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From Gratian's *Concordia discordantium canonum* to Gratian's *Decretum*: The
Evolution from Teaching Text to Comprehensive Code of Canon Law

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By

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From Gratian's *Concordia discordantium canonum* to Gratian's *Decretum*: The
Evolution from Teaching Text to Comprehensive Code of Canon Law

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This dissertation is a study of the textual development from Gratian's *Concordia discordantium canonum* to Gratian's *Decretum*. It will argue that the work was not published in two recensions but rather it progressively evolved and that each stage served a different purpose.

Textual and structural evidence in the manuscript tradition underlines this progressive evolution. Beginning as a group of core cases addressing the most pressing legal issues of the time and used for teaching law at Bologna, Gratian expanded the *Concordia* by adding clusters of cases in stages. Casting the net of legal problems wider, each cluster had its roots in the previous one by either building upon a tangential point or by augmenting a previous argument. Only at the end did Gratian organize the cases into the arrangement found in the *Concordia*. A teaching tool evolved into a work for priests serving either as advocates or as judges.

The marginal canons and accompanying supplements in mid-twelfth century manuscripts bear further witness to a development that both preceded and continued after the *Concordia's* circulation. Their inclusion implies that the vulgate recension, known as the *Decretum*, also developed over a period of time as Gratian continued to polish his work through additions and corrections. A comparison of the relationship between the multiple hands that augmented the manuscripts suggests that Gratian did not circulate the additional material all at once in a published compendium. Some canons entered into the

textual tradition at different points, in different versions, and sometimes with different placement. The evolution continued without Gratian as jurists added texts, some of which are recognized as *paleae* while a handful of others entered the vulgate tradition unnoticed. Gratian may not have intended to integrate the additional material into his work. With the number of glosses ever increasing and with the methods of augmenting the work limiting its use, scribes began to incorporate the additional canons into the main text. A comprehensive source of canon law, the vulgate text may have evolved as a product of necessity and not as a product of design.

This dissertation by Melodie Harris Eichbauer fulfils the dissertation requirement for the doctoral degree in Medieval History approved by Kenneth Pennington, Ph.D., as Director, and by Uta-Renate Blumenthal, Ph.D., and Katherine L. Jansen, Ph.D., and Lawrence R. Poos, Ph.D. as Readers.

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To Paul

For sharing our day with Gratian

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Chapter 1

THE STUDY OF GRATIAN

Gratian's *Concordia discordantium canonum*, commonly referred to as the *Decretum*, organized the canonical tradition into a comprehensive survey and laid a new foundation for canon law. Unlike previous collections that simply included canons from a variety of sources and left the contradictions found in those sources, Gratian reconciled the legal discrepancies uncovered in conciliar canons, papal decretals, and the writings of the Church Fathers. He also incorporated Roman and secular law into his collection, even though these two legal traditions were not his primary focus.

Gratian's approach to law was groundbreaking and novel. He created a new methodology of teaching law by beginning each section of his *Decretum* with an hypothetical. He then posed questions that addressed specific aspects of each case followed by a series of *auctoritates*, which either proved or disproved the argument under consideration. Interspersed throughout the questions, Gratian provided *dicta* where he offered commentary on the matter at hand. As one of the first canonists to insert his own opinions into his collection, Gratian introduced a new instructional technique to the teaching of canon law.

This dissertation is a study of the textual development from the *Concordia discordantium canonum* to the *Decretum*. It will argue that the work was not published in two recensions but rather it progressively evolved and that each stage served a different purpose. Beginning as a group of core cases that addressed the most pressing legal issues of the time, Gratian expanded the *Concordia* as a teaching text by adding

clusters of *causae* in stages. Through additions and corrections, it continued to evolve into a work for priests serving either as advocates or as judges. It gradually developed into the vulgate text, known as the *Decretum*, and became a comprehensive source of canon law. Gratian, however, was not solely responsible for this final transformation.

Gratian and his *Decretum*

Prior to the twelfth century, canonical norms were found in private compilations that established guidelines for the governance of ecclesiastical institutions. A key feature of these early collections was that they existed in a world without jurisprudence. There were no jurists to interpret the texts, to place them into a context with other canons, or to reconcile the discrepancies that inevitably arose over the centuries. The revival of canon law taking place in Bologna in the early twelfth century changed this. Pepo and Irnerius spearheaded the movement, the latter of whom was known to have lectured on all or part of the *Corpus iuris civilis*.¹

Gratian, who taught canon law at Bologna in the early to mid twelfth century, has become known as the “Father of Canon Law.” Although commonly thought to be a Camaldolese monk at the monastery of Saints Felix and Nabor in Bologna, John T. Noonan, Jr. questioned this long held assertion and many others. There exists, he argued, only one contemporary reference to a Gratian who could have compiled the *Decretum*. In 1143 the papal legate, Cardinal Goizo, consulted three *prudentes*, whom he listed as

¹ Hermann Lange, *Die Glossatoren*, vol. 1, *Römisches Recht im Mittelalter* (Munich C.H. Beck, 1997), 151-62; Ennio Cortese, *Il basso medioevo*, vol. 2, *Il diritto nella storia medievale* (Rome: Il cigno Galileo Galilei, 1999), 57-76. Both Lange and Cortese include a thorough discussion of Pepo and Irnerius.

Magister Gratian, Magister Walfred, and Magister Moysis. The latter two were identified with Bolognese lawyers.² Gratian, Noonan claimed, may not have been a monk but simply a magister at Bologna. On the other hand, because *Causae* 16-20 addressed monastic issues in such a way as to favor monks, Landau and Kuttner have remained steadfast in the belief that Gratian was both a monk and a magister.³ Complicating the issue further are two references to Gratian as a bishop. The abbot of Mont Saint Michel, Robert of Torigny, claimed in a chronicle composed about 1180 that Gratian was the bishop of Chiusi. A gloss in manuscripts from the late twelfth century bolsters Robert's assertion.⁴ While we know Gratian compiled the *Concordia*, we are less sure of his ecclesiastical status.

The *Decretum*, which comprises of the *Distinctiones*, the *Causae*, the *Tractatus de penitentia* and the *Tractatus de consecratione*, covers the gamut of canonical issues. Gratian began his work with the *Tractatus de legibus*. These first twenty distinctions (*distinctiones*) outline the hierarchical structure of law with the *ius naturale* superseding the *ius gentium*. For Chodorow, "The *de legibus* provides some of the strongest internal evidence to support the thesis that Gratian's primary aim in the *Decretum* was to expound a theory of church government in accord with the political outlook of the reform party."⁵ The next sixty distinctions are known as the *Tractatus de ordinatione clericorum* and those remaining serve as its epilogue. Gratian followed the distinctions with thirty-six

² John T. Noonan, Jr., "Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law," *Traditio* 35 (1979): 171.

³ Anders Winroth, *The Making of Gratian's Decretum* (Cambridge: Cambridge University Press, 2000), 6, n. 10.

⁴ *Ibid.*, 6.

⁵ Stanley Chodorow, *Christian Political Theory and Church Politics in the Mid-Twelfth Century: The Ecclesiology of Gratian's Decretum* (Berkeley: University of California Press, 1972), 97.

causae (cases) that address such ecclesiastical matters as simony (Causa 1), procedure (Causae 2-7), monastic issues (Causae 16-20), heresy (Causae 23-26), and marriage (Causae 27-36). Causa 33 q.3, referred to as the *Tractatus de penitentia*, deals with the issue of penitence. The *Decretum* ends with the theologically based *Tractatus de consecratione*, which is a later addition, not compiled by Gratian, addressing the sacraments. Minus the *Tractati de penitentia et de consecratione* the work is concerned with the theory and practice of ecclesiastical governance.⁶ The canonists continued to expand and update the *Decretum* after the publication of the last version. The twelfth-century jurists called these approximately 150 added texts *paleae*. The date of the collection's composition varies from as early as the mid-twelfth century to as late as 1140, but experienced a wide circulation by 1150. Gratian's canonical compilation replaced earlier collections and became the source for law.

Despite the Church never officially promulgating Gratian's *Decretum*, it has undergone a number of editions. Of the 195 incunable editions, the first appeared in Strassbourg in 1471. The canonist Antoine de Mouchy (Antonius Monachiancenus Demochares) produced the first critical edition of the sixteenth century, the text of which Le Conte (Contius) incorporated and then published in 1570. Charles Dumoulin (Molineaus), a Protestant jurist, also produced a printed edition in 1554. The Catholic Church began the process of creating an official edition of the *Decretum* in the mid-1500s. Pope Pius V gathered a commission called the *Correctores Romani* in 1566, the members of which included Cardinals Ugo Buoncompagni (later Pope Gregory XIII) and

⁶ Ibid., 13.

Felice Perretti (later Pope Sixtus V). Comparing printed editions with Gratian manuscripts from the Vatican Library as well as relying on pre-Gratian canonical collections, the *Correctores* sought to bring the canons in line with the original sources cited by Gratian and to correct his erroneous transcriptions. Their goal was to create a usable text and preserve the canonical legal tradition. Completed in 1582, the *Editio Romana* became the sole accepted version of the Church with the 1580 bull *Cum pro munere pastorali* of Gregory XIII. Creating alternatives to the *Editio Romana*, Peter and François Pithou corrected the work of the *Correctores* in 1687 utilizing French manuscripts as well as providing an alphabetical index of Gratian's chapters. In 1747, Justus Henning Bömherr, a leading Protestant canonist, used four Gratian manuscripts and relied on Hardouin's edition of conciliar canons to create his edition. Aemilius Ludwig Richter, the founder of the historical school of ecclesiastical law, corrected the typographical errors of the Roman edition and generated an apparatus of references and sources in 1836. Less than fifty years later, Emil Friedberg created the last critical edition by relying only on eight German manuscripts, six of which were written in the twelfth century. Creating an apparatus, he noted variants from the *Editio Romana* and included all earlier research.⁷

At the Seventh International Congress of Medieval Canon Law in Cambridge, Stephan Kuttner paid tribute to the previous work of scholars, particularly to that of

⁷ Peter Landau, "Gratian and the *Decretum Gratiani*," in *The History of Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*, eds. Wilfried Hartmann and Kenneth Pennington (Washington D.C.: The Catholic University of America Press, 2008): 49-52.

Adam Vetulani, and outlined five areas on the *Decretum* that warranted further attention.⁸

Twenty years later at the Twelfth International Congress of Medieval Canon Law in Washington D.C., Anders Winroth returned to these five points and assessed the present state of the scholarship.⁹ Following suit I will use them to explore more deeply the historiographical developments.

Kuttner first questioned the extent to which the *Decretum* developed from successive redactions and whether it was Gratian or others who completed the vulgate recension. Much of the work had focused on the *De penitentia* and the *De consecratione*, the late additions of canons from the Second Lateran Council, canons and dicta containing Roman law, and duplicate texts considered paleae as well as true paleae.¹⁰ Winroth's discovery of four manuscripts, previously considered to be abridged editions of the *Decretum*, conclusively proved at least two successive redactions.¹¹ He argued first that the text of the four manuscripts was closer to the original reading, second that

⁸ Stephan Kuttner, "Research on Gratian: Acta and Agenda," in *Proceedings of the Seventh International Congress of Medieval Canon Law* (Vatican City: Biblioteca Apostolica Vaticana, 1988), 3-36.

⁹ Anders Winroth, "Recent Work on the Making of Gratian's *Decretum*," *Bulletin of Medieval Canon Law* 26 (2006): 1-29.

¹⁰ Jacqueline Rambaud, "Le legs de l'ancien droit: Gratien," in *L'âge classique 1140-1378: sources et théorie du droit*, eds. Gabriel Le Bras, Charles Lefebvre, and Jacqueline Rambaud (Paris: Sirey, 1965), 76-77, 82-114, 119-129, 128-129; Karol Wojtyła, "Le traité de 'penitentia' de Gratien dans l'abrégé de Gdańsk Mar. F. 275," *Studia Gratiana* 7 (1959): 355-390; John Van Engen, "Observations on *De consecratione*," in *Proceedings of the Sixth International Congress of Medieval Canon Law*, eds. Stephan Kuttner and Kenneth Pennington (Vatican City: Biblioteca Apostolica Vaticana, 1985): 309-320; Titus Lenherr, "Fehlende 'Paleae' als Zeichen eines überlieferungsgeschichtlich jüngeren Datums von *Dekret-Handschriften*," *Archiv für katholisches Kirchenrecht* 151 (1982): 495-507; idem, "Die Summarien zu den Texten des 2. Laterankonzils von 1139 in Gratians *Dekret*," *Archiv für katholisches Kirchenrecht* 150 (1981): 528-551; Stephan Kuttner, "New Studies on the Roman Law in Gratian," *Seminar* 11 (1953): 12-50; Jean Gaudemet, "Das römische Recht im Dekret Gratians," *Österreichisches Archiv für Kirchenrecht* 12 (1961): 177-191.

¹¹ Winroth first presented his findings in 1996 at the Eleventh International Congress on Medieval Canon Law in Syracuse, New York. The manuscripts that contain Gratian 1 are Aa (Admont, Stiftsbibliothek 23 and 43), Bc (Barcelona, Arxiu de la Corona d'Argó, Santa Maria de Ripoll 78), Fd (Florence, Biblioteca Nazionale Centrale, Conventi Soppressi, A.1.402), and P (Paris, Bibliothèque Nationale de France, nouvelles acquisitions latines 1761).

the layout of the argument was more coherent in Gratian 1, third that Gratian 1 relied on different set of sources than the vulgate recension (Gratian 2), and finally that Gratian 1 drew blocks of sequential canons from those sources. Furthermore, he found that the additional material in Gratian 2 served to breakup and confuse the original discussion, which was evidence of someone other than Gratian as responsible for its compilation; essentially, there were two different authors.¹²

Scholars quickly tested and supported Winroth's findings. Jean Werckmeister has analyzed Winroth's hypothesis in the marriage cases, *Causae* 27-36. He compared Gratian 1 to Gratian 2 paying attention to the logic of the arguments. Werckmeister found that the shorter version was more homogenous, more structured, and less repetitious than the longer version. The diversity of texts, such as the use of penitentials and decretals, was greater in Gratian 1, amounting to eleven percent. Gratian 2, however, added no more than four percent of such texts and added two to three times more Roman law. Like Winroth, Werkmeister espoused the two 'Gratian' theory maintaining that Gratian authored the shorter version, having a sense of conciseness and responding clearly to the questions posed. Gratian 2, which could have been a collective effort, was more verbose and did not hesitate to digress.¹³ Based upon an examination of C.3 q.1 d.p.c.2, which originated with Roman law even if it was not cited explicitly, José Viejo-Ximénez likewise believed that the inclusion of the texts to the second recension gravely distorted the arguments, thus it was difficult to accept that the same person authored both

¹² Winroth, *The Making of Gratian's Decretum*, 123.

¹³ Jean Werckmeister, "Les deux versions du 'de matrimonio' de Gratien," *Revue de droit canonique* 48:2 (1998): 301-302, 304, 311.

texts.¹⁴ The Gratian of Gratian 1 was a compiler, that is, a collector of texts intended to unite ancient canonical law into a manageable and coherent work.¹⁵ In a fashion similar to the others, Weigand has analyzed Causa 25 in each of the recensions and has come to similar conclusions as those previously discussed, though he did not comment on authorship.¹⁶

In his analysis of the Florence manuscript, Carlos Larrainzar has argued that this particular manuscript represented the original version of Gratian 1 and was the copy used to generate Gratian 2. He observed that three distinct hands – Hands A, B, and C – dominated the manuscript in addition to the three other hands also present – Hands D, E, and G. Hand G(ratian), which Larrainzar subdivided based upon slight variations, provided reasonable evidence that the Florence manuscript was the original work of the author, who used it to compile the second redaction. It added about 250 canons and some dicta, and also made some corrections through interlinear or marginal notations and glosses. The augmentations resulted in the vulgate recension minus the paleae.¹⁷

Larrainzar's conclusions regarding the Florence manuscript have faced intense scrutiny. In addition to taking issue with Larrainzar's dating of the manuscript, a disagreement I will discuss below, Winroth has rejected Larrainzar's assertion that the corrections to the Florence manuscript equal the second recension. For instance, C.3 q.9

¹⁴ José Viejo-Ximénez, "Concordia y *Decretum* del maestro Graciano: In memoriam Rudolf Weigand," *Ius canonicum* 39 (1999): 340.

¹⁵ *Ibid.*, 349.

¹⁶ Rudolf Weigand, "Causa 25 des *Dekrets* und die Arbeitsweise Gratians," in *Grundlagen des Rechts: Festschrift für Peter Landau zum 65. Geburtstag*, eds. Richard H. Helmholz, Paul Mikat, Jörg Müller und Michael Stolleis (Paderborn: F. Schöningh, 2000), 277-290.

¹⁷ Carlos Larrainzar, "El *Decreto* de Graciano del Codice Fd (= Firenze, Biblioteca Nazionale Centrale, Conventi Soppressi A.I.402): In memoriam Rudolf Weigand," *Ius Ecclesiae* 10 (1998): 421-489.

c.15 contains missing words found neither between the lines, nor in the margins, nor in the *Additiones bononienses*. Winroth further disagreed with Larrainzar's argument that only the corrections of Florence correspond exactly to the second recension. Larrainzar used only ten passages to argue this point. Countering Larrainzar's assertion, Winroth pointed to C.6 q.1 c.17 where someone, not necessarily Gratian, made corrections to the text. How then could one claim this was the original text when the author was not necessarily responsible for making corrections? Furthermore, both the Admont and Barcelona manuscripts contain corrections not found in the Florence manuscript, but no one has claimed either to be the original text. None of the four manuscripts, according to Winroth, was the original and the Florence manuscript certainly was not Gratian's personal text. The final point of contention concerns Larrainzar's argument that the five variations of Hand G, which extended over a long period of time, were that of Gratian himself. The variants are supposedly the same writing, date from the twelfth century, and correct the work of the scribes. Hand G α was the oldest of the variants with Hand G ω as the most recent. Winroth has maintained that these two hands were chronologically distinct and thus he could not accept that the same hand wrote them, particularly since Larrainzar did not explain this portion of his argument.¹⁸ An examination of C.3 q.1 d.p.c.6 led Lenherr also to doubt that Florence was the original manuscript of Gratian

¹⁸ Anders Winroth, "Le manuscrit florentin du Décret de Gratien: Une critique des travaux de Carlos Larrainzar sur Gratien I," *Revue de droit canonique* 51:2 (2001): 211-231.

based on the differences between St. Gall's and Gratian 1's choice of words, word order, and word usage.¹⁹

Not more than three years after Winroth's discovery of Gratian 1, Larrainzar put forth the argument for another, earlier, recension of the *Decretum*. Found in but one manuscript, Sankt Gallen, Stiftsbibliothek MS 673, contains only thirty-three *causae*, omits the *De consecratione*, and lacks the traditional form of the *De penitentia*. One extra *causa*, *Causa prima*, contains material later incorporated into the *Distinctiones*. Larrainzar grounded his theory in structural analysis. First, the manuscript contained vestiges of duplicate texts that Weigand considered indicative of Gratian 1.²⁰ Second, the Roman definition of marriage in C.27 q.2 d.a.c.1 – “Sunt enim nuptiae sive matrimonium viri mulierisque coniunctio, individuum vitae consuetudinem retines” – retained the traditional Roman form of *continens* rather than *retinens*.²¹ Third, C.29 q.1 d.a.c.1 kept the Roman slave names of Stichus and of Pamphilus, which the *Digest* used to discuss contracts.²² Fourth, a number of *dicta*, such as C.23 q.3 pr. and C.35 qq.2-3 d.p.c.20, offered evidence for an earlier stage.²³ Fifth, the manuscript omitted blocks of texts and rubrics, omitted canons that referenced distinctions, and included texts unique only to the St. Gall manuscript.²⁴

¹⁹ Titus Lenherr, “Die Vier Fassungen von C.3 q.1 d.p.c.6 im *Decretum Gratiani*. Zugleich ein Einblick in die neueste Diskussion um das Werden von Gratians Dekret,” *Archiv für katholisches Kirchenrecht* 169 (2000): 377-378.

²⁰ Carlos Larrainzar, “El borrador de la *Concordia* de Graciano: Sankt Gallen, Stiftsbibliothek MS 673 (=Sg),” *Ius Ecclesiae* 11 (1999): 610-611.

²¹ *Ibid.*, 611.

²² *Ibid.*, 619.

²³ *Ibid.*, 620-627.

²⁴ *Ibid.*, 603, 613, 616-617, 619-620.

Scholarly attention has focused heavily on the nature of the St. Gall manuscript. According to Larrainzar, the context and the methodological progression in thought prohibit it from being an abbreviation of any sort.²⁵ All scholars, however, have not agreed with this assessment. While conceding that Gratian 1 may not have been the first effort, Mary Sommar has argued that nothing in Causa 7 substantiated the theory of St. Gall as an earlier redaction. The evidence suggests that it could either be an abbreviation of Gratian 1 or the product of a student's lecture notes. She found that the canons absent from St. Gall neither detracted from nor formed a crucial part of the argument. All thirteen dicta were present in the St. Gall manuscript with no change to content, though there was variation in their form. Only about half of the canons in the causa contained rubrics.²⁶ Finally, Causa 7, as it appeared in St. Gall, contained a few technical errors that Gratian would not have made if this were an earlier recension. C.7 q.1 c.42 used the phrase *in cardinales ordinates* for *incardinatus*; q.1 c.6 used *pseudo* in lieu of *pseudoepiscopus*; the incipit of q.1 c.44 read *Episcopatum qualitas* instead of *Temporis qualitas*; the inscription of q.1 c.45 contained a peculiar rendering of the year ccc.lxxx.t'u.²⁷

In his work on C.3 q.1 d.p.c.6, Lenherr concluded that a close relationship existed between the St. Gall manuscript and the manuscripts of Gratian 1 based on linguistic characteristics and style. As a living text, there was a progressive development of ideas

²⁵ Carlos Larrainzar, "La formacion del *Decreto* de Graciano por etapas," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 87 (2001): 72.

²⁶ Mary Sommar, "Gratian's Causa VII and the Multiple Recension Theories," *Bulletin of Medieval Canon Law* 24 (2000): 86-87.

²⁷ *Ibid.*, 88.

that led him to view St. Gall neither as a normal abbreviation nor as an abbreviation of the vulgate recension. He could not determine, however, if St. Gall was a draft or an abbreviation of Gratian 1.²⁸ His work on D.31 and D.32 led Lenherr to refine this view. First, the marginal hand in St. Gall, which corrected the sequence of authorities in D.31 and D.32, identified himself as the corrector of mistakes. Second, the authorities not in St. Gall though included in Gratian 1 and the reference to D.31 c.12 in D.31 d.p.c.11/13 were omissions. Third, the text structure of D.31 c.1 and D.31 c.8 in St. Gall showed that it rested on the text structure of Gratian 1, and thus existed not as a draft but as a variation of Gratian 1. Such evidence convinced Lenherr that St. Gall was not a redaction stage, though it was not a common abbreviation. Reaffirming a suspicion arising from his work on C.3 q.1 d.p.c.6, St. Gall was transformed into a lecture format and intended for oral transmission.²⁹

Other scholars see the discussion of St. Gall's nature as a waste of intellectual energy. Winroth has been one of the staunchest critics of the three recension theory. In a paper delivered at the Twelfth International Congress on Medieval Canon Law, he lambasted Larrainzar's evidence using textual examples to argue that the St. Gall manuscript was an abbreviation of Gratian 1 and not an earlier recension.³⁰ A student of Winroth's, John Wei, accepted the idea that St. Gall represented an abbreviation of a first recension manuscript containing texts interpolated from a second recension manuscript.

²⁸ Lenherr, "Die Vier Fassungen von C.3 q.1 d.p.c.6," 374-375.

²⁹ Titus Lenherr, "Ist die Handschrift 673 der St. Galler Stiftsbibliothek (Sg) der Entwurf zu Gratians *Dekret*? Versuch einer Antwort aus Beobachtungen an D.31 und D.32," <http://www.t-j-l.de/Sg-Entw.PDF>.

³⁰ Winroth, "Recent Work on the Making of Gratian's *Decretum*," 7-23.

His thesis rests on canons in the *De penitentia* that appear in St. Gall, in Admont, and in the vulgate.³¹

Some scholars, however, have concurred with Larrianzar's assessment. An examination of Causa 19 has led Pennington to believe that St. Gall was a recension predating Gratian 1. C.19 q.2 c.2 (*Duae sunt*), a decretal of Urban II that permitted clerics to become monks whether or not their bishops gave them permission, served as the first piece of evidence. St. Gall and Gratian 1 preserved a shorter version of the text, which Pennington has argued was the original version as it reflected the same chancery style as other letters of Urban II.³² Pennington's analysis of Roman law in the early twelfth century and its steady infiltration into canon law has bolstered the argument for St. Gall as an earlier redaction. To offer one example, he found that Gratian provided a more sophisticated discussion of the difference between arbiters and judges in Causa 2 of St. Gall than that offered by Bulgarus, whose work Gratian knew. As the connections between Bulgarus' procedural treaty *De arbitris*, the papal chancellor Haimeric, and two letters of Innocent II reveal, Bulgarus worked sometime before 1130, thereby offering a timeframe for the composition of St. Gall which predated that of Gratian 1.³³ Like Pennington, Atria Larson has supported Larrianzar's theory. In her examination of the

³¹ John Wei, "A Reconsideration of St. Gall, Stiftsbibliothek 673 (Sg) in Light of the Sources of Distinctions 5-7 of the *De penitentia*," *Bulletin of Medieval Canon Law* 26 (2004-2006): 141-180. Atria Larson has criticized Wei's thesis focusing on his methodology for determining the formal sources.

³² Kenneth Pennington, "Gratian, Causa 19, and the Birth of Canonical Jurisprudence," in "*Panta rei*": *Studi dedicati a Manlio Bellomo*, ed. Orazio Condorelli (Rome: Il Cigno, 2004): 4:339-355. Titus Lenherr came to similar conclusions regarding C.19 q.2 c.2 (*Duae sunt*) five years earlier though he did not use them to argue for the antedating of St. Gall, believing rather that it was an abbreviation. See "Zur Überlieferung des Kapitels *Duae sunt, inquit, leges* (*Decretum Gratiani* C.19 q.2 c.2)," *Archiv für katholisches Kirchenrecht* 168 (1999): 359-384.

³³ Kenneth Pennington, "The 'Big Bang': Roman Law in the Early Twelfth-Century," *Rivista internazionale di diritto comune* 18 (2007): 48-52.

De penitentia she found that the treatise, as it appears in the St. Gall manuscript, was written in a manner similar to other questions because it was used as a teaching tool.³⁴

Other scholars have remained unsure of whether or not the St. Gall manuscript represented an earlier redaction. In his analysis of Causa 13, Frederick Paxton observed that St. Gall often preserved a different word order, whereas Florence always agreed with the vulgate recension. Such differences could be evidence of a prior stage in the composition of Causa 13, but they also could be the work of an abbreviator or someone who had taken notes from a lecture on the first recension text. None of the differences confirms conclusively Larrainzar's claims for the priority of the St. Gall manuscript. The overall structure of St. Gall, however, did support them. The cross-referencing of Causa 16 and Causa 13, which I discuss in-depth in Chapter Four, also posed problems. In the end Paxton concluded the text in the St. Gall and in the Florence manuscripts preceded the text in the vulgate recension, but there remained questions about the method of composition.³⁵ Enrique De León has found that C.35 q.6 c.8 probably was taken directly from Innocent II's decretals. Because the St. Gall manuscript contains the canon, which neither the Florence nor the Admont manuscripts include, it could not be an abbreviation.³⁶ While Paxton and De León were willingly to concede that St. Gall was not an abbreviation, they were unwilling to agree that it antedated Gratian 1.

³⁴ Atria Larson, "The Evolution of Gratian's *Tractatus de penitentia*," *Bulletin of Medieval Canon Law* 26 (2004-2006): 96-114.

³⁵ Frederick Paxton, "Le cause 13 de Gratien et la composition du Décret," *Revue de droit canonique* 51:2 (2001) : 233-249.

³⁶ Enrique De León, "La biografia di Graziano," in *La cultura giuridico-canonica medioevale: Premesse per un dialogo ecumenico*, eds. Enrique De León and Nicolás Álvarez de las Asturias (Milan: Giuffrè, 2003): 102.

The chronology of the *Decretum* was the second area of research called for by Kuttner. In 1984 many agreed that the work circulated in the 1140s, thus one could assume that Gratian began compiling the work in the 1130s.³⁷ In 2003 De León maintained that the vulgate recension was probably finished around the pontificate of Eugenius III (1145-1153) with reproductions made by 1150.³⁸ Winroth concurred with this assessment in 2004.³⁹ The reference to a Sienese court decision in 1150, unearthed by Paolo Nardi, showed that the *Decretum* was known by that date in a small Tuscan town. Combined with numerous canons from Second Lateran Council of 1139, the vulgate recension must have been compiled in the 1140s.⁴⁰

With the date of St. Gall too difficult to pinpoint with certainty, the debate about the chronology of the *Decretum* currently focuses on Gratian 1 and how that affects the date of the vulgate recension.⁴¹ Winroth has argued that aside from D.63 d.p.c.34, which referred to a decision (c.28) of the Second Lateran Council, Gratian 1 does not contain a text that can be dated confidently after 1119. The remainder of the canons from the Second Lateran Council were missing from Gratian 1 as were canons from the First Lateran Council (1123) and the decretals of Innocent II. This lone reference to the Second Lateran Council in Gratian 1 was not an interpolation, as Werckmeister would

³⁷ Kuttner, "Research on Gratian," 10, 19.

³⁸ De León, "La biografia di Graziano," 97-98.

³⁹ Winroth, "Recent Work on the Making of Gratian's *Decretum*," 3-4.

⁴⁰ *Ibid.*, 3-5.

⁴¹ Aside from Larrainzar, few have ventured a concrete date for the St. Gall manuscript. He posited that St. Gall was composed around 1140 with the vulgate recension of Gratian 2 compiled between 1145 and 1150. As a living text, Gratian compiled each of the three redactions within a very short period of time, even as little as a decade. See "El borrador de la *Concordia* de Graciano," 645-646.

argue;⁴² it was present in and circulated with the text from the beginning. The earliest possible date then for the completion of the first recension was 1139. Both recensions of the *Decretum* were completed in Bologna within a short time-span between 1139 and 1158 at the very latest. Peter Lombard quoted the second recension of the *Decretum* in his *Sentences* with this latter work securely dated to between 1155 and 1158.⁴³

Larrainzar has argued for a later date. Based upon his work on the Florence manuscript, he dated Hand A to between 1139 and 1145, Hand B, which copied the *Additiones bononienses*, to before 1148, and Hand C to 1148.⁴⁴ Larrainzar's dating roused criticism from Winroth. Paleographic evidence based on the work of Adriana Di Domenico has suggested that Hands A and B were not written before 1148 and that there was no evidence to suggest that Hand C added the canons promulgated at the Council of Rheims in that same year. The hands could not have worked during the timeframe established by Larrainzar.⁴⁵

Some, however, have espoused an earlier date for the first redaction.

Werckmeister believed that Gratian 1 could date from the 1120s.⁴⁶ Believing that the reference to the Second Lateran Council (D.63 d.p.c.34) was interpolated, the most recent

⁴² Jean Werckmeister, "Les études sur le Décret de Gratien: Essai de bilan et perspectives," *Revue de droit canonique* 48:2 (1998): 373-376.

⁴³ Winroth, *The Making of Gratian's Decretum*, 136-144; Anders Winroth, "Les deux Gratien et le droit romain," *Revue de droit canonique* 48:2 (1998): 286. Winroth's conclusions push back almost a decade the date of the vulgate recension outlined by Kuttner in 1984.

⁴⁴ Larrainzar, "El Decreto de Graciano del Codice Fd," 434, 437-438, 441-442.

⁴⁵ Winroth, "Le manuscrit florentin du Décret de Gratien," 214-217; Adriana Di Domenico, "Codici miniati romanici nel fondo Coventi soppressi della Biblioteca Nazionale Centrale di Firenze: Camaldoli-Vallombrosa-Santa Maria Novella" (Ph.D. diss., Università degli Studi di Firenze, 1990).

⁴⁶ Werckmeister, "Les deux versions du 'de matrimonio' de Gratien," 313. Pennington has concurred with the earlier dating of Gratian 1. See "Gratian, Causa 19, and the Birth of Canonical Jurisprudence," 350-351.

texts of Gratian 1 dated from the First Lateran Council in 1123, which in turn were promulgated at the Council of Toulouse in 1119. If Gratian 1 was finished ca. 1139-1140, why were there no decretals later than Calixtus II and why was there only one reference attributed to the Second Lateran Council? Because of the lack of decretals postdating Calixtus II and the lack of canons from the Second Lateran Council, Gratian 1 dated from around 1120 to 1122. The vulgate recension then dated from the 1130s with the canons from the Second Lateran Council added at the last minute in 1139. The paleae were added later, sometime after 1140 but before 1170.⁴⁷ Larson has supported Werckmeister's earlier timeframe pointing to the reference in D.63 d.p.c.34 to a *synodus generalis* in Rome. Neither is there a specific reference to a council held during this time nor are there extant canons for this council. Nevertheless, Larson argues that a gathering of the pope, ecclesiastical dignitaries, and lay officials to address matters of ecclesiastical politics and practice, followed by spike in activity from the papal chancery, suggests one. It most likely took place during Lothar III's coronation in June 1133.⁴⁸ Innocent II and his predecessors, furthermore, are known to have repeated canons promulgated at earlier councils.⁴⁹ Canon twenty-eight, to which D.63 d.p.c.34 refers, thus did not necessarily have to originate at the Second Lateran Council.⁵⁰ Placing the origin of the reference with a council in 1133 allows a greater period for the development of the various stages

⁴⁷ Werckmeister, "Les études sur le Décret de Gratien: Essai de bilan et perspectives," 373-376.

⁴⁸ Larson, "Early Stages of Gratian's *Decretum*," 33.

⁴⁹ Robert Somerville, "Pope Innocent II and the Study of Roman Law," in *Papacy, Councils and Canon Law in the 11th -12th Centuries* (Aldershot: Variorum Reprints, 1990), XIV: 106. Somerville has shown that Innocent II originally did not promulgate c.9 *Prava autem consuetudo* at the Second Lateran Council (1139). He simply repeated a text which he first promulgated at the Council of Clermont (1130) and reiterated at assemblies held at Rheims (1131) and at Pisa (1135).

⁵⁰ Larson, "Early Stages of Gratian's *Decretum*," 21.

in the production and dissemination. Gratian compiled the text found in the St. Gall manuscript and the first recension in the 1120s and early-to-mid 1130s.⁵¹ Pennington has provided proof for these early dates. Addressed to the bishop of Lund in 1133, a letter of Pope Innocent II cited the connection between the Golden Rule and the *ius naturale*, a connection made only by Gratian in the *Tractatus de legibus*. Gratian therefore must have finished the *Tractatus* prior to 1133 and, by extension, must have been teaching law in Bologna from the late 1120s or early 1130s.⁵²

A third area pointed to by Kuttner for further exploration was the sources, both formal and material, of the *Decretum*. Peter Landau has contributed significantly to this area. His research has led him to conclude that Gratian worked from a limited number of collections. He has identified the *Collectio canonum* of Anselm of Lucca, the *Polycarpus*, the *Collectio III librorum*, the *Panormia* and the *Tripartita* of Ivo of Chartres, the *Liber de misericordia et iustitia* of Algier of Liège, *Sententia* of Magistri A, and *Etymologies* of Isidore of Seville as formal sources. While Pseudo-Isidorian decretals only made up ten percent of possible sources, the Dionysio-Hadriana was not a formal source. Gratian's knowledge of Dionysius Exiguus came from other collections and not from direct exposure. One also cannot discount the *Collection of Seventy-Four Titles* as a potential source.⁵³

⁵¹ Ibid., 33-34.

⁵² Kenneth Pennington, "Lex Naturalis and Ius Naturale," *The Jurist* 28.2 (2008): 577-578.

⁵³ Peter Landau, "Neue Forschungen zu vorgratianischen Kanonensammlungen und den Quellen des gratianischen Dekrets," *Ius commune* 11 (1984): 1-29; idem, "Quellen und Bedeutung des gratianischen Dekrets," *Studia et documenta historiae et iuris* 52 (1986): 218-235; idem, "Gratian und Dionysius Exiguus: Ein Beitrag zur Kanonistischen Interpolationenkritik," in *De iure canonico Medii Aevi: Festschrift für Rudolf Weigand*, *Studia Gratiana* 27 (Rome: LAS, 1996): 271-283, esp. 283;

Jean Gaudemet and Titus Lenherr have examined the material sources that Gratian employed in lieu of the collections that served as formal sources. Gaudemet found that the material sources contained in the *Decretum* vary considerably, deriving from: *Canons of the Apostles*, *Statuta Ecclesiae antiqua*, conciliar canons from the orient and the occident, false and authentic pontifical decretals, Church writers, patristic fathers, penitentials, formulas, liturgical texts, secular legislation, and Roman law. He found that the canons added to Gratian 2 in the *Tractatus de matrimonio* (C.27 q.1 to C.36 q.2 c.11) showed an emphasis on ecclesiastical authors, such as Jerome, Augustine, and Ambrose, followed by papal decretals from Sirice to Gregory I, then canons from councils, and finally canons from Roman law.⁵⁴ Lenherr examined the use of the *Glossa ordinaria* in the *Distinctiones* and found that Gratian employed the gloss of I Tim. 3:1-7 and those of Brother Gilbert, who glossed the Lamentations and probably the Pentateuch and the greater prophets. Gratian not only used the *Glossa ordinaria* as a reference both for canons but also for the dicta.⁵⁵

Both the work of Linda Fowler-Magerl and the work of Anders Winroth have opened a different avenue for investigation into Gratian's sources. Folwer-Magerl has facilitated the exploration into Gratian's sources with the *KanonesJ* program followed by the expanded and updated *Clavis canonum* program. These databases permit searches of approximately 80,000 canons based on inscriptions, rubrics, incipits, and explicits in

⁵⁴ Jean Gaudemet, "Les sources du Décret de Gratien," *Revue de droit canonique* 48:2 (1998): 247-261, esp. 248, 251.

⁵⁵ Titus Lenherr, "Die *Glossa Ordinaria* zur Bibel als Quelle von Gratians *Dekret*: Ein (neuer) Anfang," *Bulletin of Medieval Canon Law* 24 (2000): 97-129.

collections dating between 1000 and 1140.⁵⁶ Winroth has argued that each recension drew from particular collections. For Causa 24, Gratian 1 drew from the *Panormia* and the *Polycarpus*, while Gratian 2 drew from the *Collectio III librorum* and the *Tripartita*. For C.11 q.3 Gratian 1 drew from the *Collectio canonum* of Anselm, the *Panormia*, the *Tripartita*, and one or more unidentified source.⁵⁷ Viejo-Ximénez came to similar conclusions in his analysis of Causa 29. There he found that the *Panormia* was the source for the first recension of C.29 q.2 c.1, q.2 c.4, and q.2 c.5 as well as for q.2 c.3, q.2 c.7, and q.2 c.8 which were included in the *Additiones* both of Admont and of Florence. The first recension of Causa 29 did not make use of either the *Collectio III librorum* or the *Tripartita*.⁵⁸

Other scholars have found slight variations in the causa they have studied. Weigand found that Gratian 1 used the *Decretum* of Buchard of Worms while Gratian 2 incorporated approximately 266 texts from the Registers of Gregory I, which he drew from texts like the *Tripartita*, the *Collectio III librorum*, and the *Liber de misericordia et iustitia* of Algier of Liège. The paleae attributed to Gregory I were drawn from the

⁵⁶ Linda Fowler-Magerl, *KanonesJ* [CD-ROM]: *A Selection of Canon Law Collections Compiled outside Italy between 1000 and 1140* (Piesenkofen: Kanones WIP Verlag, 1998); eadem, *Clavis canonum* [CD-ROM]: *Selected Canon Law Collections Before 1140*, Monumenta Germaniae Historica, Hilfsmittel 21 (Hannover: Hansche Buchhandlung, 2005).

⁵⁷ Winroth, *The Making of Gratian's Decretum*, 76, 125. Winroth did not clearly state the sources used for the vulgate recension of C.11 q.3.

⁵⁸ José Viejo-Ximénez, "La redacción original de C.29 del *Decreto* de Graciano," *Ius ecclesiae* 10 (1998): 168. Lenherr's findings have corroborated those of Viejo-Ximénez. Gratian's formal sources were most likely the *Tripartita*, the *Polycarpus*, and the *Collectio III librorum* with many of the biblical arguments coming from the *Collectio III librorum* though Gratian did use the *Glossa ordinaria* for C.23 q.5 d.p.c.49. See "Zur Redaktionsgeschichte von C.23 q.5 in der '1. Rezension' von Gratians Dekret: The Making of a Quaestio," *Bulletin of Medieval Canon Law* 26 (2004-2007): 31-58.

Polycarpus or the *Collectio III librorum*.⁵⁹ The conclusions of Sommar and of Landau have reinforced those of Weigand. Sommar discovered that Gratian 1 took seventy-five percent of the texts from papal texts and ten percent from conciliar texts. With the vulgate recension, Gratian used forty-two percent papal texts and forty-five percent conciliar texts.⁶⁰ Landau found that Gratian could have used Burchard of Worms as a potential source for the first redaction, but only for approximately ten to fifteen canons. The second redaction was edited to include more texts from Augustine and from the Church Fathers.⁶¹ The work of Werckmeister fell in line with that of previous scholars. Gratian's material sources were the Bible, Church Fathers, councils, decretals, and roman-barbarian law. The formal sources were the *Panormia* and the *Polycarpus* for Gratian 1 and the *Tripartita* and the *Collectio III librorum* for Gratian 2. He supplemented these formal sources with Isidore of Seville, Anselm of Lucca, Algier of Liège, and unidentified patristic florilegia.⁶² Frederick Paxton found that Causa 13 in Gratian 1 drew from the *Collectio canonum* of Anselm, the *Tripartita*, and the *Collectio III librorum*.⁶³ In his study on C.15 q.1, Tatsushi Genka observed that Gratian 1 mixed theology and canonical material by relying on Abelard's *Sic et Non*, the *Tripartita*, and

⁵⁹ Rudolf Weigand, "Mittelalterliche Texte: Gregor I., Burchard und Gratian," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 84 (1998): 335-336, 340-341. 330-344. Peter Landau has recanted his earlier assertion that Gratian made no use whatsoever of Burchard's *Decretum* (33). He has argued though that Gratian took the fragments of Gregory I's letters from earlier canonical collections and not from the registers. See "Gratian and the *Decretum Gratiani*," 33, 34.

⁶⁰ Sommar, "Gratian's Causa VII and the Multiple Recension Theories," 80.

⁶¹ Peter Landau, "Burchard de Worms et Gratien: Pour l'étude des sources directes du *Décret* de Gratien," *Revue de droit canonique* 48:2 (1998): 233-245, esp. 234; idem, "Patristische Texte in den beiden Rezensionen des *Decretum Gratiani*," *Bulletin of Medieval Canon Law* 23 (1999): 77-84, esp. 81-82.

⁶² Werckmeister, "Les études sur le *Décret* de Gratien," 363-379.

⁶³ Paxton, "Le cause 13 de Gratien," 240.

the *Collectio III librorum*, while the formal sources of Gratian 2 were the *Collectio canonum* of Anselm of Lucca, the *Digest*, the *Tripartita*, and the *Collectio III librorum*.⁶⁴ Finally, Winroth has argued that Gratian relied on the French theologian Walter of Mortagne, who taught in Laon c.1120 and wrote the work *De coniugio* in 1140, for his ideas on the marriage of slaves.⁶⁵

The discovery of different recensions has brought attention to the incorporation of Roman law. Winroth has argued that Gratian 1 did not take canons directly from Justinian's compilations. Rather it focused more on ancient canonical texts, Roman barbarian law, such as the *Lex Romana Visigothorum*, and Carolingian capitularies. As the use of *animo et corpora* in C.3 q.1 d.p.c.2 illustrates, Gratian 1 relied on the *Lex Romana Visigothorum* for the terminology, which lacked sharpness. Gratian 1 was unfamiliar with Justinian law when he compiled the first recension and thus did not use it. Gratian 2, whoever he was, used terminology more appropriately and added texts from Justinian law. The discussion of false accusation in C.2 q.3 serves as another example. Gratian 1 took passages from *Lex Romana Visigothorum* and was ignorant of the complex treatment of infamy in Justinian legislation. Gratian 2 added two long passages from Justinian law to clarify the concept. They are both from the *Senatusconsultum Turpilianum*, a law promulgated by the Roman Senate under Nero.⁶⁶ Viejo-Ximénez's examination of C.2 q.6 found fragments of law from the *Novella* in Gratian 1, followed

⁶⁴ Tatsushi Genka, "Gratians Umgang mit seinen Quellen in C.15 q.1," in "*Panta rei*": *Studi dedicati a Manlio Bellomo*, ed. Orazio Condorelli (Rome: Il Cigno, 2004), 2:421-443.

⁶⁵ Anders Winroth, "Neither free nor slave: Theology and Law in Gratian's Thoughts on the Definition of Marriage and Unfree Persons," in *Medieval Foundations of the Western Legal Tradition: A Tribute to Kenneth Pennington*, eds. Wolfgang Müller and Mary Sommar (Washington, D.C.: Catholic University of America Press, 2006), 97-109.

⁶⁶ Winroth, "Les deux Gratien et le droit romain," 285-299.

by texts from the *Digest* and from the *Codex* of Justinian added to Gratian 2. Akin to C.3 q.1 d.p.c.20, C.2 q.6 d.p.c.31 illustrates that Gratian carefully chose sections, extracted the content, manipulated the literal meaning, and altered the sense of the Roman law.⁶⁷ Throughout the *Decretum*, approximately 260 fragments of Roman law were compacted into approximately forty-six passages comprising both of canons and dicta. There were approximately 107 fragments from the *Digest*, 122 fragments from the *Codex* of Justinian, and thirty from the *Novella*. Gratian integrated these passages over time.⁶⁸ Pennington has refined Viejo-Ximénez's conclusion. Rather than being unfamiliar with Roman law, as Winroth has attested, Gratian progressively incorporated it into the various stages of the *Decretum*. As the teaching of Roman law evolved between 1120 and 1140, both Gratian's understanding and use of it followed in step.⁶⁹

Scholars also are exploring the use of and references to Roman law in the St. Gall manuscript. St. Gall, as Viejo-Ximénez noted, retained only four passages of Roman law, but contained texts from the *Lex Romana Visigothorum*. The incorporation of Roman texts was purposeful; in other words, it was incorporated in blocks as a reaction to a specific issue and was a reflection of St. Gall's status as an earlier recension.⁷⁰ Pennington has pointed to a similar conclusion noticing, like Larrainzar earlier,⁷¹ that C.29 q.1 d.a.c.1 in St. Gall employed the generic names used to refer to slaves in Roman

⁶⁷ José Viejo-Ximénez, "Les Étapes de l'incorporation des textes romains au Décret de Gratien," *Revue de droit canonique* 51:1 (2001): 251-260; idem, "El derecho romano 'nuevo' en el Decreto de Graciano," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 88 (2002): 1-19. The latter work is the Spanish translation of the former.

⁶⁸ José Viejo-Ximénez, "La recepción del derecho romano en el derecho canonico," *Ius Ecclesiae* 14 (2002): 377.

⁶⁹ Pennington, "The 'Big Bang'," 53.

⁷⁰ Viejo-Ximénez, "La recepción del derecho romano," 378-379.

⁷¹ Larrainzar, "El borrador de la *Concordia* de Graciano," 618-619.

law of contracts, Stichus and Pamphilus. Gratian 1 and Gratian 2 used the names Plato and Virgilius. This is further evidence that Gratian used the *Digest* and that St. Gall is not an abbreviation. No abbreviator, regardless of how clever, would have changed the Roman slave names taken from the *Digest*.⁷² Gratian's progressive incorporation of Roman law into his text was a reflection of the Romanization of canon law in the first half of the twelfth century.⁷³

The purpose of the *Decretum* was a fourth point that Kuttner called upon for further research. This area has not received as much attention since 1984 as the three previously discussed points. Kuttner highlighted the work of Stanley Chodorow, who has argued that Gratian's ecclesiology reflected the political culture of the time. Gratian's work, in many respects, was a reaction both to the problems faced by Paschal II and to the Schism of 1130.⁷⁴ Along similar lines, Landau felt that the Gregorian Reform influenced Gratian. The work was a commentary on Rome's legislative powers bringing together the priestly powers of the church and its jurisdictional power, both of which were in the hands of the pope. Gratian, however, was not an absolutist; councils continued to play an important role.⁷⁵ At least in terms of the marriage causae, René Heyer has noted that Gratian's purpose was to counterbalance the canonical idea of marriage with the realities of the time.⁷⁶ John Noonan, Jr. has commented that the canon law teacher of the early to mid- twelfth century was a theologian on his way to becoming

⁷² Pennington, "The 'Big Bang'," 60-61.

⁷³ Viejo-Ximénez, "La recepción del derecho romano en el derecho canonico," 399.

⁷⁴ Kuttner, "Research on Gratian," 10, 20-21; Winroth, "Recent Work on the Making of Gratian's *Decretum*," 3-4; Chodorow, *Christian Political Theory*, 17-64.

⁷⁵ Landau, "Quellen und Bedeutung des gratianischen Dekrets," 228-232.

⁷⁶ René Heyer, "Aspects temporels dans la formation du lien matrimonial chez Gratien," *De droit canonique* 48:2 (1998): 350.

a lawyer. Gratian's method of teaching was dialectical in that he stated reasons, made distinctions, created categories, drew lines, and posed analogies. Gratian placed an importance on authority and the analysis of that authority. The hypotheticals provided avenues by which to delve into the law and offered opportunity for digressions.⁷⁷

Pennington has suggested that the St. Gall manuscript was a teaching tool used in Bologna.⁷⁸ Winroth has maintained that Gratian 1 was a pastoral tool used to train priests who would have to be familiar with canon law. Gratian 2, he argued further, reflected a clearly defined ecclesiology and was a work used to train professional jurists.⁷⁹ The shift in the purpose of the various redactions could benefit from much more attention.

A final area demanding attention, according to Kuttner, was the need for a new critical edition of the *Decretum*.⁸⁰ In addition to the need for a new edition of the vulgate recension, there is a need for a critical edition of Gratian 1. Little work has been done on the *Decretum* as a whole, but scholars have worked on particular aspects. Weigand has explored the paleae to ascertain which were true paleae and which were marked as paleae but were actually duplicates of other canons.⁸¹ Lenherr has completed a new critical edition of C.24 q.1. He observed that two Cologne manuscripts used by Friedberg, manuscripts Ka (Cologne, Erbschöfliche Diözesan- und Dombibliothek 127. s. XII) and Kb (Cologne, Erbschöfliche Diözesan- und Dombibliothek 128. Germany, s. XII),

⁷⁷ John Noonan, Jr., "The Catholic Law School - A.D.1150," *The Catholic University Law Review* 47 (1998): 1196.

⁷⁸ Pennington, "The 'Big Bang'," 64, 69.

⁷⁹ Winroth expressed this view in a lecture entitled "Marital Consent and the Two Gratians" given at Catholic University of America, April 2005.

⁸⁰ Kuttner, "Research on Gratian," 10, 21-24; Winroth, "Recent Work on the Making of Gratian's *Decretum*," 3, 24-25.

⁸¹ Rudolf Weigand, "Versuch einer neuen, differenzierten Liste der Paleae und Dubletten im *Dekret Gratians*," *Bulletin of Medieval Canon Law* 23 (1999): 114-128.

represent an eccentric branch of the manuscript tradition, characterized by the substitution of individual works and frequent transpositions of the word order. Those manuscripts that have the highest number of readings in common with the *Polycarpus* are the closest representations of Gratian's text. Manuscript Mk (Munich, Bayerische Staatsbibliothek, clm 28161. Italy, s. XII) matched this requirement best.⁸² Weigand was critical of Lenherr's reliance on Mk rather than using sound judgment.⁸³ Regula Gujer has worked on a manuscript analysis of D.16. Looking at the chronological layers, she paid particular attention to manuscript groups, transpositions, additions, omissions, and corrections. Gujer noticed a deterioration in the text quality due to text corruption from the first chronological grouping, to the second, and to the third.⁸⁴ Like Gujer, Tatushi Genka employed the Lachmann Method to determine the correct rubric for C.15 q.1 c.8.⁸⁵

The Lachmann Method is a two-step process to create a critical edition. First, one must establish the category *recensio* by combining research on the manuscript tradition with textual criticism to reconstruct an archetype without interpreting the text. The second step is to establish the category *emendatio*, the process by which one corrects the archetype with the help of text-internal criteria to reconstruct the Urtext. The first

⁸² Titus Lenherr, *Die Exkommunikations- und Depositionsgewalt der Häretiker bei Gratian und den Dekretisten bis zur "Glossa Ordinaria" des Johannes Teutonicus* (St. Ottilien: EOS Verlag, 1987).

⁸³ Rudolf Weigand, "Zur künftigen Edition des *Decretum Gratiani*," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 83 (1997): 325-36.

⁸⁴ Regula Gujer, *Concordia Discordantium Codicum Manuscriptorum? Die Textentwicklung von 18 Handschriften anhand der D.16 des "Decretum Gratiani"* (Cologne: Böhlau, 2004; eadem, "Zur Überlieferung des *Decretum Gratiani*," in *Proceedings of the Ninth International Congress of Medieval Canon Law*, eds. Peter Landau and Joers Mueller (Vatican City: Biblioteca Apostolica Vaticana, 1997): 87-104.

⁸⁵ Tatushi Genka, "Some Critical Comments on the Rubric of C.15 q.1 c.8 of Gratian's *Decretum*," *Forum historiae iuris*, <http://s6.rewi.hu-berlin.de/online/fhi/articles/0701genka.htm>.

process is independent of the second.⁸⁶ The problem of a critical edition seems best approached by the Lachmann Method. No longer, however, will one edition serve the needs of scholars. There must be a critical edition both of Gratian 1 and of the vulgate recension indicating the paleae as either duplicates or as true paleae. By identifying the first chronological grouping and establishing an archetype, scholars could create an Urtext for each of the previously stated editions.

The Contribution of this Work

In the course of this dissertation I will argue that Gratian's work evolved from the *Concordia discordantium canonum* into the *Decretum*. Rather than serving as steadfast recensions, the manuscript tradition preserves phases serving as "stages" of the work's progression. The St. Gall manuscript is neither a first recension nor an abbreviation of Gratian 1; it is a stage in the work's development preserved by chance, which bears evidence to an earlier stage that preceded St. Gall. Textual and structural evidence point to core *causae* that Gratian used as the basis of his teaching in Bologna. As Gratian continued to teach, he continued to add *causae* in clusters. Internal textual evidence in Gratian 1 suggests that this stage was a product of continued revisions and additions to the work preserved in St. Gall and thus it too passed through some sort of developmental phase. An examination of the marginal and supplementary additions to Gratian 1 manuscripts further supports this theory as well as suggests that Gratian 2 also developed over time. Neither Gratian 1 nor Gratian 2 circulated originally as definitive redactions

⁸⁶ Ibid.

and Gratian was not necessarily the sole author of this final evolutionary phase.

Originally concerned with the teaching of law, the *Concordia discordantium canonum* became a work used by ecclesiastical jurists, and finally transformed into the *Decretum*, a work focused on ecclesiology and the preservation of the Church.

Chapter Two argues that St. Gall is not a first recension but the earliest known exemplar of the work. Rubrics appear inconsistent or “randomly” throughout the St. Gall manuscript. When the *causae* are grouped according to the percentage of rubrics used, the clusters of cases suggest the general order in which Gratian compiled his *causae* over a period of time and the manner in which Gratian gradually incorporated rubrics into his work. The implication is that Gratian began teaching canon law in Bologna with only eight cases found in Cluster A – *Causae* 13, 14, 15, 17, 19, 20, 22, and 34 – which Chapter Four will analyze in greater detail.

Chapter Three will examine the arguments for St. Gall as an abbreviation of Gratian 1 and Gratian’s use of sources. Textual characteristics will show, however, that this cannot possibly be the case. Features common in the St. Gall manuscript, such as the appearance of the canons and the inclusion of *dicta*, show little resemblance to features common among abbreviations. Furthermore, the question of which sources Gratian used is more problematic than the assertion that he relied on a limited number of collections.

Chapter Four will analyze the structural evidence in the eight *causae* of Cluster A to support the conclusion that Gratian compiled his *causae* in clusters over time. These *causae* form a natural grouping with regard to content, the teaching of courtroom procedure and methodology, and the discussion of rights. These *causae* also solve

practical legal problems commonly faced by a medieval canon lawyer, solutions which oftentimes were tangential to the main point. In order to cover all the necessary material in the fewest number of cases, the hypotheticals glued together the main thrust of the argument and a particular legal question.

Chapter Five will focus on the inclusion of the four remaining clusters – Clusters B through E – maintaining that each cluster has its roots in the previous one by either building upon a tangential point or by augmenting a previous argument, though each cast the net of legal issues wider. Cluster B is connected closely to Cluster A in that the first *tractatus* continues with the *ordo iudiciarius*. Aside from the *tractatus de matrimonio*, the two additional cases of Cluster C have roots in *causae* of *ordo iudiciarius* in Cluster B. With Cluster D, Gratian centered on the episcopate with a *tractatus* on discipline and promotion through the ecclesiastical stations. Standing alone, Causa 10 ends the discussion on ecclesiastical property rights began in Cluster B. Finally, Cluster E adds one final tract on the *ordo iudiciarius*, Causa 30 on marriage, and Causa 23 on war and heresy. More often than not, each cluster contains tightly woven *tractatus* on specific legal issues that anchor the subsequent cluster.

Chapter Six examines the transition from Gratian 1 to Gratian 2 by focusing on the margins and supplements of the Gratian 1 manuscripts Barcelona (Bc), Florence (Fd), and Admont (Aa). I will argue that internal textual evidence in Gratian 1 supports the theory for some sort of developmental phase. Furthermore, the “additions” to these manuscripts were more than simply bringing texts of Gratian 1 up to date with Gratian 2. I will demonstrate that because the margins and supplements do not contain all of the

texts found in the vulgate recension (Gratian 2) – and do contain texts not found in the vulgate (Gratian 2) – Gratian originally did not publish the additional material as a finished compendium. This is also clear evidence that scribes copied the additional texts in the margins and in the “additiones” found in the Admont, Barcelona, and Florence manuscripts prior to, and not after, Gratian 2 began to circulate. This will lead us to question Winroth’s “two ‘Gratian’ theory.” Employing a methodology similar to the one he used to determine the canons of the first recension, it seems that, while Gratian did not add all the canons to what would become the vulgate, he did add most of them.

Gratian’s *Decretum* changed as the needs for it changed. Originally compiled as a teaching tool, it guided the student through the legal issues he assuredly would encounter in his career. As the teaching of law evolved so too did the work as Gratian added more *causae*. Eventually, this teaching text became the *Concordia discordantium canonum* in which 101 *Distinctiones*, thirty-six *causae*, and the *De penitentia* covered the gamut of legal questions. A code of law, Gratian compiled it especially for the ecclesiastical jurist. He kept his *Concordia discordantium canonum* current by adding texts in the margins or in supplements at regular intervals. The *Concordia* therefore continued to evolve eventually becoming the *Decretum*; a work for professional jurists that distorted his dialectic method as jurists after Gratian incorporated the supplementary texts into the work to make it useable. The significance is that the *Decretum* may have resulted as a product of necessity and not as a product of design. My dissertation reexamines the development and purpose of Gratian’s work as a living text.

Chapter 2

THE EARLIEST *DECRETUM*: SANKT GALLEN STIFTSBIBLIOTHEK 673

As I have discussed already in Chapter One, scholars have debated the importance of the St. Gall manuscript. Anders Winroth is convinced that it is an abbreviation of Gratian 1.¹ Larrainzar and Pennington have argued that it represents the first known stage of Gratian's text in the manuscript tradition.² In a recent essay I have studied the rubrics in the St. Gall manuscript and concluded that they provide very good evidence that it is not an abbreviation.³ The rubrics and rubrication techniques that Gratian employed is conclusive evidence that St. Gall is a stage in the development of the *Decretum*.

The rubrics in St. Gall reveal a pattern uncharacteristic of abbreviations. Whereas some *causae* used rubrics with relative consistency, other *causae* omitted them almost completely. No *causa* in the St. Gall manuscript makes use of rubrics for every canon and the pattern is inconsistent throughout the work. The use or non-use of rubrics in St. Gall reflects the general order in which Gratian compiled his *causae*. The rubrication suggests Gratian compiled his cases in clusters and thus there were developmental stages to the work rather than being compiled all at once. In my essay I argued that five clusters of *causae* can be isolated based upon the percentage of rubrics used. As Table 1 illustrates, the progressive incorporation of rubrics reflects the development of Gratian's structure for the *causae*.

