 283.

theological position is not too clear to us (perhaps a version of the idea that the human Jesus is only an adopted son of God). Innocent I tells a suffragan bishop to use the civil law to get them expelled.[132] As Dunn says, a striking overall fact (Pelagianism apart) is how little is said about theological content.

Transmission of papal letters

Dunn surveys the scholarship on the canon law material in two key manuscripts.[133] He draws attention (p. 180-181) to Hubert Wurm's thesis that they both include what he thinks may be an extremely early canon law collection, consisting of JH[1] 665 Innocent to Victricius, *Etsi tibi*; JH[1] 675 Innocent to Exsuperius, *Consulenti tibi*; JH1[1] 691 Innocent to Rufo et al., *Magna me gratulatio*; JH[1] 821, Celestine I 'Universis episcopis', *Cuperemus quidem*; JH[1] 823, Celestine I to Bishops of Apulia, *Nulli sacerdotum*, with JH[1] 745, Zosimus to Hesychius, *Exigit dilectio* being added later but early on.[134] As Dunn notes, Detlev Jasper endorsed Wurm's reconstruction of a primitive collection consisting of five letters. Dunn reasseses Wurm's thesis, showing weaknesses in its arguments from the absence of rubrics.[135] The details of Dunn's own guess are hard to work out from his compressed presentation of it, but it seems to be that there was a primitive collection, but that one should add to it a letter from Leo I. He suggests that if there was such a primitive collection it would have been put together 'sometime after 443', possibly by Leo I himself 'to address issues of clerical qualification that were likely to be raised among the various churches to show them how the church in Rome had dealt with them'.[136]

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[132] Ibid. 284.
[133] Dunn , '*Collectio Corbeiensis, Collectio Pithouensis*, and the Earliest Collections of Papal Letters', *Collecting Early Christian Letters: From the Apostle Paul to Late Antiquity*, edd. Neil Bronwen and Pauline Allen (Cambridge 2015) 175-189.
[134] Ibid. 180-181; for convenience I give references to the newest version of Jaffe's *Regesta*.
[135] Ibid. 183-185.
[136] Ibid. 185-187, indented quotation at 189.

> One could argue that Leo was concerned that Hilary [of Arles] was writing Rome out of the equation and that by sending a bundle of documents from Rome . . . he hoped to check Hilary's ambition.

The final sentence has a relevance transcending the particular theme of the paper: 'Medieval manuscripts give us evidence that over various generations early papal letters were found useful and relevant in fresh contexts and situations and were copied and distributed with increasing frequency' (p. 189).

The foregoing represents only a selction of Geoffrey Dunns' prodigious output of papers on the period but they are probably the most important for present purposes. We may now turn to several studies that also tend towards a 'minimizing' estimate of papal authority in the late Empire, but which approach the problem with an agenda influenced by the French philosopher Michel Foucault.

Recent studies influenced by Michel Foucault

Kristina Sessa has a fresh angle: she presents bishops as 'household managers' or stewards', and on three levels: 1. in a literal sense, as managers of the properties of the their own church, which had estates in a range of regions; 2. indirectly, because bishops of Rome intervened in the management of other (especially episcopal) households – with the issues of celibacy and of the rule against remarried widowers becoming clerics being treated as aspects of household management; and finally 3. in a metaphorical sense, as managers or stewards of the Church.[137] She is concerned with papal letters insofar as she finds in them evidence for her argument about the influence of models of Roman household management on the character of papal government. The mildly critical comments that follow relate to secondary aspects only of this important study and do not affect its main line of argument. The 'official responses to

[137] Kristina Sessa, *The Formation of Papal Authority in Late Antique Italy. Roman Bishops and the Domestic Sphere* (Cambridge 2012).

queries posed by other clergy' are among her sources.[138] Sessa says that because many extant letters:[139]

> appear in medieval corpora of canon law, scholars sometimes misperceive their original meaning, erroneously interpreting the letters as prescriptive, statutory statements rather than as reactions to specific cases brought before bishops.

Here her views converge with Dunn's. Sessa had not read the comments of Zechiel-Eckes quoted above (they appeared too late for her to see them) or she might have modified this statement. The antithesis between 'reactions to specific cases' and 'prescriptive . . . statements' is questionable because of its implicit assumption that 'law' equals 'legislation'. Both Roman law of the pre-code periods and the common law systems of England and America build up prescriptive law on the basis of reactions to specific cases: that is what case law is. Furthermore, these papal responses are incorporated into canon law collections that fall squarely *within* her period, so one cannot neatly separate, chronologically, 'medieval reception of Rome's episcopal correspondence from its late ancient production and meaning'—though she is right that the two settings of production—original letter and letter in canon law collection—need to be kept distinct.[140] Perhaps understandably given her theme, Sessa tends to manages to read almost any regulation as being really about household management. Thus, the rule of celibacy within marriage for deacons or priests is the basis of her claim that 'A clergyman's success as a household manager partly determined his advancement within the church'.[141] The symbolic rationale of the rules against clerics marrying widows or marrying twice isn't given its due, while a series of perhaps rather strained transitions of thought connects a discussion of this 'bigamia' to her central theme of household management.[142]

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[138] Ibid. 31.
[139] Ibid.
[140] Ibid.
[141] Ibid. 180.
[142] Ibid. 181.

The answers of Innocent I and Leo I to a complex question about whether a marriage before baptism could be added to a post-baptismal marriage to make a man ineligible for the clergy is treated as being all about power:[143]

> Rather than ignoring such questions or simply referring the petitioners to earlier decretals and imperial edicts, Roman bishops answered them repeatedly.

The preoccupation with power may be a symptom of the influence of Foucault on Sessa. But to the best of my knowledge imperial edicts did not deal with this problem. As for decretals: this is a period before collections of them would be generally available. Papal discourse might make it sound as though everyone knew their earlier decisions unless culpably negligent, but it seems unlikely that this corresponded to the facts on the ground: was it really easy to look up an earlier decretal unless it had been sent to the same diocese? It is unlikely that even popes imagined that copies of their letters were easily at hand everywhere. Surely the absence of ready availability is an obvious reason why:[144]

> letters composed from the second half of the fifth century . . . become repeatedly repetitive and laconic.

<not that>

> the clerical household had become a vehicle for asserting episcopal authority and a subject on which the Roman bishop liked to claim a monopoly.

Collections of papal decretals were developing as a genre from the second quarter of the fifth century, but the real take-off was after 500.

George E. Demacopoulos has written another study influenced by Michel Foucault's ideas of discourse and power.[145] He refers to Foucault especially when discussing 'the matrix of possibilities that enabled [papal] speech and action', as opposed to 'purposeful "use" or "employing" of Petrine discourse' which

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[143] Ibid. 184.
[144] Ibid.
[145] George E. Demacopoulos, *The Invention of Peter: Apostolic Discourse and Papal Authority in Late Antiquity* (Divinations: Rereading Late Religion; Philadelphia 2013) 3-7.

is also within the remit he sets himself.[146] In fact a good deal of the book's substance could be reformulated as another analysis of papal Petrine ideology and its propagation *à la* Ullmann. Demacopoulos does have a distinctive thesis, however, namely that popes upped the ideological ante as a defence mechanism, or, rather, on the principle that attack is the best method of defense:[147]

> the escalations of papal rhetoric, almost always linked directly to a Petrine claim, were often born in moments of papal anxiety or weakness. In other words, whenever a Roman bishop in this period claimed to be the primary or sole arbiter in dogmatic, moral, or judicial conflicts, especially if that claim was rhetorically bolder than those that preceded it, we would be well served to consider whether or not such a statement was uttered in response to the same bishop's authority having been threatened, challenged or simply ignored by a particular audience.

