The Beginning of Roman Law Jurisprudence and Teaching in the Twelfth Century: The Authenticae

There has been vigorous debate in recent years about when and where jurists began to teach Roman law. That debate is the larger context in which this essay should be read. Here I will attempt to provide evidence for one aspect of the jurists’ work at the dawn of the...
school of law in Bologna, the addition of *authenticae* to the margins of Justinian’s *Codex*. *Authenticae* were also added to the *Institutes*, but those additions will not be considered here. These marginal additions have been only little studied until recently. Frederick A. Biener wrote about them in depth for the first time at the beginning of the nineteenth century². Almost a century later Giovanni Baptista Palmieri published a transcription of the *authenticae* that he found in the margins of six manuscripts and in a collection of *authenticae* in a Montecassino manuscript³. If Palmieri had written an essay on the basis of his work, he could have made the following points: 1. the *authenticae* were added to the margins of the *Codex* in stages; 2. although some of the *authenticae* summarize passages from Justinian’s *Novellae* fairly accurately, others bear only a loose relationship to the *Novellae*. 3. although the Bolognese tradition attributed the *authenticae* to Irnerius, the manuscripts contain *authenticae* with the sigla of a number of twelfth-century jurists. 4. there were many more *authenticae* in the twelfth- and thirteenth-century manuscripts than contained in the late medieval and early modern printings. Palmieri might have concluded that many of the twelfth-century *authenticae* were rejected by later jurists because of their sometimes dubious origins.

The *authenticae* circulated primarily in the margins of *Codex* manuscripts, but they also circulated as small collections that were appended to copies of the *Codex* or that circulated separately⁴.

⁴ E.g. Vat. lat. 1427, fol. 1r-2r, Vat. lat. 11598, fol. 2ra-3vb. Adam Vetulani and Wacław Uruszczak have written about a collection of *authenticae* in a Krakow manuscript, ‘Collectio Authenticarum’, *Revue de droit canonique* 30 (1980) 364-381; most recently Franck Roumy has edited a collection of *authenticae* in Paris, Bibliothèque nationale de France (=BNF) lat. 3922 A, fol. 209ra-210ra in ‘Une collection inédite d’authenticae fabriquée en Normandie à la fin du XIIe siècle’, *Novellae constitutiones: L’ultima legislazione di Giustiniano tra Oriente e Occidente, da Triboniano a Savigny: Atti del Convegno Internazionale, Teramo, 30-31 ottobre 2009*, ed. Luca Loschiavo, Giovanna Mancini, Cristina Vano (Università Degli Studi Di Teramo, Collana della Facoltà di Giurisprudenza 20; Napoli, Edizioni Scientifiche Italiane, 2011) 155-204. Walter Holtzmann and, later, Christopher and Mary Cheney examined this collection, but they did not realize what the texts were, see *Studies in the Collections of Twelfth-Century Decretals from papers of the late Walter Holzmann*, edd. C.R. and Mary G.
exploration of the manuscripts is far from complete but already provides evidence that the *authenticae* were added to manuscripts from ca. 1100-1125 on⁵. When manuscripts that predate ca. 1100 have *authenticae* they are added by hands that are later than the hand(s) of the text and are, for the most part, clearly not the product of the same scriptorium as the main text of the *Codex*. That is, the text of the *Codex* and the *authenticae* were not produced at more or less the same time in these manuscripts. Berlin, Staatsbibliothek, Preußischer Kulturbesitz lat. 272 is an example of such an early text with *authenticae* added by a later hand. Since this manuscript omits many *authenticae* of the later tradition, it and others like it may be a guide to the very earliest stage of the *authenticae* tradition. A manuscript like Berlin, Stuttgart, Württembergische Landesbibliothek jur. lat. fol 71 also provides good evidence that the *authenticae* were first added around 1100. The earliest glosses date to the first quarter of the twelfth century. The *Authenticae* are added in several different hands. Whether Irnerius was the author, or more accurately, the crafter of the first *authenticae*, is a question to which we will probably never have a conclusive answer⁶.

There were vigorous debates in among early modern scholars about Irnerius’ authorship⁷. Odofredus is often quoted in the secondary literature as having credited authorship of the *authenticae* to Irnerius. Odofredus is well known to legal historians as being amiable and garrulous, but unreliable as a source. However, the tradition of Irnerius’

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⁵ Radding and Ciaralli, *Corpus iuris civilis* 157 point to Berlin, Staatsbibliothek, MS lat. 272 and 273 as having been written between 1080 and 1120. They do not pay any attention to the *authenticae* in their survey of *Codex* manuscripts.


⁷ A particularly interesting example is Cornelis van Bijnkershoek (Cornelius van Bynkershoek) (1673-1743), who wrote a tract defending the authorship of Irnerius and also argued that other twelfth-century jurists were responsible for them, see ‘De auctore auctoribusve authenticarum (quas vocant) Diatriba’, *Opera minora* (2nd ed. Lugduni Batavorum [Leiden]: Apud Joannem van Kerkhem, 1744) 181-220, Bynkershoek appended a series of epistolary debates about his tract.
having inserted the *authenticae* extends back to the twelfth century. One of the earliest jurists to attribute the *authenticae* to “Irnerius or someone else” was the canonist Huguccio in his commentary on Gratian’s *Decretum* at a point where the Father of Canon Law had included five *authenticae* in his collection. If, as is likely, Huguccio were a student in the 1160’s, he might have learned this fact from teachers who had known Irnerius. Huguccio may have heard a Bolognese oral tradition, or he may have noted when he read the *Codex* that some of the *authenticae* were signed with Irnerius’ sigla, “y.”