¹ Winroth, "Recent Work on the Making of Gratian's *Decretum*," 8-18.

² Larrainzar, "El borrador de la *Concordia* de Graciano," 593-666; Pennington, "Gratian, Causa 19, and the Birth of Canonical Jurisprudence," 4:339-355; Pennington, "The 'Big Bang'," 43-70.

³ Melodie Harris Eichbauer, "St. Gall Stiftsbibliothek 673 and the Early Redactions of Gratian's *Decretum*," *Bulletin of Medieval Canon Law* 27 (2007): 105-139.

Table 1: Causa by Cluster

Cluster	Percentage of Rubrics	Causae
A	0-3%	13, 14, 15, 17, 19, 20, 22, 34
B	6-19%	5, 6, 12, 16, 18, 21
C	35-43%	3, 11, 31, 32, 33
D	50-75%	prima, 1, 7, 8, 9, 10, 27, 29, 35, 36
E	80-86%	2, 4, 23, 30

Although the first cluster of causae do not have any rubrics, an examination of the way in which Gratian used “de eodem” in Cluster A – Causae 13, 14, 15, 17, 19, 20, 22, and 34 – casts light on the Gratian’s techniques for creating them. One technique was the use of “de eodem,” which was an original formula used to link the canon with the preceding canons addressing the same topic. Gratian foreshadowed his method of rubrication that would become common in other causae. Because full rubrics were not used in Cluster A, “de eodem” provided little help as a rubric unless the user of the text already knew what the previous canon had argued. These notations originated for Gratian’s use and later would help the reader. In addition to the occasional use of “de eodem,” Gratian sometimes considered the previous dictum as sufficient for summarizing the following *auctoritas*. Due to the slow incorporation of rubrics, it stands to reason that Gratian used the *auctoritas* to formulate portions of the preceding dictum for transition purposes. The dictum, which derived in part from the *auctoritas*, inspired the rubric later. A rubric could stem from condensing a sentence or from a particular clause of that sentence. In such instances it was an ad hoc summary of the chapter.

Rubrics as Evidence for St. Gall as an Early Stages of the *Decretum*

In 1981 Titus Lenherr published a study in which he examined the rubrics of canons from the Second Lateran Council in the vulgate recension. He discovered that they varied considerably in the early manuscripts. From this evidence he concluded that the canons must have been added very late to the *Decretum*, giving textual support to a suspicion long held by scholars.¹ Inspired partly by Lenherr and partly by the inconsistent use of rubrics throughout St. Gall, I examined all the rubrics in the St. Gall manuscript to see whether they might provide further evidence for the development of the *Decretum*. Gratian rarely took his rubrics from earlier collections. Rather, he created his own and often melded the rubrics with his dicta. The evidence of the rubrics also provides clues as to which core *causae* Gratian might have used when he began teaching canon law in Bologna.

In the Florence manuscript (Fd), Gratian used rubrics to explain a canon or to provide continuity in his text.² They served as easy to use summaries of the *auctoritates*. The rubrics in Fd match, by and large, those in the vulgate recension.³ A careful examination of St. Gall reveals that some *causae* used rubrics with relative consistency and others omitted them almost completely. While this may appear random, I will argue that the rubrics were not left out haphazardly.

¹ Lenherr, "Die Summarien zu den Texten des 2. Laterankonzils von 1139 in Gratians *Dekret*," 528-551.

² Fd, fol. 1r-104r. The Florence manuscript begins in the middle of D.28 d.p.c.13 at '//stituti licite matrimonio...'

³ Biblioteca Nazionale Centrale, Conventi Soppressi A 1.402 (Fd) will serve as the base manuscript for the analysis of Gratian 1 because it is the most complete and uninterpolated of the Gratian 1 manuscripts.

No causa in the St. Gall manuscript contains rubrics for every canon.⁴ In Causa 4, six out of seven canons have rubrics with space left for the one rubric never added. That is the greatest proportion in any causa of St. Gall.⁵ Like Causa 4, Causa 2, Causa 23, and Causa 30 more often than not use them to introduce the canon. In Causa 2, the canons with only inscriptions are found throughout the causa. Gratian began by relying solely on inscriptions in Causa 23, but before the completion of Question one he added rubrics; twenty-nine of the thirty-four canons have a rubric. Similarly, sixteen of the twenty canons in Causa 30 have a rubric. The four canons that only have inscriptions are scattered throughout the causa. Grouped midway through the work is a set of seven causae that contain no rubrics at all. In Causae 13, 14, 15, 17, 19, 20, and 34 only inscriptions precede the canons. Causa 22, which contains only one rubric amid forty-one canons, is included with this group of causae.⁶ The rest of the causae in the St. Gall manuscript include rubrics with varying degrees of regularity, falling somewhere in between the two extremes. For example, four of the seven canons in Causa 31 have only inscriptions, while three canons have both inscriptions and rubrics.

⁴ Since the added causa – Causa prima – and the omitted causae – Causae 24-26 and 28 – skew the sequential ordering of Sg, I have titled the causae according to the numeration found in Gratian 1 and the vulgate recension.

⁵ Sg, p. 73a. As with one canon in Causa 3 (p. 71b) and with two canons in Causa 36 (p. 201b), the canon in Causa 4 does not include a separate inscription. The space could either be for an inscription or an inscription and a rubric. One canon in Causa 31 (p. 176a), one canon in Causa 32 (p. 180a), one canon in Causa 33 (p. 184a), and one canon in Causa 35 (p. 189a) leave a space but contain a separate inscription. More than likely the space in each of these four causae was for a rubric. Despite these possibilities, the Appendices 1-3 represent all these canons as not having rubrics.

⁶ The rubric for C.22 q.2 c.14 in St. Gall is ‘Ut ueritas possit celari’ (Sg, p. 152b). The canon is heavily truncated as compared to that found in either Fd or in the vulgate and only reads: ‘Manifestum est non esse culpandum aliquando uerum tacere, falsum autem dicere non inuenitur concessum sanctis.’ With the addition to the canon in Gratian 1 (Fd, fol. 59v; Vgl. *edF*, col. 871), the rubric is also altered to represent the change. The correction – ‘Pro temporali uita alicuius perfectus mentiri non debet’ – reflects the added text.

The use of rubrics varies considerably throughout the manuscript. Appendix 1 lists the percentage of rubrics found in each of the *causae* of St. Gall. *Causa prima* and *Causa 1* contain rubrics for roughly fifty percent of the canons.⁷ While *Causa 2* has rubrics for eighty percent of the canons in St. Gall, *Causa 3* includes them for approximately thirty-seven percent of the canons. While *Causa 4* contains eighty-five percent of its rubrics, *Causa 5* has only twelve percent of its rubrics, *Causa 6* contains six percent of its rubrics, and *Causa 7* and *Causa 8* have approximately fifty percent of their rubrics. There is a stark disparity between *Causa 22*, which includes two percent of its rubrics in St. Gall, and *Causa 23*, which has rubrics for eight-five percent of the canons. Finally, *Causa 34* contains no rubrics in St. Gall, but *Causa 35* has rubrics for seventy-five percent of the canons. It is apparent that there is neither a progressive decline nor a progressive rise in the use of rubrics. The scribe neither began using rubrics and steadily ceased doing so, nor did he begin solely relying on inscriptions and move toward the incorporation of rubrics. The *causae* rather inconsistently contain rubrics throughout the manuscript. Inscriptions quite commonly are in red ink where rubrics are omitted. In instances where rubrics are used, either both the inscription and rubric are in red ink or the inscription is in black ink and the rubric is in red ink.⁸

A comparison of the rubrication style in Sankt Gallen to Italian collections dating after ca.1100 suggests a pattern that would have been familiar to Gratian.⁹ Collections

⁷ The following figures are based upon the number of canons in a particular *causa* of St. Gall that make use of rubrics. These rubrics are in addition to and not a part of the preceding dictum.

⁸ Instances occur where the scribe originally wrote the inscription in black ink, but underlined it in red.

⁹ My discussion of the canonical sources rests on information contained in Fowler-Magerl's *Clavis canonum* [CD-ROM] program, which allows a search of canonical collections prior to 1140 based on various criteria. Her accompanying work is a thorough description of the collections. My search focused

such as the *Collectio Gaddiana*, the *Collectio Casinensis*, the *Collectio Beneventana*, and the *Collectio III librorum* use rubrics irregularly. The *Collectio Gaddiana*, copied in central Italy in the early twelfth century and named for the library in which it was found, does not use rubrics for the majority of the canons.¹⁰ Fowler-Magerl also has noted that inscriptions and rubrics are often missing.¹¹ The *Collectio Casinensis*, which dates to the second decade of the twelfth century and was copied for the abbey of Montecassino, incorporates rubrics though not consistently.¹² The *Collectio Beneventana*, which was intended to supplement the annals and the cartulary for the monastery of S. Sofia of Benevento and begins with the second version of the *Annales Beneventani* that ended with the year 1119, includes rubrics for eleven of twenty-six canons.¹³ The *Collectio III librorum*, compiled after 1111, frequently uses rubrics in Book One but uses them more sparingly in Books Two and Three. Fowler-Magerl likewise noted that few rubrics are attached to the individual canons.¹⁴ Each of these collections alternate between using a rubric, using some variation of *Item de eadem*, or foregoing a rubric altogether. Though the collections did employ more rubrics than the Sankt Gallen manuscript, they did so with much more irregularity than collections associated with the Gregorian reform.

The use of rubrics both in the Sankt Gallen and in post-1100 Italian collections differs significantly from the use of rubrics in the eleventh-century reform collections.

on the inscription, incipit, and explicit. Unless stated otherwise, I have used her database for all references to canonical collections.

¹⁰ Fowler-Magerl, *Clavis canonum*, 214-215.

¹¹ *Ibid.*, 214.

¹² *Ibid.*, 215-216.

¹³ *Ibid.*, 227-228.

¹⁴ *Ibid.*, 234-235.

The use of rubrics is a typical feature among these collections.¹⁵ The *Diversorum partum sententie* (*Collectio LXXIV titulorum*), which Bernold of Constance first used in 1073/1074,¹⁶ frequently uses a rubric followed by the use of *Item de eadem re* for the subsequent canons on the same subject. When the subject changes another rubric is used followed again by *Item de eadem re* until yet another change in subject. Canons 277-308 do not use rubrics; however, this can be explained. The rubric for c.276 introduces the section with “Incipiunt quaedam capitula a beato Gregorio in generali sinodo disposita.” The following canons, c.277-c.289, were taken in order from that synod. The rubric to c.290 reads “Hec capitula sparsim collecta sunt et angliranno mediomatrice urbisepiscopo Rome a beato papa Hadriano tradita quando pro sui negotii causa inibi agebatur” and c.291-c.307 likewise were taken in order. The use of rubrics resumes with c.308 and continues through the remainder of the work. The *Liber decretorum* of Burchard of Worms, compiled between 1012 and 1022, uses rubrics for almost every canon.¹⁷ The same is true for the *Collectio canonum* of Anselm of Lucca, compiled in Italy around 1086, and the *Collectio canonum* of Deusdedit, compiled before 1087 and dedicated to Pope Victor III.¹⁸ Following suit, the *Tripartita* uses rubrics for the vast majority of the canons.¹⁹ The *Decretum* and *Panormia* of Ivo of Chartres, which he compiled between 1093 and 1099, omit more rubrics than the other reform collections, though they continue to use them more consistently than the post-1100 Italian collections and Gratian.²⁰

¹⁵ In all of the reform collections canons that appear as subsidiaries, such as Anselm of Lucca *Collectio canonum* 3.89b-zt, will not have rubrics. The main canon, however, will have a rubric.

¹⁶ Ibid., 110-119.

¹⁷ Ibid., 85-90.

¹⁸ Ibid., 139-145, 160-163.

¹⁹ Ibid., 187-190.

²⁰ Ibid., 193-202.

While Gratian had his own ideas about how to use rubrics when he first compiled his work, Sankt Gallen conforms to post-1100 Italian collections in that rubrics were not regarded as essential. The use of rubrics in early twelfth century collections seems to be a ‘compiler’s prerogative.’ The compiler added rubrics when he thought they were necessary. In other instances, he regarded as perfectly acceptable the use of *Item de eadem* or the omission of a rubric entirely. Even though the Sankt Gallen manuscript uses fewer rubrics than these collections, it conforms to the ‘compiler’s prerogative’ genre that would have been familiar to Gratian. He returned to the rubrication style characteristic of reform collections with the first recension, a style in which rubrics played an important role by facilitating the work’s usability.

The use or non-use of rubrics in St. Gall reflects the order in which Gratian compiled his *causae*. The *causae* can be grouped into five clusters according to the percentage of rubrics used.²¹ The clusters, Clusters A through E, also bring attention to the positive correlation between the steady incorporation of rubrics and the steady incorporation of canons. Incorporating fewer than three percent of the respective rubrics in St. Gall as opposed to the near complete use of rubrics in the later recensions are *Causae* 13, 14, 15, 17, 19, 20, 22, and 34. These *causae*, comprising Cluster A, not only contain the smallest percentage of rubrics, but also represent the smallest percentage of canons. There is an average of sixteen canons per *causa*. Incorporating between six and nineteen percent of the respective rubrics for the canons present in St. Gall are *Causae* 5, 6, 12, 16, 18, and 21. This cluster, Cluster B, averages thirty-one canons per *causa*. The inclusion of between thirty-five and forty-three percent of the rubrics for the canons

²¹ See Appendix 2 for the individual clusters.

found in St. Gall distinguishes the next cluster, Cluster C, represented by Causae 3, 11, 31, 32, and 33, which averages thirty-two canons per causa. A fourth cluster of causae, Cluster D, ranges between fifty and seventy-five percent of the rubrics for the canons in St. Gall and averages thirty-seven canons per causa. Causae prima, 1, 7, 8, 9, 10, 27, 29, 35, and 36 fall into this fourth, and largest, category. Finally, Cluster E, which includes Causae 2, 4, 23, and 30, has between eighty and eighty-six percent of the rubrics for the canons present in St. Gall and averages forty-one canons per causa.²² As Gratian incorporated more causae, he incorporated more rubrics and more canons.

The idea of clusters based upon the percentage of rubrics used and the number of canons per causa suggests that Gratian compiled his work in stages over a period of time rather than all at once. From a cluster of cases in which he relied solely upon inscriptions, Gratian began to incorporate rubrics steadily with the second group of cases and continued with the subsequent groups. As Gratian added causae, he not only added more canons to each causa but also added rubrics as needed. The theory of clusters explains the erratic use of rubrics that we find in the St. Gall manuscript. Rather than being haphazard, it shows that Gratian reorganized the cases into the order preserved in St. Gall after he finished compiling them.

In her examination of the *De penitentia*, Atria Larson also noticed the lack of rubrics in St. Gall. Her observations are akin to those of Mary Sommar, who observed that seven of the canons in Causa 7 of St. Gall are without rubrics whereas eight others

²² The average number of canons should be greater for Cluster E, but Causa 23 omits the latter part of Question four, and all of Questions five, six, and seven despite their inclusion in the hypothetical. As I discuss below, the scribe of the St. Gall manuscript may have used a faulty exemplar that contained a missing quire.

have them. Sommar concluded that if it were an early draft of the *Decretum*, then rubrics would be found for either no canons or for every canon.²³ Such irregularity shows, however, that Gratian developed the *causae* in phases, and the steady increase in the use of rubrics serves as developmental markers of those phases.

The Development and Purpose of Rubrics

These stages of rubrication are unique to St. Gall. At least ninety-four percent of the canons in any particular *causa* of Fd contain the same rubrics as in the vulgate text.²⁴ Discounting C.33 q.3, the *De Penitentia*, Fd omits eleven rubrics.²⁵ In the case of ten canons – D.34 c.5, C.1 q.1 c.26, C.2 q.1 c.16, C.16 q.1 c.20, C.22 q.2 c.4, C.22 q.5 d.p.c.8 §3 (appears as a canon), C.24 q.2 c.4, C.27 q.2 c.1, C.27 q.2 c.2, and C.30 q.4 c.5 – space was left for the rubric in Fd.²⁶ While the lack of a rubric in St. Gall was intentional, the omission in Fd was not; the rubric simply was not copied. Interestingly, C.6 q.2 c.3 uses a rubric in St. Gall but not in Fd. The rubric in St. Gall is a variant of that found in the vulgate recension.²⁷ The Florence manuscript, however, omitted both the inscription and the rubric. A possible explanation is that because c.2 ended at the bottom of fol. 35v the

²³ Sommar, “Gratian’s *Causa VII* and the Multiple Recensions Theories,” 87; Larson, “The Evolution of Gratian’s *Tractatus de penitentia*,” 88, 91. Using the vulgate recension as a point of reference, Sommar has counted fifteen canons in *Causa 7*. I have added an extra canon for a total of sixteen, eight of which are without rubrics, because a portion of q.1 d.a.c.1 appears as a nonrubricated canon in St. Gall (p. 80a). Unlike *Causa 7*, which possesses all its rubrics in Fd, the *De penitentia* contains few rubrics in Gratian 1, which, to Larson, is evidence of the work as a separate treatise.

²⁴ See Appendix 3 for a percentage comparison of rubrics by *causa* in Sg as opposed to Fd. In the following discussion, I do not address the *Distinctiones* because they are not a separate entity in St. Gall.

²⁵ Fd, fol. 88r-99v. While C.33 q.1, q.2, and q.4 make use of rubrics, C.33 q.3 does not. See Larson’s article, cited above, for a full discussion of the rubrication in the *De penitentia* and the implications.

²⁶ Fd, fol. 2v, fol. 20r, fol. 27r, fol. 51r, fol. 59r, fol. 61r, fol. 72r, fol. 79v, fol. 84r. In the cases of C.27 q.2 c.1 and q.2 c.2, Vgl. *edF* does not employ a rubric nor do the *Correctores* note the possibility of one (Vgl. *edF*, col. 1063). Though Friedberg noted that the rubric could be omitted (Vgl. *edF*, col. 1103, n. 37), a later hand added to the rubric to C.30 q.4 c.5 in Gratian 1 (Fd, fol. 84r).

²⁷ Sg, p. 78b; Vgl. *edF*, col. 571.

scribe forgot to add the information either in the line remaining at the bottom of the folio or to leave extra space for it at the top of fol. 36r, which begins with c.3. This variation also could illustrate that early manuscripts of the *Decretum*, such as St. Gall and Florence, were not uniform. They contained texts and additions largely dependent upon when and where the manuscript was produced, both of which are not known for either of the manuscripts. One finds a systematic effort to include rubrics in Gratian 1, which is in stark contrast to the St. Gall manuscript where the use of rubrics developed slowly with the addition of *causae*.

Previous scholars had attempted to explain the development and purpose of the rubrics in Gratian's *Decretum*. Despite the *causae* lacking complete rubrics, an examination of the techniques used in Cluster A, *Causae* 13, 14, 15, 17, 19, 20, 22, and 34, casts light on the earliest examples of Gratian's methodology for rubrication.

Ramnaud-Buhot maintained that some rubricators used "de eodem" as a generic summary of the canon.²⁸ In his analysis of the canons from the Second Lateran Council, Lenherr argued that the formula was added in instances where the original rubric was missing. It performed a visual function, which my examination of Cluster A has confirmed.²⁹ "De eodem" was an original formula used to remind Gratian that the canon fit with the preceding canons addressing the same topic. Its purpose was not necessarily to remind him of the canon's contents. *Causa* 13 in St. Gall contains no formal rubrics amid its eleven canons.³⁰ Accompanying the inscription to the Council of Trebur in C.13 q.2 c.14, Gratian included the notation "de eodem." He wanted to associate this canon,

²⁸ Ramnaud, "Le legs de l'ancien droit: Gratian," 73-74; Kuttner, "Research on Gratian," 15.

²⁹ Lenherr, "Die Summarien zu den Texten des 2. Laterankonzils von 1139 in Gratians *Dekret*," 544, 551.

³⁰ Sg, p. 109b-115a.

which prohibited priests from charging for burial, with the previous canon, c.12, which addressed the same subject. Because this theme was a lengthy deviation from the original topic – the tithing rights of an ancestral church versus those of the baptismal church – Gratian included the note as a brief reminder to link the two canons together.³¹ A similar occurrence is found in C.22 q.4 c.13 where the note “de eodem” follows the inscription.³² As with C.13 q.2 c.14, the canon immediately prior, c.12, does not use a rubric. Gratian wanted to remind himself that the canon fit with the above eight canons, which maintain that one may not uphold an illicit oath. He was on the verge of ending this particularly long section and switching to a new topic. In these instances, there is no preceding rubric to offer a context for “de eodem.” Such a reference provided little help as a rubric unless the user of the text already knew what the previous canon had argued.

These references were intended for Gratian’s use and foreshadow how he would use rubrics in the other *causae* to help the reader. If St. Gall were an abbreviation of Gratian 1, which included rubrics, then omitting complete rubrics and simply retaining those references that provided no help when standing alone would have served little purpose. An abbreviator would not do this for only eight, non-consecutive, *causae*. The initial use of “de eodem” was not meant specifically as a rubric but rather as a way to link canons together. In later clusters, such as examples in *Causa prima*, *Causa 2*, *Causa 8*, and *Causa 11*, Gratian would include a rubric and follow with canons that used either “de eodem” or simply an inscription, and then would add another rubric when the subject

³¹ Sg, p. 114b.

³² Sg, p. 154a.

changed.³³ Once Gratian began adding rubrics with more consistency, “de eodem” likewise evolved into a systematic method of rubrication. One only needed to refer to the rubric above to know what the canon argued.

Both J. Rambaud-Buhot and John Noonan, Jr. have highlighted the similarity between dicta and rubrics, that is, a rubric very often echoes the dictum that immediately precedes it. D.95 c.1 and D.97 c.3 are examples of this.³⁴ Their observation is reaffirmed if one considers that a vast number of canons, as St. Gall demonstrates, originally did not make use of rubrics. As I discussed previously, St. Gall conforms to post-1100 Italian collections, such as the *Collectio III librorum*, in that rubrics were not regarded as essential. The dictum by default helped to introduce the next *auctoritas*, a technique exemplified best in the first cluster of causae. For instance, the d.a.c.1 of C.14 q.6 reads: “Quod uero penitentia agi non possit nisi res aliena reddatur, dicat Augustinus in epist. ad Macedonium.” This dictum is written in red ink.³⁵ The rubric for c.1 – “Penitentia non agitur, si res aliena non restituitur” – appears in Fd.³⁶ The dictum, which summarized the canon, served as the inspiration for the rubric rather than the rubric serving as inspiration for the dictum. C.15 q.2 c.1 also utilizes this technique. In q.2 d.a.c.1 “clerici munera exigere prohibentur, in quo sic statutum legitur” is in red ink.³⁷ This portion of the dictum serves as the foundation for the rubric added to Fd – “Pro patrociniis impensis clericus munera exigere non debet.”³⁸ C.17 q.4 d.a.c.1, and C.22 q.5

³³ Causa prima: Sg, p. 25a, p. 27a; Causa 2: Sg, p. 45b, p. 56b; Causa 8: Sg, p. 85a; Causa 11: Sg, p. 96a.

³⁴ Rambaud, “Le legs de l’ancien droit: Gratian,” 72-73; Kuttner, “Research on Gratian,” 15; Noonan, Jr., “Gratian Slept Here,” 164-165.

³⁵ Sg, p. 118a.

³⁶ Fd, fol. 48v.

³⁷ Sg, p. 120b.

³⁸ Fd, fol 49v.

d.p.c.13 also contains this pattern. At the end of the introductory dictum to C.17 q.4 the inscription Unde Simachus Papa precedes “Possessiones quas unusquisque etc. – et iterum de eodem” in red ink.³⁹ In Fd and in the vulgate this text is a part of q.4 d.a.c.1 and the rubric is “Honore priuetur qui de iure ecclesiae aliquid alienare presumit.”⁴⁰ In C.22 q.5 d.p.c.13 the red-inked dictum in St. Gall – “De etate quo iurantium ambigi qua etate quos ad iurandum cogi debeat” – serves as the impetus for the rubric to c.14 – “Ante rationabiles annos aliqui non cogantur iurare” – added to Fd.⁴¹ These isolated instances in the first cluster illustrate that Gratian felt that the dictum was sufficient for summarizing the following *auctoritas*. When he chose to incorporate rubrics in Fd, he sometimes drew them from the dictum.

Tatsushi Genka has argued in his analysis of C.15 q.1 c.8 that Gratian formulated his rubrics from the source he was using.⁴² An examination of the rubrics in Causa 23, which includes eighty-five percent of its rubrics and is representative of the *causae* as a whole, shows that, when used, they inevitably derive from the canons they introduce. Gratian carved out the relevant portion of the dictum and the rubric from the text of the *auctoritas*. In some instances, he either truncated a sentence or formulated a rubric from a particular clause of that sentence.⁴³ Table 2 below offers a few examples in Causa 23 of a rubric that originated from some section of the *auctoritas*.

³⁹ Sg, p. 141a. A marginal notation made later in brown ink refers the reader to the causa above on monks where the papal letter is contained in C.16 q.1 c.61 (Sg, p. 131b). As Winroth notes in *The Making of Gratian's Decretum* (p. 180), Gratian would later refer to the letter again in C.25 q.2 d.p.c.25.

⁴⁰ Fd, fol. 55v; Vgl. *edF*, col. 815.

⁴¹ Sg, p. 157b; Fd, fol. 61v.

⁴² Genka, “Some critical comments on the Rubric of C.15 q.1 c.8 of Gratian's *Decretum*,” <http://s6.rewi.hu-berlin.de/online/fhi/articles/0701genka.htm>.

⁴³ C.23 q.1 c.5; C.23 q.2 c.1, c.2; C.23 q.3 c.6-c.8; C.23 q.4 c.1, c.2, c.7, c.8, c.28, c.31, c.34; C.23 q.8 c.8, c.9, c.12.

Table 2: Rubrics in Causa 23 created from a portion of the *auctoritas*

Canon in <i>Decretum</i>	C.23 q.2 c.1	C.23 q.3 c.7	C.23 q.4 c.8	C.23 q.4 c.31	C.23 q.8 c.8
Rubric	Quid sit iustum bellum	Qui a socio non repellit iniuriam similis est ei, qui facit	Non te maculat malus, si ei non consentis, sed ipsum redarguis	Iudicis non est sine accusatore dampnare	Ultor sui gregis Papa debet esse ac precipuus adiutor
<i>Auctoritas</i>	<u>Iustum est bellum, quod</u> edicto geritur de rebus repetendis, aut propulsandorum hominum causa. Iudex dictus est, quia ius dictat populo, siue quod iure disceptet. Iure autem disceptare est iuste iudicare. Non enim est iudex, si non est iusticia in eo.	Non in inferenda, sed in depellenda iniuria lex uirtutis est. <u>Qui enim non repellit a socio iniuriam</u> , si potest, tam est in uicio quam ille, qui facit.	A malis semper corde disiungimini ad tempus caute corpore copulamini. Duobus modis <u>non te maculat malus: si non consentias, et si redarguas</u> . Hoc est non communicare, non consentire – ut insultantes arguatis.	Si quis potestatem non habet quem scit reum abicere, uel probare non ualet, immunis est, et <u>iudicis non est sine accusatore dampnare</u> , sicut nec Christus abiecit Iudam.	Scire uos oportet, quod numquam ab aliquibus nostros homines sinimus opprimi; sed, si necessitas ulla occurrerit, presentialiter uindicamus, quia <u>nostri gregis in omnibus ultores esse debemus et precipui adiutores</u> .

Gratian used a section of the text whether from the beginning, middle, or end of the canon. The key portions of the text, be it a clause or a truncated sentence, summarized the overall theme of the canon. In other instances, a rubric summarized the chapter.⁴⁴

Gratian formulated his rubric from the argument of the canon. As Table 3 below

⁴⁴ C.23 q.1 c.3, c.6; C.23 q.3 c.5; C.23 q.4 c.5, c.14, c.15, c.18, d.p.c.27 (a canon in Sg); C.23 q.8 c.7, c.11, c.13, c.14, c.19, c.24.

illustrates, the rubrics were in his own words rather than utilizing a slice of the

auctoritas.⁴⁵

Table 3: Rubrics in Causa 23 created by Gratian

Canon in <i>Decretum</i>	C.23 q.1 c.6	C.23 q.3 c.5	C.23 q.4 c.15	C.23 q.8 c.7	C.23 q.8 c.19
Rubric	<u>Pacata sunt bella, que geruntur, ut mali coherceantur et boni subleuentur</u>	<u>Iusticia plenus est qui patriam bello tuetur a barbaris</u>	<u>Presens ecclesia simul recipit bonos et malos</u>	<u>Pro Sarracenis Papa iubet populum congregari</u>	<u>Episcopi non debent occupari negociis</u>
<i>Auctoritas</i>	Apud ueros Dei cultores etiam ipsa bella pacata sunt, que non cupiditate aut crudelitate, sed pacis studio geruntur ut mali coherceantur et boni subleuentur.	Fortitudo, que bello tuetur a barbaris patriam, uel domi defendit infirmos, uel a latronibus socios, plena iustitia est.	Hec uita, que inter celum et infernum sita est, sicut in medio subsistit, ita utrarumque partium ciues communiter recipit: quos tamen sancta ecclesia et indiscrete suscipit, et postmodum in egressione discernet. Si igitur boni estis, quamdiu in hac uita subsistitis, equanimiter tollerate malos. Nam quisquis malos non	Romanorum portum Sarracenos clam furtiueque uenturos esse dicebant. Pro quo nostrum precipimus congregari populum, maritimumque ad litus descendere decreuimus.	Reprehensibile constat ualde quod subintulisti, dicendo, maiorem partem omnium episcoporum die noctuque cum aliis fidelibus tuis contra piratas maritimos inuigilare et, ob id episcopi inpediantur, cum milites Christi sit Christo seruire, milites uero seculi seruiant seculo, sicut scriptum est: "Nemo militans Deo

⁴⁵ If Gratian did not use the rubrics of his sources, one cannot use them as part of the search criteria for determining the canonical source from which he took his material.

Canon in <i>Decretum</i>	C.23 q.1 c.6	C.23 q.3 c.5	C.23 q.4 c.15	C.23 q.8 c.7	C.23 q.8 c.19
			tollerat, ipse sibi per intollerantiam testis est, quia bonus non est.		implicat se negociis secularibus." Quod si seculi milites miliciae student, quid ad episcopos et milites Christi, nisi ut uacent orationibus?

My observations of Causa 23, therefore, echo Genka's argument that "the rubrics are a combination of the first and last part of the *auctoritas*."⁴⁶ Due to the slow incorporation of rubrics, it stands to reason that Gratian used the *auctoritas* to formulate portions of the preceding dictum for transition purposes. The relevant portion of the dictum in turn became the basis for the rubric. If a dictum did not precede the canon, the *auctoritas* served as the impetus for the rubric.

Ramnaud-Buhot has observed that the rubrics contain a wide variety of wording, much more variation than usually permitted in a scriptorium. Noonan has pointed to instances where some rubrics are inaccurate, such as that to C.27 q.1 c.40 which is borrowed from C.27 q.1 c.28, or they contradict the canon they introduce, as is the case for C.27 q.2 c.50 which d.p.c.50 refutes. Based on these observations, namely, the similarity between the preceding dictum and the following rubric, the variation in wording, and the inaccurate and contradictory dicta, Noonan has argued that a hand other than Gratian formulated the rubrics. Titus Lenherr has disagreed. He has found that the

⁴⁶ Genka, "Some critical comments on the Rubric of C.15 q.1 c.8 of Gratian's *Decretum*," <http://s6.rewi.hu-berlin.de/online/fhi/articles/0701genka.htm>.

majority of the rubrics originated prior to the publication of the *Decretum* and thus the first copyists had not inserted them. Either Gratian himself or a team working in conjunction with him inserted the rubrics before publication. The variation in wording could stem from the frequency of transcription, which inevitably would lead to errors.⁴⁷

My findings concur with and refine those of Lenherr. The rubrics were not the work of another hand; rather, Gratian created rubrics on an ad hoc basis for use in the classroom and later for his readers. He did not take them from his canonical sources and thus one cannot include rubrics among the criteria for determining from which collections Gratian may have taken a canon. As Kenneth Pennington has argued, Gratian used the text of the St. Gall manuscript for teaching in Bologna.⁴⁸ When he first compiled the *Decretum* his purpose was to collect a set of hypothetical cases to introduce students to canon law. His primary purpose was neither to compile a comprehensive collection of canon law nor to bring concord to the entire body of canon law. The *Concordia discordantium canonum* emerged later when he expanded his collection. Because he was using the cases as the basis of his teachings, Gratian would have had little use for rubrics in the beginning, particularly with the first group of cases since he was well acquainted with the *auctoritates* and how they supported the argument. What would have mattered for teaching were the inscriptions. The eight *causae* of Cluster A support this conclusion. Just as professors make notations to themselves in their class notes, these reminders would have proved useful during a lecture. Only after using his casebook in the

⁴⁷ Rambaud, "Le legs de l'ancien droit: Gratian," 76; Kuttner, "Research on Gratian," 15; Noonan, Jr., "Gratian Slept Here," 164-165; Lenherr, "Die Summarien zu den Texten des 2. Laterankonzils von 1139 in Gratians Dekret," 544, 551.

⁴⁸ John Noonan, Jr. has called into question Gratian's role as a teacher based upon the conjecture surrounding his contributions to the *Decretum*. See "Gratian Slept Here," 160-170, esp. 169-170.

classroom did Gratian realize it could serve as a tool for students. He may have realized that complete and individual rubrics for each canon would provide a good guideline for those learning and using the material, hence their progressive inclusion in later clusters and inclusion in virtually all the canons in Fd.⁴⁹ The implication is that the cases with fewer rubrics have an earlier history than those with more substantial rubrication.

As Gratian added more material, he developed rubrics to remind himself at a glance of the canon's content. The cases of Cluster B – Causae 5, 6, 12, 16, 18, and 21 – employ both the techniques used in Cluster A as well as incorporating a few full rubrics. For instance, the first eight cases contain instances where a portion of a dictum was in red and served as the foundation for a later rubric. Such is the case with C.5 q.5 d.p.c.3, which serves as the foundation for the later rubric of c.4.⁵⁰ What distinguishes this group from the first is the use of full rubrics rather than ad hoc references. The full rubric of C.5 q.4 c.1 is nearly identical to that found in Fd and in the vulgate recension.⁵¹ Causa 6 includes one full rubric, C.6 q.2 c.3, amid the fifteen canons found in St. Gall.⁵² Causa 12 follows with three full rubrics – q.2 c.61, q.2 c.71, and q.4 c.3 – amid forty-seven

⁴⁹ See Appendix 3 for the percentage of rubrics in Fd.

⁵⁰ Sg, p. 76a; Fd, fol. 35r. The dictum to C.5 q.5 d.p.c.3 in Sg is: 'Hinc datur intelligi, quod magis contulit utilitati fraternae, qui crimen uel iudicando uel accusando persequitur, quam qui celando fouere nititur. Autem Eusebius contra statuere uidetur, dum aliorum crimina sponte confitentes in accusationem episcoporum recipi prohibet dicens.' As in Cluster A, a portion of the dictum is in red, 'Autem Eusebius...prohibet dicens.' This portion of the dictum introduces c.4 and the rubric, added in Fd, reads almost identical – 'Ad accusationem non admittantur aliorum crimina sponte confitentes.'

⁵¹ Sg, p. 75b; Fd, fol. 35r; Vgl. *edF*, col. 548. In Sg the rubric is: 'Ut episcopus nec iudicatur nec audiatur nisi in legitima synodo.' The rubric is altered only slightly in Fd – 'Nisi in legitima synodo episcopo iudicari non debet uel audiri' – and in Vgl. *edF* – 'Nisi in legitima synodo episcopus iudicari uel audire non debet.'

⁵² Sg, p. 78b; Vgl. *edF*, col. 561. As I will discuss below, the rubric is missing in Fd because the scribe did not leave space for it. C.6 q.2 c.2 ends at the bottom of Fd fol. 35v and c.3 begins at the top of Fd fol. 36r with the pen-initial. C.6 q.2 c.3's rubric reads – 'Ut cum episcopus aliquem sibi soli crimen confessum dicat non credatur.' In Vgl. *edF* it reads – 'De episcopo, qui sibi soli dicit aliquem suum crimen fuisse confessum.'

canons found in St. Gall. The rubrics in St. Gall are the same as those found in Fd and Gratian 2, with the exception of word order and slight grammatical changes.⁵³ C.16 q.1 c.23 and q.1 c.24 and C.16 q.4 c.3 use “de eodem” in the place of full rubrics. C.16. q.1 c.23 and C.16 q.4 c.3 retain “de eodem” as the rubric even in Gratian 2, while the more complete rubric “Clericorum offitia monachi presbiteri libere administrant” replaces the generic rubric for C.16 q.1 c.24.⁵⁴ In addition to these, Causa 16 includes full rubrics for q.1 c.64, q.2 c.1, q.2 c.8, q.3 c.7, q.3 c.10, q.7 c.21, and q.7 c.34.⁵⁵ Causa 18 includes rubrics for two of the eleven canons, q.2 c.19 and q.2 c.26.⁵⁶ Finally, Causa 21 includes one rubric for thirteen canons, q.1 c.3.⁵⁷ Unlike the previous group, this second cluster contains more full rubrics rather than relying solely on a portion of the introductory dictum or “de eodem.” Supplementing the issues addressed in the first group of cases, which contain only one rubric, and interwoven amid them is the second group of cases that occasionally makes use of full rubrics.

⁵³ C.12 q.2 c.61: Sg, p. 106a; Fd, fol. 45v; Vgl. *edF*, col. 705. The rubric to C.12 q.2 c.61 in Sg – ‘Quomodo alienatio de rebus ecclesiae rata esse poterit’ – is exactly the same as that of Fd and Vgl. *edF* minus the word order – ‘Alienatio de rebus ecclesiae quomodo rata esse poterit.’ C.12 q.2 c.71: Sg, p. 107b; Fd, fol. 46r; Vgl. *edF*, col. 710. With the pen-initial *N*, the rubric for C.12 q.2 c.71 is: ‘Non parietes templi ornati sed pauperibus prouidere gloria episcopi est.’ Again this is the exact same rubric as that found in Fd – ‘Non parietes templi ornare sed pauperibus prouidere gloria episcopi est’ – and Vgl. *edF* – ‘Non parietes ornare templi sed pauperibus prouidere gloria episcopi est’ – minus slight grammatical changes. C.12 q.4 c.3: Sg, p. 108b; Fd, fol. 46v; Vgl. *edF*, col. 715. The same holds true for C.12 q.4 c.3 where the rubric in St Gall – ‘De his que sacerdotes emunt ad ecclesiae nomen scripturam faciant’ – is the same as that found in Fd and almost identical to that found in Vgl. *edF* – ‘De his que sacerdotes emunt ad ecclesiae nomen faciant scripturam.’

⁵⁴ Sg, p. 127a, p. 127b, p. 136b; Vgl. *edF*, col. 767, col. 797.

⁵⁵ Sg, p. 131b, p. 133a, p. 133b, p. 135a, p. 135b, p. 138b, p. 139b. The rubric for C.16 q.2 c.1 (Sg, p. 133a) is not affiliated with d.a.c.1. In other words, there is a rubric in addition to the dictum, something not found in the first group of cases.

⁵⁶ Sg, p. 143b, p. 144a.

⁵⁷ Sg, p. 148a.

Conclusions

As Chapter Three will illustrate further, the St. Gall manuscript represents an early stage in the development of the *Decretum* after Gratian had compiled the *causae* and organized them into a suitable order rather than an abbreviation. First, the St. Gall manuscript does not lend itself to an abbreviation that could be used conveniently. The canons included are either included in full or in a truncated form rather than relying on rubrics, key sentences, or summaries. Second, a vast majority of the dicta are incorporated showing that Gratian's opinion was important and not simply the *auctoritates* as seen in abbreviations. Third, the inconsistent system of rubrication found throughout the St. Gall manuscript is not the result of an abbreviator's whim. As the Bamberg, Pommersfeld, and Lichtenhal abbreviations show, abbreviators typically included or did not include rubrics as a part of a prevailing formula found throughout their work. It is rather very strong evidence that the St. Gall manuscript preserves a stage earlier than Gratian 1. Furthermore, the rubrication in St. Gall varies rather considerably from *causa* to *causa* suggesting a progressive incorporation of rubrics that parallels a progressive development of Gratian's work. The percentage of rubrics included distinguish these stages. These stages, in turn, represent the order in which Gratian compiled the *Decretum*.

The smallest percentage of canons and the smallest percentage of rubrics (in comparison to Fd) appear in the *causae* of Cluster A, *Causae* 13, 14, 15, 17, 19, 20, 22, and 34, earmark these *causae* as Gratian's core *causae*, that is, as the *causae* with which Gratian began teaching canon law. The lack of any significant or detailed rubrics (except

one) in these causae in St. Gall indicate that Gratian was not yet thinking to assist readers; if correct it suggests that Gratian initially used these core cases for teaching purposes only. The implication, discussed in Chapter Four, is that the cases with fewer rubrics have an earlier history than those with more substantial rubrication and thus the *Decetum* passed through a series of stages which antedate that preserved in St. Gall.

Chapter 3

THE FEATURES OF AN ABBREVIATION

A comparison between the textual characteristics common among abbreviations of Gratian's *Decretum* and those of the St. Gall manuscript does not lend support to the supposition that St. Gall is an abbreviation of Gratian 1.¹ Abbreviators either left rubrics in or removed them. Some abbreviators included rubrics as a summary of the following *auctoritas* and then left out that *auctoritas*. At other times, an abbreviator would omit rubrics opting rather to rely on the *auctoritas*, which might be truncated, summarized, or copied in full.² Other abbreviators preferred to include both the rubric and the *auctoritas* for the parts of their exemplar they chose to copy.³ While some abbreviators preferred inscriptions to rubrics and left virtually all rubrics out of their abbreviations,⁴ most abbreviators viewed rubrics as important to their work. Their goal was to shorten a text and still get all the important points across; rubrics would be very helpful in that task. However they chose to use rubrics, abbreviators would, by and large, be consistent. No abbreviator of Gratian's *Decretum* would use almost all the rubrics in one causa, omit them all in the next, pick out a few to use in another, and utilize a slim majority in

¹ My discussion focuses upon Causae 22 and 23, which are representative of all the causae.

² Relying on the rubric and omitting the *auctoritas* or including the *auctoritas* and omitting the rubric as redundant is the prevailing pattern in the Bamberg abbreviation. On occasion the abbreviator included the rubric and the *auctoritas* that either was copied in full, truncated, or summarized. Alfred Beyer provides a transcription of the Bamberg abbreviation. See Alfred Beyer, ed., *Lokale Abbreviationen des "Decretum Gratiani": Analyse und Vergleich der Dekretabbrevationen "Omnes leges aut divine" (Bamberg), "Humanum genus duobus regitur" (Pommersfelden) und "De his qui intra claustra monasterii consistent"* (Lichtenthal, Baden-Baden) (Frankfurt: Peter Lang, 1998), 30-168.

³ Relying on the rubric and the *auctoritas*, with or without the inscription, is the prevailing pattern in the Lichtenthal abbreviation. Approximately forty instances do occur where the abbreviator chose to include only the canon or the canon and the inscription. There are few similarities between the Lichtenthal abbreviation and the St. Gall manuscript; St. Gall omits rubrics to approximately 570 canons. Beyer provides a transcription of the Lichtenthal abbreviation. See *Lokale Abbreviationen des "Decretum Gratiani,"* 373-430.

⁴ The Pommersfeld abbreviator typically included the inscription and an excerpt of the *auctoritas* without using rubrics or the full *auctoritas*. Beyer provides a transcription of the Pommersfeld abbreviation. See *Lokale Abbreviationen des "Decretum Gratiani,"* 221-328.

another. Abbreviators had clear intentions in how they wanted to use rubrics. St. Gall exhibits no such deliberateness or regularity. Abbreviators furthermore made conscience decisions both regarding which *auctoritates* and how much of the *auctoritates* to include, and regarding the omission of dicta. The choice of *auctoritates* reflected their desire to represent the thrust of the question, rather than show the methodological development of the question and of Gratian's thought. Abbreviators engaged in a deliberate program of picking and choosing what information was relevant to summarize the *Decretum* in an easy-to-use manual, thereby minimizing the importance of Gratian's dicta. In St. Gall the incorporation of rubrics was a progressive process rather than selective omission by an abbreviator, the *auctoritates* arguments are not summarized, and the majority of the dicta remain.

I must make an important methodological point at the end of these observations. The Bamberg, Lichtenthal, and Pommersfeld abbreviations of the *Decretum* that I will discuss in this chapter are all products composed after the vulgate *Decretum* began to circulate. The vulgate *Decretum* was a complex text with almost 4000 canons. Gratian 1 contained half that many. If Sankt Gallen were an abbreviation of Gratian 1, the methodology the abbreviator used cannot be taken as a certain "blueprint" of later abbreviators, who grappled with a much larger collection. These later abbreviations do provide, nonetheless, evidence of how early canonists approached the task of abbreviating Gratian, and perhaps other legal texts. The abbreviators bring to light that there was no standard methodology for abbreviating the *Decretum*. Regardless of the approach he chose, however, an abbreviator ordinarily used or omitted rubrics in a

discernable pattern.

Arguments for Sankt Gallen 673 as an Abbreviation

In 1958 Alfons Stickler provided a description of Sankt Gallen 673 under the heading of *Abbreviationen und Transformationen*, a description which he based on S. Stelling-Michaud's 1954 work *Catalogue des manuscrits juridiques de la fin du XII^e au XIV^e siècle conservés en Suisse*. In his description Stickler focused on the peculiar inclusion of Causa prima by including the hypothetical, briefly introducing Question one and Question three, and noting the causa's use of the *Tractatus de ordinatione* (D.27 – D.79 in particular). He also mentioned the omission of Causae 24-26 and of Causa 28 as well as the inclusion at the end of the manuscript of various authorities who outlined the duties of a priest (p. 201a-203a) and the inclusion of fragments from the Church Fathers, from conciliar canons, from papal letters, and from moral, dogmatic, and ascetical works not found in the *Decretum* (p. 203b-246b).¹ The extent of Stickler's discussion surrounding the nature of Sankt Gallen 673 as an abbreviation was limited to the placement of his description under that category.² Since then Anders Winroth has used Stickler's categorization as a springboard to argue that the manuscript was an abbreviation. "When Alfons Stickler examined it [Sankt Gallen 673] in 1958, he concluded that it contains an abbreviation of Gratian's *Decretum*."³ John Wei has

¹ Alfons Stickler, "Iter Helveticum," *Traditio* 14 (1958): 474-475.

² A catalogue of Admont Stiftsbibliothek compiled by Andrea Scheichl refers to Aa 23 and Aa 43 as abbreviations of the *Decretum*. Thanks to Winroth, however, we now know they represent an earlier redaction. See "Studien zu Handschriften des 12. Jahrhunderts aus der Stiftsbibliothek Admont," (Vienna: Staatsprüfungsarbeit, Institut für Österreichische Geschichtsforschung, 1989), 24-25, 73-87.

³ Winroth, "Recent Work on the Making of Gratian's *Decretum*," 8. Winroth's citation of Stickler's article is misleading. The footnote (n. 21) refers to pgs. 462-483 leaving the impression that the discussion of Sg

followed on the assertions of Winroth also putting forth arguments for St. Gall being an abbreviation. Whereas Winroth has argued for it as an abbreviation of Gratian 1, Wei has concluded that the manuscript was an abbreviation of a Gratian 1 manuscript containing second recension texts. Titus Lenherr has seen the manuscript as an abbreviation of Gratian 1, but one which witnessed an oral transmission of the text.

Winroth has maintained that the various arguments used to justify the antedating of St. Gall could just as easily designate it as an abbreviation of Gratian 1. On the one hand, St. Gall omitted cross-references to texts not included in the work, similar to other abbreviations. C.15 q.3 d.p.c.4 in Gratian 1 and Gratian 2 contained an explicit reference to D.10 c.1 at the beginning of the work. This portion of the dictum reads:

Sed sicut circa huius operis initium premissum est, totiens legibus imperatorum in ecclesiasticis negociis utendum est, quotiens sacris canonibus obviare non inveniuntur.⁴

Distinction 10 c.1, which is a letter of Pope Nicholas I to bishops gathered for a council near Senlis, reads:

Lege imperatorum non in omnibus ecclesiasticis controversiis utendum est, presertim cum inveniuntur evangelice ac canonice sanctioni aliquotiens obvari.⁵

As St. Gall omitted the *Tractatus de legibus*, the distinction and thus the reference to the distinction – “Sed sicut circa huius operis initium premissum est” – were absent as well.

C.15 q.3 d.p.c.4 in St. Gall was unchanged otherwise reading:

Sed totiens legibus imperatorum in ecclesiasticis ecclesiasticis [sic] negociis utendum est, quotiens sacris canonibus obviare non inveniuntur.⁶

673 covers these pages, when in fact his work is a description of numerous manuscripts and his description of Sg 673 is found only on pgs. 474-475.

⁴ Fd, fol. 49v-50r; Vgl. *edF*, col. 752.

⁵ Vgl. *edF*, col. 19. Fd does not contain D.10 c.1 as the manuscript begins in the midst of D.28 d.p.c.13.

The missing reference to the earlier distinction should not suggest that St. Gall was an early recension. The similarity of the language, and thus the indirect reference to D.10 c.1, implied, according to Winroth, that the scribe copying the St. Gall text knew of the distinction and chose not to make the cross-reference. The Pommersfeld abbreviation, as a case in point, did not reference the distinction either.⁷

D.10 c.1 circulated widely among the earlier canonical collections. A number of collections included the canon: *Collectio Caesaraugustana* (Version 1, 1.63), *Decretum* of Ivo of Chartres (4.86.1), *Tripartita* of Ivo of Chartres (1.64.3), *Collectio X partium* (Cologne HA 199, 9.1.8), *Collectio Britannica* (11.126a), *Paris, Bibliothèque de L'Arsenal* (361). Other collections contained the same inscription and incipit but the explicit read “inferre iudicium asseramus”: *Collectio canonum* of Anselm of Lucca (Version A, 12.33a), *Collectio XII librorum* (Vat. lat. 1361, 12.28a), *Collectio III librorum* (1.9.9), *Collectio IX librorum* (Arch. S. Pietro C.118, 1.1.94), *Deusdedit* (4.87a), *Polycarpus* of Gregory of St. Grisogono (1.29.9), and *Collectio VII librorum* (Vienna ÖNB 2186, 1.35.1). Two collections, the *Collectio VII librorum* (Turin BNU D.IV.33, 6.34) and the *Collectio XIII librorum* (Berlin Savigny 3, 11.89), contained the explicit “suis penitus alienus.”⁸ That the collections did not use the same rubric as that found in the *Decretum* is of little consequence as Gratian devised his own rubrics to suit his needs. D.8 c.3, from the same letter as D.10 c.1 experienced a much more limited

⁶ Sg, p. 121b.

⁷ Winroth, “Recent Work on the Making of Gratian’s *Decretum*,” 9-10.

⁸ My discussion of the canonical sources rests on information contained in Fowler-Magerl’s *Clavis canonum* [CD-ROM] program. My search focused on the inscription, incipit, and explicit. Unless stated otherwise, I have used her database for all references to canonical collections.

circulation, included only in *Collectio Catalaunensis I* (7.5) and the *Tripartita* (3.7.4) attributed to Ivo of Chartres.

Cross-references between a dictum and a canon found elsewhere however are inconsistent. Sometimes there is a specific reference to the canon in the dictum. The examples of C.13 q.1 d.p.c.1 cross-referencing C.16 q.1 c.42 and C.13 q.2 d.p.c.1 cross-referencing C.16 q.4 illustrate this point.⁹ Other times, however, an explicit connection between a dictum and the canon is absent. The inspiration for C.16 q.1 c.45 in St. Gall was a decree of Leo IV, “De decimis non tantum nobis, sed etiam sancta baptismata dantur, debere dari,” mentioned in C.13 q.1 d.p.c.1.¹⁰ In C.14 q.1 d.p.c.1, Gratian cited the *De vita contemplativa* of Prosper, “Sacerdos cui dispensationis cura commissa est, etc,” which would appear as C.1 q.2 c.9 in Fd.¹¹ Gratian also added Gregory I’s letter to Bishop Eleutherius, “Quamvis triste sit nobis etc,” mentioned in C.15 q.1 d.p.c.13 as C.7 q.1 c.14 in Fd.¹² “Pro impensis uero patrociniis Terraconensi Concilio clerici munera exigere prohibentur, in quo sic statutum legitur” in C.15 q.2 d.a.c.1 would appear as C.2 q.7 c.6 in Gratian 1.¹³ Finally, C.17 q.1 d.p.c.4 in St. Gall alluded to, but did not link specifically, D.1 c.5 of the *De penitentia* – “Patet ex verbis Augustini dicentis: Dixi, confitebor, etc” – which St. Gall also included.¹⁴ Points raised in dicta frequently spawned canons as seen by a reference to a text in a dictum and the expanded version as a canon included elsewhere. Nevertheless, dicta did not have specific cross-references to

⁹ C.13 q.1 d.p.c.1 (Sg, p. 111b), C.16 q.1 c.42 (Sg, p. 129b), C.13 q.2 d.p.c.1 (Sg, p. 112a), C.16 q.4 (Sg, p. 136b).

¹⁰ C.16 q.1 c.45 (Sg, p. 129b), C.13 q.1 d.a.c.1 (Sg, p. 110b).

¹¹ C.14 q.1 d.p.c.1 (Sg, p. 115b), C.1 c.2 c.9 (Fd, fol 23v). In the St. Gall manuscript, this portion of C.14 q.1 d.p.c.1 appears as a canon.

¹² C.15 q.1 d.p.c.13 (Sg, p. 120b), C.7 q.1 c.14 (Fd, fol. 36v).

¹³ C.15 q.2 d.a.c.1 (Sg, p. 120b), C.2 q.7 c.6 (Fd, fol. 125v).

¹⁴ C.17 q.1 d.p.c.4 (Sg, p. 140a); *De penitentia* D.1 c.5 (Fd, fol. 88r).

canons not included in that recension. The cross-reference in C.15 q.3 d.p.c.4 to D.1 c.10 – “sicut circa huius operis initium premissum est” – was lacking because Gratian had yet to add the *Distinctiones*. The reference in C.15 q.3 d.p.c.4 served as an inspiration for D.1 c.10, hence the similarity in language and the later cross-reference.

Winroth has discounted the underdeveloped use of Roman law and the unique dicta as evidence for the antedating of St. Gall. A number of abbreviations, he has argued, contain a less sophisticated use of Roman law than the vulgate recension.¹⁵ As I will discuss in Chapter Six, Pennington has demonstrated that Gratian’s use of Roman law, beginning with St. Gall, grew in step with the teaching of Roman law in Bologna.¹⁶ The twenty supposedly unique dicta found in St. Gall were, according to Winroth, not unique but rather had their origin in Gratian 1 and Gratian 2. For instance, C.1 q.7 d.p.c.4 in St. Gall reads:

Set ex septima synodo habemus quod quidam redeuntes ab hereticis reparari possunt quidam non.¹⁷

This text echoed the rubric for C.1 q.7 c.4 in Gratian 1 and Gratian 2, which reads:

Qui redeuntes ab hereticis recipi¹⁸ possunt vel qui non.¹⁹

While the two obviously depended upon one another, there was no evidence, according to Winroth, for the precedence of the St. Gall text. “A simple comparison of the two texts provides no basis for concluding that one derives from the other. This is inconclusive evidence, although it is presented as evidence which ‘confirms’ that the St. Gall text is an

¹⁵ Winroth, “Recent Work on the Making of Gratian’s *Decretum*,” 10-11.

¹⁶ See Pennington’s article “The ‘Big Bang’,” 43-70.

¹⁷ Sg, p. 42a.

¹⁸ As Winroth has noted, P and Fd reads *recipi*, Bc and Aa reads *reparari*, and Vgl. *edF* reads *separari*. See “Recent Work on the Making of Gratian’s *Decretum*,” 15.

¹⁹ Fd, fol. 25v; Vgl. *edF*, col. 428.

earlier version of the *Decretum*.”²⁰ I see no self-evident reason to arrive at this conclusion either, rather dicta often spawned canons added later.

Winroth has relied heavily on C.1 q.1 c.19-d.p.c.22 and C.1 q.6 c.108 as proof for St. Gall’s status as an abbreviation rather than an earlier recension. C.1 q.1 c.19, q.1 c.20, and q.1 d.p.c.22, as they appear in Gratian 1, are almost identical to the text as found in Alger of Liège’s *De misericordia et iustitia*. St. Gall, however, omits the second half of c.19 and omits *vigilanter* from c.20. The dictum in St. Gall is shortened, using *sine* rather than *nisi cum*, and using *ivit* rather than *ire presumpsit*. The problem for Winroth was why Gratian would turn first to Alger’s text, make small changes and shorten it, only to return to the text and make the corrections.²¹ Oftentimes teachers will rely on memory when initially presenting an argument only to return to the original source and make slight corrections later. I will address the issues surrounding Winroth’s final point of contention, C.1 q.6 c.108, in Chapter Six.

Relying on a source analysis of Distinctions 5-7 of the *De penitentia*, Wei has deviated slightly from Winroth’s assessment to argue that St. Gall was an abbreviation of a first recension manuscript interpolated with canons found in the vulgate recension. Wei concluded that for the first recension Gratian took three of the five canons (*De pen.* D.5 c.1, *De pen.* D.6 c.1, and *De pen.* D.7 c.6) directly from the Pseudo-Augustinian work *De vera et falsa penitentia*. Because Gratian was the first writer to mention the work by name, he could not have copied the texts from an intermediate source. Gratian took the

²⁰ Winroth, “Recent Work on the Making of Gratian’s *Decretum*,” 12.

²¹ *Ibid.*, 14-16. Winroth provided a comparison of the canons as found in the first recension, St. Gall, and in the *De misericordia et iustitia*.

two remaining canons (*De pen.* D.7 c.2 and *De pen.* D.7 c.5) from the *Collectio III librorum*.²²

An analysis of the texts added to the second recension revealed, according to Wei, that the *Tripartita* and the *Collectio III librorum* served as the formal sources. *De penitentia* D.5 c.2, D.5 c.3, D.5 c.4, and D.5 c.5 came from the *Tripartita* while *De penitentia* D.5 c.6, D.7 c.1, D.7 cc.3-4 came from the *Collectio III librorum*.²³ *De penitentia* D.7 c.2 came from two different sources. The shortened version of D.7 c.2 included in the first recension originated with the *Collectio III librorum*; the text added to the second recension originated with the *Tripartita*.²⁴

St. Gall contained four canons from Distinctions 5-7 of the *De penitentia*: D.6 c.2, D.6 c.3, D. 7 c.1, and D.7 c.2. With the exception of *De pen.* D.7 c.2, these canons were second recension texts in that the Florence manuscript omitted them and yet the Admont manuscript included them. The correlation between the canons contained in St. Gall, omitted from Florence, and included in Admont led Wei to the conclusion that St. Gall was a unique abbreviation of a first recension manuscript, one similar to Admont.²⁵ He further pointed to St. Gall's omission of the canons from the *De vera et falsa penitentia* (*De pen.* D.5 c.1, D.6 c.1, and D.7 c.6), which served as the core of the first recension. One would expect to find these canons in an earlier redaction, though an abbreviation would not necessarily have included them.²⁶ The inclusion of *De pen.* D.6 d.p.c.2 in St. Gall served as another piece of evidence supporting the theory that Sankt Gallen was an

²² Wei, "A Reconsideration of St. Gall, Stiftsbibliothek 673 (Sg)," 148.

²³ *Ibid.*, 153-170.

²⁴ *Ibid.*, 166-168.

²⁵ *Ibid.*, 171.