Demacopoulos helpfully explains his theoretical framework, namely:[148]

> the 'hermeneutic of suspicion', typically understood to mean that a reader attempts to remain ever aware of a text's worldview, its embedded hierarchies, and the extent to which the text will reflect and reinforce that worldview by employing rhetorical strategies that openly reinforce it or by marginalizing and silencing alternative perspectives.

These are legitimate questions to ask about any texts, whether a fifth century papal document or a feature in the *New York Times.* How well does the argument work for the papal letters that would find their way into canon law collections? There are two problems with applying it to such letters. Firstly, most decretals were responses. Roman bishops were not imposing their ideology on a dubious public. They were usually replying to bishops who had taken the initiative and asked questions. Secondly, once canon law collections with decretals came into existence, popes could do little to ensure that they were copied. But copied they were. Once again, it is the demand side of the decretal system that falls outside the scope of Demacopoulos's general thesis, though the argument may give us an insight into other kinds of papal documents.

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146 Ibid. 192-193, cf. 5-6.
147 Ibid. 2.
148 Ibid. 191 n.3.

Retrospect and prospect

These recent studies differ from earlier scholarship in their willingness to look to social theory, especially Foucault's, and to look for more sophisticated interpretative models than the straightforward model, represented by Ullmann, of a conscious and eventually successful papal effort to spread a 'descending theme' ideology of power. Power is doubtless an aspect of everything, however, but not everything can be reduced to it. The will to power does not explain why bishops felt the need to consult the pope. To understand that better, we need to think harder about the content of these questions as reflected in the responses. Further thought about why bishops needed authoritative advice is needed to explain the new type of ecclesiastical communication that emerged as the Empire in the West slid into collapse.

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Landau, Peter. *Europäische Rechtsgeschichte und kanonisches Recht im Mittelalter: Ausgewählte Aufsätze aus den Jahren 1967 bis 2006*. Badenweiler: Bachmann, 2013. Pp. 930. ISBN 3940523135

Atria A. Larson

This volume from Bachmann Verlag republishes forty essays by the eminent German legal historian Peter Landau. Unlike collected essays volumes in the Variorum series, these essays have been re-formatted in a uniform style, organized into thematic sections, and paginated continuously. The Table of Contents provides bibliographical information for the original publication of each essay. The volume is organized into six sections: 1. the foundations of medieval canon law, 2. principles of canon law, 3. law pertaining to ecclesiastical office, organization, and administration (*Amts- und Verfassungsrecht*), 4. canonical procedural law, 5. canonical marriage law, and 6. canon law and private law (*Privatrecht*). One essay is in English ('*Aequitas* in the *Corpus Iuris Canonici*') and one in Italian ('L'evoluzione della nozione di "Legge" nel diritto canonico classico'); the remaining thirty-eight essays are in German. The oldest essay in the volume, 'Hadrians IV. Dekretale *Dignum est* (X 4.9.1) und die Eheschließung Unfreier in der Diskussion von Kanonisten und Theologen des 12. und 13. Jahrhunderts', dates to 1967; the most recent, published in 2006, also pertains to marriage law: 'Papst Cölestin II. und die Anfänge des kanonischen Eheprozessrechts'. Each essay is followed by a relatively brief (less than a page) paragraph of *Addenda* written by Landau in 2012. These *Addenda* paragraphs always provide a helpful summary of the essay, sometimes note the original context for its production, on occasion note a point of correction, and frequently include reference to more recent work done on the topic. So, for instance, by way of emendation, in the *Addenda* for 'Die Leprakranken im mittelalterlichen kanonischen Recht', Landau notes that a certain decretal, JL 16607, can now definitively be attributed to Pope Celestine III, whereas the matter was left uncertain in the original essay, attributing it either

to Celestine III or Clement III.[1] In the *Addenda* for 'Die kirchliche Justizgewährung im Zeitalter der Reform', which had discussed the *Panormia* and attributed it to Ivo of Chartres, Landau notes the recent scholarship by Christof Rolker showing that the collection cannot be attributed to Ivo. Landau had also suggested, in the Q&A period following the delivery of that paper in Spoleto in 1996, that the *Collection in Seventy-Four Titles* (74T) could have originated in northern France, and he finds support for that assertion in Rolker's article on 74T.[2] Such bibliographical additions are helpful but should not be considered exhaustive. The volume concludes with a detailed index of pre-modern names, authors, and works; an index of modern authors; a subject index; and an index of manuscripts.

Landau's collection is important for several reasons. First, and most practically, it combines into one volume essays that appeared in many different journals or edited volumes. Especially for scholars not residing in Germany who do not have easy access to several of those publications, this volume, though hefty, offers a more convenient mode for accessing dozens of Landau's articles. Scholars of medieval canon law will no doubt want a copy on their own shelf.

Second, collectively, the essays demonstrate a particular brand of scholarship that is both uncommon and admirable. Landau's work combines textual study of printed editions and manuscripts, investigation of sources from late antiquity through the early modern period, and engagement with larger ideas and current issues. This collection of essays does not contain some of the most technical in Landau's corpus that students of medieval canon law and specialists on Gratian and the twelfth-century decretal collections know well.[3] Many essays that are included

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[1] *Europäische Rechtsgeschichte und kanonisches Recht* 495.

[2] Ibid., 561. Rolker's article is 'The Collection in Seventy-Four Titles: A Monastic Canon Law Collection from Eleventh-century France', *Readers, Texts and Compilers in the Earlier Middle Ages: Essays in Honor of Linda Fowler-Magerl*, edd. Martin Brett and K. G. Cushing (Farnham 2009) 59-72.

[3] E.g. Landau, 'Die Entstehung der systematischen Dekretalensammlungen und die europäische Kanonistik des 12. Jahrhundert', ZRG Kan. Abt. 65 (1979) 120-48; 'Neue Forschungen zu vorgratianischen Kanonessammlungen

still demonstrate an attention to detail and a range of technical knowledge about various canonical collections compiled across centuries; such technical knowledge is on full display, for instance, in the transcript of Landau's impromptu answers to questions in Spoleto in 1996.[4] Few scholars today can match both the breadth and depth of Landau's familiarity with the sources. What might be more surprising to those scholars accustomed to engaging Landau's technical scholarship is his ability to engage more abstract concepts and to think in a theological and philosophical mode. Landau reflects on the nature of the Church and the nature of justice; he contemplates natural law and the humane treatment of individuals within the structure of legal norms. Landau wrote several of the essays, especially those in the first two sections, for public lectures in front of larger and broader audiences. His audience has not always been just scholars of medieval canon law; he has had a voice to a larger community of academics, lawyers, and churchmen and has repeatedly made the case to them that the history of canon law is both important for contemporary understanding and relevant to current discussions. Sometimes that understanding might be important for realizing that a modern notion, such as that of 'private law', diverges from the earlier understanding of the term (ius privatum).[5] Sometimes that understanding might be important for appreciating medieval canon law's various contributions in the western legal tradition,

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und den Quellen des gratianischen Dekrets', *Ius commune* 11 (1984) 1-29; 'Quellen und Bedeutung des gratianischen Dekrets', SDHI 52 (1986) 218-235; 'Gratians Arbeitsplan', *Iuri canonico promovendo: Festschrift für Heribert Schmitz zum 65. Geburtstag*, edd. Winfried Aymans and Karl-Theodor Geringer (Regensburg 1995) 691-707; 'Burchard de Worms et Gratien: Â propos des sources immédiates de Gratien', RDC 48 (1998) 233-245. Some of these essays already appeared in a collected volume of Landau's essays published in 1997: *Kanones und Dekretalen: Beiträge zur Geschichte der Quellen des kanonischen Rechts* (Bibliotheca eruditorum, Internationale Bibliothek des Wissenschaften 2; Goldbach 1997).