Modern scholars have accepted Irnerius’ authorship. Friedrich Karl von Savigny and Enrico Besta used the commentaries of the jurists to decide which of the *authenticae* Irnerius had written. Besta thought that 40 *authenticae* could be safely ascribed to Irnerius on the evidence provided by Azo, Accursius and Odofredus in their glosses and commentaries. The obvious problem with that approach is that these jurists were far removed from the first quarter of the twelfth century. Vetulani and Urusczak believe that *authenticae* might be attributed to Irnerius; they provided a good reason for making that conjecture. Gratian included ca. 30 *authenticae* in his *Decretum* before 1140. “If not Irnerius who?” one might ask. In any case Vetulani’s and Urusczak’s surmise is based on better evidence than the conjectures of the later jurists.

Another aspect of the problem is a very early gloss at the beginning of the *Codex* that the jurists attributed to Irnerius because the manuscripts carried his sigla “y.” In it, Irnerius seems to question the authenticity of the *Authenticum*. If Irnerius did not believe that the

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8 D.54 c.20, s.v. *episcopalis dignitas*. See Wolfgang P. Müller, *Huguccio: The Life, Works, and Thought of a Twelfth-Century Jurist* (Studies in Medieval and Early Modern Canon Law 3; Washington, D.C.: 1994) 133 n. 41, 186-187. *Authenticae* were added to the margins of *Decretum* manuscripts in the 1130’s; see Pennington, ‘Big Bang’ 63-64.

9 e.g. Palmieri, *Authenticarum collectio* 74, 81.

10 Lange, *Römisches Recht* 75-76.


13 See José Miguel Viejo-Ximénez, ‘Las *Novellae* de la tradicion canonica occidental y del decreto de Graciano’, *Novellae constitutiones* (note 4) 206-277; at 275-277 he lists the *authenticae* in Gratian.

14 Vetulani and Urusczak, ‘Collectio’ 365; in fact Gratian included 26 *authenticae*, not 14.
Authenticum was authentic, why did he use so many extracts from it to update the Codex? The medieval jurists who read Irnerius' gloss asked themselves the same question. Odofredus, as usual, had a firm answer: Irnerius changed his mind. Luca Loschiavo has thoroughly examined both versions of Irnerius' gloss and concluded that Irnerius' point was simply that the Authenticum was not an official codification because it lacked a statute of promulgation and that Irnerius drew attention to the stylistic fact that the Latin translation of many of the laws was not elegant.

At this point in my research, I can say is that the tradition of adding authenticae began in the very early twelfth century and that other jurists composed a large number of authenticae during the twelfth century that they entered the margins of many manuscripts. In the thirteenth century, this rush of creativity slowed considerably. The jurists began to reject authenticae they considered to be dubious. They pointed out that the authenticae sometimes had little connection or a dubious connection with the Novellae from which they purported to be derived. The jurists also decided that some authenticae were so "inauthentic" that they were false or misleading. I will give a notable example of a "false" authentica below. Their questions about the authenticity of some of the authenticae are highlighted by many later short comments in the manuscripts that noted certain authenticae should not be read in the lecture halls. Eventually, by the time the Codex was printed in the fifteenth century, ca. 220 authenticae were a part of the text, but ca. 150 authenticae were dropped from the tradition.

Irnerius' and the jurists' purpose and goals for adding authenticae are not hard to see. The Codex contained Roman imperial legislation. They wished to incorporate some of the up-dates Justinian made, and they also wished to bring these laws into concordance with twelfth-century law. 15 Savigny, Geschichte 3.490-504 at 493 where he prints Odofredus' gloss to the constitution Cordi.

16 His argument is much more complicated than those two points, but these conclusions are important for this essay, see Luca Loschiavo, ‘La riscoperta dell'Authenticum e la prima esegesi dei glossatori’, Novellae constitutiones (complete citation above in note 4) 111-139 at 128-136.

17 Lange, Römisches Recht 76, is incorrect to write that “Neue Authentiken scheinen indessen nach Irnerius nur spärlich geschaffen worden zu sein.”

18 Besta, L'opera d'Irnerio 138-139, gives some examples.

19 e.g. “Hec autentica non legitur,” Paris, BNF lat. 8940, fol. 4rb, Paris, BNF lat. 4523, fol. 151v or “vacat,” Paris, BNF lat. 4534, fol. 7vb, Paris, BNF lat. 4527, fol. 171v or “hec autentica falsa est,” Paris, BNF lat. 4536, fol. 163va, or that a famous jurist has declared that the text is not legitimate: “Set B<ulgarius>, dicit non esse authenticam,” Wien, ÖNB, lat. 2267, fol. 171r. See also, Pennington, “Big Bang” 68 with nn. 97-98.
century societal norms. For the historian of medieval law in the twelfth and thirteenth centuries, these latter changes are the most interesting.