²⁶ *Ibid.*, 171-172.

abbreviation of a first recension manuscript with interpolated canons from the second recension. The dictum reconciled two divergent viewpoints. On the one hand was the advice to a penitent that he should choose a worthy priest to hear his confessions. On the other hand priests were prohibited from hearing the confessions of people from other parishes.²⁷ The dictum in St. Gall incorporated the phrase *sacerdotem scientem ligare et solvere*, which was text found in *De pen.* D.6 c.1. The dictum in St. Gall also contained the phrase *ab hac auctoritate*, which referred to the authority that contained the text. St. Gall, however, did not include *De pen.* D.6 c.1.²⁸ According to Wei, the ‘abbreviator’ copying St. Gall omitted the text but retained the reference in the dictum. Finally, Wei maintained that the version of *De pen.* D.7 c.2 as found in St. Gall corresponded more closely to the second recension as opposed to the version found in the first recension.²⁹

Wei’s textual analysis rested on the selection of base texts. For Gratian 1, he chose the Florence manuscript. Admont, which is the only other Gratian 1 text to contain the *De penitentia* contains interpolations and thus does not have the best reading. For the base text of Gratian 2, Wei chose the manuscript München, Bayerische Staatsbibliothek lat. 28161 (Mk) because it deviates little from the formal sources.³⁰ Wei mentioned in a footnote that problems surround using Mk as a base text.³¹ There was neither a discussion of the problems, just a reference to Gujer’s work which addressed them, nor a discussion of ways he overcame these problems. The use of sources typically does not

²⁷ Ibid., 172.

²⁸ Ibid., 172-173.

²⁹ Ibid., 174. Wei argued that the first recension version of *De pen.* D.7 c.2 was abbreviated from the *Collectio III librorum* (3.19.37). In the second recension, the text was expanded with material from the *Tripartita* (3.28.2). The version of the canon in Sg contains text both from the *Collectio III librorum* and from the *Tripartita*.

³⁰ Ibid., 146-147.

³¹ Ibid., 147, n. 21. See Gujer, *Concordia discordantium codicum manuscriptorum?*, 196-202.

determine a base text, but rather the textual characteristics that render the best reading is the determining factor. Such a process requires a collation of the manuscripts. While this is difficult in the case of the *Decretum*, Friedberg at least has attempted this feat. Wei did not explain why he chose to use Mk over the Friedberg edition, which, problems notwithstanding, scholars typically use.

The foundation for Wei's conclusions rested on those of Landau, who argued that Gratian used only five sources to compile the *Decretum*.³² Wei took as definitive that the only sources Gratian used were the Anselm of Lucca's *Collectio canonum* (Version A), *Tripartita*, *Panormia* of Ivo of Chartres, *Polycarpus*, and the *Collectio III librorum*. Though Landau stated Gratian did not rely on the *Decretum* of Ivo as a source, Wei chose to report the relevant findings since, according to him, scholars universally have not accepted this portion of Landau's thesis.³³ Wei did not state which scholars disagreed with Landau regarding Gratian's use of the Ivonian *Decretum*, and he presumed that all scholars agree with Landau's conclusions. If one were to consider the variety of collections in circulation, Wei's conclusions seem much less definitive. I offer a few examples. For instance, Wei attributed *De pen.* D.5 c.7 to Anselm of Lucca's *Collectio canonum*. The canon also appears in the *Collectio XIII librorum* (Vat. lat. 1361, 11.119 and Berlin Savigny 3, 10.119). Though both the *Collectio canonum* and *Collectio XIII librorum* used the same inscription, incipit, and explicit, they use a rubric different from that used by Gratian. Taking into consideration that Gratian developed his own rubrics,

³² Landau, "Neue Forschungen zu vorgratianischen Kanonessammlungen und den Quellen des gratianischen *Dekretes*," 1-29.
Dekretes," 218-235.

³³ Wei, "A Reconsideration of St. Gall, Stiftsbibliothek 673 (Sg)," 143-145.

the *Collectio XIII librorum* seems just as plausible as the *Collectio canonum*. Wei stated that a formal source is unknown for *De pen.* D.6 c.3, which is identical to the *palea* C.9 q.2 c.2.³⁴ The canon appears in *Collectio XIII librorum* (Vat. lat. 1361, 8.33) with slight differences that should not disqualify it necessarily as a potential source. The inscription of the canon in the *Collectio XIII librorum* reads “Idem” rather than “Urbanus II,” but one only has to look back to the previous canon for the attribution. The rubric of C.9 q.2 c.2 reads “de eodem” rather than “Cuiuslibet sacerdoti commissum, nisi pro eius ignorantia, alter sacerdos ad penitentiam non suscipiat” found in the *Collectio XIII librorum*. Again, this difference is irrelevant because Gratian created his own rubrics. The incipit in the *Collectio XIII librorum* varied very slightly, reading “Item placuit ut deinceps nulli sacerdotum” rather than “Placuit ut deinceps nulli sacerdotum.” The explicit in the *Collectio XIII librorum* transposed *sui* and *ordinis* reading “ordinis periculo subiacebit” rather than “sui periculo subiacebit.” The differences in the inscription, rubric, incipit, and explicit are trivial. *De pen.* D.7 c.1, which does not have a rubric, is more problematic. In all of the collections the inscription varies between “Idem,” “Eiusdem,” and Pope Leo. There are a number of collections that contain the same explicit – “concilio maturiore perficitur” – however, they begin with incipit “Ancillam [a] Thoro abicere et uxorem.”³⁵ A few others contain yet other variations of the incipit though

³⁴ Ibid., 164.

³⁵ *Collectio Dacheriana*, Papal decretals in the *Dionysiana*, *Collectio Hispana*, *Tripartita* of Ivo of Chartres, *Collectio X partium* (Cologne HA 199), *Collectio IV librorum* (Cologne HA 124), *Collectio Lanfranci*, *Collectio II librorum* (Ambrosiana 46.inf.), Paris BN lat. 3858C, *Collectio Sancte Marie Novelle*, *Collectio XII partium* (CDP 1 and CDP 2), *Collectio IX librorum* (Vat.lat. 1349), *Collectio V librorum* (Vat.lat. 1339), Brugge BM 99/London BL Cleopatra C.VIII, *Collectio VII librorum* (Vienna ÖNB 2186), *Collectio Sinemuriensis* (Semur BM 13), *Hispana systematica*.

retaining the same explicit.³⁶ Two collections, the *Collectio IX librorum* (Arch.S.Pietro C.118, 9.5.35) and the *Collectio III librorum* (3.19.36), which Wei claimed is the formal source for *De pen.* D.7 c.1, contain the correct incipit though they have the explicit “communicare non possumus.” Either Gratian truncated the canon and ended with “concilio maturiore perficitur,” in which case any of the collections is as plausible of a match as the *Collectio III librorum*, or the canon circulated in version contained in the vulgate, in which case Gratian took the canon from an unknown source. Finally, *De pen.* D.7 cc.3-4, which Wei attributed to the *Collectio III librorum*, also appears in the *Collectio IX librorum* (Arch.S.Pietro C.118, 9.5.36) though it transposes two words in the explicit reading “et certum dimitte incertum” rather than “certum et dimitte incertum.” Determining Gratian’s sources may be a more complicated process than simply relying on five collections. Given the criteria, it is difficult to know the collections Gratian used.

Wei found it safer to rely on source analysis to determine the precedence of St. Gall rather than to rely on the logical priority of an argument. An argument could become tighter and more coherent simply through the process of revision and abbreviation. It offered no evidence of one text preceding another.³⁷ This is an interesting assertion when one considers the methodology used by Winroth to prove the precedence of the Gratian 1 manuscripts. The first two prongs of his three-pronged approach maintained that each recension drew from a different set of sources and that the canons in Gratian 1 were more akin to the original source than those canons added to Gratian 2. The final prong argued that the arguments found in Gratian 1 were crisper and

³⁶ Concordia canonum of Cresconius, Madrid (BN lat. 11548), *Collectio IX librorum* (Vat.lat. 1349).

³⁷ Wei, “A Reconsideration of St. Gall, Stiftsbibliothek 673 (Sg),” 143.

more coherent than the at times distorted and convoluted arguments of Gratian 2.³⁸

While Wei relied on the first and second prongs for his thesis, he seems to have rejected his mentor's third prong even though scholars have accepted the scope of Winroth's approach.

In his work on C.3 q.1 d.p.c.6, Lenherr found differences between St. Gall's and Gratian 1's choice of words, word order, and word usage. He concluded that St. Gall was an abbreviated version of Gratian 1.³⁹ He tested his theory in an analysis of D.31 and D.32.⁴⁰ He found that both St. Gall and Gratian 1 drew from a similar set of sources. Like Landau, Winroth, and Wei, Lenherr only took into consideration the *Panormia*, the *Tripartita*, Anselm of Lucca's *Collectio canonum*, the *Polycarpus*, and the *Collectio III librorum*. However, he did consider the collection *Paris, Bibliothèque de L'Arsenal 713*. He later disqualified it as potential source because the canons were not taken in a sequential order, that is, were not taken as a block of texts. He concluded that the *Panormia* and the *Tripartita* served as the formal sources for both St. Gall and Gratian 1. Omitted from St. Gall, D.32 c.1, which came from the *Polycarpus*, is the lone exception to the pattern of sources used for compiling Gratian 1.⁴¹ Second, Lenherr argued that the structure of D.31 c.1 and c.8 in St. Gall was derived from Gratian 1. Like his findings with C.3 q.1 d.p.c.6, the usage of words differed and St. Gall omitted snippets of text.⁴² Third, Lenherr, like Wei in *De pen.* D.6 d.p.c.2, found an explicit reference in a dictum to

³⁸ For a full discussion on the coherency of the argument in Gratian 1, see *The Making of Gratian's Decretum*, 78-79, 97-99, 126-127.

³⁹ Lenherr, "Die Vier Fassungen von C.3 q.1 d.p.c.6 im *Decretum Gratiani*," 362-365, 375.

⁴⁰ Lenherr, "Ist die Handschrift 673 der St. Galler Stiftsbibliothek (Sg) der Entwurf zu Gratians *Dekret*?", <http://www.t-j-l.de/Sg-Entw.PDF>.

⁴¹ *Ibid.*, 11-15.

⁴² *Ibid.*, 17.

a canon not found in St. Gall. D.31 d.p.c.13 was combined with D.31 d.p.c.11 and contained the phrase “ut de pafnutio in nicena synodo legitur,” which cited the text in the omitted D.31 c.12.⁴³ Finally, Lenherr pointed to the marginal hand that identified himself as the ‘corrector of mistakes.’⁴⁴ The original order of the canons in St. Gall was: D.31 d.a.c.1-c.3, D.31 c.6, D.32 c.3, D.32 c.4-c.6 I, D.32 c.7, D.31 c.7, D.31 d.p.c.7, D.31, c.8, D.31 d.p.c.9, D.31 c.10, D.31 d.p.c.11/d.p.c.13, and D.32 c.8. This ‘corrector of mistakes’ noted the appropriate sequence of canons.⁴⁵ If one wanted to argue for St. Gall as a redaction that antedated Gratian 1, than one must view the ‘corrector’ as having made a mistake himself.⁴⁶ Lenherr’s findings thus confirmed his earlier work that St. Gall existed not as a draft but as a variation of Gratian 1. His analysis led him to refine further his theory maintaining that the text appeared to be something that would be transmitted orally. St. Gall was a version of Gratian 1, but it was one that was changed into a lecture format.⁴⁷

Lenherr’s analysis, however, possesses the same shortcomings as that of Winroth and Wei. First, he rested his source analysis solely on those collections identified by Landau without considering other possibilities. An examination of the collections reveals additional possibilities that are equally plausible. For instance, D.31 c.1, in addition to the *Panormia* and the disqualified *Bibliothèque de L’Arsenal 713*, also appears in the

⁴³ Ibid., 16.

⁴⁴ Sg, p. 7a: ‘Hoc totum usque ad simile signum debet esse superius inter ista capitula ‘Eos ad sacrificum’ et c(etera) et hoc aliud ‘Si quis uero clerici’ et c(etera) et sursum est itidem signum.’ For Lenherr’s discussion of this text see “Ist die Handschrift 673 der St. Galler Stiftsbibliothek (Sg),” 1-2.

⁴⁵ Lenherr, “Ist die Handschrift 673 der St. Galler Stiftsbibliothek (Sg),” 1-4.

⁴⁶ Ibid., 10.

⁴⁷ Ibid., 17-18.

Polycarpus (4.32.39) though Lenherr did not consider it as a source.⁴⁸ Each collection contains the same inscription – “Gregorius Petro Subdiacono Sicilie” – the same incipit – “Ante triennium subdiaconi omnium” – and the same explicit – “ministerium fuerit approbata.” In the case of D.32 c.7, Lenherr reported matches for the disqualified *Bibliothèque de L’Arsensal* 713, the disqualified *Panormia*, and the chosen source the *Tripartita*. He attributed the canon to the *Tripartita* based on the idea that Gratian took canons from his sources as blocks of text. The preceding canons – D.32 c.3, D.32 c.4, and D.32 c.6I – along with D.32 c.7 appear as a string of texts in the *Tripartita* taken in order from 1.55.87, 1.62.45, 1.66.2.3, and 2.11.2 respectively. This was not the case with the *Panormia*, hence its disqualification as a potential source.⁴⁹ Gratian attributed D.32 c.7 to the VI Synod with the incipit reading “Si quis eorum qui ad clerum” and the explicit reading “ordinem subdiaconatus faciat.”⁵⁰ My search of Lenherr’s source *Tripartita* 2.11.2 using Fowler-Magerl’s *Clavis canonum* yielded a result different from that reported by Lenherr. The canon *Tripartita* 2.11.2 was attributed to Bede’s *De Temporibus* with the incipit “Sexta sinodus universalis Constantinopoli celebrata est” and the explicit “et omnes hereticos.” I found D.32 c.7 in *Tripartita* 2.13.3 with the explicit “ordinationem subdiaconatus faciat” and the inscription of *cap.7* with the full attribution found earlier with 2.13.1a. The *Collectio X partium* (Cologne HA 199, 6.4.33) also included D.32 c.7 with the same inscription, incipit, and explicit as *Tripartita* 2.13.3.

Lenherr’s observations of the change in word choice and the reference to a canon not included are not arguments for an abbreviation. Gratian made revisions to his work

⁴⁸ Ibid., 14.

⁴⁹ Ibid.

⁵⁰ Vgl. *edF*, col. 119-120.

and the added canons which often came from points addressed in the dicta. Finally, D.31 and D.32 in St. Gall are included in Question two of Causa prima, a causa which appears in no other Gratian manuscript. Lenherr did not analyze whether the order of these canons in Sankt Gallen made sense within the context both of the question and of the causa. It is indeed possible that the ‘corrector of mistakes’ was himself making a mistake. The first recension no doubt replaced Gratian’s early draft quickly. The same happened with the second recension. It eclipsed Gratian 1 in such a short amount of time that only two full manuscripts and two partial manuscripts are known to exist and scholars regarded them as abbreviations until 2000. Depending upon when the scribe made the corrections, the purpose of St. Gall could have long passed from memory. St. Gall then was not the lecture format of Gratian 1. It was, as I will argue in the next chapter, a teaching text and thus possessed characteristics of a tool used in the classroom.

Features of Three Abbreviations

The textual features of abbreviations share little common ground with those of the St. Gall manuscript. Abbreviators sought to simplify the text in order to make it usable. They chose to omit dicta and to condense an *auctoritas* either by including only the rubric or a key sentence, or by summarizing a large block of text. If they omitted the text, they would rely upon rubrics to give the reader an idea of what the *auctoritates*, and thus the questions, addressed. If they included the text, they would omit the rubric as redundant. St. Gall, while it condensed the *auctoritates* by leaving out sections of the text, did not simply summarize an argument. Also unlike the abbreviations, St. Gall

included a large percentage of dicta, and the missing dicta, or the missing portion of the dicta, more often than not corresponded topically to the omitted text. Finally, as argued in Chapter Two, the rubrication in St. Gall does not distinguish the manuscript as an abbreviation.

As a product of a Benedictine monastery in Michaelsberg, the Bamberg abbreviation was a teaching tool intended for a school smaller than that of Bologna; however, its structure is very different from the St. Gall manuscript.⁵¹ It omitted only two *distinctiones* from the *Tractatus de legibus* and thirty-three other *distinctiones* from those remaining.⁵² It also included all the *causae*, but only provided a general summary of each one. Its purpose was to give an overall representation of the questions' arguments, rather than the methodical proof of those arguments as one finds in St. Gall. For instance, nine rubrics represent the canons of C.23 q.4.⁵³ The wicked do not harm the good, so long as the latter does not interact with but rather reprove the former. It is the responsibility of the good to punish sins committed against the Lord, regardless of who committed them. A priest may not excommunicate an offender for sins committed against him or in cases where an accuser refuses to come forward. While a man must love a shepherd, tolerate a mercenary, and guard against a pirate, a Christian must punish those actions contrary to the truth. Once the sinner has paid his debt, he is free from his sin and it should not be held against him. The choice of *auctoritates* reflected the abbreviator's desire to represent the thrust of the question, rather than to show how the

⁵¹ Beyer, ed., *Lokale Abbreviationen des 'Decretum Gratiani'*, 14, 30-168, 214-216.

⁵² D.7, D.16, D.26, D.36, D.37, D.39, D.42, D.48, D.49, D.52, D.53, D.57, D.58, D.59, D.65, D.69, D.70, D.71, D.72, D.73, D.75, D.76, D.77, D.80, D.84, D.85, D.86, D.87, D.89, D.92, D.94, D.97, D.98, D.99, D.101.

⁵³ C.23 q.4 c.9, c.12, c.27, c.28, c.29, c.31, c.34, c.52, c.54.

question developed from maintaining that the good must always endure the wicked to the good should punish the wicked for their benefit.

The abbreviator of the Bamberg edition sought to simplify the text in order to make it usable. He relied heavily upon rubrics in order to give the reader an idea of what the *auctoritates*, and thus the question, addressed.⁵⁴ Even if one should argue that this section of the *Decretum* was not the focus of the abbreviator's attention, hence his reliance on rubrics, so far as I have found no-where in St. Gall did the scribe represent a canon with only a rubric. On occasion the Bamberg abbreviation included a fragment of the text, but no more than a sentence or two.⁵⁵ For instance, it contained only the last sentence of C.22 q.5 c.10 and of C.23 q.2 c.1.⁵⁶

Table 4: C.22 q.5 c.10 in the Bamberg Abbreviation

Vgl. <i>edF</i> , col. 885	Bamberg Abbreviation (Beyer, 125)
Ecce, karitati vestrae dico, et qui per lapidem iurat falsum periurus est. Unde hoc dico? Quia multi et in hoc falluntur, et putant, quia nichil est per quod iurant, non se crimine teneri periurii. Prorsus periurus es, quia per id, quod sanctum non putas, falsum iuras. Si tu illud sanctum non putas, sanctum putat, cui iuras. Non enim quando, iuras, tibi aut lapidi, sed proximo iuras. Homini iuras ante lapidem, sed numquid non ante Deum? Non te audit lapis loquentem, sed punit Deus te fallentem.	Non enim quando, iuras, tibi aut lapidi, sed proximo iuras. Homini iuras ante lapidem, sed numquid non ante Deum? Non te audit lapis loquentem, sed punit Deus te fallentem.

⁵⁴ C.22 q.1 c.17; C.22 q.2 c.19, c.20; C.22 q.4 c.7; C.22 q.5 c.4, c.15, c.16; C.23 q.3 c.8; C.23 q.4 c.9, c.12, c.28, c.29, c.31, c.34, c.27, c.52, c.54 (which is cross referenced as q.5 c.9); C.23 q.5 c.24, c.38, c.37, c.46; C.23 q.6 c.1, c.4; C.23 q.8 c.7, c.8, c.9, c.10, c.15, c.30.

⁵⁵ C.22 q.2 c.4, c.14; C.22 q.5 c.1, c.7, c.10, d.p.c.21; C.23 q.1 c.5; C.23 q.2 c.1; C.23 q.3 c.1, c.6; C.23 q.5 c.9, c.15, c.38, c.41, c.42, c.44; C.23 q.6 d.p.c.4; C.23 q.7 d.p.c.4; C.23 q.8 d.p.c.6, d.p.c.20.

⁵⁶ There were instances, such as C.22 q.2 c.14, where the Bamberg abbreviation contained the same version of the canon as Sg. These instances, however, are purely coincidental.

Table 5: C.23 q.2 c.1 in the Bamberg Abbreviation

Vgl. <i>edF</i> , col. 894	Bamberg Abbreviation (Beyer, 126)
Iustum est bellum, quod ex edicto geritur de rebus repetendis, aut propulsandorum hominum causa. Iudex dictus est, quia ius dictat populo, siue quod iure disceptet. Iure autem disceptare est iuste iudicare. Non enim est iudex, si non est iusticia in eo.	Non est iudex, si non est in eo iustitia

Unlike St. Gall, the Bamberg abbreviation condenses a large section of text into a sentence. Take for instance C.23 q.1 c.5. The first sentence of the Bamberg abbreviation corresponds to the first part of the canon; however, the second sentence is the abbreviator's summary of the remainder of the canon. The canon in St. Gall reads exactly as that found in the vulgate recension; though it may omit a section of text in St. Gall, which correspond to an altered dictum, the scribe has not summarized the canon.

Table 6: C.23 q.1 c.5 in Bamberg Abbreviation and Sankt Gallen 673

Vgl. <i>edF</i> , col. 893	Bamberg Abbreviation (Beyer, 126)	Sg, p. 159b-160a
Militare non est delictum, sed propter predam militare peccatum est; nec rempublicam gerere criminis est, sed ideo agere rempublicam, ut divitias augeas, videtur esse dampnabile. Propterea enim quadam providentia militantibus sunt stipendia constituta, ne, dum sumptus queritur, predo crassetur. Item: Dominus ipse dixit: "Reddite que Dei sunt Deo, et que sunt cesaris cesari." Igitur quod cesar precipit ferendum est,	Militare non est delictum, sed propeter predam militare peccatum est. Sola gerat miles, quibus arma coherceat arma	Militare non est delictum, sed propter predam militare peccatum est; nec rempublicam gerere criminis est, sed ideo agere rempublicam, ut divitias augeas, videtur esse dampnabile. Propterea enim quadam providentia militantibus sunt stipendia constituta, ne, dum sumptus queritur, predo crassetur. Item: Dominus ipse dixit: "Reddite que Dei sunt Deo, et que sunt cesaris cesari." Igitur quod cesar precipit ferendum est, quod inperat tollerandum est; sed fit

Vgl. <i>edF</i> , col. 893	Bamberg Abbreviation (Beyer, 126)	Sg, p. 159b-160a
quod inperat tollerandum est; sed fit intollerabile, dum predam exactores accumulunt. Item: "Interrogaverunt Iohannem milites, dicentes: Quid faciemus et nos? Ait illis, neminem conculatis, neque calumpniam faciatis, sed estote contenti stipendiis uestris." Sic autem se cognoscere – Iohannis sententia condempnatur.		intollerabile, dum predam exactores accumulunt. Item: "Interrogaverunt Iohannem milites, dicentes: Quid faciemus et nos? Ait illis, neminem conculatis, neque calumpniam faciatis, sed estote contenti stipendiis uestris."

The most striking feature of the Bamberg abbreviation is the lack of dicta. It included only two of the dicta from Causa 22 and only four of the dicta from Causa 23.⁵⁷ The emphasis was not on Gratian's opinion, but rather on the canons themselves. St. Gall, by contrast, included the majority of dicta contained in the vulgate recension. The Bamberg edition and that of St. Gall have little in common. Whereas the intention of the abbreviation was to summarize a completed work and make it assessable, the intention of St. Gall was to develop and implement ideas that would form the basis of the completed work.

Found in the private collection of the Count of Schöborn, the Pommersfeld abbreviation was a personal reference work, similar to a teacher's lecture notes.⁵⁸ This abbreviation is longer and more involved than that of Bamberg and offered a more general overview of the *Decretum*. It contained all but nineteen *distinctiones* and the

⁵⁷ C.22 q.2 d.p.c.18, C.22 q.5 d.p.c.21, C.23 q.6 d.p.c.4, C.23 q.7 d.p.c.4, C.23 q.8 d.p.c.6, C.23 q.6 d.p.c.20. Canons and dicta may appear out of order and reorganized in abbreviations.

⁵⁸ Beyer, ed., *Lokale Abbreviationen des 'Decretum Gratiani'*, 14, 221-328, 368.

final three *causae*.⁵⁹ While Pommersfeld contained more *auctoritates*, like the Bamberg abbreviation it, more often than not, included a fragment from the *auctoritas*. Omitting rubrics, it provided an incipit and a key sentence from some part of the canon. Take for instance C.22 q.1 c.2 and C.23 q.4 c.35.

Table 7: C.22 q.1 c.2 in Pommersfeld Abbreviation

Vgl. <i>edF</i> , col. 861	Pommersfeld Abbreviation (Beyer, 304)
Non est contra preceptum Domini iuratio, que a malo, non iurantis est, sed increduli a quo iurare cogitur. Nam hinc intelligitur, ita Dominum prohibuisse a iureiurando, ut, quantum in ipso est, quisque non iuret; quod multi faciunt, in ore habentes iurationem tamquam magnum atque suaue aliquid. Nam utique Apostolus – ad fidem.	Non est. Ita intelligitur, ita Dominum prohibuisse a iusiurandum, ut, quantum in ipso est, quisque non iuret.

Table 8: C.23 q.4 c.35 in Pommersfeld Abbreviation

Vgl. <i>edF</i> , col. 815-816	Pommersfeld Abbreviation (Beyer, 311)
Duo ista nomina cum dicimus, homo peccator, non utique frustra dicuntur. Quia peccator est, corripe: et quia homo, miserere, nec omnino liberabis hominem, nisi eum persecutus fueris peccatorem. Huic offitio omnis – communem naturam.	Duo ista. Quia peccator est, corripe, et quia homo, Miserere

In terms of the percentage of canons represented from Causa 22 and Causa 23, the emphasis in this abbreviation lay with Questions four and five in both *causae*.⁶⁰ Aside from Questions four and five, the concern did not seem to be with the development of ideas but rather the outcome of the discussion. For instance, Causa 23, q.2, q.6, q.7, and

⁵⁹ D.9, D.11, D.15, D.17, D.18, D.52, D.53, D.57, D.58, D.60, D.69, D.71, D.72, D.73, D.84, D.85, D.87, D.91, D.97; C.34, C.35, C.36.

⁶⁰ C.22 q.2 contained snippets of five canons and one dictum, whereas q.4 contained four canons, two of which were complete.

q.8 only have one canon a piece.⁶¹ Each *auctoritas* offered a summarized answer for the question originally posed. The two dicta for Causa 22 are q.2 d.p.c.2 and q.4 d.p.c.23. The abbreviation included four dicta for the all of Causa 23 and three are from Question four: d.p.c.23, d.p.c.25, and d.p.c.32. However, d.p.c.23 is a palea. The other, d.p.c.4, is the lone *auctoritas* from Question six. As with the Bamberg abbreviation, the text is the primary focus and not Gratian's ideas.

Compiled in a monastery, the structure of the Lichtenhal abbreviation is considerably different from either that of the other two abbreviations or that of St. Gall.⁶² Intended for practicing lawyers, this handbook for pastoral care focused on the information that could be applied directly to courtroom proceedings, which came from eight distinctions and twenty causae. The abbreviation omitted ninety-three of the distinctions and sixteen causae. The abbreviator did not treat a causa in its entirety, but rather deliberately picked and chose what information was relevant. The inclusion of the rubric with the text or a section of the text served as the overwhelming pattern. On rare occasions the abbreviator would omit the rubric or use only a rubric to represent the canon. For instance, Causa 22 is found in two different places of the text and Causa 23 can be found in four different places. The abbreviator only included two canons and one dictum for C.22 q.2, which treat perjury. While only a rubric represents one canon, a summary stands in for the second canon and the dictum by maintaining that someone is not guilty of lying if he ardently believes the truth of that to which he is swearing. The

⁶¹ C.23 q.2 c.1, C.23 q.6 d.p.c.4, C.23 q.7 c.4, C.23 q.8 c.21.

⁶² Beyer, ed., *Lokale Abbreviationen des 'Decretum Gratiani'*, 14, 373-430, 457-458.

emphasis of Causa 22 lay with Question five.⁶³ Question five c.1, c.3-d.p.c.7, c.9, and c.10 focus on: the receiver forcing the taker into the oath, taking someone in deceit, and the validity of an oath sworn upon a stone or by something other than God. For Causa 23 the abbreviator included the final resolutions for Question four and Question five, and only the relevant portion of Question eight. From Question four the significant canon, c.50, justified punishment by providing the example of God punishing Achan along with his people for his sin. Canon forty-one of Question five assures that it was not a sin to kill a guilty man out of duty. Canon twelve of the same question established suicide as a sin. Canon thirty-one of Question eight maintained that a person needed judicial authority to burn a home or to mutilate a limb. While the Lichtenhal abbreviation used material only relevant to practicing lawyers, St. Gall sought to establish a theoretical argument.

Abbreviations were just that ... abbreviations. They were created for the purpose of making the *Decretum* accessible to its intended audience. St. Gall, however, did not follow the structural pattern of abbreviations in that it did not make Gratian 1 convenient to use. The user had to work through the development of the argument to reach the conclusion rather than to have the key points and conclusion provided. Second, abbreviations have a rubrication pattern that is consistent throughout the work. St. Gall, however, does not have such a pattern. Third, the abbreviations do not focus on the dicta; however, the dicta anchor the discussion in St. Gall. Of the sixty-four dicta possible in

⁶³ C.22 q.2 c.4 is a rubric only and C.22 q.2 c.5 and d.p.c.5 are summaries. C.22 q.5 is represented by c.1, c.3-c.7, d.p.c.7, and c.9-c.10, which are included in their entirety.

Causa 22 and Causa 23, St. Gall contains forty-eight, or seventy-five percent, of them.⁶⁴

St. Gall contained one causa, Causa prima, found neither in the subsequent redactions nor in the abbreviations. Employing some of the *distinctiones*, this causa dealt with clerical concubinage, while relevant earlier, was no longer an issue by the time of the circulation of Gratian 1.⁶⁵ No abbreviator would recycle only some of the *distinctiones* found in Gratian 1 and supplement them with additional canons to create an entirely new causa. Finally, St. Gall omitted the last twenty distinctions (D.80-D.100), which scholars have long argued were an ‘appendix’ to the first eighty distinctions.⁶⁶

Additional Features of Sank Gallen, Stiftsbibliothek 673

In spite of retaining the majority of the dicta found in the later recensions, as Causa 22 and Causa 23 illustrate, St. Gall contains grammatical and syntactical simplifications that an abbreviator would have had no reason to make. Whereas the dicta in Gratian 1 possess a more formal literary style and better articulate the arguments, St. Gall contains a number of examples in which either the wording of the dicta rendered the argument less eloquent or the argument differed from that found in Gratian 1.

⁶⁴ Vgl. *edF* contains thirty dicta in Causa 22 and Causa 23 contains fifty-two dicta, though two are paleae. Of the fifty remaining dicta, sixteen are between C.23 q.4 c.34 and q.8, the text of which is missing from Sg. The figure used is based upon the thirty-four dicta in Causa 23 contained in Sg. Some of the dicta in Sg were in their nascent forms and were augmented in later recensions.

⁶⁵ The eleventh century reform movement, often referred to as the Gregorian Reform, worked to realize the goal of clerical celibacy in order to protect church assets. Both popes before and after Gregory VII, after whom the movement took its name, sought to stop the alienation of church property to sons of clerics or for the upkeep of clerical concubines by enforcing the age-old church policy. The reform movement succeeded in this endeavor. See Kathleen Cushing, *Reform and the Papacy in the Eleventh Century: Spirituality and Social Change* (Manchester: Manchester University Press, 2005), 99, 120-124, 143-144.

⁶⁶ Pennington, “Gratian, Causa 19, and the Birth of Canonical Jurisprudence,” 352; Rudolf Weigand, “Chancen und Probleme einer baldigen kritischen Edition der ersten Redaktion des Dekrets Gratians,” *Bulletin of Medieval Canon Law* 23 (1998): 67.

In addition to the use of rubrics, the grammar and syntax of the hypotheticals suggests that St. Gall was a work used by the owner for teaching. The meaning of Causa 22's hypothetical remained the same in Sg, Fd, and Vgl. *edF*, though the grammar of in Sg is unpolished.

Table 9: Causa 22 Hypothetical in Sankt Gallen 673 and in Gratian 1

Sg, p. 149b-150a	Fd, fol. 58v; Aa 43, fol. 49r-49v
A certain bishop swore as false what he ^a <u>thought to be true</u> ; ^b <u>having realized the situation</u> his archdeacon swore that ^c <u>he no longer would obey him</u> . The archdeacon is compelled ^d <u>that he may obey him according to custom</u> ; the bishop is accused of double perjury, both that he swore what was false and that he compelled the archdeacon to perjure himself. First it is asked, whether or not an oath should be sworn? Second, if he is a perjurer who swears as false what he thinks is true? Third, if it is permitted for the archdeacon to refuse the customary obedience to the bishop? Fourth, if what the archdeacon swore is determined to be illicit, whether the oath ^e <u>ought to be upheld</u> ? Fifth, if it is decided that it should be upheld, whether the bishop, who compelled his archdeacon to go against his oath, is guilty of perjury.	A certain bishop swore as false what he ^a <u>thought true</u> ; ^b <u>having discovered the situation</u> archdeacon swore that ^c <u>he would never take an oath of obedience to him</u> . The archdeacon is compelled by the bishop ^d <u>to show him the customary respect</u> ; the bishop is accused of double perjury, both that he swore what was false and that he compelled the archdeacon to perjure himself. First it is asked, whether or not an oath should be sworn? Second, if he is a perjurer who swears as false what he thinks is true? Third, if it is permitted for the archdeacon to refuse the customary obedience to the bishop? Fourth, if what the archdeacon swore is determined to be illicit, whether the oath ^e <u>should be upheld</u> ? Fifth, if it is decided that it should be upheld, whether the bishop, who compelled his archdeacon to go against his oath, is guilty of perjury.

Table 9a: Causa 22 Hypothetical in Sankt Gallen 673 and in Gratian 1

Sg, p. 149b-150a	Fd, fol. 58v; Aa 43, fol. 49r-49v
Episcopus quidam falsum iuravit quod verum ^a <u>esse putabat</u> , quo ^b <u>cogito iuravit archidiaconus eius quod</u> ^c <u>amplius ei non obediret</u> . Archidiaconus ab episcopo compellitur ^d <u>ut de more sibi obediat</u> . Unde episcopus de dupplici periurio accusatur, sed de eo, quod falsum iuravit, et quod archidiaconum ad peierandum	Quidam episcopus iuravit falsum quod ^a <u>putabat verum</u> , quo ^b <u>conperto archidiaconus eius iuravit</u> ^c <u>se [Fd: deest] numquam prestaturum ei obedientiam</u> . Compellitur archidiaconus ab episcopo ^d <u>ad exhibendum sibi consuetam reuerentiam</u> ; accusatur episcopus de dupplici periurio, et de eo, quod falsum iuravit, et quia

Sg, p. 149b-150a	Fd, fol. 58v; Aa 43, fol. 49r-49v
<p>conpellit. Queritur ergo an iuramentum sit prestandum, necne? Secundo, an periurus sit iurat falsum quod verum putat? Tertio, an licuit archidiacono consuetam obedientiam denegare? Quarto, si constiterit esse illicitum quod archidiaconus iuravit, an ^eservari debeat? Quinto, si constiterit illud servandum esse, an episcopus sit reus periurii, qui contra iuramentum archidiaconum suum ire compellit?</p>	<p>archidiaconum ad peierandum compellit. Primum queritur [Fd: Queritur primum], an iuramentum sit prestandum, uel (an) non? Secundo, si sit periurus qui iurat falsum quod putat uerum? Tertio, si licuit archidiacono denegare episcopo consuetam obedientiam? Quarto, si constiterit esse illicitum quod iuravit archidiaconus, an ^esit <u>servandum</u>? Quinto, si constiterit illud servandum esse, an episcopus sit reus periurii, qui contra iuramentum archidiaconum suum ire compellit?</p>

In addition to a slightly different word order, the grammatical difference between the versions lay in the choice of verb tense. St. Gall left out *esse* in (a) as unnecessary. Also Gratian 1 and the vulgate recension made more use of the future active participle, such as in (c), to indicate intention and the future passive participle or periphrastic, such as in (d) and in (e), to indicate obligation.

The simplified hypothetical of Causa 23 in St. Gall left the background for the causa obscure. The later stages offered a more complex picture of the situation.

Table 10: Causa 23 Hypothetical in Sankt Gallen 673 and in Gratian 1

Sg, p. 158b	Fd, fol. 61v; Aa 43, fol. 60r-60v
<p>Certain bishops along with the people entrusted to them have lapsed into heresy; <u>they were compelled into heresy by the Catholics of the surrounding regions.</u> Certain bishops along with the people entrusted to them have lapsed into heresy; ^a<u>they were compelled into heresy by the Catholics of the surrounding regions.</u> ^b<u>Whence the Pope ordered the Catholic bishops</u> ^c<u>having civil jurisdiction from the emperor, to defend the Catholics from the heretics and</u> ^e<u>by whatever means possible to compel them</u> ^f<u>to be returned to the</u></p>	<p>Certain bishops along with the people entrusted to them have lapsed into heresy; ^a<u>they have begun to compel the Catholics of the surrounding regions with threats and tortures to fall into heresy.</u> ^b<u>Having discovered the situation,</u> the Pope ordered the Catholic bishops ^d<u>of the surrounding regions, who</u> ^c<u>had received civil jurisdiction from the emperor, to defend the Catholics from the heretics and to compel them</u> ^e<u>by what means they could to return to the</u> ^f<u>truth of the faith.</u> ^g<u>Upon receiving these papal mandates, the</u></p>

Sg, p. 158b	Fd, fol. 61v; Aa 43, fol. 60r-60v
<p><u>rectitude of the faith.</u> ^e<u>With the bishops receiving the apostolic mandates,</u> they mustered soldiers and began to fight ^h<u>the heretics clearly and</u> ⁱ<u>by ambushes.</u> ^j<u>At last with several heretics having been killed,</u> and several having been deprived of their personal property or others having been ^k<u>confined in prisons and dungeons,</u> they are returned ^m<u>finally to the faith.</u> Therefore it is asked, whether military service is a sin? Second, what is a just war? Third, whether one should use arms to ward off injuries done to allies? Fourth, whether one should to take revenge? Fifth, ^p<u>whether a judge or an official sins by putting to death the guilty?</u> Sixth, whether evil people should to be compelled to do good? Seventh, whether heretics should to be deprived of their possessions and those of the Church, and whether those who possess the things taken from heretics are said to possess what belongs to another? Eighth, whether bishops or clerics may take up arms on their own authority or at the command of the pope or the emperor?</p>	<p>bishops mustered soldiers and began to fight ^h<u>openly and</u> ⁱ<u>through ambushes</u> against the heretics. ^j<u>Finally</u> ^l<u>with several heretics having been handed over to be killed,</u> and others having been deprived of their personal property or those of the Church, and others ^k<u>having been confined in prison and penitentiary,</u> they returned ^m<u>under compulsion to the unity of the catholic faith.</u> It is asked ⁿ<u>first,</u> whether military service is a sin? Second, what is a just war, ^o<u>and how were just wars waged by the sons of Israel?</u> Third, whether one should use arms to ward off injuries done to allies? Fourth, whether one should to take revenge? Fifth, ^p<u>whether it is a sin for a judge or an official to put the guilty to death?</u> Sixth, whether evil people should to be compelled to do good? Seventh, whether heretics should to be deprived of their possessions and those of the Church, and whether those who possess the things taken from heretics are said to possess what belongs to another? Eighth, whether bishops or clerics may take up arms on their own authority or at the command of the pope or the emperor?</p>

Table 10a: Causa 23 Hypothetical in Sankt Gallen 673 and in Gratian 1

Sg, p. 158b	Fd, fol. 61v; Aa 43, fol. 60r-60v
<p>Cum plebe sibi commissa episcopi quidam in heresim sunt lapsi; ^a<u>Catholicos adiacentes ad heresim conpellebant.</u> ^b<u>Unde apostolicus episcopis catholicis ciuilem iurisdictionem ab imperatore</u> ^c<u>habentibus,</u> inperauit, ut ab hereticis catholicos defenderent, et ut ^e<u>cumque</u> posserent eos ad ^f<u>fidei rectitudinem reuenti</u> cogerent. ^g<u>Accipientes episcopi, apostolica mandata,</u> militibus convocatis ^h<u>hereticos manifeste ac</u> ⁱ<u>insidiis</u> impugnare ceperunt. ^j<u>Demum</u> ^l<u>multis eorum occisis,</u></p>	<p>Quidam episcopi cum plebe sibi commissa in heresim lapsi sunt; ^a<u>circumadiacentes catholicos minis et cruciatibus ad heresim conpellere ceperunt,</u> ^b<u>quo conperto</u> apostolicus catholicis episcopis ^d<u>circumadiacentium regionum,</u> qui ab imperatore civilem iurisdictionem ^c<u>acceperant,</u> inperauit, ut catholicos ab hereticis defenderent, et ^e<u>quibus modis</u> posserent eos ad ^f<u>fidei veritatem</u> redire conpellerent. ^g<u>Episcopi, hec mandata Apostolica accipientes,</u> convocatis militibus</p>

<p>Sg, p. 158b</p> <p>multis quos suis rebus expoliatis, aliis in ^k<u>carceribus et latrimiis</u> reclusis, ^m<u>ad fidem tandem</u> redierunt. Queritur ergo, an sit militare peccatum? Secundo, quod bellum sit iustum? Tertio, an socios ab iniuria defendere liceat? Quarto, an sit inferenda vindicta? Quinto, ^p<u>an peccet iudex vel minister occidendo reos</u>? Sexto, an ad bonum mali cogi debeant? Septimo, an suis bonis et ecclesiis heretici debeant expoliari et an aliena possidere dicantur, qui eius ablata possideret. Octavo, an utrum episcopis vel quibuslibet clericis sua auctoritate, aut vel apostolici, si vel imperatoris precepto arma movere liceat?</p>	<p>Fd, fol. 61v; Aa 43, fol. 60r-60v</p> <p>ⁿ<u>aperte et</u> ^l<u>per insidias</u> contra hereticos pugnare ceperunt. ^j<u>Tandem</u> ^l<u>nonnullis eorum neci traditis</u>, aliis rebus suis vel ecclesiasticis expoliatis, aliis ^k<u>carcere et ergastulo</u> reclusis, ^m<u>ad unitatem catholicae fidei coacti</u> redierunt. Hic ⁿ<u>primum</u> queritur, an militare peccatum sit? Secundo, quod bellum sit iustum, ^o<u>et quomodo a filiis Israel iusta bella gerebantur</u>? Tertio, an iniuria sociorum armis sit propulsanda? Quarto, an vindicta sit inferenda? Quinto, ^p<u>an sit peccatum iudici vel ministro reos occidere</u>? Sexto, an mali sint cogendi ad bonum? Septimo, an heretici suis et ecclesiae rebus sint expoliandi, et qui possidet ab hereticis ablata an dicatur possidere aliena? Octavo, an episcopis vel quibuslibet clericis sua liceat auctoritate, vel apostolici, vel imperatoris precepto arma movere?</p>
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The hypothetical of St Gall (a) simply stated that the heretics compelled the Catholics of the regions to fall into heresy. In Gratian 1 and in the vulgate, (a) elaborated by stating that the heretics compelled the Catholics from the surrounding regions with threats and violence. Also, whereas St. Gall (m) stated that the heretics returned to the faith, (m) in Gratian 1 and in the vulgate elaborated that they were compelled to return to the unity of the catholic faith. The vast majority of the corrections were substitutions offering a sophisticated way of expressing the same idea. As a case in point, St. Gall used the more simplified (e) *cumque* whereas Gratian 1 and Gratian 2 used the more eloquent phrase (e) *quibus modis*. St. Gall used (h) *manifeste* as opposed to (h) *aperte* and (i) *insidiis* rather than (i) *per insidias* to express the notion of attacking in the open and through ambushes. Finally, the hypothetical of St. Gall did not include the reference to divine law in (o),

which corresponds to the omission to q.2 c.2 and the omission of q.2 d.p.c.2 and c.3.⁶⁷

St. Gall mirrors, by and large, Gratian 1, though grammatically it is less polished and a few ideas would be clarified.

Akin to the hypotheticals, the dicta in St. Gall have a simplified grammatical structure when compared to Gratian 1. Paxton has corroborated these findings in his analysis of Causa 13. He has noted that the incipits and explicits of the dicta have a different word order than those in Fd, which always agreed with Vgl. *edF*.⁶⁸

Furthermore, the dicta in St. Gall did not analyze the issues in question as thoroughly as the dicta in the later recensions. Take for example C.22 q.2 d.p.c.22.

Table 11: Causa 22 q.2 d.p.c.22 in Sankt Gallen 673 and in Gratian 1

Sg, p. 153a	Fd, fol. 59v-60r; Aa 43, fol. 53r-53v
But also it is understood concerning which Jacob is not a liar about either matter. For he did not say that he was first born by birth, but by the right of primogeniture, by exposing, it was passed down. And thus Christ said that John was Elias, not in person but as an imitation of virtue. And thus it is that, though the Jews were the sons of Abraham in the flesh they are said [to be] sons of the devil in imitation. And on the contrary the gentiles, though they are the second offspring of the flesh from origin of another, nevertheless they are considered	Likewise it is understood that through his lying Jacob both benefited himself and harmed another [his brother Esau], nevertheless he is not reprimanded but is commended. But Jacob has not lied by saying that he is the first born in lieu of Esau. For he did not say that he was first born by birth, but by primogeniture, by exposing it, it rightly passed down. And thus Christ said that John was Elias, not in person but as an imitation of virtue. Therefore Jacob was Esau, not by birth, but by the purchase of inheritance, concerning the right of the first born was

⁶⁷ The addition to C.23 q.2 c.2 and the addition of C.23 q.2 c.3 further bolster the rightness of a just war by implicating natural law. Canon two adds that God alone is the author of a just war, thereby making those who wage them just (Fd, fol. 62v-63r). Canon three, likewise, implies that a just war results from a transgression to natural law. The sons of Israel conducted a just war against the Amorites because 'Innoxius enim transitus negabatur, qui iure humanae societatis equissimo patere debebat' (Fd, fol. 63r). Inevitably, it is God, or His earthly representative the pope, who can call a just war. This states explicitly what St. Gall insinuated.

⁶⁸ Paxton, "Le cause 13 de Gratien et la composition du *Décret*," 243-244. Paxton has noted also Larrainzar's observation that the hypotheticals of all the causae were slightly different than those found in Fd and Vgl. *edF*.

Sg, p. 153a	Fd, fol. 59v-60r; Aa 43, fol. 53r-53v
by virtue the sons of Abraham in the imitation of faith	<p>not passed down onto the firstborn, and thus Esau himself did not deserve to be made first born with the rights of inheritance by the betrayal from the first born [Jacob]. And thus the Jews, since they were the sons of Abraham in the flesh, because were not his sons in imitation, are not considered among the sons of Abraham, are called the sons of the devil, of whom they are the sons, not by birth, but by imitation.</p> <p>Whence it is said to them by the Apostle: "If you are the seed of Christ, therefore you are the seed of Abraham." Here the same Apostle writing to the Romans says: "O you Judae, if you were circumcised, [and] you do not obey His law, your circumcision has been made uncircumcised [as if the circumcision never happened], also just as an uncircumcised man, if he keeps the justices of the law, should he not count as circumcised." Therefore the imitation of work prefaces the origin of the flesh. Therefore Jacob truthfully, not falsely, said that he was Esau; not by his lying, but by speaking the truth, he [Jacob] was beneficial to him [Esau], but he did not harm with another truth, because he received for himself an owed benediction, he did not snatch away what was someone else's. But this very bishop, about whom it is concerning, also swore falsely, however because, as it was said above, except for his guilty mind he is not make guilty speech, in no way is he held guilty of perjury. For it is proven by this example of Saul, who, when he was going to fight against the Philisteos in the castles, he ordered that whosoever ate before the rising of the sun would be killed. Moreover Jonathan his son, since he did not hear the oath of the king, since he had</p>

Sg, p. 153a	Fd, fol. 59v-60r; Aa 43, fol. 53r-53v
	<p>rendered a great defeat of the enemy in battle, and had ensured well-being in Israel, laboring with hunger he sees a honey-comb of honey, on the royal branch, which he carried in his hands, he took it and ate it, and immediately his eyes, which hunger had closed entirely, opened, and his face was cheerful. Saul having learned this wanted to bring death upon him; but having been pleased by the requests and the pious supplication of the people he recalled the sentence of death, he [Jonathas] was not killed, by whom safety had been given in Israel, and by whose fighting the very people had been freed by his hands. Behold Saul swore falsely, because what he decreed he was going to do by his swearing having been proclaimed at the requests of the people he did not do. Nevertheless he is declared not to be guilty of perjury, because as far as in him lay, that he fulfilled what he swore, when he gave a sentence of death against his son, as he recalled [it] not by carnal affection, but by the supplication of the people.</p>

Table 11a: C.22 q.2 d.p.c.22 in Sankt Gallen 673 and in Gratian 1

Sg, p. 153a	Fd, fol. 59v-60r; Aa 43, fol. 53r-53v
<p>Opponitur, et de Iacob sed utique non est mentitus. Non enim dixit, se primogenitum nascendo, sed ius primogeniturae, illo vendente, adeundo. Sic et Christus Iohannem ait esse Helyam, non persona sed vitutis imitatione. Inde est quod, cum Iudei filii essent Habrahae carne filii diaboli imitatione dicuntur. Econtra gentiles, cum secundum carnis originem ex ordine alieni essent, fidei tamen imitatione filii Habrahae virtute consentur.</p>	<p>Item opponitur, quod Iacob mentiendo et sibi profuit, et alii nocuit, nec tamen reprehenditur, sed commendatur. Sed Iacob dicendo se esse Esau primogenitum, non est mentitus. Non enim dixit, se esse primogenitum nascendo, sed ius primogeniturae, illo vendente, rite adeundo. Sic et Christus Iohannem dixit esse Heliam, non persona, sed imitatione uirtutis. Erat ergo Iacob Esau, non nascendo, ut diximus, sed emptione primogenitorum, de non primogenito in primogenitum transeundo, sicut et ipse Esau primogenita vendendo de</p>

Sg, p. 153a	Fd, fol. 59v-60r; Aa 43, fol. 53r-53v
	<p>primogenito non primogenitus fieri meruit.</p> <p>Unde ab Apostolo dicitur eisdem: "Si autem Christi, ergo Abrahae semen estis." Hinc idem Apostolus scribens Romanis ait: "O tu Iudee, si circumcidaris, nec legem eius obserues, circumcisio tua preputium facta est, quomodo et preputium, si iusticias legis custodiat, in circumcisionem reputatur." Prefertur ergo, ut ex premissis colligitur, imitatio operis origini carnis. Veraciter ergo, non mendaciter, Iacob se dixit Esau esse; nec mentiendo, sed verum dicendo sibi profuit, alteri vero non nocuit, quia benedictionem sibi debitam accepit, non alienum subripuit. Episcopus vero iste, de quo agitur, etsi falsum iuravit, tamen quia, ut supra dictum est, ream linguam non facit nisi rea mens, nequaquam reus periurii habetur. Probatur etiam hoc exemplo Saulis, qui, cum esset in castris pugnaturus contra Philisteos, iuravit se interfecturum quicumque ante solis occasum comederet. Ionathas autem filius eius non audito regis iuramento, cum pugnando magnam hostium stragem dedisset, et salutem fecisset in Israel, fame laborans uidit favum mellis, quem regia uirga, quam gestabat in manibus, accepit et comedit, statimque oculi, quos fere fames clauserat, aperti sunt, et facies eius est exhilarata. Quo conperto Saul voluit eum dare neci; sed precibus et pia populi supplicatione placatus mortis revocavit sententiam, ne interficeretur ille, per quem salus data erat in Israel, et quo pugnante de manibus hostium populus ille liberatus fuerat. Ecce Saul falsum iuravit, quia quod iurando se facturum decrevit precibus populi provocatus non fecit. Nec tamen periurii reus arguitur, quia quantum in ipso fuit, quod iuravit inpleuit, dum sententiam</p>

Sg, p. 153a	Fd, fol. 59v-60r; Aa 43, fol. 53r-53v
	mortis in filium dedit, quam non carnali affectu, sed populi supplicatione revocavit.

St. Gall briefly stated that Jacob was not guilty of lying to his father when he claimed to be the first-born; after all, he did not say that he was the first born by birth, but only that he was first born by the law of inheritance. Christ similarly referred to John as Elias. He did not mean that John was Elias in person, but only in imitation. Taking the comparison one-step farther, the Jews were the sons of Abraham in the flesh but the Gentiles were his sons in imitation of faith. Gratian 1 delved deeper into the issue. The Florence manuscript continued with the comparison by equating the seeds of Christ, the Christians, to the seeds of Abraham, the Jews. As Paul exhorted the Romans, if one was circumcised and did not obey God's law, the circumcision was invalid. Imitation must follow the oath. Jacob's intention was not to lie, but simply to receive his rightful benediction. He, therefore, snatched nothing away from Esau. The Christians, by extension, have taken nothing from the Jews by supplanting them, but simply received their rightful benediction. The dictum also analyzed the supposed perjury of Saul as a further discussion on intention. When fighting against the Philistines, Saul ordered that anyone who ate before sunrise be killed. Not hearing this, his son, Jonathan, ate a honey-comb after a victorious battle. Learning of Jonathan's violation of his order Saul wanted to bring about his death but was swayed by the pious pleas and supplications of the people. Despite recanting his word and thus swearing falsely Saul did not commit perjury, because he recanted his oath not from his own feelings but from his people's wishes.

Instances also occur where Gratian revised his opinion in Gratian 1. Take C.23 q.3 d.p.c.10.

Table 12: C.23 q.3 d.p.c.10 in Sankt Gallen 673 and in Gratian 1

Sg, p. 160b	Fd, fol. 63r; Aa 43, fol. 64v
Behold, that one <u>always</u> should be opposed to perversions and also the injury of allies should be repelled by arms. But it is one thing to ward off injury so that they may live wantonly, which the Lord himself taught should not happen, and another so that it is possible the unimpeded welfare of others to be preserved because he who does not act takes part.	Behold, that one <u>sometimes</u> should be opposed to perversions and the injury of allies should be repelled by arms, so that both it is beneficial to take away from the wicked the ability to commit a crime and the ability of the church for unimpeded council is ministered to by the desires of the good. He who does not act takes part.

Table 12a: C.23 q.3 d.p.c.10 in Sankt Gallen 673 and in Gratian 1

Sg, p. 160b	Fd, fol. 63r; Aa 43, fol. 64v
Ecce, quod <u>semper</u> sit obviandum perversis, et sotiorum iniuria etiam armis propulsanda. Set aliud est iniuriam propellere ut liceat voluptuose vivere, quod dominus non esse faciendum in seipso docuit, aliud ut aliorum utilitati libere possit vacari quod qui non facit consentit.	Ecce, quod <u>nonnumquam</u> est obuiandum peruersis, et iniuria sociorum armis est propulsanda, ut et malis adempta facultas delinquendi prosit, et bonis optata facultas libere consulendi ecclesiae ministretur. Hoc qui non facit, consentit.

In St. Gall Gratian asserted that because one *always* should oppose perversions, a lord should prevent injuries committed against an ally. He went on to say that it is one thing to protect his people from injury so that they may live in sin; it is another to free them for common good of others. Gratian 1 altered this dictum to maintain that *in some instances* the lord should prevent injuries committed against an ally. The purpose of force was to remove the ability of the transgressor to commit a crime and leave the Church

unimpeded. The changes made to Gratian 1 correspond to the addition of C.23 q.3 d.p.c.1, which reflects the ideas found in q.3 d.p.c.10.

Table 13: C.23 q.3 d.p.c.1 in Gratian 1

Fd, fol. 62v; Aa 43, fol. 63v-64r	Fd, fol. 62v; Aa 43, fol. 63v-64r
<p>Item ab aliquo capto iniuste sua exiguntur, pro vita tamen redimenda iuste offeruntur. Item vasa sacra ab aliquot barbaro exiguntur iniuste, pro redemptione tamen captivorum iuste prestantur. Sic etiam iniuriæ propulsatio, licet iniuste postuletur, tamen iuste prestatur, quamquam et ipsa postulatione non usquequaque iniusta probetur. Aliud est enim iniuriam propellere, ut sibi liceat voluptuose vivere, aliud, ut aliorum utilitati libere possit vacare. Sicque aliud est suffragium ab homine tamquam a ministro iusticiæ postulare, ut mala voluntas adversantium eius ministerio careat effectu, et bonorum voluntas eius suffragio sortiatur effectum; aliud spem suam a Deo in hominem transferre, ut adversa, que inferuntur a Deo ad vitæ correctionem, humano pellantur auxilio nulla precedente correctione, sicut Israelitæ, qui captivitatem sibi imminentem Egyptiorum suffragio se putabant posse evadere sine penitencia preteritæ vitæ, non revocantes ad memoriam: "Da nobis auxilium de tribulatione, quia vana salus hominis." Et item: "Hii in curribus, et hii in equis, nos autem in nomine Dei nostri invocabimus." Petere ergo vel prestare in tribulatione subsidium, ut voluptuose quis in crimine vivat, dampnabile est. Petere autem vel prestare solacium, ut malis facultas delinquendi adimatur, ut ecclesia pacem adipiscatur, ut aliquis multorum utilitati seruetur, utile est et honestum; dissimulare vero est grauissimum. Hinc de Paulo</p>	<p>Likewise because of someone having been captured things are sold unjustly, however they are offered justly for the option of buying back his life. Likewise holy vessels are sold unjustly by some barbarians, however they are offered justly for the buying back of the captives. So also the repelling of injury, although it is requested unjustly, however it is performed justly, even though this request may not always correct injustices. For it is one thing to repel injury, so that he may be allowed to live wantonly, and another so that it is possible for the unimpeded welfare of others. And it is one thing to request assistance from one such as a minister of justice, so that evil will of adversaries may be confined as an effect by his assistance, and the will of the good is obtained the effect by his assistance; another to transfer his hope from God to man, so that adversaries, who are introduced by God for the correction of life, may be expelled with no previous correction by human help, just as the Israelites, who asked from Him that they be able to escape into freedom from the imminent captivity of the Egyptian without penance of past life, not recalling from memory: "Give aid to us from the tribulation, because the worthless welfare of men." And likewise: "Here in chariots, and there by horses, now we call upon in the name of our God." And therefore it is damnable for Peter to offer aid in tribulation, so that some live wantonly in a crime. And moreover it is useful and honest that Peter offer comfort (relief) so</p>

Fd, fol. 62v; Aa 43, fol. 63v-64r	Fd, fol. 62v; Aa 43, fol. 63v-64r
legitur, quod, cum quidam Iudeorum iurassent, se non comesturos panem, nisi eum interficerent, petiit milites a pretore, quorum presidio illesus servaretur ab iniuria Iudeorum, non suae voluptati, sed omnium utilitati victurus. Hinc in evangelio mercenarius vocatur qui videt lupum venientem, et dimittit oves, et fugit. Hinc etiam ecclesia auxilium ab imperatore ad sui defensionem petere monetur.	that the ability is deprived to commit evils, so that the church obtains peace, so that someone is protected for the betterment of many; but he is to neglect the worst. Here it is read from Paul, that, when certain ones of the Jews had swore that they would kill him unless he ate bread with them, he beseeched from the praetor soldiers, the aid of whom he was protected from the injury of the Jews, the conquest was not from their wantonness but for the wellbeing of all. Here he is called a mercenary in the Gospel who sees the wolf coming, abandons the sheep, and flees. So here the church is reminded to seek help from the emperor for its defense.

In the first recension, Gratian used the addition of q.3 d.p.c.1 to revisit and expand upon the idea that one should not offer aid to help another live in sin but rather for the benefit of all, ideas Gratian first addressed in Sankt Gallen q.3 d.p.c.10. Aid is offered justly when it protects the wellbeing of the people. Conversely aid is offered unjustly when it allows others to live in sin. Gratian then offered examples to illustrate this point. The Israelites requested aid from God to counter the danger posed by the Egyptians. Peter was not to offer aid unless for the benefit of all and for the peace of the church. Paul requested military assistance from the praetor. Gratian distinguished between the duty performed justly by soldiers and that performed unjustly by mercenaries. While soldiers protect against injury, mercenaries see the wolf coming, abandon the sheep, and flee. Just as he ended q.3 d.p.c.10 in Sankt Gallen with the warning that those who did not act took part in the evils, he ended q.3 d.p.c.1 with the corollary that reminded the church to

seek help from the emperor for its defense. C.23 q.3 d.p.c.1 incorporates both the ideas and the language of Sankt Gallen q.3 d.p.c.10.