[4] See *Europäische Rechtsgeschichte und kanonisches Recht* 557-560.

[5] See 'Die Anfänge der Unterscheidung von *ius publicum* und *ius privatum* in der Geschichte des kanonischen Rechts' 295-305.

including norms still operating and assumed in German law. 'Der Einfluß des kanonischen Rechts auf die europäische Rechtskultur' and 'Die Bedeutung des kanonischen Rechts für die Entwicklung einheitlicher Rechtsprinzipien' are notable in this regard.[6] The discussions for which the history of canon law might be relevant include policy discussions at the forefront of contemporaries' minds. Landau's essay on 'Traditionen des Kirchenasyls' in 1994 was timely in the context of a European discussion about the validity of the churches as places of asylum and under what circumstances such a practice might still operate in modern times.[7] The discussions in Landau's mind might also be ecumenical ones, for which, for instance, he found relevant his examination of the development of the office and canonical jurisdiction of the metropolitan bishop.[8]

At times, Landau's essays read almost as a historically-grounded apology for an institution like the papacy; especially pertinent is his 'Kanonisches Recht und römische Form: Rechtsprinzipien im ältesten römischen Kirchenrecht', where he argues for a continuity of legal thinking in Roman-influenced canon law from the fifth through the twentieth centuries but also makes the point that the papacy is not the ground for the church's legal order but rather its guarantor.[9] He also establishes there unique legal principles, including even an acknowledgment of the limitations of law, originating in a Rome-centered canon law. While not overtly applying this essay to ecclesiological or ecumenical discussions, he rather strongly states that it would be 'illusorisch' to strive for a canon law freed from its Roman form.[10] One can say, then, that Landau's historical work, which is very sound, becomes for him a tool for defending canon law's importance, defending thereby the field of the historical study of canon law, and even defending ecclesiastical structures of the

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[6] Pp. 233-253 and 255-282, respectively.
[7] Pp. 217-231.
[8] 'Die Rechtsstellung des Metropoliten in der Geschichte des Kirchenrechts' 523-538.
[9] Pp. 93-110 at 99.
[10] Ibid. 108.

Catholic Church even while opening the door to ecumenical dialogue with the realization that certain western ecclesiastical structures, such as those affecting the position of the metropolitan, did develop substantially over time in such a way that the Church could today perhaps accept contemporary practices in other churches that have adhered over time to older norms. While some historians are comfortable never leaving their offices and libraries, Landau has embraced a more public role and has done so, I would say, without threatening the integrity of his historical work.

Landau remains sensitive to historical development when he points to the potential relevance of his historical study for contemporary issues. He views the medieval reality of the *Ius commune* as especially pertinent for consideration of the law across the European Union today.[11] Nevertheless, he never adopts a simplistic viewpoint that says, 'Medieval canon law was wonderful; therefore we should re-adopt whatever medieval canon law held'. He acknowledges, for instance, that one cannot simply apply medieval canon law about asylum in churches to the contemporary context. The medieval canon law of asylum, based largely on the Old Testament institution of cities of refugee, developed as a result of a societal context where civil authority was weak and secular justice inconsistent. In that society, the church held immense power and viewed itself as an institution that was called to protect people from the capricious dealings of secular society in difficult circumstances. The modern world differs entirely, however. Thus, Landau concludes his essay on *Kirchenasyl* with the observation that:[12]

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[11] See, for instance, 'Der Einfluß des kanonischen Rechts auf die europäische Rechtskultur' 233. See also the Forward, which states, 'Foundations for a future European legal unity are in many ways to be found in classical canon law' (Grundlagen für eine künftige europäische Rechtseinheit sind vielfach im klassischen kanonischen Recht zu finden 14).

[12] 'Dabei unterscheidet sich die heutige Situation von der mittelalterlichen wesentlich dadurch, daß wir den modernen Staat mit seinem Gewaltmonopol als Partner der Kirche vorfinden und sich die grundsätzliche Frage stellt, oh [*sic*, *recte* ob] es gegenüber einem modernen, am Staat orientierten Rechtsver-

> the current situation differs from the medieval one basically in that we find the modern State, with its monopoly of power, as a partner of the church, and this raises the fundamental question whether, since the State of modern times possesses this monopoly of power, there can be any room whatsoever for a law of asylum by the church itself opposite a modern legal understanding oriented to the State.

He might find in the medieval institution of asylum a clear example of something admirable and good in its context, but that does not necessarily mean that the institution can, or even should, in Landau's view, be translated into the modern world. Ultimately, he has limited himself in this instance to what the historian can do, namely explore an institution historically and understand it, and even evaluate it, in its own times on its own terms.

Third, Landau's collection is important because the essays construct a complex narrative about the chronological development of canon law, and this narrative is important for other scholars of canon law to be aware of and to engage. This element of Landau's work could only emerge with clarity with these various essays collected into a single volume; each individual essay usually testifies to only one aspect of the narrative. The narrative that emerges is this: the *Code of Canon Law* of 1983 differs in many ways from that of 1917;[13] the 1917 *Code* retained many principles and specific regulations that established themselves in canon law over the course of the Middle Ages, especially in the twelfth and thirteenth centuries; that 'classical period of canon law' (this is Landau's consistent usage) also contributed significantly to principles that have governed western

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ständnis überhaupt Raum für ein eigenes kirchliches Asylrecht geben kann, da der Staat der Neuzeit das Gewaltmonopol besitzt' (230).

[13] Three specific examples are the barring of 'servi' from ordination (see p. 442, in 'Frei und Unfrei in der Kanonistik des 12. und 13. Jahrhunderts am Beispiel der Ordination der Unfreien'), the barring of illegitimate sons from ordination (see p. 466, in 'Das Weihehindernis der Illegitimatät in der Geschichte des kanonischen Rechts'), and the assertion of the church's right to grant asylum (see p. 217 on the assertion in the 1917 *Code* in the essay 'Traditionen des Kirchenasyls').

legal procedures, practices, and norms into the modern period.[14] The classical period stands out prominently, both for reshaping and systematizing what came before (continuity) and for bringing new norms and concepts that radically altered what had come before (discontinuity). Examples of the former include the canon law of asylum, rooted even in Old Testament precedents and actively part of church life in the early medieval period,[15] and the concept of ecclesiastical office as something theoretically distinct from clerical rank, which Landau argues arose c.1000 but substantially developed after Gratian.[16] One example of the latter includes a 'paradigm shift' in the conceptualization of marital separation in the twelfth century. Previously it was viewed purely as a punishment; as marriage law developed, separation could also be a result of a formal judgment of a marriage's invalidity.[17]

A second example is in the establishment of marriage law and procedure as something distinct from both criminal and civil law and procedure, thereby creating a third and distinct realm of law, which Landau attributes to a decretal of Celestine II (1143-1144).[18] A third example is the change in meaning of 'ordo' to refer to a unified group of religious houses and persons following the same rule. A multifaceted and in some senses nondescript term, even in Gratian, achieved new meaning after the Cistercians and especially with the rise of the mendicant orders in the thirteenth century.[19]

While the importance of the narrow period from Gratian to the *Liber extra* and the broader one from c.1050-1300 are widely recognized in scholarship, Landau's work cautions against

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[14] See Landau's forward, p. 13, for an explanation of his retention of the term 'classical canon law' for the period 1100-1350.