In order to understand fully the formation of the authenticae it is necessary to describe how they were added to the margins of Codex manuscripts. When the authenticae were copied in the scriptoria at approximately the same time as the main text, they are provided with “frames” or “boxes” that surrounded the text. These frames could be quite elaborate in manuscripts that were produced in Italian scriptoria and would often have intricate red and blue pen drawings that eventually surround the entire text of the authentica. The text of the authentica would begin with two capital letters, CN, usually one letter in blue and the other in red. The letters stood for “Constitutio nova”\(^{20}\). This notation would be followed by a rubric in red that purported to give the place in the Authenticum from which the text was taken. Sometimes the rubrics are inaccurate or missing completely, especially for those texts that had little or no relationship to Justinian’s legislation. To make the job of the readers more difficult, the texts were usually placed in the margins of the manuscripts with no indication to which laws they should be connected. There also does not seem to have been an established order in which the authenticae should be copied\(^{21}\). I have examined the sequence in which the authenticae were placed in over twenty twelfth-century manuscripts. The results have been that there does not seem to have been any established arrangement that the scribes followed. Eventually the jurists decided to which constitution in the Codex each authentica should be attached\(^{22}\). Nevertheless, in the early evolution of the authenticae readers must have had some difficulty deciding which authenticae were meant to augment which constitutions. Irnerius and the other jurists

\(^{20}\) This abbreviation has confused more than one legal historian. Emil Friedberg interpreted it as “Codex novus;” see his apparatus to C.2 q.6 c.41, n. 520; the correctores Romani were also confused; see their comment to C.10 q.2 c.3.

\(^{21}\) The varying order of the authenticae in the Montecassino and Paris manuscripts enregistered by Roumy demonstrate the confusion that the jurists must have dealt with when they looked at these texts; see Roumy’s list of authenticae, ‘Collection inédite’ 195-204.

\(^{22}\) The the Paris collection edited by Roumy, instructions are given for each text to which constitution it should be connected. Berlin, Staatsbibliothek, Preußischer Kulturbesitz lat. 408 (ca. 1200 A.D.) has the standard siglae that indicate to which constitution or section of a constitution an authentica should be attached. Most of the twelfth-century manuscripts I have seen do not have siglae but sometimes attempt to position the authentica close to the the intended constitution.
most likely intended to use the excerpts from the novellae to “up-date” Justinian’s Codex.23

Later jurists complained about the disconnects they discovered between authenticae and the texts to which they were now attached. This is not surprising if one understands how haphazardly they were incorporated into the margins of the Codex during the twelfth century.24 The insertion of the authenticae into the main text of the Codex, the format adopted by all the early printed editions, appears to have happened only in the late Middle Ages. Of the many manuscripts that I have examined, I have found only one manuscript in which the authenticae have been placed between the texts of the laws as they uniformly appear in the printed editions.25

The authenticae were purported to be summaries of, or excerpts from, Justinian’s Novellae and, when they were indeed taken from the Novellae, they derived their authority from these imperial laws. Irnerius did not use a collection of Justinian’s Novellae. Rather he knew the Novellae in the collection known as the Authenticum. The history of the transmission of the Novellae in the form of the Authenticum is obscure and very difficult to trace.26 Its evolution has not yet been explained because there is no manuscript evidence. Theories range from the Authenticum’s being a collection compiled for the lands that Justinian’s generals reconquered in the West to its being a product of the eleventh century.27 The only sure piece of evidence we have about the Novellae is

23 Emanuele Conte, Diritto comune: Storia e storiografia di un sistema dinamico (Bologna 2009) 77-82 at 81-82.
24 Accursius to Cod. 3.11.2 s.v. Quod fieri: “hec authentica non bene aptatur (var. apertatur) ad legem codicis prout Ir<nerius> eam posuit, nam innuit secundum eum quod rescriptum non teneat nisi prestita satisdatione, quod falsum est”.
25 Munich, Staatsbibliothek Clm 3501. The manuscript was written ca. 1400 and the authenticae are inserted into the text but not in the same order as in the incunabula editions. I have not yet examined enough incunabula editions to know whether they printed the authenticae in a standard format. Cf. Wallinga, ‘Authenticum and authenticae’ 148.
27 Lange, Römisches Recht 82-83 for a balanced summary of the literature. As Loschiavo has given an up-dated discussion of the Authenticum’s origin and has emphasized the paucity of evidence, see “Riscoperta dell’Authenticum” 114; when he has finished his current project on the Authenticum, we may know more.
that they circulated widely in the West in an abbreviated text whose Latin was clear and simple. This collection was called the *Epitome Juliani* after its putative author. Twenty manuscripts of the work are still extant. For our purposes, one of the most puzzling aspects of this story is that, when Irnerius began to place summaries of the *Novellae* in the margins of the *Codex*, he did not use the translations that he undoubtedly knew from the *Epitome Juliani*. Instead he seems to have relied on the Latin text of the *Authenticum* for the basis of his summaries. Perhaps, his doubts about the *Authenticum* were even more profound when confronted with an abbreviation of it.

With that introduction to the various problems surrounding our knowledge of the *authenticae* I will spend the rest of this essay concentrating on the question, how did the twelfth-century jurists create these marginal additions to the *Codex* and what these texts can tell us about the teaching of law? I begin with an *authentica* dealing with the marriage of a slave to a free person. This *authentica* dealt with the issue of the marriage of slaves to free persons and can be found in the margins of early twelfth-century manuscripts in two forms:

\[ Ad \ hec \ qui \ suam \ ancillam \ credenti \ tradit \ in \ matrimonium \ tamquam \ liberam \ aut \ sciens \ eam \ duci \ taceat, \ ex \ studio \ dominium \ amittit \ et \ eaque \ ad \ ingenuitatem \ rapitur. \]

\[ Ad \ hec \ qui \ suam \ ancillam \ credenti \ tradit \ in \ matrimonium \ tamquam \ liberam \ aut \ sciens \ eam \ duci \ taceat, \ ex \ studio \ dominium \ amittit \ et \ eaque \ ad \ ingenuitatem \ rapitur. \]

\[ Idem \ dicitur \ de \ servO. \]

Inexplicitly, Radding and Ciaralli, *Corpus iuris civilis* do not discuss the *Novellae* or the *Authenticum*.