Table 14: C.23 q.3 d.p.c.10 in Sankt Gallen 673 and C.23 q.3 d.p.c.1 in Gratian 1

C.23 q.3 d.p.c.10 Sg, p. 160b	C.23 q.3 d.p.c.1 Fd, fol. 62v; Aa 43, fol. 63v-64r
Set <u>aliud est iniuriam propellere ut liceat voluptuose vivere</u> , quod dominus non esse faciendum in seipso docuit, <u>aliud ut aliorum utilitati libere possit vacari</u> quod qui non facit consentit.	Aliud est enim iniuriam propellere, ut sibi liceat voluptuose uiuere, aliud, ut aliorum utilitati libere possit vacare

Gratian built his discussion in Gratian 1 by grounding it in the same language used to outline briefly the idea in Sankt Gallen. The relationship between q.3 d.p.c.10 in Sg, q.3 d.p.c.10 in Gratian 1, and q.3 d.p.c.1 reflect the development of Gratian's ideas, not an abbreviation of them.

Conclusions

Scholars have posited different views about the nature of St. Gall. Winroth has argued that it is simply an abbreviation of Gratian 1, whereas Wei has suggested that it is an abbreviation of a Gratian 1 text interpolated with Gratian 2 texts. Lenherr has viewed the manuscript as a text used for lecturing. Contrary to Winroth's assertion, St. Gall does not possess the features of an abbreviation in that it neither relies on rubrics alone, nor does it rely on a sentence to convey the thrust of the canon, nor does it summarize canons, nor does it rearrange the order of the material. St. Gall utilizes a simplified grammar and syntax in the hypotheticals and in the dicta, which abbreviators' overlook, and does not include canons or sections of canons along with the corresponding dictum.

This task would prove too daunting for a mere abbreviation no matter how elaborate. Contrary to Wei's assertion, one cannot rest a thesis on the belief that Gratian relied only on five collections; we simply do not know what Gratian had available to him. Lenherr was correct when he suggested that the simplified linguistic style and the omission of texts resonate with a text used for a lecture. St. Gall was a teaching tool, a point I stressed in the previous chapter where I explored the development and use of rubrics and will stress again in the subsequent two chapters where I will explore the individual clusters. This teaching tool, however, did not postdate Gratian 1 simply because a marginal corrector fixed the sequence of canons in D.31 and D.32 and because both St. Gall and Gratian 1 drew on similar sources. Precisely because we do not know what collections Gratian used, the possibility exists that he drew on similar sources when he expanded his work. The manuscript tradition suggests that the Gratian 1 text quickly eclipsed that of St. Gall. In this case then it would seem that the marginal corrector was mistaken. The St. Gall manuscript represents a stage of Gratian's work, but it is a stage that preceded the first recension.

Chapter 4

CORE CAUSAE AND THE EARLIEST VERSION OF THE *DECRETUM*

Gratian progressively expanded his work from a basic set of ideas. With each successive cluster, he cast the net of legal problems wider. It was only at the end that he organized the cases into the arrangement that is preserved in Sankt Gallen 673. The St. Gall manuscript thus represents a stage of Gratian's teaching prior to the circulation of the first recension. The argument that Gratian progressively expanded his work is, in many respects, not surprising. After all, many scholars do not write their monographs in one fell swoop from Introduction to Conclusion; rather, they begin with a central idea and then write in sections. Only at the end do they impose a final organization on the work.

I argued in Chapter Two that the use or non-use of rubrics in St. Gall reflected the order in which Gratian compiled his *causae*. When grouped according to the percentage of rubrics used, five clusters, Clusters A through E, reflect the positive correlation between the steady incorporation of rubrics and the steady incorporation of canons, which suggests that Gratian compiled his *causae* at different times. As opposed to using rubrics for almost every canon in the later stages, *Causae* 13, 14, 15, 17, 19, 20, 22, and 34 incorporate fewer than three percent of the respective rubrics in St. Gall. Rubrics in the *causae* comprising Cluster A are virtually nonexistent. Incorporating between six and nineteen percent of the respective rubrics for the canons present in St. Gall is Cluster B, which includes *Causae* 5, 6, 12, 16, 18, and 21. The inclusion of between thirty-five and forty-three percent of the rubrics for the canons found in St. Gall distinguishes the next cluster, Cluster C, represented by *Causae* 3, 11, 31, 32, and 33. As the fourth, and

largest, category, Causae prima, 1, 7, 8, 9, 10, 27, 29, 35, and 36 comprise Cluster D by incorporating between fifty and seventy-five percent of the rubrics for the canons in St. Gall. Finally, Cluster E, which includes Causae 2, 4, 23, and 30, has between eighty and eighty-six percent of the rubrics for the canons present in St. Gall and averages the most canons per causa. The idea of clusters based upon the percentage of rubrics used and the number of canons per causa suggests that Gratian compiled his work in stages over a period of time rather than all at once.¹

The earliest examples of what became Gratian's method of rubrication found in Cluster A – Causae 13, 14, 15, 17, 19, 20, 22, and 34 – represent the original nucleus around which the *Decretum* grew. These causae average the fewest canons and have only one rubric amid the 130 canons. In the course of my examination of the causae I not only will refer to pieces of evidence, large and small, to prove further that the St. Gall manuscript is not an abbreviation, but also I will argue that they are the “core” causae that Gratian used when he began to teach in Bologna. These causae form natural groupings with regard to content and methodology. First, they teach courtroom procedure—how one argues a case, who can serve as a witness, and how the judicial process progresses from indictment to conviction. Second, they use specific legal problems to discuss the question of rights in cases that would inevitably arise in the course of a lawyer's career. Gratian followed his discussion of judicial procedure with examples in which he demonstrated how to determine the validity of a monastic vow as it applied to specific circumstances, the validity of an oath, and the validity of a marriage. Embedded into the causae, and often divergent from the main argument, are resolutions

¹ Eichbauer, “St. Gall Stiftsbibliothek 673 and the Early Redactions of Gratian's *Decretum*,” 112.

to practical legal problems. Given the similarity of content and methodology, the plausible status of these *causae* as the first in Gratian's work leads to significant conclusions about Gratian's original purpose and methodology.

Gratian ingeniously created hypotheticals and structured the cases to connect, even if loosely, the main thrust of the argument with particular legal questions. John Dillon has argued that the *causae* are artificial constructs with some cases resembling conceivable legal disputes and others simply attempting to bind loosely related legal questions.² *Causa* 3, for example, pertains to trial procedure and uses accusations made against a bishop as the foundation for the discussion. According to Dillon, there is no specific reason that the eleven questions raised appear together in this particular case. Gratian, he argued, relied on Anselm of Lucca's *Collectio canonum* 3.88.4 as the paradigm for the *causa*.³ While I questioned our ability to know exactly which sources Gratian used in Chapter Three and thus hesitate to attribute the case statement to the Anselm's *Collectio canonum*, Dillon, in some respects, is correct. The core *causae* highlight Gratian's role as a teacher and the work's original use as a teaching tool. The hypotheticals reflect legal problems a lawyer would encounter. Each *causa* addresses questions that may not fit neatly with the main topic but were still important and had to be addressed. Gratian started with a main idea and then included related elements rather than creating a case for every issue. In the subsequent clusters Gratian built upon these basic questions by using conceivable legal disputes to anchor new questions that delved

² John Dillon, "Case statements (themata) and the composition of Gratian's cases," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 92 (2006): 308.

³ *Ibid.*, 309-317.

deeper into related subjects. The questions in a particular cluster built upon the questions posed in a previous cluster, thus explaining why the *causae* appear artificial.

The Importance of Courtroom Procedure in the Core Causae

First and foremost Causae 13, 14, and 15 instruct students on proper courtroom procedure. A specific ecclesiastical issue anchors the discussion in each of the three cases. With war having forced parishioners to a different diocese, Causa 13 examines a baptismal church's right to tithe people who have moved out of the parish. The causa also explores whether a statute of limitations exists for tithing rights that have fallen dormant. Causa 14 addresses the increasing involvement of canons in secular dealings. Finally, Causa 15 focuses on a case involving a cleric, who committing a sin of the flesh prior to ordination, committed murder and pleaded insanity after ordination.

The hypothetical of Causa 13 is unique in the *Decretum*. Gratian presented the arguments of the plaintiff and defendant as if it were an actual case argued before the court. War and fear forced parishioners into a different diocese from their ancestral church. For fifty years the parishioners had continued to farm their lands, which were within the borders of their ancestral church, though they paid tithes to the new parish where they lived and chose to be buried there. The ancestral church entered into litigation claiming their right to tithe their former parishioners.⁴ This hypothetical

⁴ Causa 13 d.init.: 'Quidam ecclesiae baptismalis diocesani militis bellorum cladibus pressi, hostili metu compulsi in aliam diocesim sua transtulerunt domicilia, predia tamen colere non desierunt et decimas ceperunt soluere illi ecclesiae, in cuius diocesim transierunt, et sepulturas apud eam sibi elegerunt. Demum annis transactis quinquaginta clerici, quibus quondam decimas persoluerant, in eos questionem mouere ceperunt, qui ab istis primicias et decimas accipiunt; ad causam igitur contra eos ueniunt' (Sg, p. 109b). Frederick Paxton's work on Causa 13 was very helpful for understanding the causa. See "Le cause 13 de Gratien et la composition du Décret," 233-249.

reflects the ecclesiastical geography of the Italian church with many small dioceses scattered throughout the peninsula.⁵

Although the purported main issue in Causa 13 is tithes, the real issue was how an advocate should argue a case in court. The medieval canonists noticed that Gratian shifted his *modus operandi* in Causa 13. Stephen of Tournai speculated that perhaps Gratian wanted to teach his students courtroom procedure and how to formulate an argument by demonstrating the way in which advocates argued their cases.⁶ The *Summa Parisiensis* also commented on the causa's unusual structure noting the emphasis on the claims and the counter-claims of the advocates for the plaintiff and for the defendant.⁷ The unique narrative construction of Causa 13 and its position as the first of the "core causae" may mean that it was the first case that Gratian used for teaching. It would have made sense for Gratian to have begun his *Decretum* with a discussion of how the *ordo iudiciarius* worked. Once he addressed how to formulate an argument in court there was no need to continue using this style. Its peculiar position in the center of Gratian's causae is explained by the fact that Gratian added procedural causae to the beginning of the second part of his work and never incorporated his advice on how to argue a case in Causa 2 and Causa 3. Because of Causa 13's subject matter, he left it, along with the other two causae dealing with procedure, in the tract concerned with monasticism.

⁵ Robert Brentano, *Two Churches: England and Italy in the Thirteenth Century* (Berkeley: University of California Press, 1988), 62-66.

⁶ Johann Friedrich von Schulte, ed, *Die Summa des Stephanus Tornacensis über das Decretum Gratiani* (Giessen: Emil Roth, 1891), 217.

⁷ Terence McLaughlin, ed., *The Summa Parisiensis on the Decretum Gratiani* (Toronto: The Pontifical Institute of Mediaeval Studies, 1952), 166.

Having cited a Pseudo-Isidorian letter from Bishop Dionysius to Bishop Severo in which Dionysius stated that churches, with parishes and cemeteries divided among them, were granted to each priest and that no one should take possession of another parish not within his boundaries but rather should be content with that within his boundaries and care for the church and people committed to him,⁸ Gratian turns to his intended purpose. Using a lengthy dictum in which the lawyers representing the plaintiff and the defendant press their claims, Gratian introduced his students to courtroom procedure. In their back-and-forth exchange, the lawyer for the plaintiff, the ancestral church, was first to make his arguments claiming that tithes should be paid to the baptismal church in the designated diocese. The fields were within the borders of our diocese (*nostrae diocesis*). The tithe then legitimately belonged to us and should be paid to our church.⁹ The lawyer for the defendant, the diocese to which the parishioners moved and were paying tithes, rebutted. God established the tithes through Moses (Deut. 14:27-29). The people should give them to the sons of Levi for their ministry rendered to the people in the tabernacle. The sons of Levi received tithes only from those for whom they offered prayers and sacrifices. Because we, the defendant's lawyer argued, offered prayers and sacrifices for them in the tabernacle, we served the Lord and they ought to give the tithe and first fruits to us.¹⁰ Pope Leo IV, he pointed out, echoed these sentiments stating that "concerning

⁸ C.13 q.1 c.1: 'Ecclesias singulis presbiteris dedimus; parrochias et cimiteria illis diuisimus, et unicuique ius proprium habere statuimus, uidelicet ita, ut nullus alterius terminos parrochiae aut alter inuadat, sed unusquisque terminis suis sit contentus, et taliter ecclesiam et plebem sibi commissam custodiat (Sg, 110a).

⁹ C.13 q.1 d.p.c.1: 'In diocesi autem designata, quecumque predia coluntur, prouentus decimationum baptismali ecclesiae assignatus persolui debet. Igitur quia intra terminos nostrae diocesis hec predia continentur, et prouentus decimationum legitime assignatus nobis nostrae persoluendus est ecclesiae' (Sg, p. 110a).

¹⁰ C.13 q.1 d.p.c.1: 'Decimae per Moysen a Deo sunt constitutae, ut filiis Levi a populo persoluerentur, et hoc pro ministerio, in quibus in [tabernaculo ei] deserviebant. Non enim decimas accipiebant nisi ab eis, pro

the tenth it is seen as a just order not only by us but also by the majority that it ought to be paid by the people where they are given the sacrament of baptism.”¹¹ The defendant’s lawyer maintained that those who actually performed the sacramental duties required of the church warranted the fruits of their ministering. “From which people moreover are tithes owed? From those who received baptism or from others? We baptize them and you receive tithe from them?”¹² Backed by a decretal from Pope Gelasius, which stated that after more than thirty years no one was permitted to bring to court that which exceeded the legal timeframe,¹³ the defendant’s lawyer raised a counter point arguing that there was a statute of limitations to reinforcing a tithing right that has fallen dormant. He maintained that all possession of religious houses was annulled by the thirty or forty year prescription and one hundred years for lands of the holy Roman church.¹⁴ The plaintiff’s lawyer made his emotional appeal bewailing that “Indeed you strive to take our rights from us with many and rash arguments...You accuse us that we are trying to take away those things, which are owed to you because we pursue our rights.”¹⁵ He then countered by relying on Pope Gelasius. So long as a piece of property was recognized as being

quibus preces et sacrificia offerebant. Quia igitur et nos in tabernaculo offerendo pro his preces et] sacrificia domino seruimus, et ipsi decimas et primitias nobis persolvere debent’ (Sg, p. 110a). The bracketed text was written over an erasure.

¹¹ C.13 q.1 d.p.c.1: ‘De decimis non tantum nobis, sed etiam maioribus isto ordine uisum est plebibus sunt tantum, ubi sacrosanctam baptisma dantur, debere dari’ (Sg, p. 110b).

¹² C.13 q.1 d.p.c.1: ‘Quibus uero debentur plebibus? Illis a quibus baptisma accipiunt an aliis? Nos eos baptizamus, et uos ab eis decimas accipitis?’ (Sg, p. 111a).

¹³ C.13 q.2 c.1: ‘ut ultra XXX. annos nulli liceat pro eo appellare, quod legum tempus exclusit’ (Sg, p. 112a).

¹⁴ C.13 q.2 d.a.c.1: ‘Ad hec: Decimationes istae, etsi uobis iure deberentur, ut asseritis, tamen tricennalis obiectio uobis silentium inponit. Omnis et enim possessio tricennaria tollitur prescriptione, uel quadragenaria sicut religiosarum possessiones domorum, uel et centenaria, sicut sunt Romanae ecclesiae predia’ (Sg, p. 112a). The indicator for Question two is placed next to d.p.c.1 (Part II).

¹⁵ C.13 q.1 d.p.c.1: Callida quidem et multiplici argumentatione uestra iura nobis auferre contenditis....Arguitis nos, quod ea, que uobis debentur, subripere cecidimus, quia nostra persequimur’ (Sg, p. 111a).

within a particular jurisdiction, the rights to that property remained intact. Because the parishioners' land was recognized in the diocese of the ancestral church, the prescription did not counter diocesan rights.¹⁶ Remarkably, Gratian did not provide a solution to the case in Causa 13 but rather referred to his conclusions in Causa 16.

Gratian's citation of Gelasius's decretal provides evidence that Causa 13 may have preceded Causa 16 and was the first causa. C.13 q.2 c.6 in St. Gall, originally a decree of the Council of Trebur, began with the incipit: "Ubicumque temporum vel locorum facultas tulerit."¹⁷ The canon appears again as C.16 q.1 c.16 with a slightly different incipit – "Ubicumque facultas rerum et opportunitas temporum suppetit" – and without the full text.¹⁸ After the incipit the canon in Causa 16 ends with: "sicut in eodem capite supra legitur in causa eorum, qui de diocesi ad diocesim transierunt."¹⁹ Gratian referred the reader back to the full canon as found in Causa 13. As Paxton has noted rightly, the antiquated incipit found in Causa 13 and the reference in Causa 16 to the full canon in Causa 13 suggests that Causa 13 predates Causa 16. More troubling for Paxton, however, are the cross-references to Causa 16 found in Causa 13. In C.13 q.1 d.p.c.1 Gratian cross-referenced C.16 q.1 c.42 stating: "Nam in quodam capite legitur: 'Si quis laicus, vel clericus, seu utriusque sexus proprietatis suae loca etc,' sicut in eodem capite

¹⁶ C.13 q.2 d.p.c.1: 'At illi e contra: Cuius auctoritate nobis sylentium inponere, contenditis eiusdem ora uestra auctoritate seramus. Nam idem Gelasius ait: Nulla presumptione statum parrochiarum etc. Si ergo temporalis obiectio diocesi semel constitutam diuellere non potest, patet, quod nec uobis patrocinabitur, ut, statutum nostrae parrochiae mutantes, decimationes quondam nobis legitime assignatas uindicabili usurpatione uobis uendicetis' (Sg, p. 112a).

¹⁷ Sg, p. 113b.

¹⁸ C.16 q.1 c.16 (Sg, p. 126a). *Collectio IX librorum* (Arch.S.Pietro C.118), 7.9.18; *Polycarpus* (Version I), 8.5.8; and *Collectio VII librorum* (Vienna ÖNB 2186) 7.73.6 use the same incipit as C.16 q.1 c.16; however, the two latter collections use a different explicit.

¹⁹ Sg, p. 126a; Vgl. *edF*, col. 765.

in causae monachorum notata inveniuntur.”²⁰ Similarly C.13 q.2 d.a.c.1 cross-referenced C.16 q.4: “Sed queritur hae distinguendae auctoritates in causa monachorum inveniuntur.”²¹ Such references suggest to Paxton that in actuality Causa 16 predates Causa 13. This is not necessarily the case. Because C.13 q.2 c.6 preserves the entire canon with the antiquated incipit, Causa 13 was compiled first. As the usage of rubrics indicates, Causa 16 is among those causae in Cluster B, which supplement the issues raised in the core causae of Cluster A. Gratian could have added the cross-references to d.a.c.1 after the completion of Causa 16. The St. Gall manuscript is not the “first” version of the work but rather is the culmination of Gratian’s teaching once he arranged the causae into an order that suited him. Gratian could have added the cross-references in the margins or as an interlinear notation and later seamlessly incorporated them with St. Gall reflecting these emendations.

Having modeled for the students how to argue a case in Causa 13, Gratian turned to how the choice of witnesses could lead to conflicts of interest in Causa 14. He set forth the instances in which brothers from a house involved in litigation could testify. The disjointed hypothetical of Causa 14 begins abruptly with the lawsuit and the canons of a certain church having entered into litigation concerning lands. Rather than offering further information to explain the issues surrounding the litigation, Gratian curtly stated that the canons produced witnesses from among their brothers and they lent money to businessmen (*negociatoribus*) for the purpose of receiving profits from their

²⁰ Sg, p. 111b. Vgl. *edF* (col. 720) reads: ‘Dicitur enim in quodam concilio: Si quis laicus, uel clericus, seu utriusque sexus persona proprietatis suae loca etc, sicut in eodem capitulo in causae monachorum notata inveniuntur.’

²¹ Sg, p. 112a. Vgl. *edF* (col. 720) has this portion of the text as a part of c.1: ‘Quomodo autem distinguendae sint hae auctoritates, in causa monachorum inveniuntur.’

merchandise.²² Gratian concluded that the canons, serving as administrators, neither could possess nor could demand back goods for themselves but could for church. Similarly they were prohibited from seeking a judgment for themselves and they could not stand before the judge on behalf of themselves but could on behalf of others.²³ Establishing that a lawsuit was permitted so long as it was not for personal gain, Gratian focused on whether the brothers from that house could testify in the proceedings. Differentiating between a *causa civilis* and a *causa criminalis*, Gratian opened the discussion by arguing that while witnesses from the same house could not be heard in criminal cases, they could be heard in civil cases.²⁴ Gratian refined this viewpoint by including a letter from Paschal II to his legate Guidonis that distinguished between private (*pro domestico*) and communal (*pro ecclesia*) concerns. Clerics from the same house may not testify in private matters (*pro domestico*). Qualified witnesses may testify if it was a matter of the church (*pro ecclesia*).²⁵ Because canons could not enter into private lawsuits, brothers were not permitted to testify in matters related to private grievances. Proper procedure rather dictated that testimony from brothers in the same house may only be heard when the matter involved the community as a whole.

²² Causa 14 d.init.: 'Mouent ad usus quosdam cuiusdam ecclesiae canonici de prediis questionem. Ex propriis fratribus quosdam ad testificandum producunt. Crediderunt pecuniam negociatoribus ut ex mercibus eorum sentirent emolumenta' (Sg, p. 115a).

²³ C.14 q.1 d.p.c.1: 'Sicut igitur isti non sua possident, sic nec sua repetunt, sed res ecclesiae, quarum administrationem gerunt. Sic et quod in iudicio contendere prohibentur sibi intelligendum est, uidelicet, ut non sibi stent coram iudice, sed aliis' (Sg, p. 115b).

²⁴ C.14 q.2 d.a.c.1: 'Nam cum in criminali causa de propria domo testem produci non liceat, in ciuili causa prelati hoc licet patitur' (Sg, p. 116a).

²⁵ C.14 q.2 d.p.c.1: 'Domestici ad probationem non admittantur, ut uidelicet pro his, quorum sunt domestici, testificantur. Isti uero (sicut et supra de actoribus dictum est) non pro domesticis, sed pro ecclesia, que pauperum Christi mater est testimonium dicant' (Sg, p. 116a). Paschal II's letter, which Gratian includes as c.1, is dated 27 Aug. 1115. In the core causae, this is the most recent of the *auctoritates*. Gratian then may have started compiling the core cases in the late 1110s or early 1120s.

Causa 15 ends these first *causae* on procedure. Using a murder as the subject, Gratian created a case statement in which a bishop charges a cleric with two crimes committed at different times of his life. He committed the first crime, lapsing into a sin of the flesh, prior to his ordination and the second crime, murder while in a fit of rage, after ordination. The priest pleads not guilty to the murder by reason of mental defect. The hypothetical then offered the particulars of the trial. The bishop tried the case on a Sunday. The accused sought legal defense from certain priests, who would not take the case unless they were paid. In the course of questioning the bishop extorted a confession, which supposes some use of torture. Finally, the bishop pronounced a verdict without a synod hearing.²⁶ In a way intricately woven with the case at hand, Gratian delved into courtroom protocol by analyzing a trial from indictment to conviction.

In order to indict the accused, the accused must have committed the crime with willful intent. People commit sin either by intent or through ignorance. A sin that proceeded from either was to be charged. If, for instance, one man killed another either in a game, in an exercise of strength, or with a javelin during a hunt, Gratian concluded that he was guilty of homicide.²⁷ Whether he willfully killed the man or whether it was an accident, the end result was the same. Gratian, however, qualified this assertion. “With the mind beyond one’s control, he does not garner guilt for those things that he committed, because he did not have the faculty of deliberation. A madman and a *pupillus*

²⁶ Causa 15 d.init.: ‘In crimine carnis lapsus, quidam clericus esse dicitur, ante quam sacerdos esset. Postquam uero sacerdotium est consecutus, in furore conuersus quondam hominem occidet. Quod sanitate restituta, apud episcopum accusatur ab ea, cum qua dicitur esse lapsus. Episcopus uero causam die dominico examinat. Sacerdos crimen negat. Patrocinium quorundam clericorum sibi postulat, qui non sine precio illi patrocinantur. Episcopus tandem questionibus confessionem extorquet; qui solus et sine audientia synodali presbyterum sententia ferit’ (Sg, p. 118a-118b).

²⁷ C.15 q.1 d.p.c.2: ‘Si autem ludo, uel uirium exercitatione, iaculum mittens aliquem occidat, quia hoc ab eo debet esse alienum, homicidii reus habetur’ (Sg, p. 119b).

are exonerated from wrongdoing in that they are not charged with a crime which they did not pursue with full mental capacity.”²⁸ Augustine wrote that some people, suddenly driven mad, harm and kill others. Nevertheless they were less guilty because they committed their actions unknowingly and not from their will. How could he be deemed guilty when he did not know what he did?²⁹ He did not have the faculty of deliberation. He could not be charged when his ability to make a conscious decision was impaired.

Gratian then turned to the matter of obtaining legal counsel. Once an advocate agrees to represent a client, can he charge for his legal services even if he is an ecclesiastic? Having supplied a degree from the Council of Tarragona, which stated that neither priests nor clerics should accept gifts for employing legal defense in the custom of secular courts unless they were freely offered as a tribute of devotion,³⁰ Gratian concluded that the Church has approved of monetary payments as was customary for lay advocates. “For it generally has been received as custom by the church and has been accepted as tradition that clerics can charge for legal defense in the manner of advocates. They may require gifts for their services.”³¹ He thereby reassured the classroom that, indeed, the Church did not frown upon the notion of billable hours.

²⁸ C.15 q.1 d.p.c.2: ‘Mens uero alienata cum conpos sui non sit, eorum, que committit, reatum non contrahit, quia facultatem deliberandi non habuit. Unde in maleficio pupillo et furioso subuenitur, ut ad penam eis non deputantur, que ex mentis deliberatione non processerunt’ (Sg, p. 119b). Gratian again made this parallel between the legal status of women and that of minors with the addition of C.15 q.3. c.3 to the first recension. The text, which stemmed from the Dig. 48.2.2, outlined similar situations in which both could file suit.

²⁹ C.15 q.1 c.5: ‘Aliquos scimus subito dementes factos ferro, fuste, lapidibus, morsibus, multos nocuisse, quosdam et occidisse, et tamen reos minime factos esse, eo quod non uoluntate, sed inpellente ui nescio qua hec gesserint nescientes. Quomodo enim reus constituitur qui nescit quod fecerit’ (Sg, p. 119b).

³⁰ C.15 q.2 c.1: ‘Obseruandum quoque decernimus, ne quis sacerdotum uel clericorum more secularium iudicum pro inpensis patrociniis munera audeat accipere, nisi in ecclesia gratuito oblata, que non fauore muneris uideantur accepta, sed collatione deuotionis oblata’ (Sg, p.120b).

³¹ C.15 q.2 d.p.c.1: ‘Nam generali ecclesiae consuetudine receptum est et moribus approbatum est, ut clerici more aduocatorum patrocinia inpendant, et pro inpendendis munera exigant’ (Sg, p. 120b).

The next concern of the judicial process was when and who could hear a trial. The Council of Tarragona decreed that neither bishops nor presbyters nor clerics should dare to bring forward the proposed business of any case on Sunday as it may disrupt the solemn statutes from God. So long as everyone has convened, it was permitted to try a case any other day of the week.³² Gratian also set forth the number of bishops or *consacerdotes* needed to hear a case against a priest or a bishop. He included Isidore of Seville's comments on the Council of Toledo, which had heard the case of Fragitan, a priest of Córdoba whose bishop degraded him and condemned him to exile without a synodal hearing. While a bishop alone may give honor to priests and to ministers, he may not take away that honor singlehandedly. Only the examination of a council can degrade a priest or a deacon.³³ Pope Gregory wrote that a bishop may not hear cases involving clerics unless the seniors of the church also were present.³⁴ The I Council of Carthage decreed that to condemn a deacon three bishops must be in attendance. If the one charged was a priest, then six bishops were required to sit in judgment. If he was a bishop, then twelve *consacerdotes* must be on hand to hear the case.³⁵ The IV Council of

³² C.15 q.4 c.1: 'Nullus episcoporum autem presbiterorum uel clericorum die dominico propositum cuiuscumque causae negotium audeat uentilare, nisi hoc tantum, ut Deo statuta solempnia peragant. Ceteris uero diebus, conuenientibus personis, illa, que iusta sunt, habent licentiam iudicandi, excepto criminali' (Sg, p. 121b-122a).

³³ C.15 q.7 c.1: 'Quem (Fragitanum Cordubensis) rursus ordini suo restitutum cognouimus esse, id denuo aduersus presumptionem uestram decreuimus, ut puta sanctorum Patrum synodalem sententiam sequentes nullus uestrum sine concilii examinationem quemlibet presbiterum uel diaconum deiciendum putet' (Sg, p. 123a).

³⁴ C.15 q.7 c.2: 'sed presentibus ecclesiae tuae senioribus diligenter est perscrutanda ueritas, et tunc, si qualitas rei poposcerit' (Sg, p. 123a).

³⁵ C.15 q.7 c.3: 'Si quis tumidus uel contumeliosus extiterit, in maiorem natu, uel aliquam causam habuerit, a tribus uicinis si diaconus est arguitur, si presbiter a sex, si episcopus a duodecim consacerdotibus audiatur' (Sg, p. 123a-123b).

Carthage decreed that the sentence of a bishop, who audaciously pronounced it alone without the presence of his clerics, carried no weight.³⁶

Only a conviction, which occurred by one of two means, could lead to the reprimanding of a priest. The first way was if under suspicion and under questioning, he confessed to the crime. C.15 q.6 c.1 illustrates Gratian's position on the use of torture to elicit a confession and serves as further textual evidence that Sankt Gallen cannot be an abbreviation.

Table 15: C.15 q.6 c.1 in Sankt Gallen 673

Sg, p. 122b	Sg, p. 122b
Si sacerdotibus vel auctoribus ecclesiae quedam scripturae quoquo modo per metum aut fraudem, aut per vim extortae fuerint, vel, ut se liberare possint, quocumque ab eis conscriptae aut roboratae fuerint ingenio, ad nullum eis prejudicium vel nocumentum ualere censemus, neque ullam eos infamiam uel calumpniam, aut a suis sequestrationem bonis umquam, Deo auctore et sanctis apostolis eorumque successoribus, sustinere permittimus. Confessio enim in talibus non compulsata, sed spontanea fieri debet. Omnis enim confessio, que fit ex necessitate, fides non est. Confessio ergo in talibus non debet extorqueri, set sponte confiteri.	If on account of priests or authorities of the church certain testimonies shall have been extorted in any way either by fear, or by fraud, or by force, or, so that they are able to absolve them, they [the testimonies] shall have been conscripted or elicited from them by whatever trick, we decree by God the authority and by the holy apostles and their successors that no prejudgment from them or nuisance will be valid and we do not permit that they sustain any infamy, or charge, or sequestering for their own good at any time. For a confession in such things ought not to be compelled but ought to be given willing. For every confession that happens from necessity is not faithful. Therefore confession in such matters ought not to be extorted, but willingly confessed.
Item: Est etiam hoc perlatum ad sanctam sedem (quod pudeo dicere, et non solum sacerdotali, sed etiam omni Christiano nomini est inimicum), id est quod nonnulli episcopos vel sacerdotes aut metu conpellunt, aut vi extorquent, aut fraude	Likewise: For this also has been conveyed to the holy see (which I am ashamed to say that an enemy is not only among the priestly but also among every named Christian), that is, on account of several bishops or priests coercing by fear,

³⁶ C.15 q.7 c.6: 'Episcopus nullius causam audiat absque suorum clericorum presentia; alioquin irrita erit sententia episcopi, nisi presentia clericorum firmetur' (Sg, p. 123b).

Sg, p. 122b	Sg, p. 122b
<p>decipiunt, aliquas confessionis suae in alteram partem, quam debeant, litteras scribere, aut pro suarum non requisitione causarum, aut (quod deterius est) alieni erroris sectae scripturas facere, et propriis manibus roborare, et coram populis recitare.</p> <p>Item: Confessio vero in talibus non compulsa, sed spontanea fieri debet, ipso testante, qui ait: "Ex corde procedunt homicidia, adulteria," et cetera, que sunt ad hec pertinentia. Nec tantum, attendenda sunt que fiant, quantum quo animo fiant. Amplius enim respicit Deus ad cogitationes et spontaneas voluntates, quam ad actus, qui per simplicitatem aut necessitatem fiunt.</p>	<p>extorting by force, and deceiving by fraud, some people (as they ought) write letters of confession – both confirmed by their own handwriting and read aloud to the people – regarding a different matter, or not pertaining to the examination of their case, or (which is worse) having been injured confess to a different error.</p> <p>Likewise: A true confession in such matters is not compelled, but ought to happen willingly, by the one witnessing, who said: "Homicides and adultery proceed from the heart," etc. that pertain to these things. The more these things that happen are not attended to, the more they happen in the mind. For God has greater regard for reflective and willing desires, than for deeds that happened either by simplicity or by necessity.</p>

To the papacy's dismay, bishops and priests have compelled people by fear, extorted by force, or deceived them by fraud so that they would write letters of confession to errors not committed which then were read publicly. The Holy See forbade any testimony elicited by fear, deception, or force. For God has greater regard for reflective and willing desires, than for deeds that happened either by simplicity or by necessity. A person should confess willingly and those that were not offered willingly were not valid.

Gratian would continue to develop his ideas by adding two sections of text to Gratian 1: "profiteri. Pessimum enim est de – iudicia non haberent" and "atque confiteri. Alios – suis faveant voluntatibus."

Table 16: C.15 q.6 c.1 in Gratian 1

Fd, fol. 50r; Aa 43, fol. 17r	Fd, fol. 50r; Aa 43, fol. 17r
<p>Si sacerdotibus vel auctoribus ecclesiae quedam scripturae quoquo modo per metum aut fraudem, aut per vim extortae fuerint, vel, ut se liberare possint, quocumque ab eis conscriptae aut roboratae fuerint ingenio, ad nullum eis prejudicium vel nocumentum valere censemus, neque ullam eos infamiam vel calumpniam, aut a suis sequestrationem bonis umquam, Deo auctore et sanctis apostolis eorumque successoribus, sustinere permittimus. <i>Confessio enim in talibus non compulsa, sed spontanea fieri debet. Omnis enim confessio, que fit ex necessitate, fides non est.</i> Confessio ergo in talibus non debet extorqueri, set sponte <u>profiteri</u>. <u>Pessimum enim est de suspicione aut extorta confessione quemquam iudicare, cum magis cordis inspector sit Dominus, quam operis.</u> <u>Non potest autem humano condemnari examine quem Dominus suo reseruauit iudicio.</u> <u>Si omnia namque in hoc seculo vindicata essent, locum divina iudicia non haberent.</u> Item: Est etiam hoc perlatum ad sanctam sedem (quod pudeo dicere, et non solum sacerdotali, sed etiam omni Christiano nomini est inimicum), id est quod nonnulli episcopos uel sacerdotes aut metu compellunt, aut vi extorquent, aut fraude decipiunt, aliquas confessionis suae in alteram partem, quam debeant, litteras scribere, aut pro suarum non requisitione causarum, aut (quod deterius est) alieni erroris sectae scripturas facere, et propriis manibus roborare, et coram populis recitare <u>atque confiteri</u>. <u>Alios dicunt carceribus et ergastulis retrudi, ut saltem his territi insidiis Domini sacerdotes, suis faveant voluntatibus.</u> Item: Confessio vero in talibus non compulsa, sed spontanea fieri debet, ipso testante, qui</p>	<p>If on account of priests or authorities of the church certain testimonies shall have been extorted in any way either by fear, or by fraud, or by force, or, so that they are able to absolve them, they [the testimonies] shall have been conscripted or elicited from them by whatever trick, we decree by God the authority and by the holy apostles and their successors that no prejudgment from them or nuisance will be valid and we do not permit that they sustain any infamy, or charge, or sequestering for their own good at any time. <i>For a confession in such things ought not to be compelled but ought to be given willing. For every confession that happens from necessity is not faithful.</i> Therefore confession in such matters ought not to be extorted, but willingly <u>professed</u>. For it is most wicked to judge someone <u>from a suspicion or from an extorted confession, since it is better for the Lord to be the inspector of the heart, as much as of the deed.</u> <u>Moreover it is not possible to be condemned by human examination that which the Lord reserved for His judgment.</u> <u>If indeed all things had been punished in this secular world, divine judgments would have no place.</u> Likewise: For this also has been conveyed to the holy see (which I am ashamed to say that an enemy is not only among the priestly but also among every named Christian), that is, on account of several bishops or priests coercing by fear, extorting by force, and deceiving by fraud, some people (as they ought) write letters of confession – both confirmed by their own handwriting and read aloud to the people <u>and professed</u> – regarding a different matter, or not pertaining to the examination of their case, or (which is worse) having been injured confess to a different error.</p>

Fd, fol. 50r; Aa 43, fol. 17r	Fd, fol. 50r; Aa 43, fol. 17r
ait: "Ex corde procedunt homicidia, adulteria," et cetera, que sunt ad hec pertinentia. Nec tantum, attendenda sunt que fiant, quantum quo animo fiant. Amplius enim respicit Deus ad cogitationes et spontaneas voluntates, quam ad actus, qui per simplicitatem aut necessitatem fiunt.	<u>They say that the others returned to prison and penitentiary – as the priests of the Lord have been terrified by these enemies – so that they may be inclined to their wishes.</u> Likewise: A true confession in such matters is not compelled, but ought to happen willingly, by the one witnessing, who said: "Homicides and adultery proceed from the heart," etc. that pertain to these things. The more these things that happen are not attended to, the more they happen in the mind. For God has greater regard for reflective and willing desires, than for deeds that happened either by simplicity or by necessity.

The additional text elaborates on and reinforces the argument laid out in St. Gall.

Suspects were put in prisons and in penitentiaries in an effort to extort a confession.

Rather than judging someone based on suspicion and a forced confession, it was better to allow the Lord to judge the person's deed and the intentions that were in his heart. It was not possible to condemn by human examination what was reserved for His judgment.

For if all things were judged in this world, there would be no room for divine judgment.

Winroth noted that Gratian 1 omitted "Confessio enim in talibus non compulsa, sed spontanea fieri debet. Omnis enim confessio, que fit ex necessitate, fides non est,"³⁷

though Sankt Gallen had included this text. While Admont incorporated the complete canon, a later hand copied the text in Florence.³⁸

C.15 q.6 c.1, comprised of three texts taken from a letter supposedly from Pope Alexander I, is Pseudo-Isidorian in nature. It circulated widely in the canonical

³⁷ Winroth, *The Making of Gratian's Decretum*, 214.

³⁸ Aa 43, fol. 17r; Fd, fol. 50r.

collections in many different forms.³⁹ Six collections contain the first of the three texts, “Si sacerdotibus vel auctoribus ecclesiae quaedam – iudicia non haberent.” One collection, *Collectio Caesaraugustana* (Version 2, Appendix, 89) attributes the text to Pope Alexander. Both the *Collectio Tarraconensis* (Version II, 6.152) and the Paris BN lat. 13368 (85) use an alternate version of the inscription, Alexandri PP. Four collections have the more detailed inscription “Alexander PP 5us a Petro in suorum 1o Decretalium omnibus episcopis”: *Decretum* of Ivo of Chartres (5.241a), *Tripartita* of Ivo of Chartres (1.04.001a), *Collectio X partium* (Cologne HA 199, 8.11.18a), and *Collectio Catalaunensis I* (10.002a). The final collection, *Collectio Catalaunensis I*, does contain an error in the incipit, miscopying *auditoribus* for *auctoribus*. A seventh collection, the *Panormia* of Ivo of Chartes (4.118), contains a slightly different version of the first text with the attribution of “Evaristus episcopis omnibus, Alexander PP 5us a Petro in suorum 1o Decretalium,” with the incipit of “Si sacerdotibus vel auctoribus ecclesiae quaedam,” and with the explicit of “successoribus sustinere permittimus.”

Three collections contain the second of the three texts, “Est etiam hoc perlatum ad sanctam – suis faveant voluntatibus,” though with variations to the incipit. The Correctores noted that the incipit should read “Est etiam et ad hanc.”⁴⁰ Both the *Collectio Sancte Marie Novelle* (106.06) and the *Collectio VII librorum* (Vienna ÖNB 2186, 2.033.02) contain the incipit “Est etiam et hoc ad hanc.” The *Collectio III librorum*

³⁹ My discussion of the canonical sources rests on information contained in Fowler-Magerl’s *Clavis canonum* [CD-ROM] program. My search focused on the inscription, incipit, and explicit. Unless stated otherwise, I have used her database for all references to canonical collections.

⁴⁰ Vgl. *edF*, col 755, n. i.

(2.32.151) uses “Est etiam et hoc ad sanctam.” All three collections have the inscription of Pope Alexander.

Two collections contain the third of the three texts beginning with the incipit “Confessio vero in talibus non compulsa.” While both the *Collectio X partium* (Cologne HA 199, 8.11.19b) and the *Tripartita* of Ivo of Chartres (1.04.009) begin with the same incipit as Gratian’s text, they end with the explicit “quam labia mendacia” rather than that found in the *Decretum* “aut necessitate fiunt.”

A source analysis of the three texts that comprised C.15 q.6 c.1 illustrates that the texts circulated in longer versions than that originally included by Gratian. St. Gall contains truncated versions of the first two texts and all recensions of the *Decretum* contain a truncated version of the third text. The first text included in St. Gall leaves out the latter half of the text “Pessimum enim est de – iudicia non haberent.” The second text included in St. Gall leaves out the latter half of the text “atque confiteri. Alios dicunt carceribus et ergastulis retrudi, ut saltem his territi insidiis Domini sacerdotes, suis faveant uoluntatibus.” Finally, it appears that Gratian chose not to use the entire version of the third text as the *Collectio X partium* and the *Tripartita* have a different explicit. An abbreviator would not have deleted text and then divided into three canons what was a unified canon in Gratian 1. Rather Gratian selected the information he wanted to include for his text in St. Gall; then, when he revised his work with Gratian 1, he expanded two of the three texts and combined them into one canon. He also may have removed “Confessio enim in talibus – fides non est” in the course of revising. Either

Gratian or a later jurist added the text again as it was incorporated into Admont and added in the margins of Florence.

Further evidence that the St. Gallen manuscript cannot be an abbreviation of Gratian 1 is the use of “confiteri” versus “profiteri” in the first of the three texts. This variant is important. Pseudo-Isidore, Florence, and Admont have “profiteri.”⁴¹ St. Gallen, a number of vulgate manuscripts, and the *Collectio III librorum* read “confiteri.”⁴² St. Gall cannot be an abbreviation of Gratian 1 because it does not have the same reading as the Gratian 1 manuscripts and an abbreviator would not have made this change. St. Gall conforms to a tradition found in some collections and in other vulgate texts.

Gratian used only one canon in St. Gall to answer the question of whether torture could elicit a confession. The answer apparently was self-evident enough that no further proof was needed; he did not add further canons to Gratian 1. His stance on torture did depend, however, upon the ends that it served. While he prohibited its use in this case, he painstakingly justified with 103 canons the use of torture, and even the death penalty, as punishment for the recalcitrant. Question four of Causa 23 Gratian rationalizes the use of physical coercion so long as it was not for retaliatory reasons and the Church was not involved. Question five sets forth the use of scourging and the death penalty. Torture had its uses as punishment, but not for confession.

⁴¹ Fd, fol. 50r; Aa 43, fol. 17r; Vg. *edF*, col. 754, n. 2. Friedberg noted that the canon was Pseudo-Isidorian. Neither the Paris manuscript, which ends in the midst of C.12 q.2 c.39, nor the Barcelona manuscript, which ends after C.12 q.5, contain this causa.

⁴² Vgl. *edF*, col. 755, n. 19. Friedberg noted the reading of *confiteri* in ms. B (Darmst. 2521), ms. E (Cod. lat. No. 10244 Monacensis), ms. G (Codex bibliothecae Guelferbytanæ Helmstadiensis 33), and ms. H (Cod. lat. I bibliothecae regiae Berolinensis). I would like to thank Prof. Pennington for bringing to my attention the reading in the *Collectio III librorum*.

If the accused chose not to confess, he could proceed, via the second avenue, to trial with the qualified witnesses and the appropriate number of bishops. A letter from Pope Stephan to Leo, the bishop of Tyana (an ancient Turkish city), offered instruction on how to proceed in the accusations brought against the deacon Alderic. If *mala fama* befell him without public examination, though he neither confessed willingly nor had legitimate accusers and witnesses been discovered, he should purify himself by a secret oath before Leo and a number of reverent priests and deacons of his church. Leo should announce him of good testimony and then restrain and remind the sons of his church, lest they presume to defame further a priest of God.⁴³ If the charges could not be proven and he had come under *mala fama*, the bishops were to restore his reputation and remind those under their supervision of the penalties for false denunciations. If the testimony of the witnesses was not sufficient to convict the priest or deacon and he did not confess to his crime, he could not be stripped of his office. Only a confession or the quality of testimony was able to convict a cleric and thus lead to the degrading of his ecclesiastical status.⁴⁴ Nicholas I reminded the Bulgarians that, “First, as you hear, lest you will be judged as such, you will suspend no one from your communion without evidence of the accusation brought forth, because he who is accused is not immediately guilty, but he

⁴³ C.15 q.5 c.1: ‘Quod si nec sponte confitetur, nec accusatores et testes legitimi fuerint reperti, et mala fama crebrescit, non publico examine, set coram te, et aliquantisper reuerentissimis presbyteris et diaconibus tuae ecclesiae filiis sacrato iuramento se purificet et deinceps boni testimonii eum annuncia, et conpesce et commune ecclesiae filios, ne sacerdotes Dei infamare ulterius presumant’ (Sg, p. 122a).

⁴⁴ C.15 q.5 c.2: ‘Sola ergo spontanea confessio, et canonicus numerus, et qualitas testium, decernentibus episcopis, et accusatore quod obiecerat approbante [Fd, fol. 50r; Aa 43, fol. 17r; Vgl. *edF*, col. 754: conprobante], clericum priuat proprio gradu’ (Sg, p. 122b).

who is convicted is a criminal.”⁴⁵ With that said “until he is condemned by the judgment of the bishops, communion should be seized, since the good [sacraments] only wound by the ministering of the bad.”⁴⁶ Only a conviction, which came from a willing confession or from reliable testimony, could remove him from his station. Until the judge pronounced a verdict, however, the accused should be suspended from his duties. Students learned what constituted proper protocol, which would enable them to detect irregularities if they arose.

In the course of this lesson on courtroom procedure, Gratian broached the question of whether or not a woman could accuse a clergy member. He analyzed the possibility both from the canonical as well as the Roman traditions. Beginning with the canonical tradition, he put forth the objection, posited by Pope Fabian, that women could neither accuse priests nor testify against them. Because they were not permitted to join the ranks of the priesthood, women did not have the ability to bring charges against them.⁴⁷ With this Gratian briefly considered the opposing scriptural viewpoint. The Book of Judges stated that women in the Old Testament were permitted to judge and thus they should not be forbidden from bringing accusations. He quickly dismissed this argument maintaining that: “In the old law many things were permitted, which today the perfection of grace has abolished. For the people were permitted to judge along with

⁴⁵ C.15 q.8 c.5: ‘Prius, quam audias, ne iudicaues quemquam, absque probationem accusationis illatae neminem a tua communione suspendas, quia non statim qui accusatur reus est, set qui conuincitur criminosus’ (Sg, p. 124a).

⁴⁶ C.15 q.8 c.5: ‘usquequo episcoporum iudicio reprobetur, communio percipienda est, quoniam mali bona ministrando se tantummodo ledunt’ (Sg, p. 124a).

⁴⁷ C.15 q.3 d.a.c.1: ‘Et Fabiani decretis sanctitum ut sacerdotes Domini non accusent, qui sui ordinis non sunt, nec esse possunt. Mulieres uero non solum ad sacerdotium, set nec etiam ad diaconatum accedere possunt, unde nec sacerdotes accusare, nec contra eos testificari ualent.’ (Sg, p. 120b). See Giovanni Minnucci, *La capacità processuale della donna nel pensiero canonistico classico* (Milan: Giuffrè Editore, 1989), 5-6.

women, today on account of sin, which a woman committed, the Apostle declared that they should feel shame, be subjected to a man, and to have a veil cover their head as a sign of subjection.”⁴⁸

Gratian presented another counter-argument from the Roman legal tradition that there were certain crimes in which women were not prohibited from bringing forth an accusation. While holding to the general prohibition against women bringing cases before the praetor, Roman law allowed her do so when a public crime was committed against her or against the interests of her family. Such an accusation, furthermore, was not required to be committed to writing. Aside from this a woman was forbidden from initiating an allegation.⁴⁹ Gratian’s source came from a text, found in Justinian’s *Codex*, promulgated by Emperors Diocletian and Maximian.⁵⁰ Sankt Gallen retained the attribution to *Imperatores Diocletianus et Maximianus*. Gratian 1, however, changed this original attribution to simply *Imperator Diocletianus*.⁵¹ It is improbable that an abbreviator would have referred back to the *Codex* for the name of the co-emperor and is

⁴⁸ C.15 q.3 d.a.c.1: ‘Ad quod dicitur quod ueteri lege multa mittebantur, que hodie gratiae perfectione abolita sunt. Cum enim mulieribus permetteretur populum iudicare, hodie pro peccato, quod induxit mulier, ab Apostolo eis indicitur uerecundari, uiro subditas esse, in signum subiectionis uelatum caput habere’ (Sg, pg. 121a). Gratian would note that on account of their subjugation, the testimony of women should not be admitted. See Minnucci, *La capacità processuale*, 9-10. He added the relevant sentence - ‘Que ergo his omnibus uiro subiecta ostenditur, cui pro alio postulare non conceditur, ad accusationem admittenda non uidetur’ – to d.a.c.1 in the first recension (Fd, 49v; Aa 43, fol. 15v).

⁴⁹ C.15 q.3 d.a.c.1: ‘Econtra, quamquam passim et indifferenter ad accusationem mulier non admittatur, tamen sunt quedam crimina, quorum accusationem mulier subire non uetatur’ (Sg, p. 121a). [C.15 q.3 c.1] ‘De crimine, quod publicorum fuerit iudiciorum, mulieri accusare non permittitur, nisi certis ex causis, id est si suam suorumque iniuriam persequatur, secundum antiqui iuris statuta tantum, de quibusdam specialiter eis concessum est, non exacta subscriptione’ (Sg, p. 121). See Minnucci, *La capacità processuale*, 7-8.

⁵⁰ Cod. 9.1.12: ‘De crimine quod publicorum fuerit iudiciorum, mulieri accusare non permittitur nisi certis ex causis id est si suam suorumque iniuriam persequatur secundum antiquitus statuta tantum de quibus specialiter eis concessum est non exacta subscriptione. Unde aditus preses prouinciae in primis examinabit an tale sit crimen, cuius accusationem mulier subire non prohibetur.’

⁵¹ Fd, fol. 49v; Aa 43, fol. 15v; Vgl. *edF*, col. 751.

evidence that Gratian worked with Roman law early in his teaching career.⁵² Gratian continued his argument in St. Gall by citing another text from the *Codex*, this one promulgated by Emperor Leo Augustus to Armasius, Praetorian Prefect. Leo equated simony and high treason with the former carrying the same sentence as the latter, the degrading of a cleric from his rank. He no longer was eligible to obtain the honor or benefits of his station and he also was condemned to perpetual infamy.⁵³ Given the right to bring a charge in the case of a public crime, Gratian concluded that “any person permitted to [bring forth] an accusation of public crimes or of high treason is not prohibited from bringing forth an accusation of simony.”⁵⁴

In the first recension, Gratian would refine the argument of C.15 q.3 with the addition of two texts, c.2 and c.3. These canons include four passages from the *Digest* and one from the *Codex*. In c.2, Paul drew attention to the *lex Iulia* and the prohibition against women, guilty of adultery, providing testimony as proof that in fact women could testify at a trial. A woman also could bring suit in criminal cases involving the death of her parents, children, patron/patroness, or their children/grandchildren.⁵⁵ The provision extended into criminal proceedings with regards to the will of her father’s or mother’s

⁵² Pennington has made the same observation about the inscription noting its connection with the work of Bulgarus. See “The ‘Big Bang’,” 56-57.

⁵³ C.15 q.3 c.4: ‘Sane quisquis hanc sanctam et uenerandam antistitis sedem pecuniae interuentu subisse, aut si quis, ut alterum ordinaret uel eligeret, aliquid acceperit detegitur, ad instar publici criminis uel lesae maiestatis accusatione proposita, a gradu sacerdotis retrahatur. Nec hoc solum deinceps honore priuari, set perpetuae quoque infamiae dampnari praecipimus, ut facinus par quos inquinat [et] equat, utrosque simile pena comitetur’ (Sg, p. 121a-121b). Emperors Leo and Anthemius promulgated the decree though unlike c.1, Gratian did not include Anthemius as the co-emperor in the attribution.

⁵⁴ C.15 q.3 d.p.c.3: ‘Quecumque uero persona ad accusationem publicorum iudiciorum uel lesae maiestatis admittitur, eadem accusationem symoniae subire non prohibetur’ (Sg, p. 121a).

⁵⁵ C.15 q.3 c.2: ‘Item in libro Digestorum, Paulus libro II. de adulteriis. Ex eo, quod prohibet lex Iulia de adulteriis testimonium dicere condemnatam mulierem, colligitur etiam mulieres testimonium dicendi in iudicio ius habere. Item de accusationibus et inscriptionibus, lege 1.: Non est permittum mulieri publico iudicio quemquam reum facere, nisi scilicet parentum liberorumque, et patroni et patronae, et eorum filii filiaeue, nepotis neptisue mortem exequatur’ (Fd, fol. 49v; Aa 43, fol. 15v-16r; Dig. 22.5.13; Dig. 48.2.1).

freedman. Finally, as Paul again pointed out, women could bring charges for high treason as it was Fulvia who revealed the conspiracy of Catiline and gave information to the consul M. Tullius (Cicero).⁵⁶ The addition of these canons introduced the notion that women could testify in criminal proceedings.

Gratian finally attempted to reconcile the apparent contradictions between Roman and canon law in St. Gall. Roman law left the door open for a woman to bring forth an accusation in a very specific circumstance, when the crime was against her or against the interests of her family. Canon law, however, forbade a woman from bringing forth any accusation, much less against a priest. Gratian concluded that some accusations were permitted in canon law but were not permitted in secular law and vice versa. He pointed to secular law where the children of two brothers, that is, first cousins, could marry with permission, a practice prohibited in canon law.⁵⁷ While Gratian conceded that a woman had the right to bring forth an accusation, fornication was not named specifically as one of the permitted instances and thus her accusation did not fit into the proscribed category. Furthermore, her accusation of his sin was not to be believed until he confessed to it.⁵⁸

⁵⁶ C.15 q.3 c.3: 'Paulus libro 1. de adulteriis. Certis de causis concessa est mulieribus publica accusatio, ueluti si mortem exequantur eorum earumque, in quos ex lege testimonium publicorum inuitae non dicant. Idem et in lege Cornelia testamentaria senatus statuit; sed et de testamento paterni liberti uel materni mulieribus publico iudicio dicere permissum est...Codice qui accusare possunt uel non, idem Augustus Dionisio: Uxor tua, si consobrini sui necem uindicandam existimat, adeat presidem prouinciae. Digestis ad legem Iuliam maiestatis, Papinianus libro 12. Responsorum: In questionibus lesae maiestatis etiam mulieres audiuntur. Coniurationem Sergii Catilinae Iulia mulier detexit, et M. Tullium consulem iudicium eius instruxit' (Fd, fol. 49v; Aa 43, fol. 16r; Dig. 48.2.2; Cod. 9.1.4; Dig. 48.4.8).

⁵⁷ C.15 q.3 d.p.c.4: 'Cum autem sacris canonibus accusationes omnino remoueantur, quos leges seculi non asciscunt, e diuerso uidentur admittendae que legibus seculi non prohibentur. Set hoc non infertur. Nam quicumque personae humanis legibus copulari prohibentur et diuinis. Non autem omnium copula sacris canonibus admittitur, quorum coniunctio legibus imperatorum indulgetur. Filii namque duorum fratrum earum permissiones iunguntur' (Sg, p. 121b)

⁵⁸ C.15 q.3 d.p.c.4: 'Cum autem generales regulas quedam specialiter sint excepta, in quibus mulieri accusare permittitur, inter que non numeratur fornicatio, patet, quod huius accusatio duppliciter infirmatur,

Gratian altered q.3 d.p.c.4 in the second recension. In lieu of the marriage of first cousins to illustrate the differences, he used a different example. While both laws permitted cantors and lectors to marry, canon law also included acolytes in that category. As the Correctores noted, the *Codex* did not mention acolytes because they did not exist as an order in the East. Both Kuttner and Winroth have pointed to the reference of acolytes as an example of Gratian's tenuous understanding of Roman law.⁵⁹ Winroth reasoned that because most twelfth-century canonists may not have known whether acolytes in the East could marry this passage made sense, even if incorrect.⁶⁰ The textual evidence offers a more nuanced explanation. The Admont manuscript incorporated both the original text – “Quecumque enim persone humanis legibus copulari prohibentur et divinis, non omnium copula a sacris canonibus admittitur, quorum conventio legibus imperatorum indulgetur” – and, following *aliter* (otherwise), the corrected text – “Quicumque enim clericorum nuptias sacris canonibus contrahere prohibentur, et legibus inperatorum. Non autem consequenter omnium copulam leges admittunt, quorum coniunctionem sacri canones non prohibent; legibus enim soli cantores et lectores, canonibus autem etiam acoliti uxores ducere possunt.”⁶¹ For whatever reason, Winroth did not indicate Admont's addition of both versions in his appendix, but rather he cited only the first version.⁶² A later hand erased the Gratian 1 version of the text in Florence

tum quia fornicationis crimen intendit, et quia, dum de se confitetur, super alterius crimen ei credi non debet’ (Sg, p. 121b).

⁵⁹ Stephan Kuttner, “New Studies on Roman law in Gratian's *Decretum*,” *Seminar* 11 (1953): 45-47; Winroth, *The Making of Gratian's Decretum*, 151-153.

⁶⁰ Winroth, *The Making of Gratian's Decretum*, 153.

⁶¹ Aa 43, fol. 16r-16v; Vgl. *edF*, col. 752

⁶² Winroth, *The Making of Gratian's Decretum*, 214.

and corrected the main text with the Gratian 2 version.⁶³ As Admont bears witness, both versions of the text circulated with the Gratian 2 version eventually superceding the original. The textual evidence in both Admont and Florence suggests a vague understanding of Eastern canon law and not of Roman law in general.

Gratian ended Question three in St. Gall with a decretal from Pope Julius. With the exception of high treason, a confession about another's crime was neither to be believed nor admitted because such a practice was riddled with pitfalls.⁶⁴ Gratian concluded that even though the woman's confession against the priest was dismissed, his confession against her should be taken into consideration.⁶⁵ In lieu of qualified witnesses only his confession of fornication could condemn him, a point Gratian returned to in Question eight when he linked confession to conviction.

At the outset of Question three, Gratian asked whether the testimony of a woman could condemn a priest. The short answer was yes. Her testimony could condemn him only if the woman brought the suit as a public crime committed against her or against the interests of her family. Gratian, however, offered a more nuanced understanding of the law. In Gratian 1 he added the last sentence of c.1 which stated that "when a petition has been made to the governor of the province he will first examine whether the crime is one for which a woman is permitted to bring forth an accusation."⁶⁶ The judge would have

⁶³ Fd, fol. 49v-50r. What I refer to as Hand Gr² made the in-text erasure and correction. As I will discuss further in Chapter Six, Hand Gr² may possibly be one of the later hands to augment the Florence text.

⁶⁴ C.15 q.3 c.5: 'Nemini de se confesso super alienum crimen credi oportet, quoniam eius atque omnis rei professio periculosa est, et admitti aduersus quemlibet non debet' (Sg, p. 121b). The canon is a Pseudo-Isidorian decretal.

⁶⁵ C.15 q.3 d.p.c.5: 'Quia igitur de se ista confitetur, super alienum crimen ei credi non debet, sed sua confessio contra eam est interpretanda' (Sg, p. 121b).

⁶⁶ C.15 q.3 c.1: 'Unde aditus preses prouinciae in primis examinabit an tale sit crimen, cuius accusationem mulier subire non prohibetur' (Fd, fol. 49v; Aa 43, fol. 15v).

had to dismiss the case. Because fornication did not qualify as a one of the accepted public crimes, neither could she bring charges nor could she testify. Gratian upheld the New Testament by way of Roman law. While there appeared a glimmer of hope for our poor woman – of whose trusting nature the smooth talking priest no doubt took advantage – a legal technicality kept her from the witness stand. By analyzing the varying viewpoints presented in two different legal traditions, Gratian ended his tract on procedure exactly where he began – with how to argue a case successfully.