[15] 'Traditionen des Kirchenasyls' 217-231.

[16] 'Die Ursprünge des Amtsbegriffs im klassischen kanonischen Recht. Eine quellengeschichtliche Untersuchung zum Amtsrecht und zum Archidiakonat im Hochmittelalter' 341-384.

[17] 'Ehetrennung als Strafe: Zum Wandel des kanonischen Eherechts im 12. Jahrhundert' 673-709.

[18] 'Papst Cölestin II. und die Anfänge des kanonischen Eheprozessrechts' 743-757.

[19] 'Der Begriff *ordo* in der mittelalterlichen Kanonistik' 385-399.

oversimplification. One cannot give one answer on every issue about when the decisive change or development occurred. Sometimes it happened ca.1000; sometimes it happened in the heart of the Gregorian reform, especially if Gratian then took up the perspective; sometimes it happened in the work of Gratian himself; sometimes it happened after Gratian in the early decades of decretal collections and the commentary on them; and sometimes it happened later, in the context of the *Liber extra* or even the *Liber Sextus*. While Gratian appears frequently in Landau's essays, as should be clear, he plays different roles. On the concept of office, Gratian seemingly ignored an earlier work that then informed Bernardus Papiensis's extremely influential treatise on ecclesiastical office. Thus, Gratian actually makes little or no contribution in this area of canon law.[20] On the issue of lay 'dominium' over churches, Landau argues, contra Ulrich Stutz, that Gratian diverged from some of his predecessors, such as Anselm of Lucca and Ivo of Chartres, and took a moderate and influential stance synthesizing previous customs and current thinking; his position stands in clear contrast to the extreme one taken by the *Polycarpus* on the basis of forgeries.[21] In the case of whether subordinate clerics could accuse their superiors, Gratian adopted the position taken in *Pseudo-Isidore* and the *Dictatus papae* but wrote what became the foundational treatment for this issue moving forward.[22] All in all, the lesson learned from Landau's essays consists in the fact one cannot assume that any one period or person is responsible for the major points of development in canon law. Every case is different, and sometimes the definitive impetus comes from unlikely or, for us, uncomfortable places, such as forgeries.[23]

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[20] 'Die Ursprünge des Amtsbegriffs im klassischen kanonischen Recht' 341-384.

[21] 'Das *Dominium* der Laien der Kirche', 497-510. Stutz's article is 'Gratian und die Eigenkirchen', ZRG Kan. Abt. 1 (1911) 1-33.

[22] 'Die Anklagemöglichkeit Untergeordneter vom Dictatus Papae zum Dekret Gratians' 577-591.

[23] See 'Fälschungen zum Begriff des Benefiziums und der Simonie im *Decretum Gratiani*: Ein Beitrag zur Entstehungsgeschichte des kirchlichen Benefiziums im kanonischen Recht und zu Papst Alexander II.' 511-522.

Fourth, the collection has import since Landau's essays present significant, sometimes fundamental, scholarship on particular topics, and I will discuss two of these in more depth. The first essay (and one of the lengthiest), entitled 'Sakramentalität und Jurisdiktion', engages the famous thesis of Rudolph Sohm.[24] Gratian scholars are familiar with Sohm's post-mortem publication *Das Altkatholische Kirchenrecht und das Dekret Gratians* (1918), but Landau also examines Sohm's earlier publications and detects shifts in his thinking. Landau's essay is instructive because he clarifies that the discussion here revolves not around the question of how we understand Gratian's text in the history of medieval canon law, but it revolves more fundamentally around the very nature of the Church itself. For contemporary scholars who work strictly in a historical mode, Landau's broader understanding of what was at stake in Sohm's thesis should be helpful, as is Landau's way of setting up his engagement of Sohm. In his introductory paragraph, Landau observes that the question of the relationship between sacramentality and jurisdiction in the Church can be studied from a variety of perspectives, ranging from that of theology to legal theory to church politics to history. His approach will, of course, be historical, and he argues that, on this historical basis, the thesis of Sohm is untenable. Sohm had viewed 'old Catholic canon law' as equivalent to divine law, in which the faithful bear the essence and power of the sacraments and in which there is no distinction between the sacraments and jurisdiction. For Sohm, Gratian was a practical theologian who represented the apex of his old Catholic canon law. Landau proceeds to deconstruct and attack Sohm's views, especially his example of ordination,

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[24] Pp. 17-50, with *Addenda* noting the important subsequent theological-historical work by Peter Cardinal Erdő and an article by Ludger Müller laying out the debates between Ulrich Stutz and Sohm. See Erdő, *Theologie des kanonischen Rechts. Ein systematisch-historischer Versuch*, edd. Libero Gerosa and L. Müller (Kirchenrechtliche Bibliothek 1; Münster 1999); Ludger Müller, 'Die Periodisierung der kirchlichen Rechtsgeschichte in der Auseinandersetzung zwischen Ulrich Stutz und Rudolph Sohm', *Juri Canonico Promovendo: Festschrift für Heribert Schmitz zum 65. Geburtstag*, ed. Winfried Aymans and Karl-Theodor Geringer (Regensburg 1994) 621-44.

emphasizing that the early church developed notions of jurisdictional authority and organization, leading to the establishment of the ecclesiastical hierarchy, and arguing that Sohm ignored important source material such as early medieval canon law collections, including the Carolingian *Pseudo-Isidore*. Landau then seeks to present his view of sacramentality and jurisdiction within the history of canon law, establishing the debate on different terms. In essence, Landau highlights how the theology of sacraments actually infused canon law with many principles in the period *after* Gratian, and he argues that sacramentality and jurisdiction have always operated within the church and been part of its identity as both a spiritual and social/political entity—the one on the basis of baptism and the other on the basis of the power of the keys. This essay provides a good example of Landau's ability and tendency to think in larger, more abstract terms and to apply historical analysis to what is a theological question on the nature of the Church. Landau has not provided the final word on Sohm's thesis, but anyone wanting to think through the merits and shortfalls of Sohm's work ought to engage Landau's analysis.