29 There are minor variants in the manuscripts: München, Bayerische Staatsbibliothek 3880, fol. 181v, München, Bayerische Staatsbibliothek 28178, fol. 166v, Paris, BNF lat. 4532, fol. 163v, Paris, BNF lat. 4521B and Vatican, Biblioteca Apostolica lat. 11599 omit the *authenticae*. The collection of *authenticae* edited by Roumy from Paris, BNF 3922A, ‘Collection inédit’ 193, omits the phrase “Idem dicitur de servo.” This may be an indication that although the manuscript dates to the late twelfth century, the collection of *authenticae* were put together much earlier.
The text is a summary of *Authenticum* 4.1 = *Novella* 22.11 in which Justinian made two points: if a master gave his servant girl in marriage as a free person, the marriage is valid and the girl became a free person. If the master did not give the servant girl away but knew of the wedding, the wedding was valid and the girl was free just as if the master had consented from the beginning. The addition of “Idem dicitur de servo” is clearly a later addition to the text, probably had its origins in a gloss to the *authentica*. Since there was, as far as we can tell, little distinction between an “ancilla” and a “servus” in the sources, the jurists expanded the *authentica* to include slaves, both male and female.

The jurists had further thoughts about the question. In *Novella* 22 Justinian had forbidden foreign “adscripticii” to marry a free woman whether the master knew and approved or not. In some manuscripts a jurist appended a short passage after “Idem dicitur de servo” on “adscripticii”. “A male ‘adscripticus’, indeed, may not marry a free woman” appears in a Munich manuscript. A Paris manuscript added that it is immaterial whether the master consents or not. If Irnerius were the author of the original *authenticae* the addition of the phrase “Idem dicitur de servo” evolved early in the tradition. An unknown jurist added the *authentica* with the phrase “Idem dicitur de servo” to the margin of a very early version of Gratian’s *Decretum* contained in Sankt Gallen, Stiftsbibliothek 673 before ca. 1140. The *authentica* was added to

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31 *Novella* 22 was placed in Collatio 4.1 of the *Authenticum*.

32 *Novella* 22.17 (Auth. 4.1): “Ascripticio autem alieno nubere liberam non licet neque ignorantane sciente neque consentiente possessore”. “Ascripticii” were persons who were bound personally bound to their master’s land. The term is taken from Roman law and was used in King Roger II’s legislation (ca. 1140) and in the *Constitutions of Melfi*, see Pennington, ‘The Birth of the Ius commune: King Roger II’s Legislation’ 46. See aslo Emanuele Conte, *Servi medievali: Dinamiche del diritto comune* (Ius nostrum, Pubblicati dall’Istituto di Storia del Diritto Italiano dell’Università di Roma “La Sapienza”, 21; Roma 1996) 37-65.

33 München, Bayerische Staatsbibliothek 22, fol. 154v: “Ascripticio vero nubere liberam mulierem non licet.”

34 Paris, BNF 4519, fol. 162vb: “Aliud est de seruo ascripticio cum non conceditur libera inducere uxorem siue sciente siue contradicte domino”. Wien, Österreichische Nationalbibliothek lat. 2267, fol. 157r has the added later note to the *authenticae* on “ascripticio”.

43
Gratian’s Causa 29 in which Gratian had discussed the case of a male slave marrying a free and noble woman. In his analysis of the case, Gratian had not broached the subject of the slave’s master’s rights\(^{35}\).

This addition in the Sankt Gallen manuscript provides evidence for two quite different points: First, the jurists began to tweak Irnerius’ texts as soon as they began to circulate, and second, that the text of the Sankt Gallen manuscript is not an abbreviation. The addition of four different autenticae to its margins meant that it must have been used for teaching in a center where Roman law was also taught and that the norms of Roman law were being used to explicate canonical problems. In such a school, jurists would not have been using abbreviations to teach canon law to their students. Abbreviations were used in provincial schools on the periphery not in major centers\(^ {36}\).

Later jurists were not content to leave the autenticae in the hands of their twelfth-century colleagues. In the case of “Ad hec qui ancillam suam” they expanded the text by drawing upon other sections of Novella 22:

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\text{[Nov. 22.11]} \text{ aut. Ad hoc (var. hec) qui ancillam suam credenti tradidit in matrimonium tamquam liberam, sive confecerit dotalia instrumenta sive non, aut sciens eam duci taceat ex studio, dominium eius amittit eaque ad ingenuitatem rapitur. Idem dicitur de servo.} \text{ § [Nov. 22.10]} \text{ Si uero nec domini voluntas nec taciturnitas studiosa interueniant et quis credidit libere se iungi persone, illa vero famula existere, declaretur ipso iure matrimonium non tenet.} \text{ § [Nov. 22.17]} \text{ Ascripticius autem alieno nubere liberam non licet, ignorante vel sciente vel consciente est domino; immo datur licentia domino pro se vel per presidem abstrahere ascripticium suum et plagis mediocribus eum castigare.}
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This text is found in the later manuscripts and in all of the printed editions of the Codex\(^ {37}\). It is significant that this enlarged autentica that became the standard text of the Codex by the age of printing did not reflect the some of the jurists’ discussions. Azo permitted an adscripticius

\(^{35}\) John T. Noonan noted Gratian’s incomplete analysis in his essay ‘The Catholic Law School - A.D. 1150’, The Catholic University Law Review 47 (1998) 1189-1205; I have not found any canonist citing the Roman law text until Johannes Teutonicus’ Ordinary Gloss to C.29 q.2 c.4 s.v. faciat.