The Question of Rights in the Core Causae

Following the cases on procedure Gratian focused on the question of rights in specific situations. Causae 17, 19, 20, 22, and 34, the remaining causae in Cluster A, examined these issues in the monastic life, oath-taking, and marriage.

Causa 17 introduces a three-causae tract on monasticism. The matters regarding monastic vows and what constitutes a valid vow ground the tract by providing a foundation for Causae 19 and 20. Causa 17 treats a priest who has suffered from an illness and decides to become a monk. He renounced his benefice and church.⁶⁷ Gratian would clarify in the subsequent recension that they were placed into the hands of an advocate.⁶⁸ The priest recovered from his illness and revoked his decision to become a monk and sought to recover his benefice and his church.⁶⁹ The case sets forth the

⁶⁷ Causa 17 d.init.: ‘Grauatus infirmitate presbyter quidam monachum se fieri destinavit. Sicque ecclesiae et beneficio renunciauit’ (Sg, p. 139b).

⁶⁸ Causa 17 d.init.: ‘ecclesiae et beneficio in manu aduocati renunciauit’ (Fd, fol. 55v; Aa 43, fol. 38r).

⁶⁹ Causa 17 d.init.: ‘Cum uero conualuit se uelle fieri monachum negavit. Unde ecclesiam et beneficio reposcit’ (Sg, p. 139b). James Brundage’s work was a helpful reference for Questions one and two. See *Medieval Canon Law and the Crusader* (Madison: University of Wisconsin Press, 1969), 40-42.

requisite criteria for a legitimate monastic vow. Instances undoubtedly arose in the Middle Ages when an individual sought to retract a vow, leaving a bishop with the problem of determining whether the conditions under which he entered into it were binding. Relying on canons attributed to Augustine and Jerome, Gratian began the discussion under the premise that it was damnable not to fulfill the vow or even to consider not fulfilling it.⁷⁰ Gratian then made a subtle distinction between pondering a proposal in the heart, pronouncing it aloud, and placing oneself under the obligation of a vow. “Because he simply pronounced the proposal in his heart and neither handed himself over to the abbot in a monastery nor made his promise in writing, he is held less responsible for the vow.”⁷¹ A person must enter the community physically, subject himself to the abbot, or make his promise in writing. Gratian cited Alexander II’s account of a priest named Consaldus. Sick with fever Consaldus vowed to become a monk and relinquished his benefice to an advocate. Later he denied his vow without having entered a monastery or making his intentions known in writing.⁷² According to the Benedictine Rule, simply saying aloud that he wished to become a monk did not bind

⁷⁰ C.17 q.1 c.1: ‘set postquam ea Domino promittimus, necessario reddere constringimur’ (Sg, p. 140a). [C.17 q.1 c.2]: ‘Vouentibus non solum nubere set etiam uelle dampnabile est.’ (Sg, p. 140a).

⁷¹ C.17 q.1 d.p.c.4: ‘Unde quia sui cordis propositum iste simpliciter enunciauit non autem monasterio aut abbati se tradidit, nec promissionem scripsit, minime reus uoti habetur’ (Sg, p. 140a-140b). In Sg d.p.c.4 also serves as d.a.c.1 of Question two.

⁷² C.17 q.2 c.1: ‘Consaldus presbiter quondam infirmitate feruore passionis pressus, monachum se fieri promisit, non tamen monasterio aut abbati se tradidit, nec promissionem script sit, set beneficium ecclesiae in manu aduocati refutauit. At postquam conualuit, mox se monachum negauit fieri’ (Sg, p. 140b).

him to the monastic yoke.⁷³ Furthermore, if he chose to leave the order prior to the end of his probationary period he was not bound by the vow.⁷⁴

A potential source of friction between the various ecclesiastical orders were cases in which one sought to leave his current station for a monastic life. Causa 19 questions whether clerics needed the permission of their bishop to enter a monastery. The hypothetical in St. Gall explains that two clerics wanted to transfer into a monastery and they sought permission from their bishop.⁷⁵ Though omitted from the hypothetical in Florence, the margins of Admont and later the vulgate recension would include the additional text “*unus relicta propria ecclesia eo invito, alter dimissa regulari canonica cenobio se contulit.*”⁷⁶ While one relinquished his church even though his bishop opposed his transfer to a monastery, the other transferred to a monastery having left the canons regular. The case protects the right of those wishing to lead a monastic life. In St. Gall Gratian argued by way of Urban II’s letter *Duae sunt* that a cleric may enter a monastery even if his bishop had not granted permission. Public law was that which the writing of the holy fathers confirmed and was regarded as canon law. Private law, on the other hand, was written in the heart by the inspiration of the Holy Spirit. If any cleric, having breathed in the Holy Spirit, was lead by private law to save himself by leading a

⁷³ C.17 q.2 d.p.c.2: ‘Ecce iste se corde concepit se monachum fieri, et ore pronunciauit se uelli in ocium sanctum conferre, non tamen postea coactus suscipere Benedicte quod corde concepit et ore dixit’ (Sg, p. 140b).

⁷⁴ C.17 q.2 c.1: ‘Quopropter quia et Beati Benedicti regula, et precipue patris et predecessoris nostri Santi Gregorii Papae canonica institutio interdicat monachum autem unius anni probationem effici, iudicamus et auctoritate apostolica precipimus, ut prefatus presbiter beneficium et altaria recipiat, habeat, et quiete retineat’ (Sg, p. 140b).

⁷⁵ Causa 19 d.init.: ‘Volunt duo clerici ad monasterium transire; petiit uterque ab episcopo suo licentiam’ (Sg, p. 144b).

⁷⁶ Causa 19 d.init.: ‘unus relicta propria ecclesia eo invito, alter dimissa regulari canonica cenobio se contulit’ (Aa 43, fol. 42v; Vgl. *edF*, col. 839).

monastic life, the refusal of his bishop to release him should not be a deterrent. He was not held by public law, since this decision fell under the worthier category of private law.⁷⁷ “Should someone be led by this law he was free to enter a monastery even if it contradicted the bishop’s will.”⁷⁸ Private law, which stemmed from the Holy Spirit, justified the desire of the cleric to undertake a stricter life in spite of an act of disobedience.

Pennington has argued that the version of *Duae sunt* included in St. Gall and Gratian 1 represented Urban’s original text and that Gratian took it from an unknown source of Urban’s letters. First, the version found in Gratian 2 was significantly longer. The additional text, which elaborated on the *lex publica*, referred directly to D.71 c.7 and indirectly to C.7 q.1 c.27. Both St. Gall and Gratian 1 omitted these texts.⁷⁹ Second, in order to elaborate on the *lex privata* the author of the expanded version of *Duae sunt* referred to the New Testament to justify man’s freedom from canon law because liberty is found under the protection of the Lord.⁸⁰ Third, the addition of the phrase *vel canonica regulari*, which extended to the canons regular the right to transfer into a monastery without episcopal permission, distorted Gratian’s original argument. The expanded version included in Gratian 2 corresponds to that found in every known pre-

⁷⁷ C.19 q.2 c.2: ‘Duae sunt, inquit, leges, una publica, altera priuata. Publica lex est que a sanctis patribus scriptis est confirmata, ut est lex canonum. Lex uero priuata est que instinctu spiritus in corde scribitur. Si quis qui priuata ducitur spiritu sancto afflatus, proprium quod sub episcopo retinet dimittere et in monasterio se saluare uoluerit, quoniam priuata dicitur, publica lege non tenetur. Dignior est enim priuata lex quam publica’ (Sg, p. 144b). Gratian again turned to the distinction between public and private law, though with a slightly different usage than in Causa 14. In both Causa 19 and Causa 14, though, private law referred to that which was personal while public law referred to that which impacted the whole.

⁷⁸ C.19 q.2 c.2: ‘Quisquis ergo hac lege ducitur etiam episcopo suo contradicente erit liber nostra auctoritate’ (Sg, p. 144b-145a).

⁷⁹ Pennington, “Gratian, Causa 19, and the Birth of Canonical Jurisprudence,” 4:343.

⁸⁰ Ibid.

Gratian collection, such as the *Polycarpus* and *Collectio III librorum*. Gratian, therefore, must have started working early in the twelfth century if he knew of the original text.⁸¹

Question three in St. Gall specifically addresses whether canons regular needed permission to enter a monastic life. Gregory VII prohibited abbots and monks from accepting canons regular into the monastic profession under pain of anathema.⁸² The canon originally read “*canonici posito*,” though a later hand added “*canonicos regulares a pro[posito].*” Pennington has noted that Gratian added the reference to “*canonicos regulares*” in Gratian 1 to make the text fit with the subject matter of Question three. A scribe later corrected St. Gall to bring the canon in line with Gratian 1, which provides further evidence for the evolution of the text.⁸³ Gratian followed in St. Gall with a text from Urban II, which also forbid canons regular from transferring into a monastery and proscribed the penitential cowl and a life of chanting for those who did.⁸⁴ This prohibition, Gratian explained, only pertained to those canons regular who did not receive the permission of their superior prior to entering the monastery.⁸⁵ He supported his stance with another letter of Urban II, which gave them permission to become monks with the consent both of the prior of the cathedral chapter and of the canons of the

⁸¹ Ibid., 4:346-349, 4:350-351.

⁸² C.19 q.3 c.1: ‘Nullus abbas uel monachus canonicos regulares posito professionis canonicae reuocare, atque ad monasticum habitum trahendo suscipere audeat, ut monachi fiant, quamdiu ordinis sui ecclesiam inuenire quiuerint, in qua canonice uiuendo Deo seruire, et animam suam saluare possint. Quod si temerario ausu id agere temptauerint, anathematis uinculo obligentur’ (Sg, p. 145a).

⁸³ Pennington, “Gratian, Causa 19, and the Birth of Canonical Jurisprudence,” 4:346-350.

⁸⁴ C.19 q.3 c.2: ‘Mandamus et uniuersaliter interdicimus, ne quis canonicus regulariter professus, nisi quod absit publicae lapsus fuerit, monachus efficiatur. Quod si decreto nostro contraire presumens agere temptauerit, ad ordinem canonicum precipimus ut redeat, et deinceps memorialem cucullam deferat, et ultimus in choro maneat’ (Sg, p. 145a). A later hand copied ‘cucullam defereat’ over an erasure.

⁸⁵ C.19 q.3 d.p.c.2: ‘Ubi subauditur, nisi cum patris sui licentia religionis propositum induerit’ (Sg, p. 145a).

chapter.⁸⁶ In terms of the hierarchy of vows, the monastic vow superseded previous bonds. Gratian, however, did not overlook the importance of consent for canons regular.

Pennington has shown that the text of St. Gall holds up to the same methodological scrutiny as Winroth applied to the manuscripts of the first recension. First, one only needs to skim Winroth's appendix to see that Gratian 1 contains a number of truncated canons, that is, canons that are shorter than those found in the vulgate.⁸⁷ St. Gall, as Pennington has pointed out, also contains truncated canons, such as C.19 q.3 c.5.⁸⁸ Winroth also noted that the addition of texts to Gratian 2, such as C.11 q.3 c.41-c.43 took away from the coherency of Gratian's original argument.⁸⁹ Similarly, Pennington pointed to the addition of d.p.c.5 and c.6 to Gratian 1 took away from the argument presented in St. Gall. In the first recension Gratian expanded the scope of Question three to address a matter not related to whether or not canons regular may enter a monastery without permission. With the addition of d.p.c.5, Gratian asked when a cleric who entered a monastery could be tonsured.⁹⁰ Gregory, in a letter to Bishop Fortunatus, stated that he was forbidden from being tonsured prior to his second year in the monastery.⁹¹ If Winroth's methodology led to the discovery of a recension that

⁸⁶ C.19 q.3 c.3: 'Statuimus, ne professionis canonicae quispiam postquam Dei uice super caput sibi hominem inposuerit, alicuius leuitatis instinctu uel districtioris religionis obtentu ex eodem claustro audeat sine patris et totius congregationis permissu recedere. Discedentem uero nullus abbatum uel episcoporum, et nullus monachorum sine communi litterarum cautione suscipiat' (Sg, p. 145a).

⁸⁷ Winroth, *The Making of Gratian's Decretum*, 197-227.

⁸⁸ Pennington, "Gratian, Causa 19, and the Birth of Canonical Jurisprudence," 4:349-350.

⁸⁹ Winroth, *The Making of Gratian's Decretum*, 97-99.

⁹⁰ C.19 q.3 d.p.c.5: 'Queritur si ingressis monasterium ultra relinquatur licentia testandi?' (Fd, fol. 57r; Aa 43, fol. 43v); Pennington, "Gratian, Causa 19, and the Birth of Canonical Jurisprudence," 4:349-350.

⁹¹ C.19 q.3 c.6: 'Monasteriis omnibus fraternitas uestra districtius interdicat, ut eos, quos ad conuersionem susceperint, prius, quam biennium in conuersatione compleuerint, nullo modo audeant tonsorare' (Fd, fol. 57r; Aa 43, fol. 43v).

antedated the vulgate, the same methodology, when applied to the text of St. Gall, should yield the same conclusion: St. Gall antedates Gratian 1.

If the law protects the rights of both clerics and canons regular to embark upon the monastic life due to that life's superiority, does it also require minor children to do so even though that life might be contrary to their wishes? No doubt the problem of child oblates would have plagued canon lawyers, particularly those cases where an individual sought the revocation of his vow on the grounds that he was made an oblate against his will. Causa 20 looks at the validity of an oblate's monastic vow by questioning whether minors should be compelled to follow the life their parents imposed upon them. The hypothetical states that two young boys were handed over to a monastery by the parents as minors. While one was reluctant, the other was clothed in the cowl willingly. Upon reaching puberty, the one who was reluctant returned to the secular world and one who was willing requested a stricter monastery.⁹²

Gratian put forth two different views. One, a decree from the Council of Trebur, maintained that once a child had entered a monastery he was neither able to leave nor take a wife. If he left, he would be led back; if he renounced his tonsure, he would be tonsured again; if he has taken, or rather, has usurped, a wife, he would be compelled to renounce her.⁹³ The other view, from the Eighth Synod, held that while parents could offer their child to God, even if he was a minor, he could not be forced to remain in the

⁹² Causa 20 d.init.: 'Annos pueritiae duo pariter monasterio traditi sunt; unus inuitus, alter spontaneus cucullam induit. Qui ad pubertatem uenientes, inuitus ad secularem redit, spontaneus districtius monasterium incolit' (Sg, p. 145b).

⁹³ C.20 q.1 c.6: 'Quem progenitores ad monasterium tradiderunt, et in ecclesia cepit canere et legere, nec uxorem ducere, nec monasterium deserere poterit: set si discesserit, reducatur; si tonsuram dimiserit, rursus tondeatur; uxorem si usurpauerit, dimittere compellatur' (Sg, p. 146b).

monastery against his will. A profession of virginity began at adulthood. For example, if she was a minor, it went into effect upon reaching puberty. If already an adult, it began immediately upon entering into the vow at which point one should refrain from marriage and lead a perfect life.⁹⁴ Girls traditionally reached adulthood at the age of twelve. Boys reached adulthood at the age of fourteen. Causa 22 forbade boys under that age from entering into an oath and Causa 4 forbade the testimony of boys under that age.⁹⁵ Gratian concurred with the latter of the two viewpoints. A profession of virginity began upon entering adulthood.⁹⁶ A young woman, who had taken a vow of virginity under her own free will, committed a sin if she entered into marriage. It was, however, a greater sin to lead a religious life when one was unsure of the decision. Such hesitation forsakes the vow and violates the consecration.⁹⁷ Gratian concluded that if her parents had compelled her into virginity than she was free to void the vow without transgression at a marriageable age. The girl was not obligated to follow the will of her parents and enter an order. According to Gratian, she, handed over before puberty, was allowed to remain or to leave the monastery upon reaching the age of reason.⁹⁸ Until a child has reached puberty, however, the parents' wishes reigned supreme.

⁹⁴ C.20 q.1 c.1: 'Firma autem tunc erit professio uirginitatis, ex quo adulta iam etas esse ceperit, que solet apta nuptiis deputari ac perfecta' (Sg, p. 146a).

⁹⁵ C.22 q.5 c.15: 'Pueri ante annos quatuordecim iurare non cogantur' (Sg, p. 157b-158a). [C.4 qq.2-3 c.1]: 'Ad testimonium autem intra annos quatuordecim etatis suae constituti non admittantur' (Sg, p. 73a).

⁹⁶ C.20 q.1 d.p.c.1: 'Si tunc ergo uirginitatis professio firma esse incipit, cum ad adultam uentum fuerit etatem, et utique tunc demum religionis professio firma debet esse cum ad adultam etatem fuerit peruentum' (Sg, p. 146a).

⁹⁷ C.20 q.1 c.8: 'Puellae, que non coactae parentum inperio, set spontaneo iudicio uirginitatis propositum atque habitum susceperint, si postea nuptias elegerint, preuaricantur, etiam si non dum eis consecratio accessit, cuius utique non fraudarentur munere, si in proposito permanerent. Ambigi uero non potest crimen magnum admitti, ubi et propositum deseritur, et congregatio uiolatur' (Sg, p. 146b).

⁹⁸ C.20 q.1 d.p.c.8: 'Set puella in hoc loco nubilis est intelliganda, cui liberum est arbitrium; nec parentum sequi cogitur inperium' (Sg, p. 146b).

If an oblate could not be compelled to remain in a monastery when placed there as a child, what about he who undertook the religious life contrary to the will of his parents? The parents had the right to invalidate a monastic vow undertaken by a minor, unless they and the child pronounced it publicly or before the bishop, at which point he was not permitted to return to the secular world. At the age of ten the parents could not contradict a boy's decision to enter a monastery. Should he make a vow, whether with the consent of his parents or simply on his own free will, and then chose to renege on his vow, he would be excommunicated and forced to return to the religious life.⁹⁹ Girls similarly were subjected to their parents or tutors until the age of twelve. Thus they could revoke any vow taken prior to that age. If, however, she had taken a vow of virginity in secret for more than a year and a day, neither she nor her parents could revoke it. If as a minor she chose to serve God upon reaching puberty, the authority of her parents should not prohibit it.¹⁰⁰

Jessica Goldberg has interpreted the role of the child's consent in *Causa 20* as unresolved. On the one hand, q.1 granted all authority to parents; on the other hand, q.2 addressed the child's will. Such disparity left her questioning whether the child's will could counter the wishes of the parents, and if so, when. Furthermore, if parents placed the child in a monastery against his will did his wishes matter at that point or only when

⁹⁹ C.20 q.2 c.1: 'Parentibus sane filios suos religioni contradere non amplius quam usque ad decimum annum etatis eorum licentia poterit esse. Postea uero siue cum parentum arbitrio, siue personae deuotionis uotum sit solitarium, erit filiis licitum religionis accipere cultum. Quisquis autem tonsurae abolitione, uel regularis uestis assumptione transgressionem attigisse detectus fuerit, censuram quoque excommunicationis accipiat, et religioni semper inhereat' (Sg, p. 147a). 'Postea uero – semper inhereat' appears as a dictum in Sg.

¹⁰⁰ C.20 q.2 c.2: 'Puella, si ante XII. etatis annos sponte sua sacrum sibi uelamen assumpserit, possunt statim parentes eius uel tutores id factum irritum facere, si uoluerint. At si annum et diem dissimulando consenserint, ulterius nec ipsi, nec ipsa mutare poterunt. Si uero in fortiori etate adolescentula uel adolescens seruire Deo elegerint, non est potestas parentibus prohibendi' (Sg, p. 147a).

he had reached puberty and could revoke their decision?¹⁰¹ Gratian, however, did answer these questions. As Gratian argued in q.1 a profession of virginity began upon reaching adulthood and the (female) child was free to make a decision upon reaching a marriageable age and could not be compelled to follow the parents' will.¹⁰² Conversely at the age of ten the parents could not contradict a boy's decision to enter a monastery.¹⁰³ Upon reaching the age of reason, a child could overrule his parents and either leave the monastery, where they placed him against his will, or enter a monastery, which they had forbidden previously. The corollary is that until the age of consent, the child's wishes mattered little as he was subjected to his parents' authority. Should they want to offer him or her to God, they were within their right to do so.

Integral to the preservation of monasticism, which is the subject of this second *tractatus* and an overwhelming concern in the core *causae*, is the integrity of the vow. Gratian began with the requirements necessary to make a vow valid and then applied those requirements to those seeking to enter the monastic life – as in the case of clerics, canons regular, and minors – and those seeking to leave it – as in the case of child oblates. As *Causa 20* illustrates, the point at which a vow of virginity is binding and the circumstances surrounding the taking of the vow determine whether the client's desire to leave or to remain is justified.

¹⁰¹ Jessica Goldberg, "The Legal Persona of the Child in Gratian's *Decretum*," *Bulletin of Medieval Canon Law* 24 (2000): 33.

¹⁰² C.20 q.1 d.p.c.1: 'Si tunc ergo uirginitatis professio firma esse incipit, cum ad adultam uentum fuerit etatem, et utique tunc demum religionis professio firma debet esse cum ad adultam etatem fuerit peruentum' (Sg, p. 146a). [C.20 q.1 d.p.c.8]: 'Set puella in hoc loco nubilus est intelliganda, cui liberum est arbitrium; nec parentum sequi cogitur inperium' (Sg, p. 146b).

¹⁰³ C.20 q.2 c.1: 'Parentibus sane filios suos religioni contradere non amplius quam usque ad decimum annum etatis eorum licentia poterit esse' (Sg, p. 147a).

The tract also sought to safeguard monastic rights. Gratian's choice of canons called for assets given to the monastery to remain in possession of the monastery. It was sacrilege and against the law for anyone to hold back what was bequeathed to venerable places.¹⁰⁴ An abbot may not dispense with those possessions given by monks. The bishop may recall anything sold by an abbot without his permission.¹⁰⁵ Gratian concluded that the monastery may retain possessions given to it lest the church suffer scandal, lest by despoiling the monastery it was thrown headlong into deterioration, lest on the occasion of fire the monastery burnt.¹⁰⁶ A monastery retained ownership of any endowment given to the community. In addition to judging the legitimacy of a vow, a medieval canon lawyer assuredly would have to know how to handle disputes over moveable or immoveable assets when they arose. He was to protect the monastery's ability to support and maintain itself.

The validity of an oath influenced the legality of a marriage contract and feudal relationships. Given the broad scope of oath-taking, therefore, Gratian had to instruct his students, who would have had to pass judgment on the legitimacy of an oath, under what circumstances it could be taken, and what constituted perjury. Gratian dealt with these issues in Causa 22, the longest of the core causae with forty-one canons. The case centers upon a certain bishop, who falsely swore what he in fact thought to be true.

Having learned of the bishop's oath, his archdeacon swore that he would never take an

¹⁰⁴ C.17 q.4 c.4: 'Sacrilegium et contra legem est, si quis quod uenerabilibus locis relinquatur prauae uoluntatis studiis temptauerit suis compendiis retinere' (Sg, p. 141a).

¹⁰⁵ C.17 q.4 c.40 : 'In uenditionibus, quas abbates facere presumunt, hec forma seruetur, ut quicquid sine impius licentia uenditum fuerit ad potestatem episcopi reuocetur. Mancipia uero monachis donata ab abbate manumitti non licet' (Sg, p. 141a).

¹⁰⁶ C.17 q.4 d.p.c.43: 'Sic ne ecclesia scandalum patiatur, ne discedens in deteriora precipitetur, ne in perniciem monachorum aut in incendium monasterii occasione suorum exardescat, laudabilius ne dicat sua sibi redduntur, sed auferri sinuntur, quam talia inconsulte ab illo inferantur' (Sg, p. 141b-142a).

oath of obedience to him. Angered by the archdeacon's refusal to show obedience, the bishop compelled him to display the customary respect owed by his office. The bishop was accused of double perjury, both that he swore what was false and that he compelled the archdeacon to perjure himself.¹⁰⁷ Despite the subject of the hypothetical, Gratian did not distinguish clearly between oaths taken by laity and oaths taken by clerics. In his mind, the theories behind and the rules governing oaths apply equally to both realms. The lack of discernment between clerical and lay oaths implies that Causa 22 serves as a guide not only for monks and abbots, priests and bishops, but also, as Causa 34 will illustrate, for wives and husbands.

Gratian first justified the taking of oaths and what constituted perjury in the theoretical approach of Questions one and two. He distinguished between oaths sworn spontaneously and those in defense of one's innocence, to solidify a peace treaty, or to persuade authorities when they were reluctant to believe that which would be beneficial to them.¹⁰⁸ While perjury meant to swear falsely, Gratian was careful to make a distinction between swearing a false oath and swearing in deceit. Not everyone who will have done other than what he promised swears in deceit.¹⁰⁹ Augustine pointed to a person who swore to something he thought was true, but it was in fact false. He did not perjure himself deliberately but was simply mistaken. Augustine then pointed to a person

¹⁰⁷ Causa 22 d.init.: 'Episcopus quidam falsum iuravit quod uerum esse putabat, quo cogito iuravit archidiaconus eius quod amplius ei non obediret. Archidiaconus ab episcopo compellitur ut de more sibi obediat. Unde episcopus de dupplici periurio accusatur, scilicet de eo, quod falsum iuravit, et quod archidiaconum ad peierandum compellit' (Sg, p. 149b-150a).

¹⁰⁸ C.22 q.1 d.a.c.1: 'Set aliud est ad iurandum sponte accedere, aliud uel ad asserendam innocentiam suam, uel ad federa pacis reformanda, uel ad persuadendum auditoribus, quando pigri sunt ad credende quod eis utile est, iuramentum offerre. Primum prohibetur (Matth. 5:37 and Iacob. 5:12), secundum conceditur' (Sg, p. 150a).

¹⁰⁹ C.22 q.2 d.p.c.2: 'Set aliud est iurare falsum, aliud in dolo. Non enim omnis, qui aliter facturus est quam promittit, in dolo iurat' (Sg, p. 151a).

who thought something was false, but swore that it were true. For example, when asked if it had rained, he replied that it did though he thought otherwise. Even if it had rained and he was unaware of it, he was a perjurer. The difference between the two men was how the words came forth from the mind. A guilty tongue resulted in a guilty mind.¹¹⁰ What made someone guilty of perjury was the motive behind the promise. Perjury rested upon the wishes and intention of the taker. If he wished to deceive, he was guilty. It was irrelevant whether he actually did.

Gratian has moved the students to the point that he now could discuss the practical application of his theories. Returning to the issue posed in the hypothetical, he questioned whether the archdeacon could deny the bishop his customary obedience. Because the bishop thought what he swore was true, he was not guilty of perjury. The archdeacon, therefore, could not refuse obedience to him even during the period between the preliminary sentence and the final decision. While under investigation it was not permitted for any of his clerics to depart from him.¹¹¹ In other words, the bishop was innocent until proven guilty. What the archdeacon swore – that he would never take an oath of obedience to the bishop – was illicit. Even though the bishop did not perjure

¹¹⁰ C.22 q.2 c.3: 'Fac illum iurare, qui uerum putat esse pro quo iurat; uerum putat esse, et tamen falsum est; non ex animo iste periurat, fallitur: hoc pro uero habet, quod falsum est, non pro re falsa sciens iurationem interponit. Da alium. Scit falsum esse, et dicit uerum esse, et iurat tamquam uerum sit quod scit falsum esse. Videtis, quam ista detestanda sit belua, et a rebus humanis exterminanda? Quis enim fieri uelit? Omnes homines detestantur talia. Fac alium. Putat esse falsum, et iurat tamquam uerum. Forte uerum est. Verbi gratia pluit in illo loco; interrogas hominem, et dicit pluuisse, et ad negotium ipsius competit, ut dicat, pluit, set putat non pluuisse: periurus est. Interest, quemadmodum uerbum procedat ex animo. Ream linguam non facit nisi rea mens' (Sg, p. 151b).

¹¹¹ C.22 q.3 dictum: 'Cum ergo ut monstratum esse opinor reus periurii non esset episcopus ab archidiacono sibi non obediri non debuit cum etiamsi criminis illum facere constaret ante diffinitiuam tamen sententiam, ut et iam diximus nullus suorum clericorum ab eo discedere debueret quod igitur archidiaconus iuramento sanxium illicitum et inconueniens esse conuincitur' (Sg, p. 153a). Gratian chose not augment q.3 in either Gratian 1 or Gratian 2.

himself he did compel the archdeacon into an oath, though Gratian glossed over this transgression.

Because of the importance of the oath, Gratian's choice of *auctoritates* placed the burden of its integrity upon the shoulders of its taker. It was for this reason that children who have yet to reach the age of reason were not compelled to swear an oath. A boy entering into an oath must be at least fourteen years old.¹¹² The taker's responsibility was to ensure that his intentions and his deeds reflected one another. He may not uphold a dishonorable oath and thus must evaluate the nature of his oath and when it was necessary for him to opt out of it. Just because one makes a heedless promise did not mean that he should fulfill it simply for the sake of the promise. Herod was a case in point. He upheld his promise to the daughter of Herodias, which led to the decapitation of John the Baptist. Perjury would have been better than the death of a prophet.¹¹³ On the other hand, David, whose piety was greater, preferred not to uphold his promise rather than to shed a man's blood.¹¹⁴ Pious promises that commit a crime are impious.¹¹⁵ If a person heedlessly made such a promise, one that goes from bad to worse, it was better for him to perjure himself than to commit a graver sin. David swore that he would

¹¹² C.22 q.5 c.14/c.15: 'Paruuli, qui sine rationabili etate sunt, non cogantur iurare. Pueri ante quatuordecim annos iurare non cogantur' (Sg, p. 157b-158a). 'Pueri ante – non cogantur' would become a part of c.15 in Fd (fol. 146r).

¹¹³ C.22 q.4 c.8: 'Unusquisque simplicem sermonem proferat; uas suum in sanctificatione possideat, nec fratrem circumscriptione inducat uerborum; nichil promittat inhonestum, aut, si promiserit, tollerabilius est promissum non facere, quam facere quod turpe sit. Sepe plerique constringunt se iurisiurandi sacramento, et cum ipsi cognouerint promittendum non fuisse, sacramenti tamen contemplatione faciunt quod spoponderunt, sicut de Herode supra scripsimus, qui saltatrici premium turpiter promisit, crudeliter solum. Turpe quod regnum pro saltatione promittitur; crudele quod mors Prophetarum pro iurisiurandi religione donatur. Quanto tollerabilius tale fuisset periurium sacramento' (Sg, p. 153b).

¹¹⁴ C.22 q.4 c.3: 'Quod Dauid iuramentum per sanguinis effusionem non inpleuit, maior pietas fuit. Video Dauid pium hominem et sanctum in iurationem temerariam occidis, et maluisse non facere quod iurauerat, quam iurationem suam hominis effuso sanguine implere' (Sg, p. 153a-153b).

¹¹⁵ C.22 q.4 c.5: 'Impia pia est promissio, que scelere adinpletur' (Sg, p. 153b).

kill Nabal and anyone who attempted to help him. Abigail, however, convinced him to return his sword to its scabbard.¹¹⁶ It was better for David to perjure himself than to fulfill his promise.

Gratian fittingly ended the *causa* with Fulbert of Chartres' letter to William V, count of Poitou and duke of Aquitaine, outlining the responsibilities of the taker.¹¹⁷

Since I was asked to write something about the oath of fidelity, I have noted for you these things which follow from the authority of books. Whoever swears fidelity to his lord should always have six things in mind: safe, secure, honest, useful, easy, possible. Safe, namely, lest he injure his lord with his own body. Secure lest he not injure his secret interests or his defenses through which his lord can be secure. Honest lest he not injure his lord's justice or in other matters which seem to pertain to his honesty. Useful lest he injure his lord's possessions. Easy or possible, lest that the good, which his lord could easily do, he would make difficult, and that what would be possible, he would make impossible for his lord. A faithful man should pay heed to these examples. It is not sufficient to abstain from evil, unless he may do what is good. It remains that he faithfully give his lord counsel and help in the aforementioned matters, if he wishes to be worthy of his benefice (fief) and safe in the fidelity that he has sworn. The lord also ought to render his duty to his faithful man in all things. If he does not, he may be thought of as faithless, just as he, who in consenting or telling lies will be perfidious and perjurious.¹¹⁸

¹¹⁶ C.22 q.4 c.6: 'Si aliquid forte nos incautius iurare contigerit, quod obseruatum peiorem uergat in exitum, libere illud salubriore consilio mutandum nouerimus, ac magis instante necessitate peierandum nobis, quam pro uitando periurio in aliud crimen grauius esse diuertendum. Denique iurauit Dauid per Dominum occidere Nabal uirum stultum et inpium, atque omnia, que ad eum pertinebant demoliri. Set ad primam intercessionem Abigail feminae prudentis mox remisit minas, reuocauit ensem in uaginam, neque aliquid culpae se pro tali periurio contraxisse doluit' (Sg, p. 153b).

¹¹⁷ The translation of Fulbert's letter appears in Kenneth Pennington, "The Formation of the Jurisprudence of the Feudal Oath of Fealty," *Rivista internazionale del diritto commune* 15 (2004): 60.

¹¹⁸ C.22 q.5 c.18: 'De forma fidelitatis aliquid scribere monitus, hec uobis, que secuntur, breuiter ex librorum auctoritate notauit. Qui domino suo fidelitatem iurat, ista sex in memoria semper debet habere: incolume, tutum, honestum, utile, facile, possibile. Incolume uidelicet, ne sit in dampnum domino suo de corpore suo. Tutum, ne sit ei in dampnum de secreto suo, uel de munitionibus, per quas tutus esse potest. Honestum, ne sit ei in dampnum de sua iusticia, uel de aliis causis, que ad honestatem eius pertinere uidentur. Utile, ne sit ei in dampnum de suis possessionibus. Facile uel possibile, ne id bonum, quod dominus suus facere leuiter poterat, faciat ei difficile, neue id, quod possibile erat, reddat ei impossibile. Ut fidelis hec documenta caueat, iustum est. Set quia non sufficit abstinere a malo, nisi fiat, quod bonum est, restat, ut in his sex supradictis consilium et auxilium domino suo fideliter prestat, si beneficio dignus uideri uult, et saluus esse de fidelitate, quam iurauit. Dominus quoque fidei suo[in his] omnibus uicem reddere debet. Quod si non fecerit, merito censebitur malefidus, sicut ille, si in eorum preuaricatione uel faciendo, uel consentiendo deprehensus fuerit perfidus et periurus' (Sg, p. 158a).

The taker of the oath, the *fidelis*, swore to protect his lord from harm, to safeguard his possessions, to preserve the lord's justice, and to facilitate the lords' duties by not being a hindrance.¹¹⁹ Regardless of whether the *fidelis* specifically swore to uphold each individual requirement, canonists, such as Huguccio, acknowledged his obligation to uphold all the requirements.¹²⁰ Huguccio's opinion is found in a gloss of a peculiar text, one in which Pennington has discussed. Gratian's text reads "Ut fidelis hec documenta caveat, iustum est," though Ivo's *Panormia* (8.122), which also included Fulbert's letter at the end of his discussion of perjury, reads "Ut fidelis hec documenta caveat, iustum est."¹²¹ Other collections, such as the *Collectio X partium* (9.26), the *Tripartita* (3.22.32), the *Decretum* of Ivo of Chartres (12.76), the *Collectio XIII librorum* (Vat. lat. 1361, 13.111), the *Collectio Caesaraugustana* (Version 1, 6.22), and the *Collectio Catalaunensis I* (16.32), also contain Fulbert's letter. Without examining each manuscript, however, one cannot know which, if any, of them contain the same variant as Gratian's text in the hope of identifying a potential source. Nevertheless, Gratian did not take his text from the *Panormia*, again showing that determining the collections from which Gratian drew his material is a problematic task.

Fulbert emphasized the role of the one swearing fidelity in two ways. First, the taker must provide counsel and aid to the lord in order to be worthy of his benefice. The ability to possess the latter hinged upon his fulfillment of the former. Second, as the canonist Johannes Faventinus noted in his gloss of the text, a lord who failed to fulfill his duties was guilty of bad faith (*malefidus*), not of perjury (*periurus*). This distinction is

¹¹⁹ Pennington, "The Formation of the Jurisprudence of the Feudal Oath of Fealty," 60.

¹²⁰ Ibid., 61.

¹²¹ Ibid., 65-66.

important because lords did not take oaths to vassals.¹²² It becomes especially interesting when one takes into consideration that this *causa*, and this canon in particular at the end of the *causa*, establishes the legal theory for the remainder of the *Tractatus de fidelitate et obsequio* (Causa 23-Causa 26) which Gratian completed in Gratian 1.¹²³ In Causa 23 the State was bound to protect the Church. In Causa 24 the bishop was bound to adhere to the Roman See. In Causa 25 the pope was bound, though conditionally, to conciliar canons and to decrees of his predecessors. In Causa 26 a priest was bound to his bishop and to his parish. Gratian used the feudal oath to create a well structured and obedient society.

Gratian elaborated on the extent to which a cleric may enter into an oath in Gratian 1. The gradual addition of C.22 q.5 c.20, d.p.c.21, and c.22 illustrate the progression in Gratian's thought. In St. Gall, c.20 simply states that someone who loves a lie, which constitutes both false words and false deeds, is the son of the devil.¹²⁴ The notion that among the devil's children is a bishop who professes himself a priest but works contrary to his order appears in the Florence manuscript.¹²⁵ The text that would become d.p.c.21 and the text that would become c.22 appear in the Admont manuscript. A cleric cannot swear upon the holy Gospels to any layman. He should simply speak the truth. In the event this should happen, those who are of the same status should sit in

¹²² Ibid., 61.

¹²³ I will discuss the connection between Causa 22 and Causa 23, which was one of the last *causae* Gratian added to St. Gall, in Chapter Five.

¹²⁴ C.22 q.5 c.20: 'Cauete, fratres, mendacium, quia omnes, qui amant mendacium, filii [sunt] diaboli. Non solum in falsis uerbis, set etiam in simulatis operibus mendacium est. Mendacium namque est, Christianum se dicere, et opera Christi non facere' (Sg, p. 158a).

¹²⁵ C.22 q.5 c.20: 'Mendacium est episcopum, sacerdotem uel clericum se profiteri, et contraria huic ordini operari' (Fd, fol. 61v).

judgment of him.¹²⁶ A palea extends this prohibition. A cleric ought not to swear even to a bishop unless he is being entrusted with the administration of a church. A bishop, likewise, should not compel a cleric to swear an oath to him unless he is charging the cleric with the management of ecclesiastical possessions.¹²⁷ The prohibition against a cleric binding himself to a layman is enlightening when one considers the frequency of bishops doubling as feudal lords and vassals, a point Gratian addressed in C.23 q.8.

Gratian included two important case studies in Causa 22 involving marriage. In his first case study, Augustine analyzed Abraham's decision to tell the Egyptians that Sara was his sister and rather than his wife. He did not lie but simply wanted to conceal the truth. She was called his sister, because she was the daughter of his brother.¹²⁸ In the second case study, Augustine focused upon the marriage predicament of Hubaldus about which Bishop Severus of Milan wrote to Augustine. Driven by the fear of death, Hubaldus was compelled to swear by an oath to the consanguinity of his concubine, whom he was going to support as his wife, and to expel her mother and brothers from the house and not to provide them further necessities. The marriage vow was ruled valid for, as Ambrose held, it was not a sin to support such a woman as his wife because marriage was solid and unwavering in God, despite being coerced to swear to their relation. The

¹²⁶ C.22 q.5 d.p.c.21: 'Iuramentum uero clericus laico prestare non debet. Unde in Remensi Concilio legitur' (Aa 43, fol. 60r). [C.22 q.5 c.22]: 'Nullus ex ecclesiastico ordine cuiquam laico quicquam super sacra euangelia iurare presumat, sed simpliciter cum ueritate et puritate dicat: est aut non. Sed si est aliquid, quod sibi obiciatur, prout iudicauerint qui eiusdem sunt ordinis, aut corrigatur, aut expurgetur' (Aa 43, fol. 60r).

¹²⁷ C.22 q.5 d.p.c.22: 'Episcopo similiter clericus iuramentum prestare non debet, nisi forte is, cui ecclesiae procuracionem committit' (Vgl. *edF*, col. 889). [C.22 q.5 c.23]: 'Nullus episcopus clericos suos, nisi forte quibus ecclesiasticarum rerum dispensatio commissa fuerit, sibi iurare compellat' (Vgl. *edF*, col. 889).

¹²⁸ C.22 q.2 c.22: 'Queritur inquit, cur Patriarcha mentiri uoluit, ut diceret sororem suam, et non potius Deo commisit, qui, si uellet, eius pudicitiam apud Pharaonem seruare posset. Set ueritatem uoluit celari, non mendacium dici. Soror enim dicitur, quia filia fratris erat' (Sg, p. 152b).

oath not to support her mother and brothers was illicit and, as the canons established, should not be upheld and Hubaldus should support them. Also, as the canons established, those who compelled him to swear what he ought not were guilty of entrapping perjury. Hubaldus, however, did not draw reproach because extortion compelled his will.¹²⁹

Gratian's emphasis upon the oath in Causa 22 and his references to and the case studies involving marriage in Question two and in Question four make sense when placed side-by-side with Causa 34, which the evidence of St. Gall's rubrics and the core causae suggest was the original sequence. Before Gratian could discuss legal disputes involving marriage, he first had to address the nature of the oath. It governed every aspect of society with stipulations comparable to those of the marriage vow. As with the modern tribunal, determining the merits of a case regarding the legality of a marriage constitutes one of the most important functions of a canon lawyer. Causa 34 concerns a woman who effectively marries two men. Her first husband had been taken into captivity. Hearing that her first husband was dead, she married another. After a time her first husband returned. Even though he wanted her to return to the bonds of marriage, she refused.¹³⁰ Gratian elaborated upon this case statement in Gratian 1 adding that the woman refused

¹²⁹ C.22 q.4 c.22: 'Inter cetera, ut rogaueras, a patre nostro Ambrosio quesui, quid tibi, karissime, agendum sit de Hubaldo parrochiano tuo, qui captus et timore necis compulsus suae concubinae iuramento firmauit ipsam in coniugem suscipere, propriamque matrem de domo cum fratribus expellere, nichilque alimoniae ei umquam impendere. Quia uero quam prius habuerat non est peccatum in coniugem suscipere, matrimonium sit in Deo firmum et stabile. Porro iuramentum non ob hoc inuenitur fuisse institutum, ut esset uinculum iniquitatis. Nec credo sacramentum ad hoc debere fieri, ut iniusta iuratio suorum bonorum sit iniuste iurantibus expoliatio, et accipienti eterna dampnatio. Foueat itaque Hubaldus matrem et fratres, et lugeat, si coactione et timore iuramenti aliquid defuit matri. Qui uero eum iurare coegerunt quod non debuit, reatu periurii impliciti teneantur. Iniuria quippe iniuste irrogata eius est infamia, qui facit. Nec enim ullo modo ad obprobrium coactae uoluntatis trahitur quod illicita conditio necessitatis extorsit' (Sg, p. 154a-154b).

¹³⁰ Causa 34 d.init.: 'Quidam cum ab hostibus captus teneatur, uxor eius audiens eum decessisse, alii se copulauit. Ille uero tandem reuersus, uxorem repetit. Illa autem ad eum redire reclamat' (Sg, p. 185b).

to return to her first husband because she was filled with love for her second husband.¹³¹

Gratian asked which of these marriage oaths was valid.

Gratian argued in St. Gall that the woman should be compelled to return to her first husband. Even if she would prefer to remain with the second husband, the first marriage took precedence as it was canonically valid. Pope Leo I wrote to Nicaetas, Bishop of Aquileia, concerning such matters:

On account of the disasters of war and the exceedingly oppressive attacks of the enemy you say that a marriage can be dissolved because, with husbands carried off into captivity and their wives forsaken, they think their own husbands either dead or never likely to be freed from the unjust rule [and] they have contracted another marriage under pressing loneliness. Now that the state of things has improved through the Lord's help, some of those who were thought to have perished have returned, your charity deservedly is seen to avoid what ought to be settled by us about women who are joined to other husbands. But because we know it is written that "a woman is joined to a man by God," and again, we are aware of the precept that "what God has joined, man may not put asunder," it is necessary that we uphold that the compact of the lawful marriage must be renewed, and he is restored those things having being taken, which the enemy took from him, that which given freely to him; and zealous care should be taken by all that each should recover what is his own. Nevertheless he is not judged culpable and considered as the invader of another's right, who assumed the role of the husband, who was thought no longer alive. For thus many things which belonged to those led into captivity were able to pass into the right of another, and yet it is completely just that on their return their property should be restored. And if this is rightly observed in the case of slaves or of lands, or even of houses and personal goods, how much more should this to be done in the restoration of wives, so that what has been disturbed by the necessities of war may be restored by the remedy of peace. And, therefore, if husbands having returned after a long captivity still feel affection for their wives so that they should desire them to return to union, what necessity brought back should be judged blameless and should restore what faith requested. If however any women are still captured by love of their later husbands as to prefer to remain with them than to return to their lawful union, they are deservedly to be branded: that is they are deprived ecclesiastical communion; that they have chosen the contamination of a crime for an excusable matter, showing that they rather would have pleasure their own

¹³¹ Causa 34 d.init.: 'demum ille, de capiuitate rediens, repetit uxorem suam; illa, posterioris amore capta, aspernatur thorum prioris' (Fd, fol. 100r; Aa 43, fol. 185v).

pleasure in their incontinence, than a rightful restitution forgive them. Therefore they should return to their former state with voluntary reparation.¹³²

Leo explained that the disasters of war could separate a family as husbands were carried away into captivity. Believing their husbands dead and driven by loneliness, the women left behind sometimes contracted second marriages only to have their first husbands return when conditions improved. Since God joined a woman to a man, the Church was bound to enforce the lawful compact of that marriage – “quod ergo Deus coniunxit homo non separet.”¹³³ If, therefore, husbands returned from a long captivity, still felt affection for their wives, and desired to return to the partnership, his wife should return to him. The tacit corollary is that if the husband no longer desired his wife, she may remain with the second husband. The second husband, however, should not be blamed for taking another’s possession. There were many things which pass into the custody of another

¹³² C.34 qq.1-2 c.1: ‘Cum per bellicam cladem, et per grauissimos hostilitatis incursus ita quedam dicatis esse diuisa coniugia, ut, abductis in captiuitatem uiris, feminae eorum remanserint destitutae, que uiros proprios interemptos putarent, aut ab iniqua dominatione numquam liberandos, et in aliorum coniugium sollicitudine transierunt cogente; cumque, statu rerum Domino auxiliante in meliora conuerso, nonnulli eorum, qui putabantur perisse, remearunt: merito caritas tua uidetur ambigere, quid de mulieribus, que aliis sunt ad iunctae uiris, a nobis debeat ordinari. Set quia nouimus scriptum, quod a Domino iungitur uiro mulier, et iterum agnouimus preceptum, ut quos Dominus coniunxit homo non separet, necesse est, ut legitimarum federa nuptiarum redintegrandam credamus, et remotis his, que hostilitas unicuique, id quod liberatio unicuique intulit, reformetur, omnique studio curandum est, ut recipiat unusquisque quod proprium est. Nec tam culpabilis iudicetur et tamquam alieni iuris peruasor habeatur, qui personam eius mariti, qui iam non esse estimabatur, assumpsit. Sic enim multa, que ad eos, qui in captiuitatem ducti sunt, pertinebant, in ius alienum transire potuerunt, et tamen plenae iusticiae est, ut eisdem reuersis propria reformetur. Quod si in mancipiis, uel in agris, aut etiam domibus, ceteris que possessionibus recte seruatur, quanto magis in coniugatorum redintegratione hoc faciendum est ut quod clade bellica turbatum est pacis remedio reformetur. Et ideo, si uiri post longam captiuitatem reuersi ita in dilectione suarum coniugum perseuerant, ut eas cupiant redire in suum consortium, inculpabile iudicandum est quod necessitas intulit, et restituendum quod fides poscit. Si autem aliquae mulieres ita posteriorum uiro- rum amore sint captae, ut maluerint his coherere, quam ad legitimum redire consortium, merito ita sunt notandae, ut ecclesiastica priuentur communione, que de re excusabili criminis contaminationem elegerunt, ostendentes, sibimet pro sua incontinentia placuisse quod iusta remissio poterat excusare. Redeant ergo in suum statum uoluntaria redintegratione’ (Sg, p. 185b-186a). I worked from and modified slightly the translation of Leo I’s letter found in Nicene and Post-Nicene Fathers Series II vol. 12 available at <http://www.ccel.org/ccel/schaff/npnf212.ii.iv.cliii.html>.

¹³³ Matt 19:6.

when the original owner was in captivity and thought dead. Yet it was proper that upon his return his property should be restored to him. If this was observed in the case of slaves, lands, houses, and even personal goods, it should be observed with wives, who also were regarded as possessions. Women should be branded and deprived of communion if they, consumed by love for their second husband, wished to remain with him rather than rightly return to the first. On the other side of the coin, as Innocent I instructed Probus, a husband should renounce similarly his second wife, Restituta Fontanus, if his first wife, Ursa, should return from captivity. As this first marriage was established by divine grace and he had not cast her aside by divorce, his second marriage was illegitimate.¹³⁴

Throughout the duration of her husband's absence a woman was not permitted to contract a second marriage. A council near Verberie decreed that if some inevitable necessity had compelled a woman's husband to seek refuge in another province or dukedom, and while capable of going, she chose not to out of love either for her parents or for her possessions. So long as he was gone, she could not contract a second marriage.¹³⁵ In other words, if the woman chose not to follow her husband, who was forced to flee elsewhere, she should remain without a man so long as he remained alive.

Gratian extended the prohibition of wives contracting a second marriage to those who were betrothed (*virgines*). Should a woman who was engaged to one man enter into

¹³⁴ C.34 qq. 1-2 c.2: 'Cum in captiuitate Ursa mulier teneretur, aliud coniugium cum Restituta Fontanum commisisse cognouimus. Set fauore Domini reuersa Ursa nos adiit, et nullo diffinente uxorem se esse memorati perdocuit. Qua de re, fili karissime fili, statuimus, fide catholica suffragante, coniugium illud esse, quod erat primitus gratia diuina fundatum, conuentumque secundae mulieris, priore superstite nec diuortio eiecta, nullo pacto esse legitimum' (Sg, p. 186a).

¹³⁵ C.34 qq. 1-2 c.4: 'Si quis necessitate ineuitabili cogente in alium ducatum seu prouinciam fugerit, et uxor eius, cum ualet et potest, amore parentum aut rerum suarum eum sequi noluerit, ipsa omni tempore, quamdiu uir eius, quem insecuta non fuit, uiuit, semper innupta permaneat' (Sg, p. 186b).

a marriage with another while her fiancé was in captivity, the second marriage will be deemed invalid.¹³⁶ Augustine contended that if she knowingly married him, she was held in bad faith and considered unjust. If, however, she did not know that she married him, she was not considered adulterous.¹³⁷ For unknown reasons Gratian removed these last two points – that a wife should remain unmarried if unavoidable necessity compelled her husband to flee to another province and that the stipulation for married persons also applied to those betrothed – from the first recension. These texts, qq.1-2 d.p.c.3, c.4, d.p.c.4, and c.5, would reenter the second recension.

Forming the last *tractatus* of the core *causae*, Causa 34 presents the lay application of the principles set forth in Causa 22 regarding oaths. These principles regulated both ecclesiastical and lay society equally. Essentially, Causa 22 is a lesson on judging the veracity of an oath and substantiating perjury, which occurs when one does not uphold that which he swore. However, an oath, such as marriage, that has been violated, as in the case of adultery, remains valid so long as the taker returns to the agreement, that is, so long as the adulterer returns to the bonds of marriage. As the references to marriage imply, Causa 22 offers a context and serves as the foundation for Causa 34, and, in the original text, the former *causa* immediately preceded the latter. Gratian linked these two cases together because the marriage vow shares similar characteristics with the oath in that the man and the woman swear to uphold the sanctity

¹³⁶ C.34 qq.1-2 d.p.c.4: ‘Quod autem de coniugatis auctoritate Leonis Papae dicitur [referring to c.1], hoc etiam de uirginibus intelligendum est, ut, si preter conscientiam uiro nupserint alieno, non teneantur’ (Sg, p. 186b).

¹³⁷ C.34 qq. 1-2 c.5: ‘Si uirgo nesciens uiro nupserit alieno, hoc si semper nesciat, numquam ex hoc erit adultera. Si autem sciat, iam ex hoc esse incipit, ex quo cum alieno sciens cubauerit, sicut in iure prediorum tamdiu quisque bonae fidei possessor rectissime dicitur, quamdiu se possidere ignorat alienum; cum uero scierit, nec ab aliena possessione recesserit, tunc malae fidei perhibetur, tunc iuste iniustus uocabitur’ (Sg, p. 186b).

of their union. It was necessary to understand the fundamentals of the oath in order to understand how they were to be applied to marriage. In this case, the marriage vow binds a woman to her first husband, even if she thought he was dead and subsequently married another. The second marriage is invalid and she must return to her first spouse. The fundamentals of the oath and the notions that govern deception serve to safeguard the sanctity of existing marriages and judge the legitimacy of future ones, both of which were key issues for medieval canon lawyers.¹³⁸

Practical Legal Disputes and the Core Causae

The core *causae* include legal issues tangentially related to the main theme. Whereas the thrust of the *causae* deal either with procedure or the question of rights, the peripheral points are resolutions of practical legal disputes. Financial matters are the common bond between the points raised in Causa 13, Causa 14, Causa 17, and Causa 19. Monastic rights are the theme of Causa 20, while incestuous relationships are the focus of Causa 34.

A key concern for the Church has always been its financial wellbeing. Such was also the focus for Gratian. While Causa 13 teaches how to argue a case, it also settles one of the most fundamental issues facing neighboring dioceses – the right to tithe. Each

¹³⁸ Charles Donahue, Jr., “The Monastic Judge: Social Practice, Formal Rule and the Medieval Canon Law of Incest,” in *De Iure Canonico Medii Aevi: Festschrift für Rudolf Weigand*, eds. Peter Landau and Martin Petzolt (Rome: LAS, 1996): 49-69. For scholarship focused directly on the marriage *causae* see: Jean Werckmeister, “Les deux versions du ‘de matrimonio’ de Gratien,” *Revue de droit canonique* 48:2 (1998): 301-316; José Viejo-Ximénez, “La redacción original de C.29 del *Decreto* de Graciano,” *Ius ecclesiae* 10 (1998): 149-185; Anders Winroth, “Neither free nor slave: Theology and Law in Gratian’s Thoughts on the Definition of Marriage and Unfree Persons,” in *Medieval Foundations of the Western Legal Tradition: A Tribute to Kenneth Pennington*, eds. Wolfgang Müller and Mary Sommar (Washington, D.C.: Catholic University of America Press, 2006), 97-109.

church was entitled to their portion of the tithe, but a priest could not exact money for a funerary service lest the church profit from the death of another and from the sorrow of the family. The Council of Trebur decreed that charging for burial was equivalent to the selling of land given by God. It was perfectly acceptable, however, to receive as a token something donated for candles. Spontaneous alms should be collected happily, but alms should never be obligatory.¹³⁹

In the course of Causa 14 Gratian concluded that canons could own property with the provision that it was for community. Also in the course of Causa 14, Gratian, relying on Augustine and Ambrose, set down the policies for the collection of interest (*fenus*) or usury (*usuras*), two terms used interchangeably. Typically people associate usury with money. In other words, an individual received more than what he originally lent. This however was not the case. Usury was anything that was received above the original price. It could come in the guise of wheat, wine, oil, even food or clothing.¹⁴⁰ Whatever the excess was, it constituted usury. Ambrose maintained that keeping the excess amount was regarded as robbery.¹⁴¹ In the event that a cleric received something above and

¹³⁹ C.13 q.2 c.14: 'In ecclesiastico namque libro scriptum est: Mortuo non prohibeas gratiam, sciens, quia omnes moriemur. Et item: Omnia, que de terra orta sunt, in terram conuertentur. Quid quo terra terram uendis? Memento, quia terra es, et in terram reuerteris, et quoniam mors tibi futura est, et appropriat, et si tardat. Recordare, quia hominis non est terra, set, ut Psalmista commemorat: Domini est terra, et plenitudo eius. Quare interdictum omnibus omnino Christianis terram mortuis uendere, et debitam sepulturam denegare, nisi forte proximi et amici defuncti propter nomen et amici redemptionem animae gratis aliquid dare uelint' (Sg, p. 114b-115a).

¹⁴⁰ C.14 q.3 c.1: 'Si feneraueris hominem, id est si mutuum dederis pecuniam tuam ei, a quo plus quam dedisti expectes, non pecuniam solam, set aliquid plus quam dedisti, siue illud triticum sit, siue uinum, siue oleum, siue quodlibet aliud, si plus quam dedisti expectes accipere, fenerator es, et in hoc inprobandum' (Sg, p. 116b). [C.14 q.3 c.3]: 'Plerique refugientes precepta legis cum dederint pecuniam negotiatoribus, non in pecunia usuras exigunt, set de mercibus eorum tamquam usurarum emolumenta percipiunt. Unde audiant quid lex dicat: Neque, inquit, usuras, escarum accipies, neque omnium rerum. Item. Esca usura est, et uestis usura est, et quodcumque sorti accidit usura est; et quod uelis ei nomen inponas, usura est' (Sg, p. 116b).

¹⁴¹ C.14 q.4 c.10: 'Si quis usuram accipit, rapinam facit' (Sg, p. 117a).

beyond the original fee the III Council of Carthage decreed that he should pay for the difference.¹⁴² Pope Leo I warned that usury inflamed greed and was lamentable among both the clergy and the laity. All should be kept from this opportunity to sin.¹⁴³ Both Pope Gelasius and the Council of Niceae declared that *clerici* involved in such business dealings were compelled to abstain from their clerical office,¹⁴⁴ while the I Council of Arles decreed that *ministri* were excommunicated.¹⁴⁵ People engaged in the business of buying and selling were not suited to live the life of a cleric.¹⁴⁶

The discussion of usury outlined by Gratian illustrated the growing trend of the Church, at all levels, to involve itself in secular business. The papacy charged rents. When the papal camera lent money it did so at, or above, market rates and thus collected a fee. If the papal camera borrowed money, however, it enforced the policy against usury, and thus collected rents by lowering the price of the loan.¹⁴⁷ Beginning in the twelfth century, the pope alone could confirm the new abbot of a monastery exempt from episcopal control. This confirmation came with a significant fee.¹⁴⁸ When a cleric was

¹⁴² C.14 q.4 c.6: 'Nullus clericorum amplius accipiat quam commodauit; si pecuniam, pecuniam accipiat, si speciem, eandem speciem, quam dedit, accipiat, et quicquid aliud tantum, quantum dedit, accipiat' (Sg, p. 117a).

¹⁴³ C.14 q.4 c.8: 'Quod nos ut non dicamus in eos, qui sunt in clericali ordine constituti, set etiam in laicos qui Christianos se dici cupiunt, condolemus cedere. Quod uindicari acius in eos, qui fuerint confutati, decernimus, ut omnis peccandi oportunitas adimatur' (Sg, p. 117a).

¹⁴⁴ C.14 q.4 c.1: 'Clerici ab indignis questibus nouerint abstinendum, et ab omni cuiuslibet negotiationis ingenio uel cupiditate cessandum. In quocumque uero gradu sint, si cessare noluerint, mox a clericalibus offitiis abstinere cogantur' (Sg, p. 116b). [C.14 q.4 c.7]: 'omnis, qui tale aliquid conatus fuerit, deiciatur a clero, et ab ecclesiastico gradu alienus' (Sg, p. 117a).

¹⁴⁵ C.14 q.4 c.2: 'Ministri, qui fenerantur, placuit iuxta formam diuinitus datam eos a communione se per animi' (Sg, p. 117a).

¹⁴⁶ C.14 q.4 c.3: 'Canonum statutis firmatum est, ut quicumque in clero esse uoluerit emendi uilius uel uendendi carius studio non mutetur. Quod si exercere uoluerit a clero cohibeatur' (Sg, p. 117a).

¹⁴⁷ Robert Ekelund, Jr., Robert F. Herbet, and Robert D. Tollison, "An Economic Model of the Medieval Church: Usury as a Form of Rent Seeking," *Journal of Law, Economics, & Organization* 5 (Autumn 1989): 323, 328.