A good example of Landau's topical essays, where he attempts to locate the decisive texts and figures in the development of a particular point of canon law, is his essay on illegitimate birth as an impediment to ordination.[25] Landau's story begins in the first paragraph in the pastoral epistles of the New Testament, which establish the principle that those holding office in the church should have certain qualifications, and some of those qualifications might, according to Landau's interprettation, be more about protecting the reputation of the church than about moral or other characteristics of the individual himself. He next observes that patristic passages in fact speak against what later became established canon law; the Fathers said that illegitimate sons cannot be punished for their parents' sins and should be allowed to be ordained. Landau next turns to the Carolingian era, finding a sharp turn which then was perpetuated

[25] 'Das Weihehindernis der Illegitimät in der Geschichte des kanonischen Rechts' 465-480.

in Regino of Prüm's early tenth-century collection, which took up a conciliar canon barring the child of a seducer and seduced from holy orders on account of the tainting from such an objectionable union. Regino also included three texts under a rubric stating the sons of concubines could not become clerics. Landau detects a sharp increase in material against sons of priests and illegitimate children of any kind being ordained in the reform councils of the eleventh century. They were, in particular, barred from higher orders (deacons, priests, and bishops). Ivo of Chartres provided ample room for dispensations, and Gratian noted that the prohibition was in order only if the son imitated the sins of his father (that is, if he was promiscuous). The general norm, however, was that illegitimate sons were barred from holy orders; exceptions were granted through dispensation by the pope. Landau then turns, as he often does, to the decretals and canonistic jurisprudence of the late twelfth through early thirteenth centuries and traces some new concerns (e.g., primarily a general prohibition against ecclesiastical offices and prebends as heritable), highlights the importance of Bernardus Papiensis in taking up an older canon that was not included in Gratian's *Decretum*, and notes developments under Gregory IX and Boniface VIII.[26] In the end, illegitimate sons were barred from all grades, higher and lower, and popes had to grant dispensation for higher orders while bishops could do so for lower orders. He concludes by saying that, as in so many other areas, decretal law built upon pieces from earlier canon law but significantly advanced principles and instruments for governing a practice. The essay presents a rather common form that Landau's essays take, both in terms of historical trajectory and in terms of his usage of source material.

In general, this collection of essays impresses upon the scholar of medieval canon law the fact that Landau has written something about almost everything. Thus, for any topic or text that one is researching, one should certainly attempt and expect to find publications by Landau to consult. The indices in this

[26] 1 Comp. 1.9.1 (X 1.17.1).

volume are particularly helpful in this regard. All the same, Landau has not written everything or the definitive something about everything. More detailed manuscript and textual work could certainly be done on almost every topic. As in his essay on illegitimate sons, Landau often provides a sweeping overview across several hundred or even more than a thousand years about the canon law pertaining to a particular issue, and he usually does so within the span of twenty pages or less. In such an overview, he often highlights the major figures and draws on available printed editions; he rarely tries to tease out the intricacies of debates and developments on a particular issue. At times, he looks more particularly at a text in a particular collection or at the decretist or decretalist range of positions on a topic, and here he might draw on some manuscripts, but often he relies on one manuscript alone.[27] This point is less a criticism of Landau than a simple observation that ample more work remains to be done, and such work may in fact result in emendations or subtle shifts with regard to Landau's interpretations.

One might level three minor criticisms against the book as a whole. First, Landau's assessment of medieval canon law remains overridingly positive. The positive and laudatory assessments in the essays themselves, written across four decades, are reinforced in his *Addenda*. Thus, he concludes his *Addenda* to the essay on lepers with the statement, 'On the whole, the legal position of lepers is an impressive witness for the humaneness of classical canon law'.[28] In his *Addenda* to his essay 'Ehetrennung als Strafe', he writes that 'the classical canon law of marriage provided an essential contribution to the legal equality of women'.[29] While I find his assessments in these particular cases to be accurate, one does get the impression that

[27] E.g. Biblioteca Apostolica Vaticana, Reg. lat. 973 for the *Collectio tripartita* in 'Das *Dominium* der Laien an Kirchen', or Leipzig, Universitätsbibliothek 968 for Tancred's glosses on *Compilatio prima* in 'Die Leprakranken im mittelalterlichen kanonischen Recht'.

[28] 'Im Ganzen ist die Rechtsstellung der Leprakranken ein eindrucksvolles Zeugnis für die Humanität des klassischen kanonischen Rechts' (495).

[29] 'hat das klassische kanonische Eherecht einen wesentlichen Beitrag zur rechtlichen Gleichstellung der Frauen geliefert' (709).

Landau has been, and continues to be, reluctant to consider potentially negative aspects or effects of canon law within the development of the western legal tradition and upon certain groups of people. Other scholars today might prefer to be more attentive to those negative aspects. Second, in light of Anders Winroth's and other scholars' work on the recensions of Gratian's *Decretum*, every *Addenda* should have noted to what general recension (R1 or R2) a particularly important text of Gratian belongs when Landau had discussed it in an essay published before or shortly after the appearance of Winroth's *The Making of Gratian's Decretum*.[30] At times Landau does note this information[31] but he fails to do so in other cases.[32] Finally, Landau clearly works within the German realm of scholarship, and he knows that literature, stretching back into the nineteenth century, extremely well. His usage of Italian scholarship is often impressive, but one would wish at times a more thorough engagement with scholarship in English, French, and Spanish. On the whole, however, Landau's work demonstrates an amazing breadth of knowledge of, and engagement with, both the medieval source material and secondary scholarship. Most of us can only dream of achieving so much and making such an imprint on our field of scholarship in the course of our careers.

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[30] (Cambridge 2000). R1 is my term for what is often referred to as the 'first recension'. It received numerous additions of text as well as emendations. Together, these additions and emendations eventually formed a finalized R2, or 'second recension'. The abbreviated labels allow for the identification of sub-stages of development prior to the full-fledged vulgate edition. In my opinion, a stage R2a, consisting of the first major set of additions to R1 text, is clearly discernible in manuscripts, and some examples of R2b additions are also discernible. Certain changes to R1 text can likely be attributed to a recension R2c. On this terminology, see my 'Gratian's *De penitentia* in Twelfth-Century Manuscripts', BMCL 31 (2014) 57-110.

[31] E.g., in his *Addenda*, p.591, to 'Die Anklagemöglichkeit Untergeordneter vom Dictatus Pape zum Dekret Gratians'.

[32] E.g. on p. 522 with regard to 'Fälschungen zum Begriff des Benefiziums und der Simonie im *Decretum Gratiani*'.

Ubl, Karl. *Sinnstiftungen eines Rechtsbuchs: Die Lex Salica im Frankenreich*. Quellen und Forschungen zum Recht des Mittelalters 9. Ostfildern: Jan Thorbecke Verlag, 2017. Pp. 313. €39.00. ISBN: 978-3-7995-6089-4.

Wilfried Hartmann

In his book published in 2017 on the *Lex Salica* (henceforth: LS), which played a role for almost a millennium (from the 5th to the 14th century), Karl Ubl seeks to understand it as a 'contribution to the cultural history of law'.[1] He provides a series of key questions for his investigation.[2]

1. 'Where did the unlikely persistence of the law book come from'?
2. 'What relevance has been attributed to it over the centuries'?
3. 'Why could it provide a foundation for a completely different political configuration of Frankish history'?
4. 'For what reason did it never undergo substantial changes despite social, political, and cultural changes'?
5. 'What does a "biography" of this legal book tell us about the function and symbolic meaning of legislation'?

It becomes clear with the last question in particular that this book is not only a special investigation into a text of secular law from the early Middle Ages but also about general and fundamental questions regarding legislation.