\(^{36}\) I have made the second point before in Pennington, ‘The “Big Bang”’ 66-67. Viejo-Ximenez has discussed one of the autentica added to the Sankt Gallen manuscript: ‘Novellae’ 267-268.

\(^{37}\) E.g. München, Bayerische Staatsbibliothek 14010, fol. 169v; printed editions: (Nürnberg: 1488), fol. 295r-295v and (Venice: 1496), fol. 228r
to marry a free woman but noted that he would remain in his servile status. Roldandus de Lucca agreed with Azo.

This authentica, “Ad haec qui ancillam”, is a good example of the twelfth- and thirteenth-century jurists' work and of their attitude towards these additions to Justinian’s Codex. They looked upon the Novellae in the Authenticum as a quarry in which to excavate norms they considered important for contemporary society. The rubrics make it clear that the text’s authority was derived from Justinian’s legislation. With that said, the authenticae were prime examples of textes vivantes. I have found that some authenticae, like this one, had rich textual histories; others had much more stable and less interesting lives. The jurists, however, did not feel limited by Irnerius’ work nor by the texts they found in the Authenticum. Their approach to their work was not limited by subservience to past authority.

This generalization is supported by the most interesting authenticae added to the Codex. These authenticae are sometimes completely detached from the text of the Novellae in the Authenticum. A significant number of jurists in the twelfth century added texts to the Codex and labelled them C.N. Many of these additions did not have rubrics that indicated their source in the Authenticum for the simple reason that they were not taken from the Authenticum. The jurists who crafted these texts were the most distinguished of their age. Perhaps their prestige accounts for the widespread acceptance of their texts. If the siglae in the manuscripts are to be believed, the manuscripts and Palmieri’s list of authenticae provide evidence that Bulgarus, Albertus, Jacobus, Johannes Bassianus, Pilius, Henricus de Baila added authenticae. As we will see, later jurists knew of their predecessors’ work and commented on it, sometimes disapprovingly. These jurists were not pleased with many of the additions to the margins of the Codex and became skeptical of their value. In part, I believe, because of this criticism, the early printed

38 Emanuele Conte has edited Azo’s tract on “De agricolis” that was added to his Summa Codicis in Servi medi evali 259-275. Azo wrote at p. 273: “Item ascriptitii sciente et tacente domino matrimonium contrahunt nec condicione liberantur, ut infra l. ult. (Cod. 11.48.24); servi vero sciente et tacente domino liberi efficuntur, ut in auth. de nuptiis § Si uero (Nov. 22 = Auth. coll. 4.1)”.

39 Conte, in eodem, also edited Rolandus’ tract, pp. 282-308 at 301: “Set nec per omnia comparatur ascriptitii servo; nam eo solo dominium ammitto, si me sciente liberam ducat uxor, ut in aut. de nuptis § Si vero ab initio (Auth. coll. 4.1=Nov. 22.11). Secus in ascripticio, ut eius non decrescat condicio, ut C. eodem l. ult. (Cod. 11.48.24)”.

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editions of the Codex winnowed the authenticae down to ca. 220\textsuperscript{40}. How that happened is not clear. Much more research must be done.

Two authenticae added to the margins opposite Cod. 1.2.16 are good illustrations of the method that the jurists used. One is provided with a rubric; the other with an indication of authorship, Johannes Bassianus\textsuperscript{41}.

In aut. de alien. <et> emphyteosi (Nov. 120=Coll. 9.3)
Item nullo modo aliquis hereticorum rem immobilem a quolibet venerabili loco recipiat. Quod si fecerit, quidquid pro hac causa dederit amittat; et rector qui alienavit, omni gubernatione remotus, in monasterium mittatur et per annum sacra communione privetur.

Although the rubric alleges that the text is a summary of Novella 120, there is no section of that long statute corresponds to the text of the authentica. The illegal alienation of ecclesiastical property was a constant refrain in the texts, but I have not found a source for this authentica\textsuperscript{42}.

The second authentica also establishes norms for alienation of church property:

Si archiepiscopus vendit, exigitur presentia duorum episcoporum ex his qui sub eo sunt constituti. Jo. b.

The source for the norm of having two bishops consent to the alienation of ecclesiastical property cannot be found in Roman law but in Gratian’s Decretum\textsuperscript{43}. The authentica is signed with the sigla of Johannes Bassianus. Johannes taught and wrote after ca. 1140 and would have known and used Gratian. His sigla appears on a significant number of authenticae in the manuscripts.

These two texts illustrate how the jurists introduced their ideas and their norms into medieval jurisprudence. When they wished to establish a norm, they did not hesitate to use sources outside the Roman law tradition. The twelfth-century Codex manuscripts are filled with glosses referring to Gratian’s Decretum (as early manuscripts of Gratian are littered with references to Roman law). In Stuttgart, Württembergische Landesbibliothek jur. lat. fol 71 (First half of the twelfth century), there

\textsuperscript{40}The early editions of the Codex would have to be examined in order to gain some understanding of how stable the textual tradition was in the second half of the fifteenth century.