¹⁴⁸ *Ibid.*, 315.

elevated to the episcopate, he had to pay a one-time tax (*servitia*) to the papacy. This payment may have required him to take a loan, oftentimes from the papacy, to pay.¹⁴⁹ When the papacy involved itself in money lending or money borrowing, the rents it collected amounted to usury. Rents also were similar to usury, as well as to simony, in that the papacy charged an additional fee to perform a service. This fee went beyond the normal fees the papacy would collect from the monastery or the bishopric. The relationship between usury, rents, and simony connects Causa 14 with Causa 1, where Gratian considers whether a monastery can charge an entrance fee and whether that fee amounted to simony. Causa 14 set forth the policy that anything gained in excess was usury (*usuras*) and Causa 1, added to Cluster D, established that a monastery could not charge an entrance fee, but gladly would accept gifts.

The English Cistercians serves as another case in point. By the mid-twelfth century the White Monks were important figures in the wool trade and along the way became agricultural banks and credit establishments.¹⁵⁰ In addition to the monastery producing its own wool, an abbot, though the use of *conversi*, served as a middleman by purchasing wool, referred to as *collecta*, from small producers to resell it to merchants at a profit.¹⁵¹ The English Cistercians also became involved in a system of sale credits, whereby they would receive a cash payment from merchants for the future sale of wool. The terms of the sale required the monastery to produce the wool on a specific date with a clause mandating that the monastery pay a fine if the date was not met. Naturally, the

¹⁴⁹ Ibid., 325.

¹⁵⁰ Sister James Eugene Madden, "Business Monks, Banker Monks, Bankrupt Monks: The English Cistercians in the Thirteenth Century," *The Catholic Historical Review* 49 (October 1963): 342.

¹⁵¹ Ibid., 343-344.

date would be one that the monastery could not meet and thus have to pay the fine.¹⁵² In both instances the collection of usury (*usuras*) and interest (*fenus*) played a role. In the first the monastery collected interest in the sense that, as a middleman, the abbot sold the wool for more than the purchase price. In the second instance the monastery paid interest, in the form of a fine, for its failure to fulfil the terms of the sale credit. The prohibition against interest (*fenus*) or usury (*usuras*) ensured that ecclesiastics, such as monks who had taken a vow of poverty, neither benefited from nor were affected negatively by such business practices.

Usury nevertheless did have its use. Ambrose maintained that it could be exacted as a type of financial war on those who warranted punishment.¹⁵³ Gratian concluded that usury, akin to anything inherently evil, could be turned into something good. For instance, others can benefit from profits confiscated from an astrologer who either taught his craft or foretold the future.¹⁵⁴ In the event that a priest could not return the ill-gotten gains, he could still use them for alms. Despite the potential advantages, as Augustine noted, he must return the excess if he was able. Otherwise, his penance would have no effect because his sin had not been remitted.¹⁵⁵ Gratian added only one section of text to c.9 in Gratian 1. This decree from the Council of Carthage is the same text as c.6.¹⁵⁶ It is

¹⁵² Ibid., 345-346.

¹⁵³ C.14 q.4 c.12: 'Sine ferro dimicat qui usuras flagitat, sine gladio se de hoste ulciscitur qui fuerit usurarius exactor inimici. Ergo ubi ius belli, ibi ius usurae' (Sg, p. 117a-117b).

¹⁵⁴ C.14 q.5 d.p.c.14: 'Vel ex malo acquiritur quod ex turpi causa possidetur, ueluti cum mathematicus ex arte, quam docet, uel ex futuris, que pronunciat, nonnulla lucratur. Que uero sic de malo acquiruntur in bonum possunt conuerti' (Sg, p. 118a).

¹⁵⁵ C.14 q.6 c.1: 'Si res aliena, propter quam peccatum est, reddi possit, et non redditur, penitentia non agitur, set simulatur. Si autem ueraciter agitur, non remittetur peccatum, nisi restituatur ablatum; si, ut dixi, restitui potest' (Sg, p. 118a).

¹⁵⁶ Fd, fol. 48v; Aa 23, fol. 198v.

no surprise then that he removed it in the second recension. Gratian's view on usury, however, remained the same.

Causa 17 considers whether a priest, who had placed his property in the charge of an advocate and gave himself over to a monastery, could demand it back in the event that he should leave. What if, however, the priest left the monastery without the permission of the abbot? Could his possessions be returned to him then?¹⁵⁷ In the first place, as Pope Gregory I wrote, it was sacrilege and against the law for anyone to take back what was bequeathed to venerable places.¹⁵⁸ Secondly, Gratian maintained neither the abbot nor whoever was sanctioned to alienate possessions handed over to the Church.¹⁵⁹ Pope Symachus decreed that whatever bishop, priest, or deacon alienated the lands or possessions of the Church should lose his rank as punishment. It mattered not whether he donated, sold, or alienated the possessions, the punishment remained the same.¹⁶⁰ A bishop has the right to reclaim that which a priest sold without his permission. An abbot, likewise, may not relinquish those possessions handed over to a monastery without the permission of the bishop, who may request the return of that which was dispossessed.¹⁶¹ Gratian concluded that there were times when the Church should return possessions to the donor upon his request. John the Baptist returned gold and gems to two young boys

¹⁵⁷ C.17 q.4 d.a.c.1: 'Si autem sine licentia abbatis de monasterio discesserit, queritur, an sua sibi reddi debeant' (Sg, p. 141a).

¹⁵⁸ C.17 q.4 c.4: 'Sacrilegium et contra legem est, si quis quod uenerabilibus locis relinquitur prauae uoluntatis studiis temptauerit suis compendiis retinere' (Sg, p. 141a).

¹⁵⁹ C.17 q.4 d.a.c.1: 'Set possessiones et res ecclesiae traditas quolibet modo alienare nec abbati, nec alicui licet' (Sg, p. 141a).

¹⁶⁰ C.17 q.4 c.1: 'Quicumque episcoporum, presbiterorum, diaconorum oblitus Dei, et decreti huius inmemor in constitutum committens, predium ecclesiae magnum uel exiguum, uel quicquam de iure ecclesiae alienare temptauerit, et donator, et alienator, et uenditor honoris sui amissione mulctetur' (Sg, p. 141a).

¹⁶¹ C.17 q.4 c.40: 'In uenditionibus, quas abbates facere presumunt, hec forma seruetur, ut quicquid sine impius licentia uenditum fuerit ad potestatem episcopi reuocetur. Mancipia uero monachis donata ab abbate manumitti non licet' (Sg, p. 141a).

who regretted giving away all their things to the Church for the expense of the poor. John, however, did not return the boys' *original* possessions. An abbot or bishop could return possessions to the donor requesting them back, so long as they were not counted among the Church's resources.¹⁶² In other words, the donor may receive something back, but it may not be exactly what he gave originally. While Gratian kept this a legally viable possibility, he did not espouse to it personally, lest the Church suffer scandal, lest it be thrown headlong into deterioration.¹⁶³ In the first recension, Gratian added that it was a way to compel those who have left the order to return.¹⁶⁴ A monk may have use of his possessions so long as he remained in the order; however, he relinquished the right to obtain them back in the event he should leave.

Like Causa 17, Causa 19 protects the property rights of monastery, a topic unrelated to episcopal permission or to canons regular. The Council of Chalcedon set down that once a council of bishops had dedicated a monastery it must forever remain as such. It could not be secularized.¹⁶⁵ In the event this should happen, the usurped dwelling would be restored to a monastery and the offender punished. A layman would be excommunicated and a cleric would be deposed.¹⁶⁶ Gratian then turned to whether or

¹⁶² C.17 q.4 d.p.c.42: 'Obicitur tamen quod non reddidit oblata, que iam pauperibus erogauerant, set alia que numquam facultatibus pauperum uel ecclesiarum computata fuerant recompensauit. Similiter si abbas uel episcopus aliquid habuerit, quod in ecclesiasticis facultatibus nondum annumeratum, exemplo Beati Iohannis det illa recedenti, oblata uero ecclesiae retineat' (Sg p. 141b).

¹⁶³ C.17 q.4 d.p.c.43: 'sic ne ecclesia scandalum patiatur, ne discedens in deteriora precipitetur' (Sg, p. 142a).

¹⁶⁴ C.17 q.4 d.p.c.43: 'non ideo in apostasiam euntibus sua reddenda sunt, quibus utilius necessaria subtraherentur ut coacti redirent ad ordinem a quo recesserant' (Fd, fol. 56r; Aa 43, fol. 40r).

¹⁶⁵ C.19 q.3 c.4: 'Que semel sunt dedicata monasteria concilio episcoporum meaneant perpetuo monasteria, et res, que ad ea pertinent, monasteriis reseruari oportet, nec posse ea ultra fieri secularia habitacula' (Sg, p. 145b).

¹⁶⁶ C.19 q.3 c.5: 'Quoniam a quibusdam uiris quedam uenerabiles domus subripiuntur, tam uidelicet episcopia quam monasteria, et facta sunt communia diuersoria, si quidem uoluerint, qui hec reddere, ut

not a monk could make a testament. After all, the first hermit Paul left behind in his will one article of clothing to Athanasius, the bishop of Alexandria, and another article of clothing to Anthony. He noted though that it was one thing for a hermit leading a solitary life to make a will because he did not surrender his possessions to the Church; it was another for a monk, who did surrender himself to a monastery, to make one.¹⁶⁷ The moment he surrendered himself and his possessions to a monastery he relinquished the right to leave them to others. As did he, his property passed into the possession of the monastery.¹⁶⁸ In a manner echoing Causa 17, Gratian argued that under no circumstances could monastic lands be secularized. Likewise, monks were forbidden from testaments as they, by their very nature, alienated possessions. Gratian elucidated the law concerning the maintenance of monasteries. Once someone dons the monastic habit, his possessions become property of the monastery. He could neither receive them back if he leaves the monastery nor use a will to grant them to others.

In Causa 20, Gratian shifted from protecting monastic rights to protecting the right of those seeking a more demanding life. According to the Council of Trebur, monks indeed were permitted to transfer to a stricter monastery. His request for transfer though should not be granted if he was seeking to do so for a less demanding life.¹⁶⁹

secundum antiquitatem restaurentur, bene et optime; alioquin, si de sacro catalogo fuerint, hos deponi precipimus' (Sg, p. 145b).

¹⁶⁷ C.19 q.3 d.p.c.8: 'Econtra Paulus heremita in testament collobium suum Athanasio Alexandrino reliquit, tunicam uero Beato Antonio. Set aliud est de his, qui monasterium ingressi se et sua tradiderunt: aliud de his, qui solitariam uitam ducentes se nulli ecclesiae dederint. Illi namque semel tradita denuo alteri tradere nequiunt: isti nulli oblata libere testari possunt' (Sg, p. 145b).

¹⁶⁸ C.19 q.3 c.7: 'Quia ingredientibus monasterium conuertendi gratia ulterius nulla sit testandi licentia, set ut res eorum eiusdem monasterii sint, aperta legis diffinitione decretum est' (Sg, p. 145b).

¹⁶⁹ C.20 q.4 c.1: 'Virgines sacrae si pro lucro animae suae propter districtiorem uitam ad aliud monasterium pergere disposuerint, ibidemque permanere decreuerint, synodus concedit. Si uero fuga disciplinae alium locum quesierint, redire cogantur' (Sg, p. 147b).

Gratian maintained that this rule also should apply to clerics.¹⁷⁰ Though misattributed to Basil rather than to the penitential of Theodore, a monk, who wished to enter into a vow while continuing to live in his current monastery, must receive his abbot's permission beforehand. If he failed to obtain permission the vow should be broken.¹⁷¹ Gratian concluded that if a monk made a vow pertaining to a particular abstinence or to some austerity that was outside the general customs of the brothers, he must obtain the abbot's consent lest he bring scandal upon them. Neither a cleric nor a monk may enter into a vow of pilgrimage simply to evade regular discipline. On such an occasion he should be returned to secular life.¹⁷²

In conjunction with the Gregorian Reform, the Church began to curtail marriage to seven degrees during the pontificate of Nicholas II.¹⁷³ Instances could arise in which a priest would have to determine who could marry whom. *Causa 34* passes judgment on what constitutes incestuous liaisons and how such trysts affect his or her ability to marry. The Council of Trebur decreed that two people who engaged in a sexual relationship ignorant of their familial bond and family members who did not know that they slept with the same person were not prohibited from contracting or remaining in lawful marriages. For instance, a man who slept with his sister-in-law was not guilty if he did not know that she was related to his wife. A man also was innocent so long as his ignorance stemmed

¹⁷⁰ C.20 q.4 d.p.c.1: 'Quod uero de uirginibus hoc capitulo dicitur consequenter de monachis idem est intelligendum, et de quolibet cleric' (Sg, p. 147b).

¹⁷¹ C.20 q.4 c.2: 'Monacho non licet uotum uouere sine consensu abbatis sui; si autem uouerit, frangendum erit' (Sg, p. 147b).

¹⁷² C.20 q.4 d.p.c.3: 'Set hoc intelligi debent de illis monachis qui uiuent religiose, quibus specialis abstinentiae uota que aliorum fratrum consuetudinem excedant si non consensus abbatis non licet uouent ne fratres inde ad scandalum moueantur. Causa etiam illorum et hoc statutum est, qui regularem disciplinam subterfugientes peregrinationis uota sibi assumunt, quod nec monacho, nec alicui clerico licet, ne tale occasione ad secularem redeat conuersationem' (Sg, p. 147b-148a).

¹⁷³ Cushing, *Reform and the Papacy in the Eleventh Century*, 150.

from genuine carelessness. In such a case, a man had slept with his sister-in-law though he thought it was his wife. He should perform penance and remain with his wife. The sister-in-law, however, should be deprived of a husband forever.¹⁷⁴ Here, as if the sisters were identical twins, the husband could not be held accountable for confusing the two. The blame, rather, lay with the sister-in-law who should have known that she was engaging in an incestuous affair. The pardon also held true for a father and a son who unknowingly slept with the same woman.¹⁷⁵ The Council of Trebur decreed that if a father slept with a certain woman and afterwards his son also slept with her ignorant of his father's deed, they were not to be punished further having confessed and performed a worthy penance. They both were permitted legitimate marriages lest they fall into worse things. The woman (*fornicaria*), however, was forbidden from ever having a husband.¹⁷⁶ Again, it was the woman who should have known that her liaisons involved blood relations.

Women though were not always to blame and, to some extent, were excused for ignorance. Such occurrences happen when either a mother and a daughter or two sisters unknowingly sleep with the same man.¹⁷⁷ Again from the Council of Trebur, if a man

¹⁷⁴ C.34 qq.1-2 c.6: 'In lectum mariti absente uxore soror iuit, quam ille uxorem suam esse putans, dormiuit cum ea. Super hoc iussum est, si ipse per securitatem ueram hoc probauerit, quod inscius fecerit hoc scelus, penitentiam quidem, que sibi iudicata fuerit, agat, et legitimum coniugium suum habere permittatur. Illa uero digna uindicta affligatur, et in eternum coniugio priuetur' (Sg, p. 186b).

¹⁷⁵ C.34 qq.1-2 d.p.c.7: 'De simpliciter uero fornicantibus, uel cum sororibus duabus, uel cum matre et filia, uel cum patre et filio, idem accipiendum est [referring to c.6], ut ignorantibus coniugia non negentur, scientibus perpetuo prohibeantur' (Sg, p. 186b).

¹⁷⁶ C.34 qq.1-2 c.10: 'Quidam fornicatus cum quadam muliere; et postea filius nesciens patris factum stuprum stuprumuit eandem. Quod cum pater resciret, de se filioque confessus est. Statuerunt, melius esse, ut taliter lapsis cum digna penitentia legitima permittantur coniugia, quam forte deterius delinquant. Fornicaria autem sine spe coniugii maneat' (Sg, p. 187a).

¹⁷⁷ C.34 qq.1-2 d.p.c.7: 'De simpliciter uero fornicantibus, uel cum sororibus duabus, uel cum matre et filia, uel cum patre et filio, idem accipiendum est, ut ignorantibus coniugia non negentur, scientibus perpetuo prohibeantur' (Sg, p. 186b).

slept with a mother and a daughter, and both women were ignorant of the other's deed, the man was forbidden from taking a wife. The mother and daughter, if they wanted, may take husbands. If however these women knew, they would be prohibited from marrying.¹⁷⁸ Likewise from the Council of Trebur, if a man slept with two sisters and both the sisters were ignorant of the other's deed, they may take husbands after seven years with sufficient apologizes. Again if they knew, they were to refrain from marriage for the remainder of their lives.¹⁷⁹ In both of these instances, the men were charged with the responsibility of knowing that the women were related. The women were exonerated. Like qq.1-2 d.p.c.3, c.4, d.p.c.4, and c.5, Gratian removed qq.1-2 d.p.c.5, c.6, d.p.c.7, c.8, c.9, and c.10 from the first recension only to insert these texts again with the second recension.

Conclusions

Structural evidence supports the argument for a core group of cases. The legal issues involving judicial procedure, the monastic vow, oath-taking, and marriage represent the foundation of a medieval canon lawyer's training. In each of the cases Gratian has a main theme – procedure or rights as they relate to the merits of a case – and a tangential theme – a resolution to a practical legal problem. To Gratian the issues covered in these cases were the important legal questions.

¹⁷⁸ C.34 qq.1-2 c.9: 'Si quis cum matre et filia fornicatus est, ignorante matre de filia, et filia de matre, ille numquam accipiat uxorem; illae uero, si uoluerint, accipiant maritos. Si autem hoc scierunt, absque maritis perpetuo maneat' (Sg, p. 187a).

¹⁷⁹ C.34 qq.1-2 c.8: 'Si quis cum duabus sororibus fornicatus fuerit, et soror sororem ab eodem antea stupratam nescierit, uel se sororem eius quam antea stuprauerat, non intellexit si digne penituerit, et se continere non ualuerit, post annos septem coniugia illis non negentur. Si autem non ignorauerint, usque ad mortem a coniugio abstineant' (Sg, p. 186b-187a).

These core *causae* reveal nascent *tractatus*. The first tract, consisting of *Causae* 13-15, addresses both judicial procedural and matters of ecclesiastical concern. With its unique approach, Gratian more than likely compiled *Causa* 13 first. The narrative style of plaintiff and defendant was the student's first introduction to courtroom procedure by showing how each side argued a case. At the same time as covering procedure, the case also discusses tithing disputes. The students learned that privileges do not expire and both the diocese where land is located and those who minister have rights to it. Not necessarily related to tithing rights, are burial disputes, which arose as war forced people from one diocese to another. While each church has a right to their portion of the tithe, no church can attach a monetary value to a funerary service. The conclusion directed the cleric to refer to the wishes of the deceased; otherwise, the parish where he received the sacraments held sway and could accept donations voluntarily given for the service.

Causa 14 distinguishes between private and public law. Gratian maintained that, at least for canons of a church, private ownership of property and litigation over private matters are prohibited. Public, that is, communal, ownership of land and litigation for matters related to the community or the church, however, is permitted. It is for this reason that brothers are forbidden from testifying in private matters; rather, they may testify only in matters affecting the community as a whole. The subject of usury serves as an example where Gratian stated that anything, monetary or otherwise, obtained in excess to the original loan should be returned. If that is not possible then it should be put to good use, such as alms for the poor. This foundation for litigation segues into judicial protocol in *Causa* 15. A trial must follow proper procedure, from indictment to conviction. As a

symbol of the rebirth of Roman law in the early twelfth century, a time in which Irnerius (mentioned in documents between 1112 and 1125) was known to lecture on the *Corpus iuris civilis*,¹⁸⁰ Gratian worked with two different legal traditions and, in the end, reinforced the suppositions of canon law with those of Roman law.

Integral to the preservation of monastic discipline, which is the subject of the next *tractatus*, is the vow and property rights. No doubt questions regarding a vow's legitimacy would arise as would property disputes. Causa 17 set forth the theory behind the vow. For it to be valid, the candidate must enter the community, put his intentions in writing, or subject himself to the abbot. If neither of these situations occurred, the individual is free from his vow and the property, in this case the church and benefice of a priest, is to be returned. Once the candidate takes a legitimate vow, it is irrevocable, he may not leave, and his possessions are incorporated into those belonging to the monastery. In the event he did leave the order later in life, he *may* be entitled to receive something back; however, it will not necessarily be what he originally gave. Should he leave without permission, Gratian recommended that the property remain in possession of the monastery as such oblations are essential for the wellbeing of the monastery.

Causa 17 sets the theoretical foundation for Causae 19 and 20, which put theory into practice with regards to various issues for the preservation of monastic life. A cleric may enter a monastery, even if his bishop does not grant permission. A canon regular

¹⁸⁰ Winroth, *The Making of Gratian's Decretum*, 158; Pennington, "The 'Big Bang'," 48-58. Winroth has maintained that the teaching of Roman law was not serious until the time of Bulgarus, possibly in the late 1130s or early 1140s, and that the work of Irnerius should not be over emphasized. Pennington, on the other hand, has found that Gratian provided a more sophisticated discussion of the difference between arbiters and judges in Causa 2 of St. Gall than that offered by Bulgarus, whose work Gratian knew in Bologna. As the connections between Bulgarus' procedural treaty *De arbitris*, the papal chancellor Haimeric, and two letters of Innocent II reveal, Bulgarus worked sometime before 1130.

also may enter a monastery, but only with the permission of his superior. Related to the necessity of permission covered in Causa 19, Gratian taught that once a place was designated as a monastery, it neither could be secularized nor could monks leave wills bequeathing their property to others. Advocates are to protect the property rights of monasteries. Once a monastery receives an endowment, the community possesses ownership. The legitimacy of the monastic vow also affects the status of child oblates. Parents are within their right to place a child into a religious life prior to the age of reason, that is, fourteen for boys and twelve for girls. Furthermore, they are within their right to revoke a vow taken by a minor. Vows of chastity do not take affect until the child reaches puberty. At that point, he, or she, may withdraw from the life his parent's imposed upon him. Once he takes a vow voluntarily, he may not rescind it. Parents should not deny the request of a child to enter an order and once the child has reached the age of reason parental permission is no longer necessary. Digressing from the main concern of the causa, but still of legal importance, is the necessity of an abbot to approve of vows taken while in the monastery to assure they fall in line with the customs of the community. A monk may transfer to a more demanding monastery, but not to one that is less demanding.

Forming the last *tractatus* of the core causae, Gratian turned his attention to the laity. Causa 22 sets the foundation for the oath and the principles that regulated both ecclesiastical and lay society with no distinction being made between them. Essentially, it is a lesson on judging the veracity of an oath and substantiating perjury, which occurs when one does not uphold that which he swore. An oath, such as marriage, that has been

violated, such as through adultery, remains valid so long as the taker returns to the agreement, that is, the adulterer returns to the bonds of marriage. The key element is the desire to deceive. As Fulbert of Chartres's letter brings to light, the integrity of the oath lies squarely on the shoulders of the taker. As the numerous references to marriage imply, Causa 22 serves as the foundation for, and immediately precedes, Causa 34. It was necessary to understand the fundamentals of the oath in order to understand how they were to be applied to marriage. In this case, the marriage oath binds a woman to her first husband, even if she thought he was dead and married another. The second marriage is invalid and she must return to her former spouse. The same holds true for those who are betrothed. Just as Gratian exonerated someone from the charge of perjury if he was truly mistaken as to what he swore, so too did Gratian exonerate those who truly did not know that they had engaged in an incestuous liaison. The legal playing field was surprisingly level. In an effort to preserve the sanctity of marriage, men bore just as much responsibility as women to refrain from illicit trysts.

Gratian built his *Decretum* from eight cases that offered his students the fundamentals necessary to practice law. He did not cover the subjects in painstaking detail, but simply outlined resolutions to the most common issues. It was from these fundamentals – procedure, the monastic vow and its implications, and the oath as it applies to marriage – that Gratian expanded his repertoire of cases to address an array of legal questions.

Chapter 5

SUPPLEMENTING THE CORE CAUSAE

The positive correlation between the steady incorporation of rubrics and the steady incorporation of canons outlined in Chapter Two suggests that Gratian supplemented the core causae of Cluster A – Causae 13, 14, 15, 17, 19, 20, 22, and 34 – analyzed in Chapter Four by adding clusters of causae in the course of four developmental stages. Each cluster has its roots in the previous one by either building upon a point not directly related to the main issue or by augmenting a previous argument. Cluster B – Causae 5, 6, 12, 16, 18, and 21 – incorporates between six and nineteen percent of the respective rubrics. It focuses more pointedly upon the *ordo iudiciarius*, that is, upon pre-trial procedure and on ecclesiastical property rights. Cluster C – Causae 3, 11, 31, 32, and 33 – employs between thirty-five and forty-three percent of the rubrics for the canons found in St. Gall. In addition to the *Tractatus de matrimonio*,¹ Gratian added two causae that do not form a tract but are grounded in the second cluster. While addressing litigation and property rights, they also branch off to questions of jurisdiction and the appeals process. Rooted in Cluster C is Cluster D, with between fifty and seventy-five percent of the rubrics for the canons found in St. Gall. These causae – Causae prima, 1, 7, 8, 9, 10, 27, 29, 35, and 36 – again expand the array of legal questions, adding another *tractatus* on marriage and one on the episcopate. Causa 10 focuses on a bishop's influence over clerical possessions and finances. Finally, Cluster E, with between eighty and eighty-six percent of the rubrics for the canons found in

¹ I intend to analyze the evolution of the marriage causae in a future essay.

St. Gall, contains a tract – Causa 2 and Causa 4 – elaborating on the *ordo iudiciarius*, as well Causa 23 on war and heresy and Causa 30 on marriage. More often than not, each cluster contains a tightly woven *tractatus* on a specific legal issue that anchors the subsequent cluster.

Cluster B

The causae of Cluster A anchor those of Cluster B. Causae 5 and 6 form the first of two *tractatus*, which, like Causae 13-15, continue with the theme of criminal procedure by using a bishop as the subject in question. Whereas Causae 17, 19, and 20 in Cluster A touched upon monastic property rights, the second *tractatus*, which includes Causae 12, 18, 16, and 21, turn to ecclesiastical property rights.

In Causa 5 an accuser, who levied an accusation against a bishop and sought to have him declared infamous, came forth publicly after filing the charge. Only a letter summoned the bishop and, on the day of his trial, he had his counsel represent him because he could not be present personally. The trial resulted in his condemnation though without a synod hearing. With the judgment upheld on appeal, the bishop complained of the accuser's excessive hostility because he failed to produce evidence for the charge. Gratian treated procedure from two perspectives, that of the accuser and that of the accused bishop. Concerning the accuser, Question one asks what punishment he should face for neglecting to prove the accusation levied in his defamatory publication, which he wrote in secret. Question six addresses a similar theme asking what punishment should he face for failing to prove the charges. Question five asks whether

the accuser is considered an enemy simply because he implicated the bishop in a crime. Concerning the accused bishop, Question two looks at how many court summons the accused should receive before he is condemned. Question three addresses whether an agent was permitted to represent the accused in court? Finally, Question four asks whether the accused cleric could be sentenced and condemned to infamy without a synod hearing?¹

Causa 5 focused on the events leading up to a trial. Concerning the accuser, Gratian began with a pair of canons attributed to Pope Adrian and to Pope Gregory. Pope Adrian called for the whipping of the person who could not prove his accusation.² Pope Gregory decreed that whoever did not come forth and make his accusation public shall be deprived of holy communion.³ Gratian again returned to the accuser by ending Causa 5 much as he began by arguing for the punishment of those who could not prove their case. Pope Adrian called for a sentence of infamy for those who introduced a false claim against others.⁴ Pope Gregory decreed that those who could not prove their case receive

¹ Causa 5 d.init.: 'Ad episcopum quondam infamandum accusatoris libellus occulte scribitur, accusator tandem in publicum [publicum] procedit. Episcopus litteris semel uocatus statuto tempore suae causae non ualens adesse, iudici per procuratorem se presentauit; qui quidem absque audientia synodali dampnatur. Iudicio demum per appellationem renouato, accusatorem inimicum esse conqueritur; accusator tandem in accusationem deficit. Unde primo dubitatur qua pena sit afficiendus qui famosum libellum clanculo scribens que litteris mandauit probare negligit? Secundo, quotiens ad causam sit uocandus, antequam dampnationis sententiam excipiat? Tertio, an qui causae adesse nequit per procuratorem suam causam agere possit? Quarto, utrum possit dampnari absque audientia synodali? Quinto, an quis ob hoc inimicus sit habendus quia alterius crimen indicare presumit? Sexto, qualiter puniri debeat qui quidem obiecit probare nequit' (Sg, p. 74a).

² C.5 q.1 c.1: 'Qui inquit in alterius famam publice scripturam aut contumeliosa uerba confinxerit, et repertus scripta non probauerit, flagelletur' (Sg, p. 74a).

³ C.5 q.1 c.2: 'Qui si non exierit, neque publice confessus fuerit, quisquis ille sit qui hoc agere presumpserit, uel consensum tantae iniquitatis consilio prebuit, ex Dei et Domini nostri spiritu diffinimus, ut sancti eius corporis ac sanguinis participatione sit priuatus' (Sg, p. 74b).

⁴ C.5 q.6 c.1: 'Omnis, qui aliis falsa intulerit, puniatur, et pro falsitate ferat infamiam' (Sg, p. 76b).

the same punishment as the accused would have received if convicted.⁵ Concerning the accused, Gratian concluded that except in cases called by a synod, the bishop in question was not compelled to respond to the accusers' accusations unless he so desired.⁶ Once the synod had called him, however, Pope Sylvester required him to appear within seven days. If the journey was long, he was allotted seven extra days. If he was more than two days late, he was excommunicated and anathematized on the third day.⁷ In the event that the bishop was unable to appear for his case, Gratian concluded that he could send a legate on his behalf. The legate, however, was not to conduct the case, but simply to explain the circumstances that prevented the bishop from attending in person.⁸ As the defendant, the bishop or priest could advocate for himself, except, as decrees of Pope Adrian and Pope Anacletus made clear, in criminal trials.⁹ A separate advocate must represent the accused in such instances. The Pseudo-Isidore decretal attributed to Pope Julius stated that only a legitimate synod, called by apostolic authority, may hear and judge a bishop.¹⁰ Another Pseudo-Isidore decretal, attributed to Pope Zephyrinus, stated that a case involving an

⁵ C.5 q.6 c.2: 'Qui calumpniam illatam non probat, penam debet incurrere, quam, si probasset, reus utique sustineret' (Sg, p. 75b).

⁶ C.5 q.2 d.p.c.4: 'Istis auctoritatibus manifestate quod nisi quis canonice fuerit uocatus, etiamsi ad synodum aliqua occasione ueniat, insidiatoribus respondere non cogitur' (Sg, p. 75a).

⁷ C.5 q.2 c.2: 'Presenti decreto censemus, ut inprimis paternaliter uocentur, et per septem dies expectentur, nullius ecclesiasticae rei licentia interdicta. Huic uero expectationi iterum addantur dies septem, interdicta licentia ecclesiam intrandi et omnia diuina officia audiendi. Post uero adiciantur duo dies, quibus a pace et communione sanctae sunt ecclesiae suspensi. Demum uero aliis duobus diebus sub hac expectatione deportentur. Quibus uno die superaddito, omni expectatione ueluti iam desperata, reus mox anathematis gladio feriatur' (Sg, p. 74b-75a).

⁸ C.5 q.3 d.p.c.1: 'quod episcopus inepeditus et non ualens suae causae adesse iubetur legatum per se ad synodum mittere. Sed tamen non ad causam agendam, sed ad necessitatem synodo exponendam mittitur, iste legatus quia episcopus inepeditus synodo adesse non potuit' (Sg, p. 75a-75b).

⁹ C.5 q.3 c.2: 'In criminalibus causis nec accusator, nisi per se, accusare potest nec accusatus per aliam personam se defendere permittitur' (Sg, p. 75b). [C.5 q.3 c.3]: 'Quia episcopus uniuersique sacerdotes ad laudem Dei solam bonorumque operum actionem constituuntur, debet unusquisque eorum tam pro ecclesiasticis, quam etiam pro suis actionibus excepto publico [publico] uidelicet crimine habere aduocatum' (Sg, p. 75b).

¹⁰ C.5 q.4 c.1: 'Nullus episcopus, nisi in legitima synodo et suo tempore apostolica auctoritate conuocata, et super quibusdam criminationibus pulsatus audiatur, uel iudicetur uel dampnetur' (Sg, p. 75b).

accused bishop requires twelve judges to judge and excommunicate him.¹¹ Gratian justified accusations against a bishop because the sentence of a judge corrected those whom secret admonitions were unable to correct. However, one was not able to pursue malicious accusations.¹²

Causa 6 continues the discussion of the *ordo iudiciarius*. The case centers on a bishop accused of simony by two fornicators branded with infamy. The defendant, the bishop, requested that the archbishop of another province hear the case. The bishop was found innocent as the accusers failed to produce evidence. Supplementing the topic of judicial procedure, Question one examines whether those branded with infamy can accuse another. Question three asks whether the accused, in this case a bishop, can request a trial in another province. If the trial were to remain in the same province, Question four asks what should happen if the bishops disagreed on the verdict? If the accuser failed to produce evidence, Question five looks at whether the bishop should be required to show evidence of his innocence. Finally, Question two asks whether the bishop could file a counter-suit with his trustworthiness proving sufficient?¹³

Whereas the procedural cases of Cluster A simply laid out the basics of conducting a trial, those of Cluster B focus more pointedly upon pre-trial matters, judicial

¹¹ C.5 q.4 c.2: 'Duodecim iudices quilibet episcopus accusatus si necesse fuerit, eligat, a quibus eius causa iudicetur, nec prius audiat, aut excommunicetur uel iudicetur.' (Sg, p. 75b).

¹² C.5 q.5 d.p.c.5: 'Set certe aliud est aliorum crimina ex karitate deferre, ut quos secreta ammonitione non corriguntur iudicis sententia arguantur, atque aliud insidiando falsa obicere, uel insultando uera facile exprobrare' (Sg, p. 76b).

¹³ Causa 6 d.init.: 'Fornicatores quidam et notati infamia episcopum quendam de symonia nituntur inpetere; expetit reus iudicium alterius archiepiscopi prouinciae; accusatores tandem in probatione deficiunt; ad suae innocentiae assertionem cogi reus. Queritur ergo utrum crimine irretiti seu infamia notati ad huiusmodi accusationem sint admittendi? Secundo, an episcopus si in eos accusationem retorquere uoluerit, an simplici assertioni suae cedendum sit? Tertio, si liceat sibi expetere iudicium archiepiscopi alterius prouinciae? Quarto, cuius sibi iudicium sit expetendum, si circa suam sententiam conprouinciales episcopi discordes extiterint? Quinto, si in probatione deficit accusator, an cogendus sit reus ad probationem suae innocentiae' (Sg, p. 77a).

protocol, and the character of the accuser. First and foremost, Gratian looked at the protocol that dictated the events leading up to the trial. He questioned whether the accused had the right to know the identity of his accuser or could that individual remain anonymous. Gratian set forth the time constraints under which one must answer a court summons before being held in contempt and how one's station influenced who should be responsible for hearing the case. Continuing with that theme, Gratian explored jurisdiction and whether the accused could request a change of venue. He also explained the procedure should a hung jury prevent the rendering of a verdict. A trial hinges upon the accusation. Cluster B pays particular attention to the character of the accuser, that is, does one's legal status determine whether or not he can file a grievance. Just as Causa 15 questioned whether a woman could bring forth accusations, Causa 6 delves deeper into the connection between one's legal status and the ability to levy charges. In the event that the accuser makes a false accusation, that is, he cannot provide the evidence to substantiate his charges, Gratian questions whether this should amount to a mistrial or whether the accused must still prove his innocence. The accuser may face charges as well as what amounts to a defamation of character charge filed by the defendant. This *tractatus* in Cluster B is an elaboration of Cluster A, particularly of Causa 15 where Gratian broadly outlined a trial from indictment to conviction.

Also among the *causae* of Cluster B are Causae 12, 18, 16, and 21, which amalgamate to form a *tractatus* on ecclesiastical property rights and the interaction between churches, on the one hand, and monasteries and the secular world, on the other. This *tractatus* establishes the boundaries between each of the three spheres and seeks to

limit the encroachment of one upon another. Each possesses the right to ownership; however, those rights hinge on certain criteria.

Causa 12 arises from a combination of issues addressed in Causa 19 and in Causa 14. In the course of Causa 19, Gratian argued that monks were not permitted to make wills as their possessions belonged to the monastery. In Causa 14, which centered on a house of canons, Gratian argued that there was a difference between private and communal, or public, property. Monks may possess public or communal property but could not own it privately. Causa 12 brings together these two ideas and applies them to clerics. The causa forms a theory behind ecclesiastical property rights. The case statement centers on two clerics who want to relinquish their property. They prepare testaments lavishing their own possessions and the possessions of the Church on several people. Question one explores whether they are permitted to possess either personal or ecclesiastical property. If they can possess ecclesiastical property, addressed in Question two, can it be used for the benefit of a third party, which Question three addresses? Essentially, as Question four explores, can clerics apply the laws found in secular society to ecclesiastical property? Finally Question five asks whether clerics can make wills.¹⁴ Causa 12 limits the extent to which clerics may own property as well as their ability to dispose of it in their will.

¹⁴ Causa 12 d.init.: 'Non nulli clericorum propria relinquere nolentes; de suis et ecclesiae rebus testamenta conficiunt; de rebus ecclesiae multa largiuntur. Queritur igitur primum, an clericis liceat proprium habere? Secundo, an res ecclesiae, que ab eis datae sunt, aliqua firmitate apud eos qui eas acceperunt, constare possint? Tertio, si ante tempus suae ordinationis nichil habere uidebantur et post ordinationem aliqua inuenisse noscuntur, an quibus uelint ea relinquere possint? Quarto, si de suis et ecclesiae rebus aliqua acquisisse noscuntur, an utrique communiter, an singulariter ecclesiae uel sacerdoti iure proueniant? Quinto, si testamenta eis conficere liceat' (Sg, p. 100a-100b).

Rooted in monastic property rights, Causa 18 addresses the property rights of churches but from an angle other than the disposition of wills. A certain abbot, who later was elevated to bishop, accumulated possessions from his monastery and he acquired even more from his bishopric. The brothers of his former monastery eventually complained to the new abbot. Despite the brothers' opposition, the bishop also wanted to impose himself in the monastery's election process so that he both could choose and ordain the abbot. In terms of property rights, Question one looks at whether the monastery may require back those things acquired by the bishop or whether an episcopal church may claim for itself those things which had been given over to a monastery. Adding a new facet, Question two addresses the issue of whether a bishop can elect and ordain an abbot or whether the election is under the purview of the brothers.¹⁵

The thrust of Causa 18 lay with question two. Gratian supported Question one with a canon from a council near Altheim (Württemberg). If a monk was elected bishop and thus released from the yoke of monastic rule, he must relinquish his possessions to the abbot of his monastery according to the rule of St. Benedict. After his ordination he may receive back that which he acquired.¹⁶ In Question two, Gratian addressed three main issues: unruly monks, lax abbots, and the legal standing of a monastery. Gratian

¹⁵ Causa 18 d.init.: 'Monachus quidam in episcopum consecratus monasterio prius multa contulit, deinde plura in episcopatu acquisiuit. Cui dum fratres quererent successorem, illius loci episcopus electioni se uolebat inserere, ut abbatis electio per eum fieret, fratres autem renituntur. Unde queritur, an monasterium petere possit que ab episcopo sunt acquisita, an episcopalis ecclesia possit sibi uendicare que monasterio fuerant contradita? Secundo, an per episcopum abbas sit eligendus et ordinandus, an tantum a propriis fratribus sit instituendus' (Sg, p. 142a).

¹⁶ C.18 q.1 c.1: 'Statutum est et rationabiliter secundum sanctos Patres a synodo confirmatum est, ut monachus, quem canonica electio a iugo regulae monasticae professionis absoluit, et sacra ordinatio de monacho episcopum facit, uelut legitimus heres paternam sibi hereditatem postea iure uendicandi potestatem habeat; set quicquid acquisierat, uel heres uisus fuerat, monasterio relinquat, et abbatis sui, qui fuerat secundum regulam Sancti Benedicti, arbitrio. Postquam enim episcopus ordinatur, ad altare, ad quod sanctificatur et titulatur, secundum sacros canones quod acquirere poterit restituat' (Sg, p. 142a).

began his discussion of unruly monks by presenting two different viewpoints. On the one hand, the Council of Toledo decreed that bishops ought to institute and ordain abbots.¹⁷

Pope Gregory and Pope Pelagius provided the counter-stance. Pope Gregory held that neither a bishop nor outside people should ordain the abbot of a monastery.¹⁸ Pope

Pelagius likewise decreed that an abbot be ordained from the election of the monks and from the congregation.¹⁹ Gratian then reconciled these divergent opinions.

Thus we have in the Council of Toledo that *sacerdotes* ought to institute abbots and other officials. St. Gregory and Pelagius prohibited it saying that the abbot was to be chosen and ordained by the brothers of their congregation. Therefore in what manner are we to bring concord to this discord? It was known that there were some monks of an ungoverned and unruly sort. While the abbots wanted to compel them to the fruit of every strain (that is, to compel them to religion), they rather conspired in their degradation. They (the abbots) strained to bring them under control. Such as they were who are read to have conspired in the death of St. Benedict. On account of such happenings it is constituted that abbots and other officials are instituted by *sacerdotes* [with *episcopi* written interlinear].²⁰

According to Gratian, the ungoverned and unruly behavior of certain monks has resulted in the bishop being responsible for the election and ordination of the abbot and other officials. Pope Pelagius concluded Gratian's discussion of unruly monks decreeing that

¹⁷ C.18 q.2 c.1: 'Hoc tantum sibi in monasteriis uindicent episcopi sacerdotes, quod precipiunt canones, id est monachos ad conuersationem sanctam premonere, abbates aliaque officia instituere, atque extra regulam acta corrigere' (Sg, p. 142a-142b).

¹⁸ C.18 q.2 c.2: 'Abbas in monasterio non per episcopum aut per aliquem extraneorum ordinetur' (Sg, p. 142b).

¹⁹ C.18 q.2 c.4: 'Abbatem in monasterio illum uolumus ordinari, quem sibi de sua congregatione et monachorum electio' (Sg, p. 142b).

²⁰ C.18 q.2 d.p.c.8: 'Sic habemus in Tolletano concilio quod sacerdotes abbates et alia officia instituere debeant. Set Beatus Gregorius et Pelagius hoc prohibere uidentur dicentes, abbatem esse eligendum a suae congregationis fratribus et ordinandum. Quantenus igitur hec discordia concordabamur? At uero notandum est, quosdam ceruicis indomitae monachos et effrenatae quos dum ad frugem meli omnis uite cogere uoluerint abbates, potius in eorum deiectione conspirant, et ita demum suis moribus aptum uenientem et sibi perponere conantur quod genus qui in necem Beati Benedicti conspirati esse leguntur. Quapropter pro talibus constitutum habetur, ut et abbates et alia officia sacerdotes (episcopi interlinear) instituantur' (Sg, p. 143a).

monks could not expel their abbots and ordain others.²¹ Because monks have proven historically not to keep the best interests of the order in mind, the Council of Trebur decreed that they did not possess the right to elect their own abbot. Conversely, bishops and neighboring abbots were responsible for stepping in and restricting abbots who did not cleave to the monastic regimen and who did not display humility, mercy, a pure nature, and sober discretion.²² Monasteries, according to Pope Gregory, were to remain places where the pursuit of religion stood unimpeded. It was for this reason that they were not to become the dwelling places either for clerics or for laity.²³ Gratian concluded that monasteries, to ensure their way of life and prevent against the usurpations of greedy bishops, were free from the power and dominion of the bishop. The monastery, however, should present the bishop an offering in the name of a eulogy on the day of dedication or on the feast day of the saint to whom it was dedicated. Monasteries, furthermore, were not subject to canon law.²⁴ Gratian quickly clarified this last point. The canonical laws from which monasteries believed themselves exempt were in fact synodal enforcement. An abbot was not compelled to attend a synod unless some cause warranted his

²¹ C.18 q.2 c.9: 'Nullam potestatem de cetero, nullam licentiam monachis relinquimus pro arbitrio suo aut abbates expellere, aut sibimet alios ordinare' (Sg, p. 143a).

²² C.18 q.2 c.15: 'Si quis abbas cautus in regimine, humilis, castus, misericors, discretus sobriusque non fuerit, ac diuina precepta uerbis et exemplis non ostenderit, ab episcopo, in cuius territorio consistit, et a uicinis abbatibus et ceteris Deum timentibus a suo arceatur honore, etiamsi omnis congregatio, uiciis suis consensiens, abbatem eum habere uoluerit' (Sg, p. 143b).

²³ C.18 q.2 c.26: 'Peruenit ad me, quod in ecclesiis fraternitatis tuae aliqua loca dudum monasteriis consecrata nunc habitacula clericorum, aut etiam laicorum facta sunt; dumque hii, qui sunt in ecclesiis, fingunt se religiose uiuere, monasteriis preponi appetunt, et per eorum uitam monasteria destruuntur' (Sg, p. 144a).

²⁴ C.18 q.2 d.p.c.29: 'Igitur pro talibus, qui animarum curam non habentes, bona tamen monasteriorum in suos usus conuertere cupiebant, statutum est, ut monasteria cum rebus suis penitus libera sint a potestate et dominio episcoporum. Quod autem nullis canonicis iuribus dicuntur monasteria esse subiecta, non sic intelligere debemus, quin ipsi episcopo aliquid nomine eulogiae, uel in die dedicationis, uel in natali sanctorum, quorum nomine sit monasterium dedicatum, debeat offerri' (Sg, p. 144a).

attendance. Monasteries, furthermore, were free from certain duties of office, such as works, receptions, annual exactions, and the mollification of sins.²⁵

Crossed-referenced with Causa 13,²⁶ Causa 16 likewise examines the interplay between the ecclesiastical and the monastic. The former case questioned whether the baptismal church which ministered to the people or the ancestral church where the people farmed their land possessed the right to tithe. Along a similar line, the turf war of Causa 16 involves an abbot who appoints a monk to a parish church to celebrate mass for the people. The arrangement carried on without interruption for forty years. Eventually the clerics of the baptismal church, which is in the same diocese as the parish church, filed a grievance against the abbot. On the one hand, Question one explores whether a monk may celebrate the mass, offer penance, and baptize both the people and the monks or should a monk remain with his monastery thereby leaving the clerics to minister to the people. On the other hand, the issues raised in Causa 16 established spheres of influence. For instance, Question two explores whether the monk or the bishop was responsible for managing a chapel given to the former by episcopal benefice. Likewise, does a precept (*praescriptio*) remove the rights (*iura*) of churches, a subject addressed by Question three. Question four asks whether a monastery has a right to file a grievance against a church. Furthermore, as addressed in Question five, can a monk claim for himself a chapel in his territory by the right of the territory? Question six asks whether a bishop or

²⁵ C.18 q.2 d.p.c.31: Canonica igitur iura, quibus monasteria subiecta non sunt, synodales exactiones intelliguntur. Nam non debet abbas cogi sicut in Turonico concilio statuitur ad synodum ire, nisi rationabiliter emineat causa. Sunt etiam quedam officia seruitutis, ut angariae operum, crebrae receptiones, annuae exceptiones, peccantium mulctationes, a quibus omnibus libera sunt' (Sg, 144a-144b).

²⁶ C.16 q.1 c.16 references C.13 q.2 c.6. References added after the completion of C.16 are found in C.13 q.1 d.p.c.1, which refers the reader to C.16 q.1 c.42, as well as in C.13 q.2 d.p.c.1, which refers the reader to C.16 q.4.

archpresbyter could circumvent the law and prevent the church from reclaiming that which was usurped. Gratian also added a new element with the matter of lay involvement. Question seven asks if a layman holds a chapel and he shows disapproval of an abbot by negating his appointment, can the abbot take his office with the consensus of the bishop and of the clerics.²⁷ Causa 16 sets the boundaries between monasteries and churches as well as introduces the question of proprietary churches.

Loosely related to Causa 16 but not to any of the core causae, Causa 21 examines the relationship between the ecclesiastical and the secular as well as the question of pluralism. An archpresbyter of one church received the command of another church and did not want to relinquish the first one. He also was made the manager of secular matters. Feeling important, he began adorning himself in ornate clothing. When his bishop reproached him for having abandoned his office, he turned to a secular judge. Addressing the question of pluralism, Question one asks if clerics could be committed to two churches. Question two, by extension, explores whether he was permitted to abandon one church to transfer to another? In terms of the intersection between the secular and the ecclesiastical worlds, Question three explores whether clerics may receive the administration of secular matters. Having been rebuked by the bishop, Question five

²⁷ Causa 16 d.init.: 'Abbas quidam parrochitanam habebat ecclesiam; in qua quid suum quondam monachum instituit, ut offitium populo celebraret; et eam sine interpellatione annis quadraginta possedit a clericis baptismalis ecclesiae aduersus abbatem tandem querela mouetur, in cuius diocesi illa parrochiana consistebat ecclesia. Primum ergo queritur, an monachis liceat offitia populis celebrare, penitentiam dare, baptizare? Secundo, si contigerit eos episcopali beneficio capellam habere, an ab eis sint instituendae, an ab episcopis? Tertio, utrum ecclesiarum iura ulla prescriptione tollantur? Quarto, an aduersus ecclesiam ecclesia prescriptione acquirat an monasterium aduersus aliam ecclesiam? Quinto, si capellam in suo territorio edificatam iure territorii episcopus uendicare ualeat? Sexto, si archipresbiter uel episcopus sua auctoritate, non iudiciaria sententia capellam illam inreperit, an cadat a causa, ut ecclesia, cui presidet, ulterius resposcendi ius non habeat quod sibi ius illicite usurpauit? Septimo si laici capellam illam tenebant ut quibusdam moris est et in manibus abbatis eam refutauerint, et ordinandam tradiderint, an consensu episcopi et clericorum abbas possit eam tenere' (Sg, p. 124a-124b).

asks whether they are able to relinquish their office and have recourse to a secular judge? Finally, Question four looks at clerical discipline at least in terms of dress by asking whether clerics can clothe themselves with ornate clothing.²⁸ Causa 21 serves as the cross-roads of two worlds by touching upon secular involvement and the clerical emulation of secular dress.

Gratian began Causa 21 with strictly ecclesiastical matters. Supported by a decree of Pope Leo IV, a cleric was not able to preside over two churches though he may hold one as titular church and the other in trust.²⁹ Gratian held that a cleric may relinquish one church and transfer to another provided that his superior granted him a letter of *dimissor* (pardon).³⁰ The III Council of Carthage decreed that he who did transfer may take nothing from his previous commune whether relics of the martyrs or possessions from the parish.³¹ Gratian concluded that it was one thing to transfer but another to transfer because of some fear. While the former was permitted by apostolic authority, the latter was prohibited in every way.³²

²⁸ Causa 21 d.init.: 'Cuiusdam ecclesiae archipresbiter alterius ecclesiae accepit preposituram, priorem tantum relinquere nolens. Efficitur quoque procurator secularium negotiorum. Claris uestibus se exornans corrigi ab episcopo. Relicto proprio officio ad secularem iudicem confuget. Unde primo queritur, an duabus possit ecclesiis ascribi? Secundo, utrum unam uolens relinquere, ad aliam transire ualeat. Tertio, an negotiorum secularium amministrationem clericis suscipe liceat? Quarto, an claris et fulgidis uestibus ornari expediat? Quinto, an correpti ab episcopo suum officium relinquere, et ad secularem iudicem transire possint' (Sg, p. 148a).

²⁹ C.21 q.1 d.p.c.6 (in c.4): 'Non enim utrique tamquam titolato presidere potest, sed uni titolato et alteri commendato' (Sg, p. 148b). [C.21 q.1 c.3]: 'Qui plures ecclesias retinet, unam quidem titulata, aliam uero sub commendatione tenere debet' (Sg, p. 148a-148b).

³⁰ C.21 q.2 d.a.c.1: 'Qui uero sua dimissa ecclesia ad aliam uoluerit transire sine dimissoriis litteris non suscipiatur' (Sg, p. 148a).

³¹ C.21 q.2 c.3: 'Si quis iam translatus est ab una ecclesia in aliam, nichil habeat commune cum priori siue sub ecclesia constitutis martyribus, siue in parrochiis' (Sg, p. 148b).

³² C.21 q.2 d.p.c.3: 'Set aliud est transferri, aliud propria temeritate transire. Illud apostolica auctoritate fieri licet, hoc autem omnino prohibetur' (Sg, p. 148b).

Gratian then moved to the relations between the ecclesiastical and the secular.

Clerics were prohibited from serving as advocates in secular matters.³³ The I Council of Carthage decreed that neither bishops, nor clerics, nor monks could participate in secular business and the management of another's possessions. The only exceptions were reserved for those who served as guardians (*tutelas*) for minors and a bishop who had ecclesiastical governance of churches or orphanages.³⁴ Cyprian wrote that clerics were called to divine administration and nothing else. They could retire neither from the altars nor from sacrifices and thus they were not bound by vexing secular matters.³⁵ Gratian added q.3 c.3, c.4, and c.7 to the first recension to reinforce this point. Relying on a canon from the Seventh Synod, Gratian argued quickly in St. Gall that a cleric was not permitted to dress in ornate clothing. In the style of Basil, the dress of clerics was to be of inexpensive material. Silken, colored, or decorated clothing was unnecessary.³⁶ Gratian concluded Causa 21 by forbidding a cleric from having recourse to a secular judge after a bishop had rebuked him.³⁷ According to the Council of Antioch, a priest or a deacon deposed by a bishop and a bishop deposed by a synod could turn to a synod of

³³ C.21 q.3 d.a.c.1: 'Quod secularium negotiorum amministrazioni siui procuratores esse non possit' (Sg, p. 148b).

³⁴ C.21 q.3 c.1: 'Decreuit igitur sancta synodus, neminem deinceps eorum, hoc est episcopum, siue clericum, aut monachum, conducere possessiones, aut misceri secularibus procuracionibus, nisi forte qui legibus ad minorum etatem tutelas siue curationes inexcusabiles attrahantur, aut cui ipsius ciuitatis episcopus ecclesiasticarum rerum commiserit gubernacula, uel orphanorum, aut uiduarum, que indefensae sunt, aut earum personarum, que maxime ecclesiastico indigent amminiculo propter timorem Dei' (Sg, p. 149a).

³⁵ C.21 q.3 c.6: 'Hii, qui in ecclesia Domini ad ordinationem promouentur, in nullo ab amministrazione diuina prouocentur, ne molestiis et negociis secularibus alligentur, nec ab altaribus et sacrificiis recedant' (Sg, p. 149a).

³⁶ C.21 q.4 d.a.c.1: 'Quod autem fulgidis et claris uestibus eis ornari non liceat' (Sg, p. 149a). [C.21 q.4 c.1]: 'Omne quippe, quod non propter necessitatem suam, sed propter uenustatem accipitur, elationis habet calumpniam, quemadmodum magnus ait Basilius. Set neque ex sericis texturis uestem quis uariatam induebat, neque apponebant uariorum colorum ornamenta in summitate uestimentorum' (Sg, p. 149b).

³⁷ C.21 q.5 d.a.c.1: 'Nulli autem suum episcopum relinquere, uel ab offitio suo discedere, et ad secularem iudicem transire licet' (Sg, p. 149b).

higher (*maiorum*) bishops for a ruling. The council forbade the appeal from appearing before imperial judges.³⁸ While suggesting that the ecclesiastical could not be separated completely from the secular, Gratian tried to limit the influence that the latter had on the former.

Cluster B sees the formation of two added *tractatus* that have roots in the core *causae* of Cluster A. Gratian first addressed judicial procedure using an accused bishop as the subject of discussion. Secondly, he looked at ecclesiastical property rights as it related to monastic property rights as well as to the secular world. Utilizing previous themes, Gratian applied them to new legal questions. That Gratian did not alter the *tractatus* comprising of *Causae* 22 and 34 is telling. At this particular stage, ecclesiastical matters, not the laity, were his primary concern. It is with the third cluster, with the additions of *Causae* 31, 32, and 33, and with the fourth cluster, with the additions of *Causae* 27, 29, 35, and 36, that Gratian augmented his discussion of marriage. Only in the final cluster did Gratian add *Causa* 23, which deals with just war and heresy, resulting in the recasted purpose of *Causa* 22.

Cluster C

The three central *causae* of Cluster C are *Causae* 31-33, which eventually become the center of Gratian's tract on marriage. The other two *causae*, *Causa* 3 and *Causa* 11 do not form a separate *tractatus*. *Causa* 3 echoes the procedural *causae* of *Causae* 5 and 6

³⁸ C.21 q.5 c.2: 'Si quis a proprio episcopo depositus presbiter uel diaconus, aut etiam si a synodo quilibet episcopus fuerit exauctoratus, molestiam imperialibus auribus inferre non presumat, set ad maiorum episcoporum synodum se conuertat, et que se putat habere iusta in eorum concilio alleget, atque ab eis de se expectet que fuerit deprompta sententia' (Sg, p. 149b).

found in Cluster B by focusing specifically upon the character of witnesses and the judicial process. Anchored by a property dispute, Causa 11 delves into ecclesiastical versus secular jurisdiction as well as the appeals process. The *causae* of Cluster C take their inspiration from Cluster B, but also contribute new questions to the discussion.

Causa 3 deals with judicial procedure. According to the case statement, a bishop was expelled from his see and sought restitution, which he received. He then was brought to trial and requested an adjournment. After some time, an illegally married man came forward to accuse him along with two infamous persons and three clergymen. His accusers produced witnesses from their own household and others who were the bishop's enemies. The trial went before a judge who was outside the bishop's province and was himself a criminal. He was the sole individual to hear and judge the case. Some of the accusers and witnesses were not present and tried to accuse the bishop and testify against him by letter. Though they raised many charges against him, his accusers failed to prove the first one. His accuser was accused in turn.³⁹

Gratian raised a number of questions pertaining to the *ordo iudiciarius*. First, does a despoiled person warrant restitution? The second question concerns adjournments and whether someone can be granted one only after restitution or also after the summons. Question three carries the idea further by asking how many months can a case be adjourned when granted after a restitution or after a summons. Question six asks whether

³⁹ Causa 3 d.init.: 'Quidam episcopus deiectus est a sede sua. Unde restituti petit, postquam restitutus est in causam ducitur, petit indutias procedit tandem ad eius accusationem quidam non legitime coniunctus et cum eo simul duo infames et tres alii religiosi testes de domo sua procedunt et alios producunt sibi inimicos extra suam prouinciam reus criminoso iudici offertur ab uno tantum audiendus et iudicandus, quidam de accusatoribus et testibus absentes per epystolam illum accusare et in eum testificari contendunt. Cum multa capitula ei obicerentur, deficiunt in primo accusatores; accusatio uertitur in accusatorem' (Sg, p. 66b-67a). See also Dillon, "Case Statements (themata) and the Composition of Gratian's Cases," 308-309.

the accused can be brought to court outside his province? Question seven explores whether his [a judge's] sentence should be heard when he has been tainted with wickedness equal to that of the accused? Following suit, Question eight asks if a bishop can be heard or judged by only one person? Concerning the accusers, Question four explores whether infamous people or people illegally married are allowed to accuse. Question five asks whether witnesses from the accusers' household are to be produced in court, or whether the voice of enemies should be heard. Question nine looks into whether accusers or witnesses are capable of accusing or testifying when not present at the trial. Question ten examines whether accusers who failed to prove their first charge are to be allowed to proceed to the remainder of the charges. Finally, Question eleven asks whether the defendant is permitted to file charges against his accusers, that is, whether the accused can countersue.⁴⁰

Gratian again expanded his discussion on judicial procedure in Cluster C by once more turning to the notion of character and the conduct of a trial. Causa 6 in Cluster B previously looked at the ability of those branded with infamy to bring forth an accusation, and thus the character of accusers. The discussion in Causa 3 again focuses on the character of accusers by touching on a range of other individuals whose personal status could affect one's ability to participate in the judicial process. Gratian revisits the

⁴⁰ Causa 3 d.init.: 'Queritur igitur primum, an quibuslibet expoliati sint restituendi? Secundo, uidendus est de induciis, an post restitutionem tantum, an post uocationem ad causam quibuslibet concedendae sint? Tertio, quo spacio mensium utrique sint concedendae? Quarto, an infames et non legitime coniuncti ad accusationem sint admittendi. Quinto, an testes de domo accusatorum sint producendi, uel inimicorum uox sit audienda? Sexto, an extra prouinciam reus sit producendus? Septimo, an eius sit audienda sententia, quem cum reo par efficit malicia? Octauo, an ab uno tantum sit audiendus episcopus uel iudicandus? Nono, an accusatores uel testes in absentem uocem accusationis uel testificationis exhibere possint? Decimo, an deficientes in primo capitulo sint admittendi ad sequentia? Undecimo, an accusato liceat in accusatione in accusatorem retroquere' (Sg. p. 66b-67a).

question, originally posed in Causa 14 in Cluster A, of whether someone from the same house can serve as a witness. With a slightly different twist, Gratian explores both whether the accuser can produce witnesses from his own household and, adding a new element, whether known enemies of a defendant can testify. Furthermore, Gratian questions the manner in which someone can offer their testimony. Whereas the accuser in Causa 5 of Cluster B submitted his written complaint anonymously, in Causa 3 Gratian queries whether witnesses can submit their testimony in writing. The implication then is whether a defendant has the right to cross-examine a witness, which cannot be done if the witnesses submitted his testimony in absentia. From the perspective of the trial, Gratian questions whether it could take place outside of the bishop's province, whether one person could hear the case, and whether the judge's legal standing affected his ability to hear the case. If the accusers fail to prove the first charged levied, can the trial proceed to the other charges or is it deemed a mistrial? In the event the prosecution failed to prove their case, Causa 3, akin to Causa 6 of Cluster B, explores whether the accused has the right to countersue. In a broad sense, the causa ensures the legitimacy of accusers testimony accepted into evidence.