The beginning of the work includes an overview of the historiography, which is concerned above all with the tradition of 'German' legal history, a tradition which looked for the Germanic origins and thus—in the understanding of the time—the origins of German law. This approach has largely informed the study of the LS since the middle of the nineteenth century, but since the 1970s is no longer prevalent in Germany. Ubl has already dealt with the special features of the LS in a paper

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[1] Ubl, *Sinnstiftungen* 29.
[2] Ibid. 12.

published in 2014.[3] In his opinion, the LS holds a 'special status' as compared to the other legal books produced in Gaul, such as the *Edict of Eurich* and the Burgundian *Liber constitutionum*. Unlike in fifth-century Roman vulgar law, punishments in the LS are not considered damages, but appear as fines, which usually reach an 'exorbitant height'. The fine is an attempt to establish a public criminal law with a rational penal purpose.

In chapter 2 ('Why Barbarians Make Laws') the book deals not only with the beginnings of the LS, but also with other 'barbaric' codifications from Gaul in the fifth and sixth centuries. The edict of the Visigothic King Eurich (466-484) represents a 'legislative new beginning',[4] as the text does not recognize a recourse to Roman law. The legal book, only fragmentarily preserved, was obviously geared toward the problems of the practice; approximately one-half of the titles apply to criminal law. Furthermore, agrarian life is important, which means that not only the elite of the new empire should be addressed. His son, Alaric II (484-507), created a legal book for the Gallo-Roman population, the so-called *Lex Romana Visigothorum* (or *Breviarium Alarici*), which is a short version of the *Codex Theodosianus*. The Burgundian *Liber constitutionum* were issued around 500 by King Gundobad (c. 476-516) and would soon after be supplemented with *novellae*. Like Eurich, the Burgundian king made a fresh start without directly referencing Roman law, and he too focused on criminal law. Gundobad emphasized the non-Roman nature of his legislation; he described his people as barbarians and adhered to barbarous habits such as the 'wergeld' or relatives' liability. In even more detail than Eurich, Gundobad takes into account the interests of the rural population. The focus of the legal book is the 'consolidation of Burgundian identity'.[5] Ubl expressly rejects the thesis of Patrick Wormald, who has considered the codifications

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[3] Karl Ubl, 'Im Bann der Traditionen: Zur Charakteristik der Lex Salica', *Chlodwigs Welt: Organisation von Herrschaft um 500*, edd. Mischa Meier and Steffen Patzold (Roma aeterna 3; Stuttgart 2014) 423-445.
[4] Ubl, *Sinnstiftungen* 40.
[5] Ibid. 49.

in Gaul from the period around 500 as merely 'ideological positioning' and would grant them no influence on judicial practice. In the last part of chapter 2, Ubl examines the question of the period of origin of the LS. He rejects an origin during the rule of Clovis (between 507 and 511) and prefers an origin under Chlodwig's father, Childerich, 'in the decade between 475 and 486/87'.[6] The LS was a 'deliberate positioning in the field of legislation', on which other kings of the post-Roman period distinguished themselves with their own codifications. Unlike the Goths, however, the Franks did not take over Roman law to secure their rule, but instead transposed their own law into written form.

Chapter 3 ('A Monument of Alterity') details the uniqueness of the LS among the codifications of the fifth century. The Franks had taken special liberties and privileges to distinguish themselves from the Roman landowners in the territory they controlled. The ethnic identity of the Franks is overarched by a legal identity. The LS thus received the function of a founding myth, which claimed that their own law stood at the beginning of Frankish history. With this special right, as many barbarians as possible ought to be induced to submit to the Frankish kings. The freemen who carried weapons in the LS were not wealthy landowners, but men who pursued husbandry and livestock. LS is neutral about religion; Christianity is not mentioned and paganism is not supported. The identity of the Franks rested not on religion as among the Visigoths, but on a specific legal system. Karl August Eckhardt had given the Merovingian version of the LS the title *Pactus legis Salicae*;[7] but this is a construct. Rather, it is a peculiarity that designates a legal book as *lex*, which is otherwise a name for the practices of a religious group in the period around 500. Although the LS manages without the reference to the king as a legislator and no emulation of an emperor occurs, nevertheless a conscious legal policy of the king is recognizable, as, for example, in the privilege of the

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[6] Ibid. 96.

[7] Vgl. Karl August Eckhardt, ed. *Pactus legis Salicae* (4 vols. Germanenrechte Neue Folge. Westgermanisches Recht, Bd. 1-2; Göttingen 1954-1957).

royal followers. A separate section is dedicated to the *mallus*, the court meeting. Neither the judges nor the other persons who preside are related to the king. Nevertheless, whoever went before the court submitted to a ritualized procedure. The free Franks anticipated no physical punishment and did not have to submit to the independent discretion of a judge. A court order such as that of the LS 'was meaningful only in a manageable social frame'.[8] This also speaks to the emergence of the LS before the time of a Frankish empire. A special feature of the LS are also the numerous titles about assaults against honor, for which there are no parallels in the contemporary legislation of the Romans, Burgundians, or Visigoths.

Chapter 4 ('Drafts of Community in the 6th Century') further elaborates on the thesis that the LS was the central factor to the 'ethnic change' (W. Pohl) of the early Middle Ages. Since the revisions and additions to the LS in the sixth and seventh century cannot be determined with certainty due to lack of dating, anonymity, and only later attestation in the manuscripts, Ubl examines the royal edicts of this period. Three of these edicts are handed down in connection with the LS and also are closely related to it:

- *Pactus pro tenore pacis* (between 535 and 555): combats theft and omnipresence of the divine judgment by hot water, the ordeal.
- *Edictus Chilperici* (between 567 and 584): strong connection to the LS is shown, for example, in the important position of relatives. In some places an updating of LS is recognizable.
- *Decretio Childeberti II* (c.595).

Prior to these three edicts, three other anonymous additional texts to the LS already existed, which Ubl newly dates. The *Capitulare quintum* followed by the *Capitulare primum* originated under Chlodwig. The *Capitulare tertium* was created by Childebert I (511-558). Under this king, Roman and ecclesiastical norms were incorporated into the tradition of the LS, as shown by the *Capitulare tertium* and the *Pactus de tenore pacis*. While the Merovingian kings appear to Gregory of Tours as deceitful murderers, polygamous despots, and exploitative

[8] Ubl, *Sinnstiftungen* 87.

tyrants, they are now recognized as kings who cared for the creation of a peaceful society. This also applies to Chlothar I (511-561), under whom the presence of ecclesiastical and Roman regulations become clear along with the confession to the rule of law (*norma antiqui iuris* or *lex et aequitas*).

As revision of the LS, the C-version—a B-version does not exist, it is 'a phantom of legal history'[9]—was made under Chilperic I (561-584). Here we can now identify that there are links to Roman law. Thus, in the prologue, there are parallels to the prologue of the *Breviary of Alaric II* and the newly inserted incest definition quotes literally from the *Breviary*. This text could have been inserted for a specific reason, namely the marriage of the king's son Merowech to his aunt Brunichild. The characteristic impression, however, is 'traditionalism', different from the edicts Childebert I or Chlothar I, in which the influence of the Roman right is larger. The C-version shows an extension of casuistry and also shows an advanced Christianization of society. Finally, the *Decretio Childebert II* (575-596) moved away from the LS by incorporating norms from Burgundian and Roman law; thus the LS is surpassed in key points. The death penalty now penetrates with all its might into Frankish law.