\textsuperscript{41}Both are in München, Bayerische Staatsbibliothek 22, fol. 5rb.

\textsuperscript{42}See the title “De rebus ecclesiae alienandis vel non” in the Compilationes antiquae and the Decreta Gregorii noni.

\textsuperscript{43}C.10 q.2 c.1 (Council of Agde, 506 A.D.)
THE AUTHENTICAE IN THE TWELFTH CENTURY

is a layer of glosses with references to Gratian’s Decretum. These must date to shortly after the appearance of the Decretum, because the form of citation is unusual\(^\text{44}\). In any case, canon law, through the vehicle of Gratian, began to penetrate the margins of Roman law manuscripts very early, just as Roman law, beginning with Gratian, began its inexorable entrance into canon law.

As I have already noted, Gratian placed a large number (30) of authenticae in his Decretum. Jose Miguel Viejo-Ximenez has examined all the authenticae in Gratian and explored their textual complexities\(^\text{45}\). Gratian put almost all of his texts from the Authenticum, Epitome Juliani, and the authenticae in the last, vulgate version of his Decretum. Until we have a better text for the authenticae added to the margins of the Codex it will be impossible to know exactly which tradition Gratian used. Viejo-Ximenez has thoroughly shown the relationship among the five authenticae that formed a “mosaic” Gratian cobbled together in D.54 c.20, where he treated the issue of when and how clerical orders bestowed freedom on a person. The issue was similar to the legal issue of marriage conferring freedom on an unfree person discussed above. Gratian used a series of authenticae attached to Cod. 1.3.34(33), which are present in almost all the earliest manuscripts, to resolve the question. Since Viejo-Ximenez compared Gratian’s texts only to Munich, Staatsbibliothek lat. 22 (a very interesting manuscript nonetheless), he was not able to determine which textual tradition Gratian might have used\(^\text{46}\). Without a thorough study of all the authenticae that Gratian placed in his Decretum, the most we can say for now is that the Father of

\(^{44}\) E.g. fol. 13r: Cod. 1.7.3.2 s.v. pristinum: “Nam et hoc idem euenit in symoniac, qui etsi penitens fuerit, non tamen in clericali communione recipitur, ut D c.i.q.1 cap. Ventum est. (C.1 q.1 c.18). o7o D di. xii. Nos consuetudine.” There are a number of glosses in the manuscript with the unknown sigla of o7o.” Another gloss of this jurist is on fol. 24v b. As with all his other other glosses, he cites only the Decretum. “Poli siquidem iure istud similiter precipitur cum ‘in uno quoque judicio quattuor diuersi offitii personas neccessarium sic esse quorum neuter alterius abuti debet offitto; iudex, scilicet electus quem equitatem uti oportet. Accusatores idonei qui intentione utantur ad causam fundandam seu amplificandam; defensores idonei qui ex tenuatione minuant causam. Testes legiitimi qui veritate sua causam eluminare procurent, ut D ca. iiiii. q.iiiiii. cap. Nullus (C.4 q.4 c.1) o7o.”.

\(^{45}\) Viejo-Ximenez, ‘Novellae’ 243-269.

\(^{46}\) Ibid. 264-268. E.g. the short version of the authentica “Sed dignitas episcopalis” (Auth. to Cod. 1.3.34 [33] Auth. 6.9 = Nov. 81.9) that Gratian put into D.54 c.20 can be found in Roumy’s Paris BNF lat. 3922A, n. 23 (p.188) but also in Stuttgart, Württembergische Landesbibliothek jur. lat. fol 71, fol. 5va and Vat. lat. 1427, fol. 1va. Id est Gratian did not shorten the text but took what he found in the margins of the Codex manuscript he used.
Canon Law knew them, considered them to be legitimate sources of law, and was not reluctant to add them to the canonistic tradition.

The most interesting authenticae are those that have no connection with the text of the Authenticum because they reveal the jurists most direct contemporary concerns. In the thirteenth century Accursius had observed that Jacobus had inserted a “false authentica” into the Codex47. The authentica to which Accursius referred stated that if a defendant had confessed to a debt or “any other thing” outside the courtroom to neighbors, his confession was considered to be as valid as if the confession were made in court or to a magistrate. As we will see, however, the text had a number of variant versions in the manuscripts. In the Stuttgart manuscript, which is an early text, but whose authenticae were added slightly later, the authentica is added to the margin with various notations48:

\(<rubric>\) CN in authen. de testibus § Et licet coll. vii.
Si debitor confessus fuerit debito uel de aliis rebus coram uicinis, pro eodem habetur hoc ac si coram iudice uel apud magistratum confessus fuisset. b<algarus?> non.
§ Set si creditor confessus fuerit se recepisse creditum stetur confessioni.

The italicized texts were added by three different later hands. The rubric alleged that the authentica was derived from Nov. 90.2 (=Authen. 7.2). The citation – made more precise by a later hand – is accurate, but the connection is dubious.49 The passage in the Authenticum does not deal with confessions out of court nor those made before magistrates. The notation at the end of the authentica in a different hand may mean that Bulgarus did not agree. The last gloss, in yet another hand, at the end seems to limit the text to financial civil suits.