Like Causae 12, 16, and 18 of Cluster B, property rights root Causa 11. Like Causa 21 of Cluster B, Causa 11 also questions whether a cleric can bring an issue before a secular judge. Two clerics entered into litigation over estates (*de prediis*). One cleric, the plaintiff, wanted the civil court to hear his case. Another cleric, the defendant, wanted the case heard by an ecclesiastical judge. With the help of the civil judge, the plaintiff took possession of the land in question. The bishop discovered the situation and

suspended him from office. In spite of the suspension the cleric continued to administer his office. The bishop thus deposed him without hope of restitution. While a property dispute sets the stage, the *causa* branches off into ecclesiastical jurisdiction and discipline. Should a cleric be brought before a civil judge, and if not, is the crime of forcing him to appear before a civil judge punishable by suspension? Finally, is it possible for a cleric to be deposed without hope of restitution?⁴¹

Property rights introduce the question of whether clerics have the right to choose the court before which to bring their case or is that predetermined because of their ecclesiastical status. Gratian presented both sides of the argument. As supported by the first twenty-six canons, Gratian argued that no cleric may be brought before a secular court.⁴² He then put forth the counterargument. A cleric was subjected to the bishop by way of his office (*ex officio*) and was subjected to the emperor by way of property (*ex possessionibus*). Just as they received the tithe and the unction from the bishop, they obtained the possession of estates from the emperor. Because they possessed estates by imperial law, clerics were subjected to the emperor by way of their holdings.⁴³ In the end, Gratian concluded that canon and public laws exempted clerics from civil judgment

⁴¹ Causa 11 d. init.: 'Aduersus clericum clericus de prediis questionem agitauit, quem ad ciuilem iudicem producere uoluit, reus non nisi ante ecclesiasticum iudicem stare uoluit; actor uero iudicis ciuilis potentia illum a possessione sua deiecit. Ille contempta episcopi sui sententia offitium suum amministrauit. Hoc conperto episcopus sine spe restituci omnis in eum sententiam dedit. Queritur ergo primum an clericus ante ciuilem iudicem producendus sit? Secundo, si producendus non est, an hec culpa digna sit suspensione? Tertio, si digna non fuerit, an contemptorem sententiae sui episcopi inreparabiliter oporteat deponi' (Sg, p. 92b-93a). See also Winroth, *The Making of Gratian's Decretum*, 77.

⁴² C.11 q.1 d.p.c.26: 'Cum igitur auctoritatibus istis clerici produci ante ciuilem iudicem prohibeantur' (Sg, p. 94a).

⁴³ C.11 q.1 d.p.c.26: 'His sic respondetur: clerici ex offitio episcopis suis sunt suppositi, ex possessionibus uero prediorum inperatori sunt obnoxii. Ab episcopo unctioem, decimationes et primitias accipiunt; ab inperatore prediorum possessiones nanciscuntur...Quia ergo predia possideantur imperiali lege factum est, sequitur, ut clerici ex possessionibus prediorum obnoxii sint inperatori' (Sg, p. 94a).

in both civil and criminal cases.⁴⁴ While both secular and ecclesiastical courts possessed their own sphere of influence, a *privilegium fori* exempted clerics from secular jurisdiction. This norm, according to Chodorow, derived from Paul's admonition that a cleric, as a soldier of God, did not entangle himself in secular business (2 Tim. 2:4).⁴⁵ Gratian continued by stating that a cleric could not go before a civil judge, unless perhaps the bishop either did not want to decide a civil case or he stripped the cleric, deemed a criminal, of his honorary belt.⁴⁶ Relying on the words of Clement, Gratian refined his argument to distinguish between secular business and the business of secular men.⁴⁷ Clerics were prohibited from engaging in the business of secular men but not from engaging in secular matters. The business of clerics, whether civil or criminal, was the prerogative of ecclesiastical judgment.⁴⁸ It was common for clerics to manage ecclesiastical property and thus be involved in secular matters. A bishop, however, could judge such cases if they involved a cleric.⁴⁹ Chodorow has interpreted Gratian's stance, coupled with the dwindling number of cases to which ecclesiastical judges did not claim

⁴⁴ C.11 q.1 d.p.c.31: 'Ecce uero sacris canonibus quam foresnibus ostenditur legibus clericum nec in ciuili neque in criminali causa ad ciuilem iudicem trahendum esse' (Sg, p. 95a).

⁴⁵ Chodorow, *Christian Political Theory*, 219-220.

⁴⁶ C.11 q.1 d.p.c.47: 'Istis auctoritatibus conicitur quod clericus nec etiam in causa ciuili apud ciuile iudicem debeat conuenire nisi forte ciuilem causam episcopus decidere noluerit, uel in criminali sui honoris cingulo eum nudauerit' (Sg, p. 95b).

⁴⁷ C.11 q.1 d.p.c.47: 'Illud autem quod in epistola Clementis dictum est: Non cognitorem secularium negotiorum te uult Deus esse, ex episcopali unctione intelligendum est. Neque enim quos ideo in episcopum ungitur, ut in secularibus causis cognitor existat. Prohibetur ergo negotiorum secularium cognitoribus occupari, non ad tempus sequester fieri' (Sg, p. 95b).

⁴⁸ C.11 q.1 d.p.c.47: 'Prohibentur ergo clerici a cognitione negotiorum secularium uirorum, non secularium causarum. Negotia quippe clericorum, siue criminalia siue ciuilia fuerint, non nisi apud ecclesiasticum iudicem uentilanda sunt' (Sg, p. 95b).

⁴⁹ C.11 q.1 d.p.c.47: 'Prohibentur ergo clerici a cognitione negotiorum secularium uirorum, non secularium causarum. Negotia quippe clericorum, siue criminalia siue ciuilia fuerint, non nisi apud ecclesiasticum iudicem uentilanda sunt' (Sg, p. 95b).

jurisdiction, as evidence of the Church moving away from secular powers and establishing itself as its own juridical community.⁵⁰

Causa 11 then questions what should happen in the event that the sentence is unjust? Gratian pointed first to a decree of Pope Gregory I that stated both a just and unjust sentence should be feared.⁵¹ He also pointed to a Pseudo-Isidorian decree of Pope Urban that stated one should fear the sentence of a bishop.⁵² Gratian concluded that neither Gregory nor Urban said anything about upholding an unjust sentence, but wrote only about fearing that sentence.⁵³ A person then should not obey an unjust verdict.⁵⁴ Gratian, however, refined this idea. An *iniquitous* sentence burdened no one in God's church. Others should not abstain from communion with him and he, who was subject to this iniquity, did not have to cede his office.⁵⁵ Pope Gelasius stated that a condemnation was void when brought upon a person in error. Because it did not bind him, he did not have to seek absolution.⁵⁶ An *unjust* sentence, however, did not bind anyone before God.⁵⁷ Gratian would elaborate on how such a sentence affected an individual's standing within the church.

⁵⁰ Chodorow, *Christian Political Theory*, 221-222.

⁵¹ C.11 q.3 c.1: 'Sententia pastoris, siue iusta siue iniusta fuerit, timenda est' (Sg, p. 96a).

⁵² C.11 q.3 c.27: 'Valde enim timenda est sententia episcopi' (Sg, p. 96b).

⁵³ C.11 q.3 d.p.c.40: 'Auctoritatibus praedictis, quibus usque ad examinationem etiam iniustae praecepimus parere sententiae sic respondetur: Non ait Gregorius sententiam iniuste latam esse seruandam, sed timendam. Sic et Urbanus' (Sg, p. 97a).

⁵⁴ C.11 q.3 d.p.c.43: 'Quod uero nullatenus iniustae sit parendus sententiae multis auctoritatibus probatur' (Sg, p. 97a).

⁵⁵ C.11 q.3 d.p.c.64: 'Hinc probatur, quod nullus ex iniusta sententia apud Deum alligat, nec quisquam apud eius ecclesiam iniqua sententia grauatur, quiquadmodus in Gelasii capitulo habetur. Unde nec ab eius ex communione abstinendus, nec ei ab officio cessandum, in quem iniqua sententia prolata esse cognoscitur' (Sg, p. 97b).

⁵⁶ C.11 q.3 c.46: 'Cui est illata sententia deponat errorem, et uacua est; si iniusta est, tanto curare eam non debet, quanto apud Deum et eius ecclesiam neminem potest grauare iniqua sententia. Ita ergo ea se non absolui desideret, qua se nullatenus perspicit obligatum' (Sg, p. 97b).

⁵⁷ C.11 q.3 d.p.c.64: 'Hinc probatur, quod nullus ex iniusta sententia apud Deum alligat' (Sg, p. 97b).

Gratian then explained the three different types of unjust sentences, those that were: *ex causa*, *ex animo proferentis*, and *ex ordine*. An unjust sentence *ex causa* occurred when the person either has not committed a sin or has committed a sin different from the one for which he received the sentence. An unjust sentence *ex animo proferentis* occurred when a judge issued a sentence not from love of justice but from bribes, hatred, or bias.⁵⁸ Finally, an unjust sentence *ex ordine* occurred from some error in procedure.⁵⁹ Procedural errors notwithstanding, Gratian maintained that sentences *ex ordine* ought to be upheld because the individual may be excommunicated already in God's eyes. For example, an adulterer received a sentence for sacrilege although he was innocent. Regardless of whether or not he committed sacrilege, God had excommunicated him previously for adultery and thus the sentence was in fact just. It is in this context that one should understand Gregory's words cited in c.1.⁶⁰

As Gregory had put forth whether the pastor binds justly or unjustly, regardless the sentence of the pastor should be feared by the flock. He (Gregory) added lest he, who has been subjected and bound perhaps unjustly, should merit that sentence out of his obligation from some other guilt. Therefore let him fear to bind and loose indiscriminately. Moreover may no one under the hand of the pastor contradict the judgment of his pastor from fear, lest even if he has been

⁵⁸ C.11 q.3 d.p.c.65: 'Cum autem ex causa iniusta fuerit, aliquando nullum omnino in eo delictum est, quod sit dampnatione dignum: aliquando non est in ea illud, super quod fertur, set ex alio nominandus est. Ex animo est iniusta, cum aliquis seruata integritate iudicarii ordinis in adulterum uel in quemlibet criminis non amore iustitiae, sed liuore odii, uel precio, aut fauore aduersariorum inductus sententiam profert.' (Sg, p. 98a). See Chodorow, *Christian Political Theory*, 120.

⁵⁹ C.11 q.3 d.p.c.73: 'Item sententia est iniusta ex ordine, quando non obseruato iudiciali ordine quilibet pro culpa sua dampnatur' (Sg, p. 98b).

⁶⁰ C.11 q.3 d.p.c.77: 'Cum ergo sententia ex ordine iniusta est, nec tunc ab ea recedendus est, quia etiam ante, quam sententia daretur in eum pro sui reatus qualitate apud Deum ligatus tenebatur. At uero sepe contingit, ut adulter pro sacrilegio sententiam reportet, cuius reatum in conscientia non habet. Hec sententia, etsi sit iniusta, quia non est in eo crimen, super quod lata est iuste, tamen ab eo reportata est, qui ex reatu adulterii iamdiu apud Deum excommunicatus fuerat. Et in hoc casu intelligenda est illa Gregorii auctoritas: Sententia pastoris etc' (Sg, p. 99a).

bound unjustly, he should become guilty, which he was not (originally), with pride from the fear.⁶¹

Gratian first supported his position with q.3 c.78, which stated that human judgment could be perverted in many ways. He later would add q.3 c.79, c.80, and c.81 to the first recension and finally add q.3 c.82 to the second recension to illustrate the point. The additional texts support q.3 c.78 by showing how fear, avarice, hatred, and love corrupt judgment. Gratian concluded in St. Gall that an innocent person then should obey an unjust sentence even though he was not bound before God. While the purity of his conscience had absolved him originally, he could become bound on account of his pride.⁶² Such sentences, though they bound the person on earth, did not hinder the person's spiritual progress and hope for salvation.⁶³ An unjust sentence then was separate and distinct from "an iniquitous sentence, which burdened a person neither before God nor in His Church."⁶⁴

Winroth has asserted that only in q.3 d.p.c.101, and not in q.3 d.p.c.64, did Gratian make a clear distinction between unjust sentences and iniquitous sentences.⁶⁵ However, if one reads d.p.c.64 closely he did distinguish between the two sentences, though subtly. An iniquitous sentence, according to Gratian, did not mean that people

⁶¹ C.11 q.3 d.p.c.77: 'Unde cum Gregorius premisisset utrum iuste an iniuste pastor obliget, pastoris tamen sententia gregi timenda est. Subsecutus adiecit ne is qui subest et cum iniuste forsitan ligatur, ipsam obligationis suae sententiam ex alia culpa mereatur. Timeat ergo uel indiscrete absolvere uel indiscrete ligare. Nemo sub manu pastoris sui iudicium temere reprehendat ne, etsi iniuste ligatus est, ex ipsa tumidae reprehensionis superbia culpa, que non erat, fiat' (Sg, p. 99a).

⁶² C.11 q.3 d.p.c.90: 'Quisque, ut dictum est, hic non teneatur ligatus apud Deum, tamen sententiae parere debet, ne ex superbia ligetur qui prius ex conscientiae puritate absolutus erat' (Sg, p. 99b).

⁶³ Chodorow, *Christian Political Theory*, 89-90, 117.

⁶⁴ C.11 q.3 d.p.c.101: 'Nec apud Deum, nec apud ecclesiam eius, quemquam grauat iniqua sententia' (Sg, p. 100a).

⁶⁵ Winroth, *The Making of Gratian's Decretum*, 113.

had to abstain from communion with the person or that he had to relinquish his office.⁶⁶

It bound the individual neither on earth nor in heaven. An unjust sentence, on the other hand, did not bind the person before God.⁶⁷ While it did not bind the person in heaven, Gratian followed with a detailed discussion of how it bound the person on earth. A string of canons – q.3 c.66, c.67, c.70, c.71, c.74, c.75, d.p.c.77, c.78, and d.p.c.90 – support the point that an unjust sentence bound the individual on earth but not in heaven, so long as they did not succumb to pride.

Winroth also pointed out that Gratian took the text cited in q.3 d.p.c.101 – “Nec apud Deum, nec apud ecclesiam eius, quemquam gravat iniqua sententia” – from q.3 c.46, which was a decree of Pope Gelasius. Gratian explicitly referred to this same text in q.3 c.46 again in q.3 d.p.c.64 – “Hinc probatur, quod nullus ex iniusta sententia apud Deum alligat, nec quisquam apud eius ecclesiam iniqua sententia gravatur, quiquadmodus in Gelasii capitulo habetur.”⁶⁸ As discussed in Chapter Three, Winroth used the omission of direct references as proof for St. Gall as an abbreviation. For example, although C.15 q.3 d.p.c.4 omitted the explicit reference to D.10 c.1, it retained the similarity of the language, and thus an indirect reference, which implied that the ‘abbreviator’ who copied the St. Gall text knew of the distinction and chose not to make the cross-reference.⁶⁹ To apply Winroth’s logic: if this ‘abbreviator’ was able to omit the reference to a text included in another part of the work, then one would expect the ‘abbreviator’ to exclude

⁶⁶ C.11 q.3 d.p.c.64: ‘Unde nec ab eius ex communione abstinendus, nec ei ab officio cessandum, in quem iniqua sententia prolata esse cognoscitur’ (Sg, p. 97b).

⁶⁷ C.11 q.3 d.p.c.64: ‘Hinc probatur, quod nullus ex iniusta sententia apud Deum alligat, nec quisquam apud eius ecclesiam iniqua sententia gravatur, quiquadmodus in Gelasii capitulo habetur’ (Sg, p. 97b).

⁶⁸ Winroth, *The Making of Gratian’s Decretum*, 113.

⁶⁹ Winroth, “Recent Work on the Making of Gratian’s *Decretum*,” 9-11.

two direct and redundant references made to a text found in the same question of the same causa. St. Gall included all three texts. Omitting references, therefore, cannot serve as proof for its standing as an abbreviation.

Finally, the text of St. Gall omitted the last section of C.11 q.3 d.p.c.101. This portion of dictum added to Gratian 1 – “Quod autem supra communicantes excommunicatis de ecclesia abici iubentur, non de quodlibet modo communicantibus intelligendum est” – stated that those who communicated with the excommunicated ought to be expelled from the Church. Winroth has noted that *supra* referred back to c.6, which Gratian 1 also added.⁷⁰ Augmenting the argument made in q.3 c.6, q.3 c.102-c.105, all of which appear in Gratian 1, illustrate that one did not incur sin when he communicated with an excommunicated person either out of necessity or out of ignorance.⁷¹ Gratian knew that to ensure the vitality of the Church, its stability had to be guaranteed.⁷² Such a guarantee could come only with the obedience of both the clerics and the laity. With C.11 q.3 Gratian tied obedience to the threat of a heavenly excommunication that would bind the insolent for eternity.

Cluster D

Cluster D is by far the largest of all the clusters and includes Causae prima, 1, 7, 8, 9, 27, 29, 35, and 36. In addition to yet another tract on marriage, which comprises Causae 27, 29, 35, and 36, Gratian introduces a new set of legal questions. Like Causa 5 and Causa 6 of Cluster B and Causa 3 of Cluster C, which used bishops as the subject of

⁷⁰ Winroth, *The Making of Gratian's Decretum*, 115.

⁷¹ Bc, fol. 169-170r; Fd, fol. 43r; Aa 23, fol. 181r-182r.

⁷² Chodorow, *Christian Political Theory*, 117.

their discussions, Gratian devotes a large *tractatus* in Cluster D to the episcopate.

Standing alone Gratian also adds one more case, Causa 10, on ecclesiastical property rights.

Gratian devoted five *causae* – *Causae prima*, 1, 7, 8, and 9 – to the question of episcopal discipline and promotion through the ecclesiastical stations. First, he examines the legality of the various means by which someone can rise through the ecclesiastical ranks to become bishop by considering both deliberate career choices and unsolicited assistance. Second, Gratian delves into the legality of clerical ordinations where the bishop's status is in doubt. In other words, what instances affect the validity of one's ordination?

A particular focus of the *causae* in Cluster D is the extent to which decisions willfully made or made without one's knowledge curtail one's ability to occupy an office or negate the election and/or consecration to that office. The most provocative of the cases, and surely one of the most interesting for students, is that of a learned layman who had a concubine. Upon leaving her, he became a subdeacon. Having married – his concubine, I hope – he became a deacon and eventually was elected bishop.⁷³ The decisions of this former subdeacon, and thus his character, ground the *causa*. Should his past affect his future? For instance, Question one tackles the issue of clerical celibacy by addressing whether those who marry after assuming clerical office should be separated. Question two explores whether a cleric who had a concubine could be ordained bishop.

⁷³ *Prima causa d.init.*: 'Laicus quidam litteratus concubinam habebat; tandem ea dimissa, ad subdiaconum conuolatum, deinde uxorem sibi ascivit. Post pauca ad diaconum ascendum, sicque in episcopum electus est. Queritur igitur an nubentes post uotum sint separandi? Secundo an si concubinam habuerit in episcopum sit ordinandus? Tertio utrum in sacro ordine tantum constitutus eligendus sit in episcopum' (Sg, p. 3a).

Question three focuses on whether someone should be ordained a bishop who only recently has been received in sacred orders? Since the subdeacon progressed through the ranks so quickly, the *causa* looks into the appropriate amount of time to serve in one station before elevation to the next. Gratian chose not to retain this *causa* in the next recension; rather he recycled the canons as a part of the *Tractatus de ordinatione*.

While the individual willfully made his choices in *Causa prima*, *Causa 1* centers on someone who progressed through the stations ignorant of another's surreptitious dealings. Such was the case of a boy placed into a wealthy monastery by his father, who offered a gift of ten pounds for his care. The boy thrived, was made a priest, and eventually was chosen bishop ignorant of his father's gift and the money paid by the archbishop's advisors. The bishop in question ordained both those who paid for their positions and those who did not. Having been accused and convicted by the archbishop, the bishop in question received a sentence of damnation.⁷⁴ Gratian asked with Question one whether simony, that is, the purchase of spiritualities, was sin. By extension Question two and Question three look at whether the Church can charge an entrance fee and if it should be paid, does it constitute simony.⁷⁵ He concluded that while the Church may not require money from those entering into a religious life, it would accept donations

⁷⁴ *Causa 1 d.init.*: 'Obtulit quidam filium suum cenobio qui exactione abbatis motus decem libras monasterio solum. Ipso tamen filio propter aetatem hoc ignorante. Creuit puer, dehinc ad sacerdotium conuolauit. Suffragantibus meritis in episcopos est assumptus. Tandem obsequio ac precibus paternis intercedentibus pecunia quoque ex consiliariis archiepiscopi cuidam data, consecratur electus, oblatae pecuniae ac paterni obsequii penitus ignarus, ac per hoc tempore procedente quosdam gratis nonnullos etiam per pecuniam ordinauit, qui tandem accusatus et conuictus sibi contrariam sententiam reportauit' (Sg, p. 28b-29a).

⁷⁵ *Causa 1 d.init.*: 'Primum ergo queritur an peccatum sit spiritualia emere? Secundo, an pro ingressu ecclesiae pecunia sit exigenda, uel si exacta fuerit, an sit persoluenda? Tertio, an ingressum chori emere uel prebendas ecclesiae sit symoniacum?' (Sg, p. 29a).

gratefully.⁷⁶ Gratian also questioned how the influence of others affects one's ability to hold that office. Question four explores whether he is held liable for rising through the ranks by means unknown to him, that is through his father's monetary gift, and Question five explores whether he is permitted to be in the church or to perform the duties charged to him through ordination.⁷⁷ Jessica Goldberg has observed that Gratian's concern in Question four was the nature of guilt and punishment. Because they have not reached the age of reason and because of ignorance, children could not be punished for the sins of their parents. Gratian, she argued, distinguished between two types of ignorance: ignorance of deed and ignorance of law. The child was not guilty of simony because he was ignorant of the deed in that he did not know what his father was doing, and he was ignorant of the law due to not yet having reached the age of reason.⁷⁸ The second part of Goldberg's assessment presumes that he became bishop while still a child. Gratian, however, gave no indication to that effect; we do not know at what age he became bishop and thus it seems premature for her to draw a conclusion based on ignorance of the law. Finally, Gratian asked in Question six whether those, whom this bishop ordained, should be cast aside and, as addressed in Question seven, if the bishop renounced his heresy could he continue with his episcopal functions.⁷⁹

The *tractatus* lastly treats circumstances in which the current bishop could not fulfill his duties and whether he could name his successor. The bishop in Causa 7

⁷⁶ Goldberg, "Legal Persona of the Child," 22.

⁷⁷ Causa 1 d.init.: 'Quarto, an iste sit reus criminis, quod eo ignorante pater admisit? Quinto, an liceat ei esse in ecclesia, uel fungi ea ordinatione, quam pater pecunia est assecutus?' (Sg, p. 29a).

⁷⁸ Goldberg, "Legal Persona of the Child," 35-39.

⁷⁹ Causa 1 d.init.: 'Sexto, an illi, qui ab eo iam symoniaci ignoranter sunt ordinati, abici debeant? Septimo, si suae heresi renunciants in episcopali dignitate sit recipiendus' (Sg, p. 28b-29a).

suffered from a grave illness for a long time. He elected another to replace him and beseeched the pope to assent to his request, which he did. After the chosen successor rose to the see, the previous bishop recovered and entered into litigation to receive back his see. Gratian asked first whether a successor could be appointed when the current bishop was still alive and second whether the bishop could return to his duties should he so choose.⁸⁰

Gratian began in 'sic et non' argumentation. No living bishop may be replaced by another for any reason, not even illness. Only conviction of a crime could warrant the removal of a bishop.⁸¹ Pope Gregory instructed that an administrator perform the duties of a bishop who had fallen ill though this administrator (*dispensator*) was not to replace the bishop. He was to serve in his place until the bishop was able to return so that neither God may be offended nor the city be neglected.⁸² This *coadjutor*, Gratian stressed, was not a successor but simply a helper because the bishop could not perform his duties.⁸³ In the event the bishop chose to relinquish his office due to his continued illness, he had to

⁸⁰ Causa 7 d.init.: 'Episcopus quidam infirmitate longa detentus rogauit alius sibi substitui precibus cuius pontifex romanus annuit, et quod rogauerat ei concessit. Postea conualuit episcopus idem, et quod prius fecerat rescindi cupit; mouet questionem contra eum qui succacceserat; reposcit cathedram suam tamquam sibi debitam. Queritur ergo an episcopo uiuente alius in eadem possit ecclesia ordinari? Secundo, an cathedram iste reposcere ualeat, quam alter intercessionem propria interceptit' (Sg, p. 79b-80a).

⁸¹ C.7 q.1 d.a.c.1: 'Quod autem episcopo uiuente superponi uel ordinari alius possit nisi capitali fuerit culpa remotus' (Sg, p. 80a). [C.7 q.1 d.p.c.11]: 'Sic auctoritatibus istis manifeste docetur quod proprio uiuente episcopo alius superordinari nequiat, nec etiam pro egritudine' (Sg, p. 81a).

⁸² C.7 q.1 c.1: 'Set suggerendum est, ut si quis, in regimine, egrotat, dispensator illi talis requiratur, qui possit omnem curam eius agere, et locum illius in regimine ecclesiae episcopo non deposito conseruare, ut neque Deus omnipotens offendatur, neque ciuitas neglecta esse inueniatur' (Sg, p. 80a).

⁸³ C.7 q.1 d.p.c.16: 'Sic habemus quod episcopo petente, suis uidente precibus quo populi, grauato infirmitate possit alius subrogari, set magis senectute affecto non successor, sed coadiutor dari debet, qui in regiminis loco decedenti succedat' (Sg, p. 81b).

submit his resignation in writing.⁸⁴ Gratian then considered the question of episcopal translation. He concluded that:

Another may replace a living bishop though, although really, these are not attempts to replace a living bishop. For one who is translated from one city to another ceases to be the bishop of that city from which he was transferred, and thus the one who succeeds him, succeeds not a 'living bishop' but a defunct bishop, in which situation a bishops may be replaced.⁸⁵

This same philosophy applied to the lower clergy in cathedrals and churches.⁸⁶ Gratian answered his second question with one canon. In a letter Pope Alexander II wrote that a cleric may return to his functions after he has recovered from his illness, since he incurred no guilt for the sickness.⁸⁷

Mary Sommar has found little difference between the argument in St. Gall and that in Gratian 1. Although there were syntactical differences all thirteen dicta were present with no change to content. Furthermore, the canons absent from St. Gall neither detracted from nor formed a crucial part of the argument. Both St. Gall and Gratian 1, according to Sommar, relied on the same formal sources drawing on the *Collectio canonum* of Anslem, the *Collectio III librorum*, Buchard's *Decretum*, the *Tripartita*, and

⁸⁴ C.7 q.1 d.p.c.11: 'Si uero idem Iohannes fortasse pro molestia sua petierit, ut ab episcopi honore debeat uacare, eo petitionem dante scripto, concedendum est; aliter id facere non ualemus' (Sg, p. 81a). The last clause (aliter id facere non ualemus) was copied in the margin later.

⁸⁵ C.7 q.1 d.p.c.41: 'Sic habemus in quibus causis imo episcopo uiuente alius ei substitui possit, quamquam secundum rei ueritatem non uiuente episcopo talis succedere probetur. Translatus enim ab una ciuitate in aliam illius ciuitatis episcopus desinit esse, a qua transfertur, unde qui talli succedit defuncto quodammodo et non uiuenti, substitui uidetur' (Sg, p. 83a). See Sommar, "Gratian's Causa VII and the Multiple Recension Theories," 84.

⁸⁶ C.7 q.1 d.p.c.42: 'Alius etiam casus inuenitur, in quo episcopus uiuente alius substituitur potest. Nam cum relicta cathedra priori auctoritate sua ad aliam transierit, si alius ei substitutus fuerit, licet ille prioris ecclesiae non desierit esse episcopus, episcopatum tamen substitutus habebit' (Sg, p. 83b).

⁸⁷ C.7 q.2 c.1: 'In litteris tuis continebatur sic hic clericus ordinem habet presbiteri; set quia caduco morbo laborat, et ipsi in presentiarum hoc agnouimus, non ausi fuimus concedere sibi ut uel missam celebraret. Quia uero languor non in culpa est, super hac re auctoritatis nostrae decreto consulendum deliberauimus' (Sg, p. 84a).

a collection of patristic letters.⁸⁸ Gratian's use of sources led her to conclude that the original structure of Causa 7 centered on episcopal translation and a block of texts, c.90-c.100, taken from Book six of Anselm's *Collectio canonum*. Only later did the question of a replacing a living bishop enter into the discussion.⁸⁹

Sommar, like Lenherr, Winroth, and Wei, espoused the idea that Gratian took his canons from a limited number of sources. Causa 7 highlights the problems surrounding this theory. Sommar attributed C.7 q.1 c.5, found in Gratian 1, to Anselm of Lucca's *Collectio canonum* (6.56). The *Collectio XIII librorum* (Vat.lat.1361, 6.39; Berlin Savigny 3, 5.41) also contains this canon with the same inscription, incipit, and explicit.⁹⁰ Either collection is plausible. Pennington has compared q.1 c.6, which both St. Gall and Gratian 1 include, to Anselm's *Collectio canonum* (6.57), which Sommar attributed as the formal source. He found that the *Collectio canonum* version contained a text in medio and thus could not be the collection from which Gratian drew the canon.⁹¹ Sommar attributed q.1 c.11, which both St. Gall and Gratian 1 include, to Anselm's *Collectio canonum* (6.98). St. Gall contains a shorter version of the canon, ending "aut innupta permaneat." This version appears in a number of collections: the *Collectio XIII librorum* (Vat.lat.1361, 1.59 and Berlin Savigny 3, 5.70), the *Collectio III librorum* (2.5.6), the *Collectio IX librorum* (Arch.S.Pietro C.118, 2.5.6), the *Diversorum patrum sententie* (186), the *Polycarpus* (Version I, 1.10.1), and the *Collectio VII librorum* (Turin

⁸⁸ Sommar, "Gratian's Causa VII and the Multiple Recension Theories," 86-87.

⁸⁹ Ibid., 89.

⁹⁰ My discussion of the canonical sources rests on information contained in Fowler-Magerl's *Clavis canonum* [CD-ROM] program. Unless stated otherwise, I have used her database for all references to canonical collections

⁹¹ I would like to thank Prof. Pennington for bringing this to my attention. The text in medio is not reflected in the *Clavis canonum* [CD-ROM] program.

BNU D.IV.33, 3.198). Gratian did not have to use the same source for both the version of the text found in St. Gall and that found in Gratian 1. In addition, Pennington's examination of q.1 c.11 revealed that Anselm's *Collectio canonum* contained the phrase "absque inevitabili – coniungere," which St. Gall, Gratian 1, and Gratian 2 omit.⁹²

Gratian then could not have taken this canon, regardless of recension, from the *Collectio canonum*. The source analysis of q.1 c.11 further supports the theory that St. Gall cannot be an abbreviation of Gratian 1. No abbreviator would have shortened a text as found in St. Gall to make it conform to a version found in other collections. Sommar attributed q.1 c.45, which both St. Gall and Gratian 1 include, to Ivo of Chartres' *Tripartita* (2.17.2). A search of the canon in Fowler-Magerl's *Clavis canonum* program yields the inscription "ex eiusdem (Iohanne VIII PP) ad Gennadium presbiterium et Archimandritam," the incipit "Dispensationes rerum nonnunquam cogunt parum quid," and the explicit "cunctorum patiamur dispendia." C.7 q.1 c.45, however, has the inscription "VIII Iohanne Papa, cui prefuit Petrus presbiter cardinales, et Paulus Anthonitanus episcopus, et Eugenius Hostiensis episcopus," the incipit "Hoc nequaquam apud nos," and the explicit "vel pascendi alios." I could not find a match using the *Clavis canonum* program for the incipit or explicit used by Gratian. A reexamination of the sources reveals problems with Sommar's thesis that on Anselm of Lucca's *Collectio canonum* provided Gratian the inspiration for Causa 7.

The few technical errors in St. Gall suggested to Sommar that Sankt Gallen could be a student's lecture notes. C.7 q.1 c.6 used "pseudo" in lieu of "pseudoepiscopus"; q.1 c.42 used the phrase "in cardinales ordinates" for "incardinatus"; the incipit of q.1 c.44

⁹² I would like to thank Prof. Pennington for bringing this to my attention.

read “Episcopatum qualitas” instead of “Temporis qualitas”; the inscription of q.1 c.45 contained a peculiar rendering of the year 383 by copying ccc.lxxx.t’u. If St. Gall was an earlier recension, Gratian would not have made these errors. She agreed with Lenherr that St. Gall was the product of a student.⁹³ Sommar, however, made some errors in her reading of St. Gall. Her transcription “Episcopatum qualitas” in q.1 c.44 is incorrect; the St. Gall manuscript reads “Episcopalis qualitas.”⁹⁴ Her transcription of the year 383 in q.1 c.45 also is incorrect; the abbreviation for “tertium” is correct.⁹⁵ The errors in q.1 c.6 and in q.1 c.42 could have occurred when the text was copied. There is no reason to believe that these were the errors of a student.

Continuing with a theme similar to that in Causa 7, Causa 8 centers on a certain who bishop was extremely ill and stipulated who his successor should be in his will. The bishop’s choice was elected with the assistance of his friends (*amicorum auxilio*). After his election he swore an oath to the canons of the church that he would preserve the property and rights (*indempnitas*) of the church. Subsequently he was accused as a quasi-simoniatic, since it seemed that he had promised a gift for his allegiance. His clerics abandoned the bishop before the judgment was rendered. The bishop then returned to his former church without Apostolic letters.⁹⁶ Question one asks whether a bishop can name his successor. Question two follows with whether an election won with assistance of friends is valid. Question three focuses on episcopal discipline by examining whether

⁹³ Ibid., 88.

⁹⁴ Sg, p. 83b.

⁹⁵ Sg, p. 84a.

⁹⁶ Causa 8 d.init.: ‘Quidam episcopus in extremis positus ex testamento successorem sibi subrogauit qui quidem in episcopatu amicorum auxilio eligitur; demum pro eaecclesiae indempnitate iuramentum canonicis praestitit. Unde quasi symoniacus accusatur, utque ab obsequio munus prestitisse uideretur. Derelinquitur autem antequam exinde sententia feratur a clericis suis; qui ad ecclesiam suam sine litteris apostolici reuertitur’ (Sg, p. 84b).

swearing an oath to the canons after election really constitutes simony. Question four asks whether clerics can abandon their allegiance to their bishop prior to his sentencing. Finally Question five asks whether the bishop can return to his church without a papal letter giving consent.⁹⁷

A difference in the hypothetical's wording again illustrates that St. Gall cannot be an abbreviation of Gratian 1. Whereas the case statement and Question two uses the phrase *amicorum auxilio* in St. Gall, Gratian 1 uses the more technical term *amicorum patrocinio*.⁹⁸ This Roman legal term signifies a relationship between two people in which the *patronus* grants protection or offers patronage to another.⁹⁹ An abbreviator would not have made this change. Interestingly, Gratian would use the term *patrocinium* and not *auxilium* in q.2 d.a.c.1.¹⁰⁰ It is difficult to know why Gratian began with one term and switched to another. As a teacher he may have wanted to introduce the more subtle legal terminology in the course of the question rather than at the outset. As another possibility, Gratian may used *patrocinium* in q.2 d.a.c.1 because q.2 c.1 used the term. When he revised his work with Gratian 1, he changed the hypothetical so that it would correspond to the introductory dictum.

In both St. Gall and in Gratian 1, the emphasis of the causa is on Question one. As customary, Gratian began with a counter argument maintaining that a bishop may

⁹⁷ Causa 8 d.init.: 'Unde questio primum peroratur an episcopo liceat successorem sibi subrogare? Secundo si amicorum auxilia debeant in electione conualescere? Tertio, an symoniacus sit habendus qui post electionem huiusmodi iuramentum canonicis exhibet? Quarto, utrum clericis liceat ante sententiae ab episcopo suo discedere? Quinto, an absque pontificis romani litteris ad propriam ecclesiam redire debeat' (Sg, p. 84b).

⁹⁸ P, fol. 137r; Bc, fol. 154r; Fd, fol. 37v; Aa 23, fol. 161r.

⁹⁹ Adolf Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia: The American Philosophical Society, repr. 1991), 622.

¹⁰⁰ Sg, p. 86a.

institute a successor (*successor*). He pointed to Pope Zachery and the permission he granted to the Archbishop of Mainz to name an assistant (*adjutor*), who succeeded the archbishop after his death.¹⁰¹ Gratian followed with a Pseudo-Isidorian decretal attributed to Pope John III in which he stated that the Apostle Peter selected Linus and Cletus as assistants (*adjutores*), though he did not grant them the powers of binding and loosening. Those he granted to his successor (*successor*) Clement.¹⁰² Gratian then offered a clarification. While one may deliberate with the brothers concerning the election of his successor, one may not claim that it was within his rights to name his chosen successor in his will. Peter was an example of the former as he involved himself in Clement's election.¹⁰³ The Council of Antioch decreed that a bishop, even at the end of his life, may not constitute his successor. A synod, both by the judgment of the bishops and by election of the clerics, reserved the right to make that decision.¹⁰⁴ Pope Martin decreed likewise stating that a bishop may not constitute another in his place before the end of his life.¹⁰⁵ At this point, Gratian shifted to the qualities of a priest. A canon attributed to Peter stated that a priest should preach to the audience's level of

¹⁰¹ C.8 q.1 d.a.c.1: 'Sed quod episcopo sit licitum successorem sibi eligere, ex scriptis Zachariae Papae perpenditur, quibus permisit archiepiscopo Maguntino adiutorem sibi statuere, quis rebus humanis exempto in plenum succederet' (Sg, p. 84b).

¹⁰² C.8 q.1 c.1: 'Si Petrus princeps apostolorum adiutores sibi ascivit Linum et Cletum, non tamen potestatem pontificii, aut ligandi aut soluendi normam eis tradidit, sed successori suo Clementi, qui sedem apostolicam post eum et potestatem pontificalem tradente sibi Beato Petro tenere promeruit' (Sg, p. 85a).

¹⁰³ C.8 q.1 d.p.c.7: 'Ait uero longe secus est de successorem eligendo cum fratribus deliberare, quia tamquam suae dignitatis heredem sibi subrogare. Illud enim cita culpam permitti potest: hoc uero mores omnibus prohiberi debet. Illud Beati Petri ille est in argumentum, qui tales constituunt, qualem sibi Beatus Petrus successorem quesivit' (Sg, p. 85a-85b).

¹⁰⁴ C.8 q.1 c.3: 'Episcopo non licere pro se alterum sibi successorem constituere, licet ad exitum uitae perueniat. Quod si tale aliquid factum fuerit, irritum sit huiusmodi constitutum. Seruetur autem ius ecclesiasticum, id continens, non aliter oportere fieri, nisi cum synodo et iudicio episcoporum et electione clericorum' (Sg, p. 85a).

¹⁰⁵ C.8 q.1 c.4: 'Episcopo non liceat ante finem uitae alium in loco suo constituere successorem' (Sg, p. 85a).

understanding. He ought to be learned, mature, irreprehensible, and be able to strike fear into people.¹⁰⁶ According to Jerome, unless he was holier and wiser than the other people, he ought not to be elected to the priesthood.¹⁰⁷ Gratian would add q.1 c.8, c.9, c.14, c.16, c.20, c.21, and c.22 in Gratian 1 to elaborate on the qualities of a cleric and the people's involvement in his election.

Friedberg noted that q.1 c.12 was from the apocryphal letter of Clement, which Rufinus edited.¹⁰⁸ Three collections – the *Collectio III librorum* (2.1.49), the *Collectio IX librorum* (Arch.S.Pietro C.118, 2.1.33), the *Collectio Sancte Marie Novelle* (3.5) – included this text. The *Collectio III librorum* and the *Collectio IX librorum* do not have an inscription and thus were not the sources from which Gratian drew this canon. The inscription in the *Collectio Sancte Marie Novelle* reads “Idem in 13” with “Idem” referring to “ex verbis Petri” found two canons previously (*SMN* 3.3), which is very similar to the inscription of “Item Petrus” used by Gratian. While it is unclear whether Gratian took the canon from the *Collectio Sancte Marie Novelle*, this example illustrates that Gratian drew from a variety of collections, some of which were smaller collections, for his source material.

Gratian answered the remaining questions quickly and decisively. In answer to Question two, Gratian affirmed that the election of those who benefited from the

¹⁰⁶ C.8 q.1 c.12: ‘Debet ergo adprime esse eruditus et doctus, inreprehensibilis, maturus, pauidus’ (Sg, p. 85b).

¹⁰⁷ C.8 q.1 c.15: ‘Requiratur enim in ordinando sacerdote et populi conscentia, ut sciant omnes et certi sint, quia qui est prestantior ex omni populo, qui doctior, qui sanctior, qui in omni uirtute eminentior, ille eligitur ad sacerdotium’ (Sg, p. 85b).

¹⁰⁸ Vgl. *edF*, col. 594, n. 195.

patronage (*patrocinia*) of friends was invalid.¹⁰⁹ Pope Gregory warned Subdeacon Antionius that the election taking place should involve neither bribery nor patronage. One elected with the aid of patronage felt obligated to his supporters and would comply with their wishes after ordination. In such situations, ecclesiastical order suffered. He should take care that the one elected would not bend to anyone's will and was of the highest moral caliber.¹¹⁰ Gratian concluded that he was not guilty of simony who, after the election, swore an oath for the preservation of the church's rights. It was one thing to make an oath before the election or to have made some pact to ensure one's election, but it was another to offer an oath after the election. The former involved gift giving while the latter was a promise not to impede the church.¹¹¹ Gratian cited the example of Pope Urban II who consecrated Bishop Artald of Arles after the Archbishop of Narbonne refused to do so because Artald had sworn an oath to protect the goods of the Church after his election.¹¹² Gratian, as Robert Somerville highlighted, confused Alanensis for Arelatensis. Both the *Collectio Britannica* (44) and the *Tripartita* (2.56.12.1) used Alanensis, which Somerville noted was an unusual adjective for Elne. Other collections,

¹⁰⁹ C.8 q.2 d.a.c.1: 'Quod autem patrocinia amicorum in electione non debeant conualescere' (Sg, p. 86a). Whereas Gratian used the term *auxilium* in the hypothetical, he used *patrocinia* in q.2 d.a.c.1.

¹¹⁰ C.8 q.2 c.1: 'Illud quidem pre omnibus tibi curae sit, ut in hac electione nec datio quibuscumque modis interueniat premiorum, nec quarumlibet personarum patrocinia conualescant. Nam si quorundam patrocinio quisquam fuerit electus, uoluntatibus eorum, cum fuerit ordinatus, reuerentia exigente obedire compellitur, sicque fit, ut res illius minuantur ecclesiae, et ordo ecclesiasticus non seruetur. Talem ergo te admonente debent personam eligere que nullius incongruae uoluntati deseruiat, set uita et moribus decorata tanto ordine digna ualeat inueniri' (Sg, p. 86a).

¹¹¹ C.8 q.3 d.a.c.1: 'quod non sit pro symoniaco habendus qui post electionem pro ecclesiae indempnitate iuramentum probuit probari potest. Nam aliud est ante electionem facere iuramentum, uel se pacisci facturum ut eligatur: aliud est nulla precedenti conuentione post electionem talis iuramentum offerre. Illud enim ab offitio tamquam munus inpensum degradat: hoc uero consecrando nullum inpedimentum generat' (Sg, p. 86a-86b).

¹¹² C.8 q.3 c.2: 'Artaldus Alanensis episcopus, Narbonensis ecclesiae suffraganeus, Romam consecrandus ad dominum Papam Urbanum uenit; suus quippe archiepiscopus eum consecrare nolebat, quoniam post electionem suam propter bona ecclesiae conseruanda canonicis iurauit' (Sg, p. 86b-87a).

such as the *Collectio Catalaunensis I* (9.66), the *Collectio X partium* (Cologne HA 199, 5.2.50), and the *Collectio IX librorum* (Arch. S. Pietro C.118, 2.2.23), also have the adjective Alanensis.¹¹³ The analysis again illustrates that the question of Gratian's sources goes beyond the use of five collections. Gratian relied in St. Gall on a decree of Pope Symachus to support the view that clerics may not leave their bishop while he is under suspicion but before his sentence. Ecclesiastical law required that the charges must first be examined before the pontiff could release others from their obedience to the accused.¹¹⁴ Grounding his view in the Pseudo-Isidorian letter of Pope Sixtus, Gratian concluded that an accused bishop called before the Holy See may not return to his church without papal letters.¹¹⁵ Gratian chose not to augment the arguments made in Questions two through five in the following recension. What is striking in Causa 8 is the lack of 'sic et non' argumentation. Except for Question one, he does not cite contrary canons. It was not a "Concordia discordantium" yet.

To this point Gratian has examined the various ways in which a cleric could become bishop and the legality of various circumstances that would aid him in attaining his see. Gratian continued with this subject in Causa 9 by exploring some constraints to episcopal power. Here an archbishop, branded with a sentence of excommunication, ordained several clerics of another metropolitan. He also appointed a chaplain after having deposed another. Question one examines whether the ordination of clerics by an

¹¹³ Robert Somerville, *Pope Urban II, The Collectio Britannica, and the Council of Melfi* (Oxford: Clarendon Press, 1996), 165-167.

¹¹⁴ C. 8 q.4 c.1: 'quod clericum qui ab episcopo suo ante sententiae tempus pro dubia suspicione discesserit, manifestam eum faciunt manere censuram? Lex enim ecclesiastica pontificem ab aliis accusatum prius, quam sub luce obiecta constiterint exigit non relinqui' (Sg, p. 87a).

¹¹⁵ C.8 q.5 d.a.c.1: 'Sine litteris apostolici episcopus accusatus, et a sancta sede uocatus ad suam non reuertatur ecclesiam' (Sg, p. 87a).

excommunicated archbishop is valid. Question two delves into whether a bishop, an archbishop, or a patriarch can ordain clerics subjected to another without written permission. Question three explores whether an archbishop is able to condemn and absolve clerics without the involvement of their bishop.¹¹⁶

Gratian addressed the first two questions in a concise manner. An ordination was invalid if performed by one who was not considered part of the Catholic faith. The Church mercifully tolerated ordinations if the one who performed it was within the good graces of the Church at that time and then afterwards was excommunicated.¹¹⁷ Gratian supported this argument with a decretal attributed to Urban II. Ordinations performed by excommunicated catholic bishops were accepted; ordinations performed by symoniacs were not accepted.¹¹⁸ Bishops, Gratian contended, could not ordain the clerics under the care of another bishop.¹¹⁹ Two Pseudo-Isidorian decretals attributed to Pope Calixtus decreed that no patriarch, metropolitan, or bishop was permitted to judge, to excommunicate, or to ordain the parish priest (*parrochianum*) of another church unless called upon to do so by that bishop.¹²⁰ While a bishop may not ordain the clerics under

¹¹⁶ Causa 9 d.init.: ‘Notatus quidam archiepiscopus excommunicationis sententia, ordinavit clericos aliquot alterius metropolitani; deposuit etiam quendam capellanum sui suffraganei illo inconsulto, atque alium in loco eius ordinavit. Unde queri potest, utrum illa ordinatio valeat, que ab excommunicatis fiat, vel aliquo modo possit rata haberi? Secundo, an liceat episcopo, archiepiscopo, primati vel patriarchae clericos alterius sine suis litteris ordinare? Tertio, an archiepiscopus clericos suffraganei sui illo inconsulto dampnare valeat, vel dampnatos absolvere’ (Sg, p. 87b).

¹¹⁷ C.9 q.1 d.p.c.3: ‘qui excommunicationis penam in ipsa sui ordinationem contraxerunt, qui in numero catholicorum numquam fuerunt. Ceterum, qui inter catholicos prius deputati sunt, si postea excommunicationis sententia notati fuerint, ordinationes tamen eorum ab ecclesia misericorditer tollerantur’ (Sg, p. 87b).

¹¹⁸ C.9 q.1 c.4: ‘Ab excommunicatis quondam tamen catholicis ordinatos, si quidem non symoniace ordines ipsos acceperunt’ (Sg, p. 88a).

¹¹⁹ C.9 q.2 d.p.c.9: ‘Auctoritatibus istis quilibet episcopi prohibentur alterius clericos ordinare’ (Sg, 88b).

¹²⁰ C.9 q.2 c.1: ‘Nullus alterius usurpet terminos, nec alterius parrochianum iudicare, vel ordinare presumat, quia tale iudicio, vel ordinatio, vel excommunicatio vel dampnatio’ (Sg, p. 88a). [C.9 q.2 c.3]: ‘Nullus primas, nullus metropolitanus, nullus que reliquorum episcoporum alterius adeat ciuitatem, aut ad

the supervision of another bishop without letters from him, he may separate them from the sacred orders. A cleric, should he wish to leave the priesthood, was not required to go before the same bishop who ordained him.¹²¹

The longest question of the *causa*, Question three, addressed the ability of an archbishop to act in a bishop's diocese without his permission. Gratian concluded that it was one thing for an archbishop to act out of rashness while it was another for him to act out of necessity of love because the bishop had neglected his duties. In the latter case, the archbishop was within his right to condemn and to absolve. If a bishop was diligent in his duties, the archbishop was not permitted to act, such as by dispossessing a parish, without consulting him.¹²² Gratian supported this view with a string of Pseudo-Isidorian decretals. Pope Iginus decreed that a metropolitan should not hear cases without the presence of some of his bishops and all of his the co-provincials.¹²³ Pope Anicius decreed that an archbishop could not act without the council of his bishop and likewise bishops should not act without the archbishop's consent unless it pertained to their

possessionem accedere, que ad eum non pertineat, et alterius episcopi parrochiam, super eius dispositionem nisi uocatus ab eo' (Sg, p. 88a).

¹²¹ C.9 q.2 c.10: 'Lugdunensis parrochiae clericos, quos contra statuta canonum ab alterius parrochiae episcopis ordinatorum litterarum tuarum significatione monstrasti, cum graduum suorum honore recipere religionis tuae prudentia poterit, si eos alias canonice et sine prauitate aliqua ordinatorum constiterit' (Sg, p. 88b).

¹²² C.9 q.3 d.p.c.21: 'Sciendum est ante quod multum refert an sumat quis aliquid temeritate presumptionis, aliquid gerat necessitate karitatis. Cum archiepiscoporum suffraganei subditis suis fauere malo ceperint, et circa correctionem eorum remissiores extiterint, tunc equum est metropolitanorum auctoritatem etiam suffraganeis initis sese interponere et ligandos dampnare, et reconciliandos absolvere. Cum autem episcopi diuinae karitatis zelo accensi bonos uerbo et exemplo edificant, malorum uicia aspera increpatione redarguunt, absque talium consultu in eorum parrochia aliquid agere uel disponere metropolitanis non licet' (Sg, p. 89b).

¹²³ C.9 q.3 c.4: 'Saluo in omnibus Romanae ecclesiae priuilegio nullus metropolitanus absque ceterorum omnium conprovincialium episcoporum instantia aliquorum audiat causas' (Sg, p. 89a).

parish.¹²⁴ In the event that an archbishop intervened in cases that pertained to parishes other than his own without the presence of all the co-provincials and without a council of bishops, Pope Anicius decreed that he should be corrected strictly lest he be so presumptuous in the future. If the archbishop was unable to be corrected and remained contumacious, the apostolic see should intervene and make an example of him.¹²⁵ Gratian added but one canon to Causa 9 in the subsequent recension. Another Pseudo-Isidorian decretal attributed to Pope Calixtus, q.3 c.7 supported this argument. Causa 9 sought to limit the encroachment of an archbishop on his bishops by circumscribing his ability to intervene without just cause.

Causa 9 protected the bishop's rights from an overzealous archbishop. Gratian again sought to protect episcopal rights with Causa 10 though not at the expense of the parish priest. The case statement sets the background by stating that a layman attempted to remove the church in question from diocesan law. On the other hand, a bishop attempted to make it part of his property along with its endowment. In the end the layman was run out of town and the bishop usurped the church for himself.¹²⁶ The causa examines the extent to which a bishop can claim ownership of ecclesiastical property.

Question one examines whether a basilica, together with its endowment, is regarded as

¹²⁴ C.9 q.3 c.5: 'Archiepiscopus nichil de episcoporum causis aut aliis communibus iuxta statuta apostolorum absque cunctorum aliorum agat consilio, nec illi assumant, nisi quantum ad suas pertinet parrochias, sine suo' (Sg, p. 89a).

¹²⁵ C.9 q.3 c.6: 'Si autem aliquis metropolitanus inflatus fuerit et sine conprovincialium omnium presentia uel consilio episcoporum aut alias causas, nisi eas tantum, que ad propriam suam pertinent parrochiam agere, aut eos grauare uoluerit, ab omnibus districte corrigatur, ne talia deinceps presumere audeat. Si uero incorrigibilis eisque inobediens apparuerit, ad hanc apostolicam sedem, cui omnia episcoporum iudicia referri precepta sunt, eius contumacia referatur, ut uindicta de eo fiat, et ceteri timorem habeant' (Sg, p. 89a).

¹²⁶ Causa 10 d.init.: 'Laicus quidam ecclesia quandam a se factam a lege diocesiana seperare condendit; episcopus uero eam cum omni sua dote ad dispositionem suam asserit pertinere, tandem episcopus euincit et militis militibus comitatus per parrochiam deseuit, unde que sunt ecclesiarum, quasi sibi debita usurpare querit' (Sg, p. 90a).

the bishop's property. Question two asks whether the bishop is permitted to usurp possessions belonging to a church. Question three asks what a bishop is able to exact from his priests in the name of the bishop's tax, that is, the *cathedraticum*.¹²⁷ Causa 10 contributes both to the previous discussion on jurisdiction by providing a balance between the bishop's right to collect the *cathedraticum*, a yearly tax paid to him by all churches in his jurisdiction, and the protection of clerical possessions or finances from a usurping bishop.

Gratian began the causa again protecting the rights of a bishop by relying heavily on conciliar decrees. Churches, along with all of their possessions, belonged to the authority of the bishop. The laity was not permitted to dispossess a church, which included its faculties and oblations.¹²⁸ The Council of Lérida concluded that a church did not possess the same status as a monastery and thus was not outside diocesan law.¹²⁹ While the version of this canon (q.1 c.1) in St. Gallen reads *ecclesiam*, Gratian 1 and the vulgate read *basilicam*.¹³⁰ A search of Fowler-Magerl's *Collectio canonum* yields one collection containing this version of the canon, the *Collection of canonry of St-Hilaire-le-*

¹²⁷ Causa 10 d.init.: 'Primum ergo queritur, an basilica cum tota sua dote ad episcopi pertineat ordinationem? Secundo, an res ecclesiarum episcopis liceat usurpare? Tertio, quid nomine cathedrae a sacerdotibus exigere ualeat' (Sg, p. 90a).

¹²⁸ C.10 q.1 d.p.c.15: 'Pro positis auctoritatibus quibus cum omnibus suis rebus ecclesiae ad episcopi ordinationem pertinere probantur, et tam ecclesiae quam earum facultates suis oblationes a laicorum dispositione probantur esse immunes' (Sg, p. 91a).

¹²⁹ C.10 q.1 c.1: 'Si ex laicis quisquam se factam ecclesiam consecrari desiderat, nequaquam eam sub monasterii specie, ubi congregatio non colligitur, a diocesana lege audeat segregare' (Sg, p. 90a). Gratian countered this assertion in C.18 q.2 d.p.c.31: 'Canonica igitur iura, quibus monasteria subiecta non sunt, synodales exactiones intelliguntur. Non enim debet abbas cogi...ad synodum ire, nisi rationabiliter emineat causa. Sunt etiam quedam officia seruitutis, ut angariae operum, crebrae receptiones, annuae exceptiones, peccantium mulcationes, a quibus omnibus libera sunt' (Sg, 144a-144b). Gratian explained that the canonical laws from which monasteries believed themselves exempt were in fact synodal decrees. An abbot was not compelled to attend a synod unless some cause warranted his attendance. Furthermore, monasteries were free from certain duties of office, such as works, receptions, annual exactions, and the mollification of sins.

¹³⁰ P, fol. 142r; Bc, fol. 159r; Fd, fol. 39v; Aa 23, fol. 166v; Vgl. *edF*, col. 613.

Grand (3.35), with the same inscription, incipit, and explicit. Several other collections begin with the different incipit, “De monachis uero id observari placuit,” such as: the *Collectio Farfensis* (1.52), the *Collectio Hispana* (1.34.3), the *Tripartita* of Ivo of Chartres (2.37.3), the *Collectio X partium* (Cologne HA 199, 7.2.7), and the *Collectio Lanfranci* (2.34.3). The *Clavis canonum* program does not reflect whether the canon reads *ecclesiam* or *basilicam*. It is impossible to tell from which collection Gratian may have taken the canon, and whether he truncated the canon, without examining all of them. Continuing with the authority of the bishop in St. Gall, both the III Council of Toledo and the II Council of Chalon-sur-Saône decreed that all churches, along with their endowments, tithes, and possession, were to remain in the power of the bishop and subject to his regulation.¹³¹ The Council Orléans likewise decreed that those things offered to the parish by the faithful, such as land, vines, slaves (*mancipiis*), and property, remained in the power of the bishops.¹³² Gratian sought to protect a church’s ability to support itself by ensuring that the bishop retained control of its possessions. With that said, a bishop was not to squander those possessions. The Council of Agatha decreed that a bishop may not sell, alienate, or subcontract small farms and serfs (*mancipiola*) of a church. If he must alienate something by usufruct or by indirect selling, two or three coprovincials and the area bishops must be involved in the transaction.¹³³ Pope Martin

¹³¹ C.10 q.1 c.2: ‘omnia secundum constitutionem antiquam ad episcopi potestatem et ordinationem pertineant’ (Sg, p. 90a). [C.10 q.1 c.3]: ‘Decretum est ut omnes ecclesiae cum dotibus suis, et decimis, et omnibus suis, in episcopi potestate consistant, atque ad ordinationem suam semper pertineant’ (Sg, p. 90a-90b).

¹³² C.10 q.1 c.7: ‘De his, que parochianis ecclesiis in terris, uineis, mancipiis atque peculiis quicumque fideles obtulerint, antiquorum canonum statuta seruentur, ut in episcoporum potestate consistant’ (Sg, p. 90b).

¹³³ C.10 q.2 c.1: ‘Capsellas uel mancipiola, sicut prisca canonum precepit auctoritas, uel uasa monasterium quasi commendata fidei preposito, in integro ecclesiae iure possideant, id est ut neque uendere, neque per

decreed that while the bishop has the right to dispense with possessions of the church in times of necessity, he could not dispense with them out of greed. In such cases he should appear before a council for judgement.¹³⁴

Gratian ended the *causa* by emphasizing that in spite of his power, a bishop could not exact more than the customary dues. A bishop may not usurp a third of the oblations. In addition to the *cathedraticum*, which bishops were permitted to exact, the priest and the bishop should agree upon the bishop's portion of anniversary dedications and oblations from certain holy days.¹³⁵ The Council of Braga decreed that no bishop travelling through his diocese may remove anything from the church except two solidi for the *cathedraticum*.¹³⁶ Reiterating that the *cathedraticum* was set at two solidi, Pope Pelagius reminded Cresconius that the priests and clerics of their parishes were not compelled to prepare feasts for them above their means.¹³⁷ According to the III Council of Toledo, those bishops who exacted more from the parish priest than was customary faced censure.¹³⁸ Gratian remained content with his arguments in subsequent recension,

quoscumque contractus res, unde pauperes uiuunt, alienare presumant. Quod si necessitas compulerit, ut pro ecclesiae necessitate aut utilitate uel in usufructu, uel indirecta uenditione aliquid distrahatur, apud duos uel tres conprovinciales aut uicinos episcopos causa, que necesse sit uendendi primitus conprobetur' (Sg, p. 91a).