Chlothar II (613-629 / 30) had carried out a reorganization of the Frankish empire, to which the legal sources especially testify. In 614 a council was held in Paris, attended by 76 bishops; it was the largest church congregation in the Merovingian period and thus a proof of the close cooperation of kingship and bishops. In his time the *Lex Ribvaria* was issued as an 'updating the LS'.[10] The *Lex Ribvaria* brought LS's material into a systematic order. The content it omitted can be explained by the specific conditions of the late fifth century. What is new is that the charters appear as written evidence and that the church is perceived as part of the public order. Clerics, as the king's officials, have the claim to a higher 'wergeld'. However, the *Lex Ribvaria* does not undermine the special position of the Franks.

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[9] Ibid. 151.
[10] Ibid. 130.

Why was a new law created for the Ribuarien territory and why did the LS itself not undergo a revision? The LS was no longer treated as a living text, but was understood as the 'founding document of the Frankish Empire': 'Under Chlothar II, the fossilization of the *Lex Salica* was complete'.[11] In addition, the idea of legal pluralism prevailed in the Frankish kingdom of the seventh century, that is there was no uniform law for the entire empire (unlike the Visigoths). This is also reflected in the emergence of the *Lex Alemannorum* (and perhaps also the *Lex Baiuvariorum*) at that time. After Chlothar II, no Merovingian king was associated with the text of the LS. Only Pippin the Younger (king 754-768) saved the law book from sinking into oblivion and had a new version (D) created. The oldest surviving manuscript of the LS dates from the middle of the eighth century, i.e. from the time of Pippin (Wolfenbüttel, Cod. Weissenburg 97).

In a first part of chapter 5 ('Usurpation and Legitimacy: The Recast of Pippin I') Ubl examines the 'formulae' of the late-Merovingian period, which testify to the 'interpenetration of Frankish and Roman legal concepts'.[12] Ubl objects to Nehlsen's view,[13] that the LS had no significance for everyday legal practice because in some cases a knowledge of LS can certainly be found. This is most evident in the *Liber historiae Francorum* (726/27), in which the writing down of their own right is one of the most important characteristics of the Franks.

A manuscript of the A-version, a copy of the C-version, and various additional texts were used for the editing of the D-version. The D-version has 100 titles compared to the 65 titles of the A-version. Nevertheless, the legal subject matter is barely increased, only three titles are completely new. The headings are more detailed and adapted to the content of the individual titles, which makes it easier to find the individual chapters. The text,

[11] Ibid. 133.
[12] Ibid. 141.
[13] Vgl. Hermann Nehlsen, 'Zur Aktualität und Effektivität der ältesten germanischen Rechtsaufzeichnungen' *Recht und Schrift im Mittelalter*, ed. Peter Classen (Vorträge und Forschungen 23; Sigmaringen 1977) 449-502.

however, is restrictive due to catastrophic errors in transmission, which are so prominent that many texts make no sense. The text of the LS is preceded by a long prologue and the *Decretio Childeberti II*, and followed by an epilogue and a list of the last Merovingian kings for the purpose of pursuing the new version of Pippin. Through prologue, epilogue, and list of kings a connection of the Carolingian kingship with the Merovingian dynasty is established. This makes the D-version recognizable as 'symbolic legislation'. The so-called 'long prologue' emphasizes the singular position of the Franks, who appear as the chosen people. It highlights the military superiority of the Franks, while the Romans are portrayed as vanquished opponents and enemies of Christianity. The Christian ethic of kingship (humility, help for the poor, mercy) is not mentioned. It looks as if the editor of the long prologue knew the *Lex Baiuvariorum* prologue and tried to surpass it. The new version of the LS and the long prologue, according to Ubl, fit well after the year 764 with its unfinished conflicts in Aquitaine and with the Bavarians. The new edition of the LS was not only a 'product of ideology or royal representation',[14] but also the LS 'expressed the relationship between aristocracy and royalty, the freedom and special status of the Franks, the consensual nature of the rule and the legislative authority of the monarchy'.[15] This revision was not only necessary to revive the identity-creating function of this legal book, something that had been forgotten somewhat in the late-Merovingian period. Through the 'commitment to the continuity with the Merovingian rule and to the privileges of the Franks laid down in the legal book' the dynastic change was neutralized.[16]

Chapter 6 ('Charlemagne and the Mystical Authority of Law') deals with the two revisions of the LS during the time of Charlemagne. A first recast (E) cleared the legal book of barbarous Latin; the second revision (K) also contains content-related adjustments. The revisions of the LS attempted to 'make

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[14] Ubl, *Sinnstiftungen* 163.
[15] Ibid.
[16] Ibid. 33.

current legislation a continuation of an ancient tradition'.[17] In addition to these two revisions during the time of Charles was also a translation into the vernacular and a supplementary capitulare. In addition, Charles issued numerous other capitularies in which fundamental decisions but also temporary ordinances and religious-moral admonitions are side-by-side and muddled.

The knowledge of the written law was demanded in the Frankish realm already by c.786. The E-version of the LS, which was written around 789, is a result of the effort to improve the Latin (spelling and grammar) in fundamentally important writings (as well as the Bible). Where something is incomprehensible, it is omitted, as the so-called Glosses of the Malberg noted in Old-Frankish language. Karl Ubl wrote an essay about the E-version, which was made around 789.[18] In it he emphasizes that the E-version replaced the unsuccessful D-version of Pippin (from the year 764), but without adapting the LS to the legal practice and the needs of the time. 'The LS had thus become an unchangeable text over a long time'.[19] Not only was the LS renewed around 789, but also the *Breviary of Alaric II* was confirmed by the king. This is supported by the fact that of the five manuscripts of the E-version, four of them contain a short form of the *Breviary*, the so-called *Epitome Aegidii*.[20] The main purpose of the legal reform of 789 was to support Frankish hegemony. Therefore, although the LS was subjected to revision, the 'leges' of the Bavarians and Alemanni were not.

In 802 the situation was different: Charles was now emperor and he was therefore able to give other people an equal place to the Franks. At that time the K-version was elaborated, of which more than 70 manuscripts have been preserved (54 of them from

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[17] Ibid. 34.

[18] Karl Ubl, 'Die erste Leges-Reform Karls des Großen', *Das Gesetz – The Law – La Loi*, edd. Guy Guldentops and Andreas Speer (Miscellanea mediaevalia 38; Berlin 2014) 75-92.

[19] Ibid. 80.

[20] These are the manuscripts: E11 (= Vat. Reg. lat. 846), E12 (= Paris BNF lat. 4409), E13 (= Warschau, UB 1 from Tours) and E14 (St. Gallen 729 from the first third of the ninth century).

the ninth century). Wallace-Hadrill was of the opinion that the revision was for antiquarian purposes only. According to Ubl, the K-version is based on the A-version. The K-version contains only 70 titles instead of the 99 titles of the E-version. As far as the text is concerned, the basis of the K-version is the C-version; all additions to C-version are incorporated. But the text also shows that the A-version is used. Understandability and standardization are important goals with this revision. There are also explanations of no longer easily understandable facts or concepts. The manuscripts of the K-version show the concern for care and accuracy, so that the shortcomings of D- and E-versions are largely avoided.