47 Accursius, Glossa ordinaria to Cod. 7.59.1 s.v. solvere: “Item pro se \(<\text{Iacobus Antiquus}>\) inducebat quandam falsam authenticam quam hic habebat”.
48 Stuttgart, Württembergische Landesbibliothek jur. 71, fol. 146va. The same text with minor variations can be found in München, Bayerische Staatsbibliothek 3884, fol. 156r, München, Bayerische Staatsbibliothek 28178, fol. 182v, Paris, BNF lat. 4527, fol. 171v, Paris, BNF lat. 4536, fol. 163va, Wien, Österreichische Nationalbibliothek 2267, fol. 171rb.
49 Nov. 90.2: “Et iterum adductus est aliquid alius similis calumnianti, et praeuentibus testibus ad hoc et coram tabulario deposuit apud semetipsum debita esse; et is quidem qui mercede hoc egit decessit, alius autem exactus est debitum quod ab alio quodam tamquam ab eo scilicet confessum, Deo huiusmodi omnino non indulgente occultari”.

48
In a Munich manuscript ca. 1200 the text is tweaked and the incipit is changed50:

*Istam authenticam apposuit yarenius de suo, nec est in corpore, et est falsa; Magister A<l<d<ricus?> non legitur (sic).*

aut. Si confessus fuerit debitor de debito uel de re aliqua, quis confessus fuerit apud uicinos uel v. amicis interuenientibus, pro eodem habetur ac si coram iudice uel apud magistratum confessus fuisse super l. Confessos (Cod. 7.59.1).

A much later scribe attributed the text to Irnerius and stated it is false. Another later hand noted that Albericus? or Aldricus? did not read the text in his class. The hands of both additional glosses is late thirteenth century. The text is similar to that in the Stuttgart manuscript but stipulates that the confession can be made to neighbors or to five friends who have intervened in the dispute. The jurist(s) must have imagined that friends and family would want to insert themselves into the dispute. Their assumption clearly reflected commonly held ideas about conflict resolution in the twelfth century.

The norm that a confession could be validated by five friends had a wide circulation and originated in the middle of the twelfth century. Vacarius included the *authentica* in his *Liber pauperum*. He adopted the same text as in the Munich manuscript51. At about the same time Wilhelms de Cabriano (ca. 1150) observed in his *Casus Codicis* that a person is not prejudiced by his confession outside the courtroom unless, again as in the Munich manuscript, five witnesses were summoned to hear the creditor's confession. The difference in the texts is interesting. Wilhelms assumed the witnesses would be summoned rather than intervening on their own accord. He also thought that if a debtor made a confession, then the confession was valid as if it had been made in court52:

*Qui confitetur alias in iudicio, alias extra iudicium. Si extra iudicium non preiudicat sibi confessio sua, ut ff. de interrogato. act. l.ult., nisi ut*

50 München, Bayerische Staatsbibliothek 14010, fol. 185v; the text of the manuscript and the *authenticae* were written at the same time. The Ordinary Gloss was added much later. With minor variations this text is also found in Paris, BNF lat. 4523, fol. 151v and Paris, BNF lat. 4532, fol. 178va.

51 The Liber Pauperum of Vacarius, edited by F. de Zulueta (Selden Society 44; London: Selden Society, 1927) cxxvii and 237-238.

52 The Casus Codicis of Wilhelms de Cabriano, edited by Tammo Wallinga (Studien zur europäischen Rechtsgeschichte, 182; Frankfurt am Main: Vittorio Klostermann, 2005) 549.
in auth. habetur de creditore qui ante v. testes ad hoc rogatos se debitum suscepisse fuerit, uel econtrario debitor fuerit confessus mutuam suscepisse pecuniam, ubi preiudicat confessio atque si in iudicio esset facta.

In an early Viennese Codex manuscript, a rubric that was contemporary with the text of “Si debitor” stated that the authentica could be found in the Authenticum under the title “De testibus” according to Jacobus, but that “Bulgarus said that it was not an authentica,” confirming the cryptic gloss in the Stuttgart manuscript53. Since there are no siglae attached to the authentica in any of the 20 manuscripts in which I have it, Accursius’ claim that Jacobus added it to the Codex is certainly wrong. He may have seen a manuscript like the Viennese in which Jacobus suggested where a related text in the Authenticum might be found. Since Bulgarus had weighed in on the text’s authenticity and since Jacobus was much younger than Bulgarus, “Si debitor” must have been added to the Codex in the first half of the twelfth century. I doubt, however, that Irnerius wrote it.

We have already seen that the authenticae were important texts in the canonical tradition. They also influenced secular Italian law.54 The Pisans issued statutes in the middle of the twelfth century in which they borrowed the norm contained in “Si debitor.”55 The glossed text of the statutes is preserved in New Haven, Yale University Beineke Library 415 and reads56:

<rubric> De confessioni (confessispc) extra placitum.
Confessio extra placitum ita demum valeat cum quis coram duobus testibus, interrogatus ab adversario suo, de aliqua re [quacumque

54 I have already discussed this briefly in ‘The Big Bang’ 67-69. One might assume that the authentica reflected commonly held opinions in twelfth-century Italian courts and that these opinions shaped the authentica rather than viceversa. It is possible. I think, however, that the wording of the Pisan statute is influenced by “Si debitor.”
56 New Haven, Yale University Beinecke Library 415, fol. 29v, Pisa, Constitutum usus, Title 17.
THE AUTHENTICAE IN THE TWELFTH CENTURY

qualitate uel re et ex quocumque contractu siue in scriptis siue sine scriptis [post correctionem] confessus fuerit.