If we ask which parts of the LS are still relevant after 802, then we should focus on the method of imposing fines and to the legal process. The *Recapitulatio solidorum* (around 800, and in 22 manuscripts handed down) is of interest for the continued application of the method of fines.[21] All the old law books, including canon law, contain obsolete and no longer applicable regulations. Nevertheless, one will not be able to derive 'from this fact the lack of actuality and effectiveness of canonical norms'.[22] New after 800 is the entanglement of *lex* and *capitula* (*leges* and capitularies), both in terms of content and in the written tradition. This can best be seen in the *Capitulare legibus additum* of 803, which is handed down in 36 of its 44 manuscripts together with the LS.

Chapter 7 ('Transformation and Fall of Frankish Law') represents the development in the period from Charlemagne to Charles the Bald, during which a large number of capitularies were enacted and the legal book of the LS was greatly suppressed. The capitulary collection of Ansegis (about 825) almost replaced the LS. The study of Roman law, which was known in the ninth century mainly in the form of the *Breviary of*

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[21] Cf. Karl Ubl, 'Die Recapitulatio solidorum aus der Zeit Karls des Großen', *Charlemagne: Les temps, les espaces, les hommes: Construction et déconstruction d'un règne*, edd. Rolf Grosse and Michel Sot (Turnhout 2018) 61-79.

[22] Ubl, *Sinnstiftungen* 189.

Alaric II, also made the archaic particularism of the LS stand out. The attempt to outdo his father is well recognizable in Louis the Pious (814-840). Louis fashioned himself on the Roman Empire, which is also the case in the chronicle of Frechulf of Lisieux. What is missing, however, is a unified law book for the entire kingdom. Importantly, the capitularies should apply to all faithful of the kingdom, regardless of their ethnic affiliation. Even under Louis provisions of the LS were still considered, but the legal book may not be construed 'as a codification in the modern sense'[23]: the letter of the law was not decisive in court and no exclusive application of the written form was sought. There are also traces of the knowledge and the use of the LS under Charles the Bald (843-877), as in the *Edict of Pîtres* (864). But unlike the heavy use of the Ansegis collection, these references to the LS appear marginal. On the other hand, Charles the Bald appropriated Roman law, which he understood as the right of his ancestors.

Chapter 8 ('Knowledge of the Law of the Franks in the 9th Century') examines the textual tradition of the LS. Here there is no clear endpoint of the relevance of the Frankish legal book to recognize. If one looks at the tradition, the LS is usually handed down together with other (legal) texts. Only four manuscripts of the LS, however, contain church legal material. There are no texts of an antiquarian nature (such as historical works) in the manuscripts. In numerous manuscripts of the LS—especially from the time of 825-850—*leges* and capitularies are combined, which Ubl interprets as an indication of the imperial character of the Frankish kingdom. The capitularies of Charles the Bald are rarely reported together with the LS, but rather usually in conjunction with Ansegis. Our knowledge about the owners of LS-manuscripts is very limited: A manuscript of the LS neither originates from the court of Charlemagne, nor from the court of Louis the Pious, nor that of Charles the Bald. The setting closest to Charlemagne is Paris BNF lat. 4404. In addition, there are some manuscripts from Charles's time that were made for

[23] Ubl, *Sinnstiftungen* 211.

individual ministers. A certain proximity to the court of Louis is probable for the manuscript Paris, BNF n.a.l. 204 (Scriptorium of Tours) and Copenhagen, Kongelike Bibliotek 1943. We know for sure only three manuscripts that once belonged to laymen. Whether conclusions can be drawn from the format of the codices of previous owners is uncertain: 20 manuscripts of the LS, 8 of them from the first quarter of the ninth century, can be described as small formats (below 20 cm in height). In addition, there are some large formats, among which Codex Paris BNF lat. 4418 stands out with a height of 42.5 cm.

Even after the break around the time of 900, copies of the LS were still made in considerable numbers. The reputation of the legal book as a symbol of the Frankish identity thus outlasted the crisis of the Carolingian kingdom. However, since the tenth century there seems to have been an antiquarian interest in the LS. 'It is no longer interested the validity of the norms, but the memory of a primitive text of Frankish history'.[24] In the fourteenth century, the problem of dynastic succession led to a rediscovery of the LS. The 'revolution of the law' in the twelfth century, however, was based on the *Digest*, which had remained unknown in the early Middle Ages in the Latin West. Ubl cannot and does not want to provide a critical review of the textual history of the K-version in his book. Two examples demonstrate the 'stability of the textual content' or 'the pursuit of an authentic text'.[25] Occasionally the writers tried to improve the text, to make it more understandable or to compare it with the text of an earlier version.

Chapter 9 ('For Another Legal History') raises the interesting question of why Frankish law no longer held any relevance for further development. According to Maurizio Lupoi, a common law existed before the twelfth century.[26] However, the results of Ubl's investigation point in a different direction: the LS recorded the special right of the Franks and emphasized the contrast to the

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[24] Ibid. 35.

[25] The quotes are contained in Ibid. 238 are 241.

[26] Maurizio Lupoi, *The Origins of the European Legal Order*, trans. Adrian Belton (New York 2000).

universal Roman law of antiquity. Thus it corresponds to the model of a 'gentile legal system',[27] it was not a 'legal code for the empire'. The LS still had relevance in the tenth century: 24 charters from West Francia refer to them. 'The symbolic significance of the LS thus survived the crisis of the Carolingian kingship'.[28] 'The legal book became part of the cultural memory'.[29] Ubl opposes such terms as 'big bang' or 'revolution' for the beginning of the twelfth century and basically rejects an 'evolutionary history of law'.[30] The last sentence of the book is: Codification 'had community-building functions, gave the community a symbolic value system and could be used as a mystical foundation for new legislation'.[31] It can be seen that the author has answered his guiding questions from the beginning well. What is also clear is that what Ubl actually means by 'conscious foundation (Sinnstiftung)' should be left open.

Very little criticism of the details can be put forward: the knowledge of literature is so comprehensive that older and newer literature are treated very well. However, on p. 169 where the capitula of Herstal is referred to as 'the first legislative act of Charlemagne', one might note that the capitula of 769 apparently was not taken into account.[32] The lack of an index to cite and treat sources of law (such as synods) is also regrettable as it would have been very useful for further research. In the register of manuscripts, one would have appreciated information on the time and place of the origin of the manuscripts. But these are petty things that do not affect the many new results that this highly interesting and important book offers.

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[27] Ubl, *Sinnstiftungen* 247.
[28] Ibid. 251.
[29] Ibid.
[30] Ibid. 254.
[31] Ibid.
[32] See Gerd Schmitz, 'Die Waffe der Fälschung zum Schutz der Bedrängten? Bemerkungen zu gefälschten Konzils- und Kapitularientexten', *Fälschungen im Mittelalter: Internationaler Kongress der Monumenta Germaniae Historica. München, 16.-19. September 1986*, Teil 2: *Gefälschte Rechtstexte: Der bestrafte Fälscher* (Schriften 33; Hannover 1988) 79-110 esp. 82-94.

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Dominus Episcopus: Medieval Bishops between Diocese and Court, edd. Anthony John Lappin and Elena Balzamo (Konferenser 95; Stockholm 2018) = *Dominus Episcopus*

Episcopal Power and Local Society in Medieval Europe, 900-1400, edd. P. Coss, C. Dennis, M. Julian-Jones, and Angelo Silvestri (Medieval Church Studies 38; Turnhout 2017) = *Episcopal Power and Local Society*

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