A few folia earlier another statute that a later scribe has put “vacat” around the text repeated the same norm57:

Sub iuramento si quis confessus fuerit etiam extra iudicium et probari poterit, ita pro iudicato habeatur, ut si aliter esse probare velit, non audiatur.

These Pisan statutes demonstrate that the authentica “Si debitor” or “Si confessus” had influence beyond the classroom. It and the other authenticae established norms for twelfth-century society. Norms, however, change. By the beginning of the thirteenth century, the jurists came to understand that in order to have a just and fair system of procedure, the courtroom must be the public forum in which all the elements of a trial were heard and in which all elements of procedure should be focused. Johannes Teutonicus rejected the authentica “Si debitor” in the early thirteenth century, and as we have seen, Accursius also rejected it in mid-century58.

The preceding is a small sample of the evidence for the evolution of the authenticae in the twelfth century. What conclusions can one draw? First, the evidence seems to support Irnerius as being the first to draft summaries from the Authenticum and then adding them to the margins of the Justinian’s Codex and Institutes. It must have been an important part of his literary work and teaching. The strongest pieces of evidence for his labors are the siglae of Irnerius in the manuscripts, the Bolognese oral tradition, and Gratian’s use of them when he inserted them into his Decretum ca. 1140. For the question of when the teaching of Roman law began in Bologna, this evidence adds to a growing body that the law school in Bologna must have been in full flower during the first quarter of the twelfth century59. Since we have no trace of Irnerius in the sources after 1125, he must have finished with the core of the authenticae before then. I had hoped that I might be able to see which authenticae were first added to the manuscripts by examining the early twelfth-

57 New Haven, Yale University Beinecke Library 415, fol. 26r, Pisa, Constitutum usus, Title 11: “De modo cognoscendi et iudicandi”.
58 Johannes Teutonicus (ca. 1218 A.D.), Apparatus in Compilationem tertiam to 3 Comp. 2.10.1 s.v. in iure: “<confessus> coram suo iudice... nec est authentica que ponitur C. de confessis (Cod. 7.59)”. Ed. Pennington (Monumenta iuris canonici, Series A, 3; Vatican City, Biblioteca Apostolica Vaticana, 1981) 233. Accursius’ gloss is printed in n.42 above.
59 See the essays cited in n. 1.
century Codex manuscripts. My hope has been thwarted by the fact that authenticae were added to all early the manuscripts by various hands in various stages. Until now I have not been able to see a clear pattern that would establish an Irnerian core of authenticae. Certainly, the 30 authenticae that Gratian incorporated into his Decretum could constitute an Irnerian core, but after that a list is difficult to construct on the basis of the manuscript evidence. As I have said before, I do not think that the later jurists can be used to establish authorship.

Second, of the ca. 370 authenticae that were added to the Codex, I believe that only a small percentage of those can be attributed to Irnerius. The jurists continued to add authenticae during the twelfth century. Only in the thirteenth century did they begin to turn a critical eye towards the work of their predecessors. The result was that over 150 were eventually eliminated from the vulgate Codex and a fecund era of creative jurisprudence came to an end. One last reflection: it has been often noted that medieval jurists’ writings constituted a “extra-legislative” source of legal norms in the Middle Ages and in the Early Modern Era. The authenticae are a good example of their role in the shaping of jurisprudence whose source was not tied to legislative bodies or to courtrooms.

Summary: Bolognese tradition reported that the authenticae that were added to the margins of the Justinian's Codex and Institutes were composed by Irnerius. Modern scholarship has concluded that Irnerius’ purpose was to up-date the contents of the Codex with material drawn from Justinian's later legislation that circulated in the Authenticum. This essay examines both these generalizations and concludes that Irnerius was probably responsible for a core set of the Authenticae but that many other jurists added excerpts from the Authenticum and also creatively composed texts that had little or no relationship to Justinian’s legislation. Many of these texts never became a part of the vulgate Codex that was established in the thirteenth century. The essay also concludes that these texts circulated almost immediately outside Roman law manuscripts. Gratian drew upon a large number of authenticae and inserted them into his Decretum. Authenticae were also added to the margins of Gratian’s Decretum in early manuscripts. This activity of the jurists provides a window into the teaching of law in the twelfth century.

Sommario: La tradizione bolognese affermava che le authentiche aggiunte ai margini del Codex e delle Institutiones di Giustiniano furono composte da Irnerio. La storiografia moderna ha concluso che lo scopo di Irnerio era quello di aggiornare i contenuti del Codex con materiale tratto dalla successiva legislazione di Giustiniano che circolava nell’Authenticum. Questo saggio esamina entrambe queste generalizzazioni e conclude che Irnerio fu probabilmente il responsabile di un nucleo di authenticae, ma che molti altri giuristi aggiunsero estratti dall’Authenticum e inoltre composero creativamente testi che non divennero mai parte della vulgata del Codex che si consolidò nel secolo XIII. Il saggio conclude anche che questi testi circolarono quasi immediatamente al di fuori dei manoscritti civilistici. Graziano fece ricorso a un
grande numero di authenticae e le inserì nel suo Decretum. Authenticae si trovano anche aggiunte ai margini del Decretum in alcuni manoscritti antichi. Questa attività dei giuristi offre una apertura sull'insegnamento del diritto nel secolo XII.

Key words: Justinian; Codex; authenticae; Irnerius; Johannes Bassianus; Gratian; Accursius.

Parole chiave: Giustiniano; Codex; authenticae; Irnerio; Giovanni Bassiano; Graziano; Accursio.