¹³⁴ C.10 q.2 c.7: 'Episcopus habeat potestatem in rebus ecclesiae, ut dispenset necessitatem habentibus cum omni reuerentia et timore Dei...Si autem res ecclesiasticas episcopus in suas uoluntates usurpare uoluerit, aut fratribus uel filiis, uel quibuscumque propinquis suis dederit potestatem, ut per eos latenter res ledantur ecclesiae, hunc oportet obnoxium esse concilio' (Sg, p. 91b).

¹³⁵ C.10 q.3 d.p.c.5: 'Cathedraticum pro his auctoritatibus episcopis exigere permittitur preter medietatem uel terciam partem oblationum, que iuxta ecclesiarum diuersam consuetudine ex premissis auctoritatibus debetur episcopo...set uel anniuersariae dedicationis, uel quorundam etiam solempnium dierum' (Sg, p. 92a).

¹³⁶ C.10 q.3 c.1: 'Placuit, ut nullus episcoporum, per suas dioceses ambulans, preter honorem cathedrae suae, id est duos solidos, et non aliud aliquid per ecclesias tollat' (Sg, p. 91b).

¹³⁷ C.10 q.3 c.4: 'Illud te modis omnibus uolumus custodire, ut neque quis episcoporum Siciliae de parrochiis ad se pertinentibus nomine cathedratici amplius quam duos solidos presumat accipere, neque compellere presbiteros aut clerum parrochiarum suarum supra uires suas eis conuiuia preparare' (Sg, p. 92a).

¹³⁸ C.10 q.3 c.6: 'ne uideamur in ecclesia Dei exactores potius quam Dei pontifices nominari' (Sg, p. 92b).

sufficing to add four supplementary canons – q.1 c.8, q.2 c.8, q.3 c.7, and q.3 c.10 – to Causa 10.

Gratian's overwhelming concern in the Cluster D's causae was to protect the office of bishop but not at the expense of the parish priest. He began with the character of someone elevated to the episcopate by exploring how his past affected his ability to become bishop. He then turned to the aid others provided and how they influenced one's ability to serve faithfully. As Causa 7 and Causa 8 set out, the bishopric was not a piece of property that one could will to whomever he chose, rather episcopal elections served a vital role in safeguarding the integrity of the office. Gratian ended Cluster D by protecting the rights of a bishop from the overbearing authority of an archbishop and the laity. Each had their sphere of influence and the archbishop was not to encroach upon the bishop unless the latter was not fulfilling his duties. The bishop controlled all ecclesiastical property within his diocese and the laity could not build churches and expect them to have the same exceptions as monasteries. With all of this said, Gratian made certain to protect the parish churches. Bishops could not dispense with church property except in times of need and with having taken the appropriate council. He, furthermore, neither could exact more than what was customary nor could he place a financial burden upon his parish churches.

Cluster E

The fifth and final cluster adds one tract, comprising of Causa 2 and Causa 4, which resonates with topics addressed in previous clusters. These causae again turn to

the character of witnesses and accusers, and norms of due process. In addition to Causa 30 on marriage, Cluster E adds Causa 23 exploring the notion of a just war and punishment, and, in the process, changes the purpose of Causa 22.

The *ordo iudiciarius* anchors the tract added to Cluster E. In Causa 2 a layman accused a bishop of falling into a crime of the flesh. At his trial two monks, one subdeacon, and two deacons testified against him. Despite three of the witnesses failing to provide sufficient evidence, the bishop was despoiled because his crime was *notorium*.¹³⁹ In the course of the *causa*, Gratian explored an array of issues. Question one asks whether due process should be required *in manifestis*. In Question two, Gratian examined whether bishop should be judged since he already was despoiled. Question three asks whether those whose accusation and testimony are insufficient be punished. Question four examines whether the testimony of two people is enough to condemn him. Question five asks if the accusers fail whether the bishop should be compelled to purgation (an oath of innocence backed by oaths of several neighbors to the same effect). Question seven examines whether the laity, monks, or those of lesser ranks can bring an accusation against someone of higher rank. Question eight asks whether accusations can be in writing. Question six adds a new element by examining the timeframe for a litigant to appeal to a higher judge.¹⁴⁰

¹³⁹ Causa 2 d.init.: 'Quidam igitur episcopus a laico quodam de lapsu carnis inpetitur; duo monachi, unus subdiaconus, et diaconi duo ipsum aduersus testimonium faciunt; qui quidem se a metropolitano suo sentiens praegrauari, [a sententia prouocauit]; in ipsa causae uentilatione tres ex testibus deficiunt, siue promissione decepti, siue canonica examinatione reprobati; episcopus tamen quoniam eius crimen notorium erat, expoliatur' (Sg, p. 45a). A later scribe added the bracketed text

¹⁴⁰ Causa 2 d.init.: 'Primum igitur queritur, an in manifestis iudiciarius ordo sit requirendus? Secundo, an expoliatus ab aliquo sit iudicandus? Tertio, qua pena sint feriendi qui in accusatione uel testificatione defecerint? Quarto, [si duorum testimonio sit condemnandus? Quinto, si deficientibus accusatoribus sit cogendus ad purgationem?] Sexto, si remedium sit dandum ei, qui causa dilationis uocem appellationis

As with *causae* in previous clusters, *Causa 2* tackles directly the connection between the rank of the defendant and the rank of the witness. In other words, can those of lesser rank testify against their superiors or must the witnesses be of the same status? Also addressed is the quantity and quality of evidence needed to convict the accused. How many witnesses are needed and in what manner can their testimony be admitted to court? The *causa* also explores whether the heinous nature of the accusation warrants the immediate despoliation of the accused and delves into the appeals process.

Continuing with a subject matter similar to *Causa 2*, *Causa 4* introduces the case of an excommunicate who wants to bring charges against a bishop. In order to do so he had a fourteen year old adolescent be the accuser with him serving as witness. The adolescent, however, wished to be both the accuser and a witness. The bishop did not appear in court on the day of the trial and he was suspended from communion. When the trial resumed the true accuser's identity was discovered. Though he was found culpable in the accusation, he pursued his own case. Concerning the bishop, Question five asks if his failure to appear in court should result in his excommunication. In other words, is the accused required to attend the proceedings? With regards to the accuser, Question one asks whether an individual, who is outside of communion, can have another bring forth an accusation. Question three explores whether someone is permitted to testify if he is prohibited from bringing forth an accusation. Gratian also set the age requirements for someone to act as a witness in Question two, which asks whether a fourteen year old can testify in a criminal case. Question four settles the matter of whether someone is able to

exhibuerit? Septimo, si laici, monachi uel quilibet inferiorum ordinum in accusatione maiorum sint audiendi? Octauo, quomodo debeat fieri accusatio, an in scriptis, an sine scripto' (Sg, p. 45a). A later scribe added the bracketed text over an erasure.

bring forth an accusation and also serve as a witness. Finally, Question six asks if someone is found guilty in the indictment of a bishop should he be allowed to press his own case.¹⁴¹

Gratian treated this last *causa* on procedure in a terse fashion by only offering a canon or two to answer the questions rather than delving into the ‘*sic et non*’ argumentation. The VII Council of Carthage decreed that an excommunicated person, whether he was a cleric or a layman, was not allowed to bring forth an accusation. Such was also the case for actors, pagans, and Jews.¹⁴² The version of the canon used in Gratian 1 included those subjected to deformities and heretics.¹⁴³ Combining Questions two and three, Gratian included another canon from the VII Council of Carthage, which set the minimum age to testify at fourteen.¹⁴⁴ Goldberg has observed correctly the connection between the age at which one could enter into an oath and the age at which one could testify, both of which were set at fourteen.¹⁴⁵ As one would swear to the truth of his testimony, the oath played an important role in legal proceedings. It was contrary

¹⁴¹ *Causa 4 d.init.*: ‘In excommunicatione quidam erat constitutus et episcopum accusare disponit; adolescentem infra annos quatuordecim secum ad asserendam causae adducit; qui dum ab accusationem prohibetur facit se testem et minorem accusatore; minor uero accusatoris et testis personam gerere desiderat statuta die episcopus ad iudicium non uenit, suspenditur a communione; renouato denuo iudicio accusator in accusatione culpabilis inuenitur. Demum ad assertionem propriae causae procedit. Queritur ergo primo, an constitutus in excommunicatione, possit alium accusare? Secundo, an infra quatuordecim annos in criminali causa quis testificari ualeat? Tertio, an ab accusatione quis prohibitus testificantis uicem possit assumere? Quarto, accusator et testis an possit idem esse? Quinto, an quis non ueniens die perstituta excommunicari debeat, id est a communione priuari? Sexto si culpabilis quis in episcopi indicio inueniatur ad assertionem propriae causae sit amplius admittendus’ (Sg, p. 72b-73a).

¹⁴² C.4 q.1 c.1: ‘Diffinimus, eum rite ad accusationem non admitti, qui posteaquam excommunicatus fuerit, in ipsa adhuc excommunicatione constitutus, siue sit clericus siue laicus, accusare uoluerit. Omnes etiam infamiae maculis aspersi, id est histriones etiam siue pagani siue Iudei, ab accusatione prohibentur’ (Sg, p. 73a).

¹⁴³ C.4 q.1 c.1: ‘id est histriones aut turpitudinibus subiectae personae, heretici etiam, siue pagani siue Iudei, ab accusatione prohibentur’ (P, fol. 127r; Bc, fol. 142v; Fd, fol. 34r; Aa 23, fol. 149v).

¹⁴⁴ C.4 qq.2-3 c.1: ‘Ad testimonium autem intra annos quatuordecim etatis suae constituti non admittantur’ (Sg, p. 73a).

¹⁴⁵ Goldberg, “Legal Persona of the Child,” 47.

to the *ordo iudiciarius* for the same person to serve both as accuser and as witness.

Gratian provided two canons, one from Pope Fabian and another from Pope Damasus, both of which established the personnel needed to conduct a trial. Pope Fabian decreed that no accuser could presume to be both judge and witness at the same time because a trial required four human elements: elected judges, accusers, defenders, and witnesses.¹⁴⁶

The canon established that each person involved in a trial must play a singular role; one then could not serve as both accuser and witness. The decree of Pope Damasus dealt with the same topic. Accusers were not the same as judges, as there were accusers, judges, witnesses, and those accused. Furthermore, judgment or damnation could not precede the *inscriptio* under pain of punishment equal to the crime (*talio*).¹⁴⁷ Concerning the bishop's failure to appear in court, III Council of Carthage decreed that he was not suspended from communion if he was not notified at least a month and a day before the proceedings or if he could prove the reasons that necessitated his absence (*causae necessitates suae*). His continued failure to appear, however, would result in excommunication until he was cleared of the accusation (*purgo*).¹⁴⁸ Finally, two canons from the III Council of Carthage and the VII Council of Carthage supplied the argument that even if one was prohibited from making an accusation, he could bring forth a case in

¹⁴⁶ C.4 q.4 c.1: 'Nullus umquam presumat accusator simul esse et iudex uel testis, quoniam in omni iudicio quatuor personas semper esse necesse est esse, id est iudices electos, accusatores, defensores, testes' (Sg, p. 73b).

¹⁴⁷ C.4 q.4 c.2: 'Accusatores uero et iudices non idem sint, set per se accusatores, per se iudices, per se testes, per se accusati, unusquisque in suo ordine. Inscriptio semper fiat ut talionem calumpniator recipiat, quia ante inscriptionem nemo debet indicari uel dampnari, cum et seculi leges hec eadem obtineant' (Sg, p. 73b).

¹⁴⁸ C.4 q.5 c.1: 'Nec a communione suspendatur cui crimen intenditur, nisi ad causam suam dicendam electorum iudicum, die statuta, litteris euocatus minime occurrerit, hoc est infra spatium mens ex ea die, qua eum litteras accepisse constiterit. Quod si aliquas causas suae necessitatis probauerit, suae causae dicendae intra alterum mensem integram habeat facultatem. Verum tamdiu post mensem secundum non communicet, donec purgetur' (Sg, p. 73b).

civil matters.¹⁴⁹ It was not until the final recension that Gratian added canons to Causa 4, choosing not to augment it in Gratian 1.

Cast in the shadow of Causa 22, an analysis of Causa 23 provides a unique insight into the compilation of the *Decretum*. The addition of Causa 23 in Cluster E introduces the opportunity for Gratian to return to his argument in the preceding causa, which thus far had been associated primarily with ecclesiastical obedience and the matrimonial bond. In Causa 23 Gratian highlighted the feudal nature of principles established in Causa 22 to resolve the discord resulting from a failed oath and the Church's role in restoring peace. Together these cases form a nascent tract on fidelity that Gratian would complete in the subsequent recension. What began as a case exploring the oath as it related not only to clerics but also to marriage slowly transformed into a deeper commentary on social bonds. This is the one of two tracts in the *Decretum* which contains a core causa, a causa added late in the compilation of the cases, and three causae not added until Gratian 1.¹⁵⁰ The case begins with certain bishops and their congregation having lapsed into heresy. Adding insult to injury, these dissenters took the offensive by forcing those from the surrounding regions into the heresy as well. In retaliation, the pope ordered the catholic bishops, who already received civil jurisdiction from the emperor, to defend the faithful from the heretics however they could and, when they were able, compel them to return to the rectitude of the faith. With papal and secular permission, the bishops called together

¹⁴⁹ C.4 q.6 c.1: Illud uero placuit, ut cum agere ceperit in episcoporum iudicio, si fuerit accusator dampnabilis de cetero ad arguendum non admittatur, nisi proprias causas, non tamen ecclesiasticas uel criminales, asserere uoluerit' (Sg, p. 73b-74a). [C.4 q.6 c.2]: 'Omnibus, quibus accusatio denegatur, in causis propriis accusandi licentia non est neganda' (Sg, p. 74a).

¹⁵⁰ The *tractatus* on marriage is the second instance. Gratian included Causa 34 among the core causae. He added Causae 31-33 to Cluster C; he added Causa 27, Causa 29, and Causae 35-36 to Cluster D; finally, he added Causa 30 to Cluster E. Gratian added Causa 28 to the following recension.

soldiers and began to fight openly as well as through ambushes. It appears that they accompanied the retinue to the battlefield where the soldiers used both conventional and unconventional military tactics to defeat the aggressors. Finally, with some heretics handed over to be killed, others deprived of their personal property, and still others placed in prisons and dungeons, those enemies who remained were forced to return to the faith. In order to compel the dissenters back to the Church, a variety of punishments, not the least of which was capital punishment, were employed.¹⁵¹ The quest for the *vita apostolica* introduced by the Gregorian Reform and the sermons of itinerant preachers seeking the reform of the negligent clergy laid the foundation for heresy. Northern Italy, and southern France, suffered the most from heretical movements, such as the Bogmils, the Cathars, and later the Waldensians.¹⁵²

The case statement offered Gratian the opportunity to ask a myriad of questions about the purpose of war and the role of the Church. Question one asks whether military service is a sin with Question two asking what is a just war. Question three explores whether one should use arms to ward off injuries done to allies. Question four delves into whether one should take revenge, while Question five asks whether a judge or an official sins by putting to death the guilty. Question six explores whether evil people

¹⁵¹ Causa 23 d.init.: 'Cum plebe sibi commissa episcopi quidam in heresim sunt lapsi; Catholicos adiacentes ad heresim conpellebant. Unde apostolicus episcopis catholicis ciuilem iurisdictionem ab imperatore habentibus, inperauit, ut ab hereticis catholicos defenderent, et ut cumque posserent eos ad fidei rectitudinem reuenti cogerent. Accipientes episcopi, apostolica mandata, militibus conuocatis hereticos manifeste ac insidiis impugnare ceperunt. Demum multis eorum occisis, multis quos suis rebus expoliatis, aliis in carceribus et latrimiis reclusis, ad fidem tandem redieruntur' (Sg, p. 158b).

¹⁵² For works on heretical movements see: Herbert Grundman, *Religious Movements in the Middle Ages* (Notre Dame: University of Notre Dame, 1995); Heinrich Fichtenau, *Heretics and Scholars in the High Middle Ages: 1000-1200*, trans. Denise A. Kaiser (University Park: Pennsylvania State University Press, 1998); Carol Lansing, *Power and Purity: Cathar Heresy in Medieval Italy* (Oxford: Oxford University Press, 1998); M.D. Lambert, *Medieval Heresy: Popular Movements from the Gregorian Reform to the Reformation*, 3d ed (Oxford; Malden, MA: Blackwell Publishing, 2002).

should to be compelled to do good. Question seven asks whether heretics should to be deprived of their possessions and those of the Church, and whether those who possess the things taken from heretics are said to possess what belongs to another. Finally, Question eight asks whether bishops or clerics may take up arms on their own authority or at the command of the pope or the emperor.¹⁵³

Causa 23 intricately weaves together the justification and reasons for war, retaliation, coercion, and clerical involvement in all of the above. By setting forth the rationalization for military service and just war, Gratian maintained that war was permitted so long as it was out of love and to restore peace by correcting the wayward. Only a legitimate authority, a judge who carried out his duties justly, was able to call for a war to recover lost goods and to repel injuries to himself, his *patria*, or an ally. Gratian also addressed the particulars of physical reprisal and material coercion; however, the discussion was interrupted prematurely.¹⁵⁴ The Church called for the secular realm to compel the wayward back to the fold for penance by corrective measures and thus permitted clerics to fulfill their feudal obligations, so long as they were not involved in bloodshed.

Gratian began the *causa* by establishing the legitimacy of war. Such a discussion provided the foundation for the manner in which to wage war against those who failed to

¹⁵³ Causa 23 d.init.: ‘Queritur ergo, an sit militare peccatum? Secundo, quod bellum sit iustum? Tertio, an sotos ab iniuria defendere liceat? Quarto, an sit inferenda uindicta? Quinto, an peccet iudex uel minister occidendo reos? Sexto, an ad bonum mali cogi debeant? Septimo, an suis bonis et ecclesiis heretici debeant expoliari et an aliena possidere dicantur, qui eius ablata possideret. Octauo, an utrum episcopis uel quibuslibet clericis sua auctoritate, aut uel apostolici, si uel imperatoris precepto arma mouere liceat?’ (Sg, p. 158b).

¹⁵⁴ Sg omits the remainder of Question four as well as all of Questions five, six, and seven. The progression of the argument and Gratian’s methodology comes to light in the first recension which includes the questions.

keep the peace by upholding their social obligations. He started with a laundry list of heavily abbreviated biblical citations, which Gratian neither discussed nor contextualized. These passages called for pacifism and refraining from physical force. As the Lord instructed: “If anyone struck you on one cheek, then offer to him the other (Matth. 5:39),” and again: “Who compelled you 1000 miles, go with him 2000 miles (Matt. 5:41).” The Apostle said to the Romans: “Do not defend yourselves, my dearest friends (Rom. 12:19).” Peter said: “Return your sword to its scabbard. To me belongs vengeance (Matt. 26:52);” “Do not judge (Matt. 7:1);” “Let both grow together until the harvest and (then) bind them together in bundles to be burned (Matt. 13:30).”¹⁵⁵

Despite beginning with the merits of pacifism, Gratian shifted quickly to include two canons attributed to Augustine which maintained that a person should adhere to these precepts of patience in the heart though not necessarily through an outward showing. Neither Jesus nor Paul fulfilled the principle that one should endure patiently the malice of the wicked lest he be counted among them. When struck on the face neither turned the other cheek, rather they sought to defend themselves by verbally confronting their attackers. Punishment was permissible so long as it stemmed from love and for the benefit of correction. One must do what was in the best interest of another and thus be mindful of his welfare rather than his wishes.¹⁵⁶ Military service, Augustine concluded,

¹⁵⁵ C.23 q.1 d.a.c.1: ‘Nam cum dicitur: Si quis percusserit in unam maxillam, prebe sibi et alteram, et item: Qui angariauerit te mille passus, uade cum eo a duo milia; item cum Apostolus dicat ad Romanos: Non uos defendentes, karissimi, et cetera. Petrus dictus est: Conuerte gladium tuum in uaginam. Michi uindictam et cetera. Item: Nolite iudicare et cetera. Sinite utraque crescere usque ad messem’ (Sg, p. 158b-159a).

¹⁵⁶ C.23 q.1 c.2: ‘Agenda sunt autem multa etiam cum inuitis quadam benigna asperitate plectendis, quorum potius utilitati consulendum est quam uoluntati’ (Sg, p. 159b).

was not a sin so long as those who waged war did so out of the desire for peace and sought to coerce the evil back to good.¹⁵⁷

Having justified war by way of justifying military service, Gratian turned to the question of what constituted a just war. His definition came from Isidore of Seville. A just war was waged in accordance with either a formal declaration for the sake of recovering property seized or for driving off the enemy. A judge relayed the law to the people, or deliberated according to the law. To deliberate lawfully was to judge justly; he was not a judge if justice was not in him.¹⁵⁸ A war could be waged justly when done so under an edict to recover lost goods or to repel the unjust. A judge, a legitimate authority, was the party responsible for issuing the edict issued by a legitimate authority.¹⁵⁹ This authority must judge within the law otherwise justice was not in him. Augustine held that so long as a war was just it did not matter if it was waged openly or through ambush.¹⁶⁰ As the case statement implies, the Catholic bishops had two superiors both of whom they needed to receive permission to carry out this war. As bishops they needed permission from the pope; as vassals, which it seemed they were since they received civil jurisdiction, they needed permission from the emperor. The

¹⁵⁷ C.23 q.1 c.6: 'que [bella] non cupiditate aut crudelitate, set pacis studio geruntur ut mali coherceantur, et boni subleuentur' (Sg, p. 160a). C.23 q.1 c.5 maintained that soldiers, therefore, should be paid a sufficient amount so that they did not have to plunder and they should be content with that (Sg p. 160a).

¹⁵⁸ C.23 q.2 c.1: 'Iustum est bellum, quod edicto geritur de rebus repetendis, aut propulsandorum hominum causa. Iudex dictus est, quia ius dictat populo, siue quod iure disceptet. Iure disceptare est iuste iudicare. Non est enim iudex, si non est in eo iusticia' (Sg, p. 160a).

¹⁵⁹ Frederick Russell, *Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975), 46. According to Romanists, such as Azo, Accursius, and Odofredus, only the emperor could wage war. In his commentary of Cod. 11.47, Azo would argue that the prince could delegate this authority. Gratian would argue that this authority pertained to the pope.

¹⁶⁰ C.23 q.2 c.2: 'Cum autem iustum bellum suscepit, utrum aperte pugnet, an ex insidiis, nichil ad iusticiam interest' (Sg, p. 160a).

bishops then had placed themselves in the position of having to honor two oaths that, by their very nature, could come into conflict with one another.

Gratian then used the theory of a just war to argue that one should wage a war to aid a *socius*.¹⁶¹ According to Ambrose, justice defended the weak or allies and oneself from robbers; it also guarded the fatherland or the home from war caused by barbarians.¹⁶² For Jerome, the intention was to weaken those who harm so they would stop their way of life.¹⁶³ To that end, Ambrose maintained that one did not inflict injury by driving away injury. Rather, he who chose not to oppose wrongs when able was as much at fault as he who inflicted the harm.¹⁶⁴ One then should *always* be opposed to perversions and repel with arms the injury of allies. Gratian explained that it was one thing to ward off injury so that others may live wantonly, which the Lord taught should not happen, and another so that the welfare of others remained unimpeded. He who did not act, contributed to the evils.¹⁶⁵ It was the responsibility of one who could protect others to do so. Gratian would qualify this statement in the following redaction by stating that one *sometimes* ought to oppose perversions and repel injuries to allies. The

¹⁶¹ Interpretations of *socius* could vary. On the one hand, it could refer to a neighbor. On the other hand, it could refer to a co-operative bond involving an oath of obedience or fidelity. Because of the placement of Causa 23 succeeding Causa 22, the latter rendering seems likely particularly since Causa 22 used the term *comitatus*, a synonym for *socius*. See Gerd Althoff, *Family, Friends, and Followers: Political and Social Bonds in Early Medieval Europe*, trans. by Christopher Carroll (Cambridge: Cambridge University Press, 2004), esp. Chapters 2-3.

¹⁶² C.23 q.3 c.5: 'Fortitudo, que bello tuetur a barbaris patriam, uel domi defendit infirmos, et a latronibus socios, plena iustitia est' (Sg, p. 160b).

¹⁶³ C.23 q.3 c.6: 'Debilitata enim membra, quibus prius non bene utebantur, a malo opera cessabunt' (Sg, p. 160b).

¹⁶⁴ C.23 q.3 c.7: 'Non inferenda, set depellenda iniuria lex uirtutis est. Qui enim non repellit a satio iniuriam, si potest, tam est in uitio quam ille, qui facit' (Sg, p. 160b).

¹⁶⁵ C.23 q.3 d.p.c.10: 'Ecce, quod *semper* sit obuandum peruersis, et sotiorum iniuria etiam armis propulsanda. Set aliud est iniuriam propellere ut liceat voluptuose vivere, quod dominus non esse faciendum in seipso docuit, aliud ut aliorum utilitati libere possit vacari quod qui non facit consentit.' (Sg, p. 160b).

maintenance of the Church's freedom and the hindrance of the wicked were the restricting factors.¹⁶⁶ It seems that the secular realm should assist the Church whenever called upon; however, assistance to other *socii* would become situational. Reflective of Causa 22's discussion of feudal law where a vassal has taken an oath of obedience to his lord, Gratian applied the criteria for a just war, which was for the recovery of lost goods and the repulsion of injury, to argue that one may come to the aid of *socii*. If one has sworn an oath to defend another, he must fulfill that oath or be guilty of perjury.

Like the waging of war, physical reprisal sought to correct those who have failed to fulfill their social obligations; they have invalidated an agreement by perjury. Gratian found it best to move the students slowly to the idea that scourging and the death sentence could serve a beneficial purpose. His slow and methodical proof of not only the right to punish but of the right to sentence the guilty to death proves this. The first section argues against force but rather one must endure patiently the malice of others. The second argues that the wicked would receive divine punishment. The third section argues that there are some instances when punishment is permitted so long as it is out of love for the desire to correct. Gratian accomplished this by outlining the instances when it was not permitted. A missing quire interrupts the fourth section, which begins to look at the role and duty of a judge.

In these later *causae*, Gratian begins to emphasize 'sic et non' methodology. At the beginning of C.23 q.4 he cited a number of texts attributed to Augustine that stated physical retaliation was not a viable option. The prophets did not send away the wicked

¹⁶⁶ C.23 q.3 d.p.c.10: 'Ecce, quod *nonnumquam* est obuiandum peruersis, et iniuria sociorum armis est propulsanda, ut et malis adempta facultas delinquendi prosit, et bonis optata facultas libere consulendi ecclesiae ministretur. Hoc qui non facit, consentit' (Fd, fol. 63r; Aa 43, fol. 64v).

but lived among them and entered the temple to celebrate the sacraments alongside them.¹⁶⁷ The good must tolerate the wicked. For example, Christ tolerated Judas and gave him the sacraments along with the other apostles.¹⁶⁸ While it was permitted to withdraw spiritually, it was not permitted to withdraw physically as, for the moment at least, the good and the wicked were bound to each other. Each was responsible for his own sins and could not be held accountable for the sins of others. The sins of the wicked, Augustine maintained, did not affect the good of the Church so long as they did not consent to but rather reprovved them. The good have three options in which to handle the wicked: correct them by proving them wrong, separate themselves from those they were unable to correct, or rightly condemn those from whom they were unable to separate.¹⁶⁹

Having laid out the first section – the good should tolerate the wicked and withdraw from them spiritually but not physically – Gratian continued with the second. He refined the argument to maintain that while the good must not punish the wicked physically because those who take up the sword will die by the sword, they should face spiritual punishment.¹⁷⁰ Vengeance was the purview of Him alone. While it was said in the Hebrew Bible “an eye for an eye,” Christ instructed us not to oppose the wicked but love our enemies. Paul instructed us to feed our enemy if he were hungry and give him

¹⁶⁷ C.23 q.4 c.1: ‘Non enim prophetae, qui hec dicebant, populum suum dimiserunt, set inter eos habitabant, quos increpabant, unum templum cum eis intrabant, eadem sacramenta celebrabant’ (Sg, p. 161a).

¹⁶⁸ C.23 q.4 c.2: ‘Tu bonus tollera malum. Nam et Christus Iudam tollerauit et ad predicandum misit, eique cum aliis eucharistiam dedit’ (Sg, p. 161a).

¹⁶⁹ C.23 q.4 c.5: ‘Quisquis uel quod potest arguendo corrigit, uel quod corrigere non potest saluo pacis uinculo excludit, uel quod saluo pacis uinculo excludere non potest equitate inprobat, firmitate supportat’ (Sg, p. 161a). [C.23 q.4 c.8]: ‘Duobus modis non te maculat malus: si non consentias, et si redarguas. Hoc est non communicare, non consentire; communicatur quippe, quando facto eius consortium uoluntatis uel approbationis adiungitur. Neque ergo consentientes sitis malis, ut approbetis; neque negligentes, ut non arguatis; neque superbientes, ut insultantes arguatis’ (Sg, p. 161b).

¹⁷⁰ C.23 q.4 d.p.c.12: ‘Ecce, quod sunt mali tollerandi, non corporali, set spirituali uindicta sunt puniendi...Item: Omnis, qui gladium acceperit, gladio peribit’ (Sg, p. 161b).

drink if he were thirsty.¹⁷¹ Augustine admonished those who presumed to exercise powers not even granted to the Apostles. They lacked humility and were guilty of arrogance who discerned tares from corn.¹⁷² Because this life straddled heaven and hell, Pope Gregory I stated that the good and the wicked must live together. A good person calmly tolerated the wicked. Should he not, he is wicked by his intolerance.¹⁷³ Gratian therefore moved the argument from simply tolerating the wicked and separating oneself spiritually, to tolerate the wicked though they will receive divine punishment.

In the third section Gratian argued that with the right mindset punishment was beneficial.¹⁷⁴ To introduce the possibility he began with the counter stance that, while beneficial chastisement was permitted, there were some instances when physical punishment was not permitted. Physical punishment, such as scourging, was not applicable for those *nostri iuris non*.¹⁷⁵ Augustine explained that they were not able to win the unfaithful to Christ, if they shunned their gatherings and banquets. The Lord did

¹⁷¹ C.23 q.4 d.p.c.15: 'Ex his colligi, quod uindicta malorum Deo sit reseruanda, quod multis et uariis exceptus ostendi possit. Unde: Audistis: quia dictum est antiquis, Oculum pro oculo, et cetera. Ego autem dico uobis: Nolite resistere malo, sed diligite inimicos uestros, et cetera. Item Paulus: Si esurierit inimicus tuus, ciba illum, et multa alia in hunc modum' (Sg, p. 161b-162a).

¹⁷² C.23 q.4 c.14: 'Quantus arrogantiae timor est, quanta humilitatis et lenitatis obliuio et arrogantiae iactantia, ut quis se posse facere credat, quod nec Apostolis concessit Dominus, ut zizania uidelicet a frumento se putet posse discernere' (Sg, p. 161b).

¹⁷³ C.23 q.4 c.15: 'Hec uita, que inter celum et infernum sita est, sicut in medio subsistit, ita utrumque partium ciues communiter recipit...Si igitur boni estis, quamdiu in hac uita subsistitis, equanimiter malos tollerate. Nam quisquis malos non tollerat, ipse sibi per intollerantiam testis est, quia bonus non est' (Sg, p. 161b).

¹⁷⁴ C.23 q.4 d.p.c.15 and d.p.c.16 appear as one dictum with d.p.c.16 transitioning the argument (Sg, p. 162a); d.p.c.25 and d.p.c.26 also appear as one dictum (Sg, p. 161a-162b); d.p.c.27 appears as a canon (Sg, p. 162b).

¹⁷⁵ C.23 q.4 d.p.c.16: 'quedam sunt que salubiter per ammonitione sunt corripienda, non corporalibus flagellis animaduertenda; set diuino examini reseruanda, quando si in delinquentes nequam disciplinam exercere, uel quia nostri iuris non sunt, uel quia illorum crimina, licet nobis manifesta sint, manifestis tamen indiciis probari non possunt. De his, qui nostri iuris non sunt, ait Apostolus: Quid enim mihi attinet de his, qui foris sunt, iudicare' (Sg, p. 162a). Chodorow, *Christian Political Theory*, 86, n.25. Baptism was required for judicial inclusion of the Church. Those who were not baptized were not within the jurisdiction and therefore were outside of the Church's ability to bind and to loose.

not shun such people for He ate and drank with tax collectors and sinners.¹⁷⁶ Temporal punishment was also not an option for those whose crimes, while known, were not able to be proven with clear evidence.¹⁷⁷ Though Gratian mentioned this instance, he chose not to elaborate on it further, possibly because the *causae* on the *ordo iudiciarius* had discussed the matter. A third exemption, according to Gratian, occurs when wickedness engulfed the multitude. They should not be punished but rather tolerated lest the church suffer injury.¹⁷⁸ Gratian supported the third exemption with a text attributed to Augustine. By definition patience was the realization that the good and the evil live together and thus the former should remain firm and tolerate the latter.¹⁷⁹ Though this version of the text did not circulate as a separate canon in pre-Gratian collections, the significantly longer version of this text added to Gratian 1 circulated in both Anselm of Lucca's *Collectio canonum* (Version A, 12.63) and in the *Collectio XIII librorum* (Vat.lat.1361, 12.53) and better articulated Gratian's dictum. The Church, Augustine went and to explain, tolerated dogs for the sake of peace. Where peace has been secured, dogs were not tolerated.¹⁸⁰ The fear seems to be that punishment would result in schism when the majority of the congregation was in error. The preservation of the community

¹⁷⁶ C.23 q.4 c.17: 'Infideles non possumus Christo lucrari, si colloquium eorum uitamus et conuiuium. Unde et Dominus cum publicanis et peccatoribus manducauit et bibit. In his uero, qui intus sunt, id est infidelibus, putredo resecanda est' (Sg, p. 162a).

¹⁷⁷ C.23 q.4 d.p.c.16: 'quedam sunt que salubitur per ammonitione sunt corripienda, non corporalibus flagellis animaduertenda; set diuino examini reseruanda, quando si in delinquentes nequam disciplinam exercere, uel quia nostri iuris non sunt, uel quia illorum crimina, licet nobis manifesta sint, manifestis tamen indiciiis probari non possunt. De his, qui nostri iuris non sunt, ait Apostolus: Quid enim mihi attinet de his, qui foris sunt, iudicare' (Sg, p. 162a).

¹⁷⁸ C.23 q.4 d.p.c.17: 'Item, quando multitudo est in scelere, nec salua pace ecclesiae mala puniri possunt, sed potius tolleranda sunt, quam uiolata pace ecclesiae punienda' (Sg, p. 162a).

¹⁷⁹ C.23 q.4 c.18: 'Quidam, cum bonorum malorum bonorum que conmixtionem in ecclesia demonstratam uel predictam esse perspexerint, et precepta patientiae didicerint, que nos firmissimos reddunt' (Sg, p. 162a).

¹⁸⁰ C.23 q.4 c.18: 'canes in ecclesia propter pacem ecclesiae tolleremus, et canibus sanctum, ubi est pax ecclesiae tuta, non demus' (Fd, fol. 63v; Aa 43, 67r-67v).

seemed to be the main concern. Crimes, Gratian explained in Sankt Gallen, should be punished for the saving peace of the Church. Though one should make a distinction. While there were instances when patience meant waiting for them to repent, there were other times when, for the saving peace, the good might punish the wicked. There came a point when the good must punish the few so their castigation might serve as an example and they may turn others from their wicked course and towards penitence.¹⁸¹ In a letter to Januarius, Pope Gregory asserted that while we should punish sins committed against God or against neighbor, we should tolerate patiently those sins committed against us.¹⁸² Gratian would include this text with q.4 d.p.c.26 in Gratian 1, and finally with the addition of q.4 c.27 in Gratian 2 this text would become q.4 d.p.c.27.¹⁸³ Gratian concluded in St. Gall that physical chastisement was necessary so long as it did not stem from hatred or from bitterness and the crime was committed against God. Offenses requiring toleration were: *nostri iuris non*, crimes that could not be proven, when a majority of the congregation was in error, and when the crime was against our person; otherwise punishment was beneficial.

To introduce the duties of a judge, Gratian returned to the idea that crimes could not be prosecuted when, although known, they could not be proven with clear evidence. Gratian determined that a judge cannot punish a sin when public proof was missing. Christ alone knew of Judas' sin and, despite being the judge, he lacked the public proof

¹⁸¹ C.23 q.4 d.p.c.25: 'Sic crimina tolleranda sunt, quando sine prohibitione ecclesiae feriri non possunt; set hoc discretione. Nam quandoque delinquentium multitudo per patientiam ad penitentiam expectanda est: quandoque in paucis est punienda, ut poena paucorum sit metus multitudinum' (Sg, p. 162a-162b).

¹⁸² C.23 q.4 d.p.c.27: 'Peccata, que in Deum uel in proximum committuntur, a nobis punienda sunt, ea uero, quibus in nos delinquitur, patienter tolleranda sunt, uel potius dissimulanda' (Sg, p. 162b).

¹⁸³ Fd, fol. 64r; Aa 43, fol. 68v-69r; Vgl. *edF*, col. 912.

necessary to convict him. He thus had to endure his crime with patience.¹⁸⁴ Ambrose stated that aside from possessing the necessary authority and proof to convict, a judge must have an accuser in order to prosecute an individual. Since Judas did not have an accuser, Christ did not have the power to convict him.¹⁸⁵ Consequently, a judge was obligated to set the defendant free if he lacked either public proof or an accuser. The implication is that if these rules bound Christ, they bound all men serving as judge.

In the St. Gall manuscript Question four abruptly ends with c.34 on page 162b, which is the end of the quire. The text omits the rest of Question four as well as all of Questions five, six, and seven despite the hypothetical including these three questions. The causa resumes with d.a.c.1 of Question eight at the top of page 163a. I maintain that this lacuna is the result of a faulty exemplum that was missing a quire.

The peculiarity comes from the catchphrase at the bottom of page 162b. Canon thirty-four is the end of the quire as indicated by the catchphrase *et tanto*, which is written in the same ink as the text in the lower right hand of the pages. The placement of this catchphrase, however, does not correspond to those that end previous quires on pages 18b, 34b, 50b, 66b, 98b, 130b, 146b, 178b, 194b, and 210b. In those cases the catchphrase is in the extreme lower right margin and written near the binding. On page 162b the catchphrase is not hidden in the lower right margin, but is found a little higher and more to the left. Whereas the others are inconspicuous, this catchphrase is quite noticeable. It was placed where it could be seen easily. Furthermore, the duplication of

¹⁸⁴ C.23 q.4 d.p.c.30: 'Ea uero peccata, que publicis deseruntur indiciis, puniri non debet quod inprobatur, quod Christo solus iudam furem esse cognoscens, non abiecit, sed patienter tolleratur' (Sg, p. 162b).

¹⁸⁵ C.23 q.4 c.31: 'Si quis potestatem non habet quem scit reum abicere, uel probare non ualet, immunis est, et iudicis non est sine accusatore dampnare, sicut nec Christus Iudam abiecit' (Sg, p. 162b).

the catchphrase on page 163a does not correspond to that on page 162b. In the other instances the catchphrase is repeated as the first word or two at the top of the next page exactly as it is found at the bottom of the previous page. It is not found in the margin, but rather is a seamless continuation of the text. If the quire pattern on pages 162b and 163a followed the pattern of other quires, the manuscript should read:

(162b) ... percutis cor, (163a) et tanto nequiores reddis ...
(catchphrase) et tanto

This is not the case, however, on page 163a. Rather, *tanto* is placed in the left margin and written later with brown ink. This catchphrase is not exactly the same as that found on the previous page. The manuscript reads:

(162b) ... percutis cor, (left margin) tanto (163a) nequiores reddis...
(catchphrase) et tanto

This is the only instance in the manuscript where such an instance occurs.

The peculiarity with the catchphrase corresponds with the marked deletion of the indicators for Questions five, six, and seven. A scribe haphazardly placed these indicators in the midst of Question four almost as if attempting to make the number of questions correspond to the hypothetical. The indicator for Question five on page 161b is placed next to q.4 c.14, "Quantus arrogantiae tumor." The indicator for Question six on page 162a is placed next to q.4 d.p.c.16, "Quibus respondetur quedam." Finally, the indicator for Question seven, also on page 162a, is placed in the middle of q.4 d.p.c.17, "Hinc etiam, cum," at "Item, quando multitudo." The same brown ink that later added *tanto* in the left margin of page 163a added four dots under each question indicator to mark their deletion.

This lacuna is the result of a scribe originally copying the St. Gall manuscript from a faulty exemplum that had itself a quire missing or from damage to the St. Gall manuscript at an early stage of its life. The catch words are written in a twelfth-century hand. As he copied, the scribe did not notice the gap in the text and went from q.4 c.34 to q.8 d.a.c.1. At some point, another scribe detected the missing questions and added indicators to make the text correspond to the hypothetical. In an attempt to note the error, the scribe, making corrections and notations in brown ink, added the partial catchphrase in the left margin of page 163a and marked the indiscriminately placed question markers for deletion. It is the same ink used to make corrections throughout the *causae*, which could be the result of comparing it with another manuscript. The rubricator's efforts make it clear that the text was already missing when St. Gall was produced.

Causa 23 loses its structure after q.4 c.34. The missing questions interrupt the theory and practice methodology found in Questions one through three. The justification for the use of physical retaliation is left incomplete. Gratian has only outlined the possibility of punishment by way of the exceptions. The question abruptly ends in the middle of the fourth section dealing with the role of the cleric as judge. St. Gall also omits the fifth and final section, the thrust of the entire question, where Gratian explicitly deals with the appropriate use of physical punishment to coerce the wicked to good.

St. Gall continues again with Question eight where Gratian focused upon the Church's role in compelling the wayward back to the fold and whether, in light of his feudal oath and obligations, a cleric may take up arms on behalf of the Church. Gratian argued that a life dedicated to God prevented clerics from taking up weapons on either

their authority or that of the pope. Christ ordered Peter to return his sword to the scabbard, for all who take up the sword, unless by His authority, would die by the sword. While their predecessors were allowed to wield the corporeal sword, bishops were permitted only the spiritual sword constituting tears and prayers.¹⁸⁶ Clerics could not take up arms by their own hand, but simply encouraged others to take up arms for the defense of the oppressed and to attack the enemies of God.¹⁸⁷ What Christ did not do on his own behalf neither could those who served him.

While the spiritual and secular work in conjunction with one another, deeds, such as military service, once deemed acceptable were no longer considered appropriate for clerics. Jerome pointed to Phinehas with his javelin, the harshness of Elijah, the anger of Simon, and severity of Peter, and the inflexibility of Paul as ancient examples of piety.¹⁸⁸ John Chrysostom warned that even though Phinehas killed a man, Abraham was prepared to murder his own child, and Peter was guilty of a double homicide, one must take into consideration the overall context of time, cause, and mindset.¹⁸⁹ In support of the clerics'

¹⁸⁶ C.23 q.8 d.a.c.1: 'De episcopis uero uel aliis clericis facile ostenditur quod neque sua apostolici auctoritate arma debatur arripere. Nam cum Petrus primus apostolorum fuerat electus, materialem gladium exerceret, ut magistrum defenseret, audiuit: conuerte gladium tuum in uaginam, omnis enim, qui acceperit gladium, gladio peribit, tamquam si diceretur: hucusque tibi tuisque predecessoribus corporali licuit serire; decreto in exemplum patientiae gladium tuum, id tibi hucusque permisum, conuerte in uaginam, spirituale tantum gladium, qui est uerbum Dei, in mactatione ueteris uitae exerce. Omnis enim preter illum, deest quo ait apostolus, non sine causa gladium portat, cui etiam omnis anima subdita esse debet, omnis, inquam, quid preter hunc uel hic auctoritatem gladium acceperit gladio peribit. Item Ambrosius: Arma episcopi lacrimae sint et orationes' (Sg, p. 163a).

¹⁸⁷ C.23 q.8 d.p.c.6: 'Quod sic intelligi quod sua manu arma arripere non debent; set alios ad arripiendum, ad oppressorum defensionem, atque ad inimicorum Dei oppugnationem eis licet ortari' (Sg, p. 163a).

¹⁸⁸ C.23 q.8 c.13: 'Legi telum Finees, auctoritatem Helyae, et zelum Simonis Chananei, Petri seueritatem Ananiam et Saphiram trucidantem, Pauli constantiam, qui Elimam magum uiis Domini resistentem eterna seueritate dampnauit. Non est crudelitas pro Deo set pietas' (Sg, p. 163b).

¹⁸⁹ C.23 q.8 c.14: 'Occidit Finees hominem, et reputatum est illi ad ui. Abraham uero, non solum homicida, sed et patricida fuit quod grauius est et tamen Deo placuit. Petrus uero geminum fecit homicidium: fuit tamen opus spirituale, quod factum est. [Dictum in Sg] Non solum igitur respiciamus ad opera, set ad tempus, et ad causam, et uoluntatem, personarum quoque differentiam' (Sg, p. 163b-164a).

changing role, Gratian highlighted the example of Pope Gregory I who ordered the citizens of Tuscany to take up arms against the Lombards and decreed stipends for the soldiers. He did not take up the arms himself, but induced those to whom such duties have been entrusted by his authority.¹⁹⁰ Pope Nicholas I stated emphatically that a bishop was not to involve himself in military matters. He wrote Emperor Charles that secular soldiers should serve the secular realm and soldiers of Christ should serve Christ. Those bishops who were guarding against the maritime pirates and thus performing their auxiliary duty had no time for preaching, which was the duty of a cleric.¹⁹¹

A cleric then could order people to take the offensive even while limiting his personal role. Pope Leo IV ordered his people to gather and fight back the Saracens who were attacking the harbor by sea with stealth and secrecy.¹⁹² To the first recension Gratian made one short, but curious, addition with the final clause, *et egressi sumus Romam*, to imply some participation on the part of Leo.¹⁹³ As the secular lord of the territory and the guardian of Rome, Leo's responsibility was to raise troops. Though he accompanied them to the shores, the canon does not specify his role in the attack. It was

¹⁹⁰ C.23 q.8 d.p.c.18: 'In registro etiam legitur, quod Beatus Gregorius ciuibus Tusciae, ut contra Longobardos arma pararent, mandauit, et militantibus stipendia decreuit. Hoc igitur exemplo et auctoritatibus superdictis ostenditur, quod sacerdotes, etsi propria manu arma capere non debeant, tamen uel eis, qui huius offitium sunt, persuadere, uel quibuslibet, ut ea arripiant, sua auctoritate ualeant inperare' (Sg, p. 164a). The text is a part of the dictum begun by *Non solum* of c.14. Gratian 1 would add q.8 c.16 and q.8 c.17 to support q.8 d.p.c.18.

¹⁹¹ C.23 q.8 c.19: 'Reprehensibile constat ualde quod subintulisti, dicendo, maiorem partem omnium episcoporum die noctuque cum aliis fidelibus tuis contra pyratas maritimos inuigilare et, ob id episcopi inpediantur, cum milites Christi sint Christo seruire, milites uero seculi seruiant seculo, sicut scriptum est: Nemo militans Deo implicat se negociis secularibus. Quod seculi milites militiae student, quid ad episcopos et milites Christi, nisi ut uacent orationibus' (Sg, p. 164a).

¹⁹² C.23 q.8 c.7: 'Igitur cum sepe a Sarracenorum partibus aduersa perueniant nuntia, quidam in Romanorum portum Sarracenos clam furtiueque uenturos esse dicebant. Pro quo nostrum congregari precipimus populum, maritimumque que ad litus descendere decreuimus' (Sg, p. 163a).

¹⁹³ C.23 q.8 c.7: 'Pro quo nostrum congregari precipimus populum, maritimumque ad litus descendere decreuimus, et egressi sumus Romam' (Fd, fol. 69r; Aa 43, fol. 83v).

important that harm never came to *nostri homines*, our people. In the event this happened, they, the pope and the emperor, ought to be the principal defenders of their flock.¹⁹⁴ Suggesting a dual effort, the pope acted in conjunction with secular authority with the former legitimizing the military actions of the latter. John VIII wrote to Duke Demago impressing upon him that his reputation hinged on the zeal with which he oppressed the marine bandits, the Saracens. If he did not drive them away he was as much at fault as he who inflicted the harm.¹⁹⁵ These canons touch upon what becomes an important theme in Gratian 1, namely that the Church could request assistance and the secular leader must oblige. However, a cleric must act in a spiritual capacity. Speaking to the Frankish army, Leo IV assured them that should they die for the truth of the faith, for the preservation of the country, and in the defense of Christians – all three elements of which make up a just war – then they would obtain heavenly rewards.¹⁹⁶ Though not explicitly stated, an early precursor of an indulgence was alluded to by the assurance that those who died fighting to protect the Church would receive spiritual benefits. Pope Alexander II warned the bishops of Spain that while it was proper to punish the Saracens, as they persecuted Christians and drove them from their homes, it was not proper to

¹⁹⁴ C.23 q.8 c.8: 'Scire uos oportet, quod numquam ab aliquibus nostros homines sinimus opprimi; set, si necessitas ulla occurrerit, presentialiter uindicamus, quia nostri gregis in omnibus ultores esse debemus et precipui adiutores' (Sg, p. 163a).

¹⁹⁵ C.23 q.8 c.12: 'Preterea deuotionis tuae studium exhortamur, ut contra marinos latrunculos, qui sub pretextu tui nominis in Christicolos debachantur, tanto uehementius accendaris, quanto illorum prauitate famam tui nominis obfuscata fuisse cognoscis; quoniam, licet credi possit, quod te nolente illi nauigantibus insidientur, tamen, quia a te conprimi posse dicuntur, nisi eos conpescueris, innoxius non habebis. Scriptum quippe est: Qui crimina, que potest emendare, non corrigit, ipse committit.' (Sg, p. 163b).

¹⁹⁶ C.23 q.8 c.9: 'Nouit enim omnipotens, si quilibet uestrorum morietur, quod pro ueritate, et saluatione patriae, ac defensione Christianorum mortuus est, ideo ab eo celeste premium consequetur' (Sg, p. 163b). Brundage has maintained that the reference to heavenly rewards did not mean indulgence because Leo did not remit sins. Rather it was comparable to the *absolutio super tumulum* of the burial service. See Brundage, *Medieval Canon Law and the Crusader*, 23.

punish the Jews, as God had provided them to serve.¹⁹⁷ Punishing those who commit a crime against God was not cruel, but rather was a pious act so long as a cleric was not the one responsible.

In spite of their feudal oath, Gratian concluded that clerics must free themselves from temporal affairs, such as that of war, and be content with their inheritance from the Lord, the levitical portion. The intention of the tithe was to ensure that the priest would never be stripped of his possessions or of his freedom. A prelate then was exempt from taxation unless he held manors, villas, castles, or cities. Under these circumstances, he owed taxes to the king as he was a vassal. One must give to Caesar that which belonged to Caesar.¹⁹⁸ The Council of Meaux decreed that not only was the tithe exempt from taxation, but so too were lands given for burial, oblations of the faithful, and imperial grants. Should anyone violate this order, he may not take communion until he made

¹⁹⁷ C.23 q.8 c.11: 'Dispar nimirum est Iudeorum et Sarracenorum causa. In illos enim, qui Christianos persecuntur, ex urbibus et propriis sedibus pellunt, iuste pugnatur; hii ubique seruire parati sunt' (Sg, p. 163b).

¹⁹⁸ C.23 q.8 d.p.c.20: 'Set sciendum est, quosdam episcopos Leuitica tantum portione esse contentos, qui, non nisi decimas et primitas africibus recipient dicentes: dominus pars hereditatis meae. Hii profecto cum principibus seculi, nichil habent commune tales nullam accommodationem habent ut seculari militia occupantur, ut dicere ualeant: uenit princeps mundi huius, et in me non habet quicquam. Si uero alii quod decimis non contenti, predia, uillas, et castella possident, unde tribute debent cesari. Unde et eis dicitur: Que sunt Cesaris Cesari; et reddite' (Sg, p. 164a-164b). [C.23 q.8 d.p.c.22, which is combined with d.p.c.20]: 'sacerdotibus sic ministravit necessaria, ut nec possessionibus, nec libertate priuarentur. Ex quo tempore dominus, sacerdotes in omni gente liberos esse praenuntiauit' (Sg, p. 164b). C.23 q.8 d.p.c.20, taken in part from the Agreement of Sutri in February 1111 (MGH Const. 1 nos. 83-101, pp. 134-52) in which Paschal II granted to Henry V the right of investiture, is evidence, according to Chodorow, of Gratian's sympathies for Paschal II. The ensuing Crisis of 1111 questioned the legality of Paschal's concession. Placidus of Nonantula, Girard of Angoulême, and others argued that Paschal should repudiate the privilege as it countered the canons and previous decrees. In response to their calls Paschal reiterated his desire to uphold the pronouncements of his predecessors, especially those of Gregory VII and Urban II. He bowed to the pressure and issued a statement nullifying the concession at the Lenten Council in March 1112 (Mansi, vol. 21, col. 50-51). See Chodorow, *Christian Political Theory*, 151-52; idem, "Ecclesiastical Politics and the Ending of the Investiture Contest: The Papal Election of 1119 and the Negotiations of Mouzon," *Speculum* 46 (1971): 613-640.

amends.¹⁹⁹ Gratian added that should a bishop purchase property or receive it as a gift, than he owed the customary obedience attached to the land to the prince. This obedience would include not only the taxes attached to the property, but also the associated military obligations.²⁰⁰ Gratian examined the ability of a bishop to fulfill his feudal obligations to support a war financially. As a vassal, a bishop may be required to raise and accompany the soldiers to where the military was encamped. As Leo IV did, a cleric may encourage anyone to his defense against the adversaries of the faithful and to summon them against the strength of the infidel. As Gregory I did, a cleric may request defense from any faithful leader or from the emperors. Under no circumstance, Gratian concluded, could a cleric spill blood either on the authority of the bishops or on that of the emperor.²⁰¹ The reference to the emperor reflected the bishop's role as a vassal and thus a feudal lord in his own right.

In Gratian 1 Gratian elaborated by arguing that, either by war or by a judicial sentence, punishment must be left to the state as part of its obligations to the Church and the prelate must conduct himself in a manner suitable to his office. Oftentimes princes entrusted their capital crimes to priests. Because Christ had elected them to administer to the well-being of the people, they should not agree to serve as judges for kings unless the

¹⁹⁹ C.23 q.8 c.24: 'si quilibet, pro loco sepulturae aliquid largitus ecclesiae fuerit, de decimis et oblationibus fidelium nullus quemquam presbiterorum aliquem censum soluere cogat, nec quisquam cuiuslibet ordinis aut dignitatis exinde quicquam subtrahat, aut redhibitionem quamcumque exigat temporalem. Quod si fecerit, communione usque ad satisfactionem priuetur' (Sg, p. 164b).

²⁰⁰ C.23 q.8 d.p.c.25: 'De his uero, quibuslibet emerit uel uiuorum donationibus acceperit, principibus consueta debet obsequia, ut et annua eis persoluat tributa, et conuocato exercitu cum eis proficiscatur' (Sg, p. 164b).

²⁰¹ C.23 q.8 d.p.c.28: 'Licet igitur ecclesiasticis exemplo Gregorii ab inperatoribus uel quibuslibet ducibus defensionem fidelibus postulare. Licet etiam et cum Beato Leone contra aduersarios ecclesiae quoslibet admonere et exhortari, et ad procul uim infidelium arcendam incitare. Set sanguinis effusionem nulli etiam imperiali auctoritate licet inperare' (Sg, p. 164b-165a). The dictum is combined with d.p.c.25.

remission of physical punishment was assured by the swearing of an oath.²⁰² Because the cleric handled the sacraments, the XI Council of Toledo decreed that he must not be part of a trial that involved bloodshed. If a cleric appeared as a judge in a trial unbecoming of his vocation, he was guilty before Christ of the spilling of blood and he would lose his ecclesiastical rank. Though he was in the perpetual prison of damnation, the Church should not withhold communion from him on his deathbed, as the Lord did not want the death of a sinner but his rehabilitation.²⁰³ Under no circumstance, therefore, could a bishop be the cause of a defendant's physical harm or death. Despite a prelate's duty to repair severed bonds, some actions were forbidden by his station.

Conclusions

Gratian began his work with a basic set of ideas. From that platform he progressively expanded them to address a wider array of legal problems with each successive cluster. When he completed the work, he organized the cases into the order of *Causae prima-36*, the arrangement that is preserved in Sankt Gallen 673. The St. Gall manuscript does not represent an 'UrGratian' but rather represents a stage of Gratian's teaching, which began prior to the manuscript's production. This stage is a precursor to the first recension and not an abbreviation of the first recension. The argument that Gratian progressively expanded his work gains credibility when one takes into

²⁰² The importance of the oath as holding together the social fabric of society again is underscored. On account of this oath, the state cannot force a cleric to serve as judge in trials where the penalty could result in physical reprisal.

²⁰³ C.23 q.8 c.30: 'His a quibus sacramenta Domini tractanda sunt, iudicium sanguinis agitare non licet...Quod si quisquam horum inmemor preceptorum aut in ecclesiae suae famulis, aut in quibuslibet personis tale aliquid fecerit, concessi ordinis honore priuetur et loco; sub perpetuo quoque dampnationis teneatur ergastulo religatus. Cui tamen communio exeunti ex hac uita non est neganda propter Domini misericordiam, qui non uult peccatoris mortem, sed ut conuertatur et uiuat' (Fd, fol. 70r; Aa 43, fol. 85v).

consideration that many works begin with a central idea and the sections expand upon and explore its different facets. Only at the end does the author organize and link the various sections to create an understandable and usable work. This may be true of the stage of Gratian that we have in the St. Gall manuscript.

Cluster B most closely relates to the core *causae*. It tailors those ideas found in the judicial tract in Cluster A to focus more pointedly on the *ordo iudiciarius* and ecclesiastical property rights. The *tractatus* of *Causae* 5 and 6 sets forth the manner in which to introduce and the punishment for failing to prove an accusation. The *causae* also delineate a few of the accused's rights and obligations. The *tractatus* geared toward ecclesiastical property rights also has its origins in the core *causae*, which focused on monastic property rights. Gratian took the principles laid out there and applied them in a slightly different fashion to relate to churches. *Causae* 12, 16, 18, and 21 limit both a cleric's right to make a will, whereby he could dispossess property, and a cleric's right to possess secular property. Second, they separate that which is ecclesiastic from that which is monastic by curtailing a bishop's ability to intervene to the detriment of the monastery. Third, they separate secular and ecclesiastic jurisdictions. Fourth, they protect the rights of individual churches from the abuses of pluralism.

In addition to each contributing *tractatus* on marriage, Cluster C and Cluster D augment the previous discussions. The third cluster continues the discussion of judicial procedure. Bolstering *Causae* 5 and 6 in the second cluster, *Causa* 3 hones in on the character of witnesses and their role in the legal process. *Causa* 11 resonates with *Causa* 21 in Cluster B by emphasizing the jurisdictional spheres of the secular versus the sacred.

Cases involving clerics are to be heard by the church, not by the state. Cluster D supplies one last case on ecclesiastical property rights. Connected with Causa 21 and Causa 11, Causa 10 sets ecclesiastical property, such as a basilica, apart from both a layman's attempts to remove it from diocesan law and a bishop's attempt to over-tax it. In addition, Cluster D introduces a new array of legal issues. *Causae prima*, 1, 7, 8, and 9 analyze a bishop's ascension to the episcopate in instances when he is cognizant of his actions, when others are 'assisting' him without his knowledge, and when he is named by his predecessor who could not fulfill his duties. In connection with this, Gratian addressed how such circumstances affect the clerical status of those ordained.

Cluster E ends with one more tract on the *ordo iudiciarius*. Causa 2 and Causa 4 address the status of those introducing the charges and serving as witnesses. In other words, the *causae* explore whether one's inferiors can condemn him or only his peers. They also address whether an excommunicate can bring forth an accusation and testify by proxy, and what is the required age for witness to offer testimony. Finally, the tract questions whether a notorious crime warrants a suspension of due process.

The St. Gall manuscript is marked by *tractatus* on fairly specific topics. This, however, changes when Gratian organized the *Decretum* into the form preserved by St. Gall. This arrangement centers on broader tracts that contain no internal organization. *Causa prima*, which Gratian would remove from later recensions as superfluous, and *Causae* 1-10 form a tract on episcopal matters, specifically litigation and advancement. *Causae* 11-15 form a tract on clerical matters, specifically judicial procedure and property rights. *Causae* 16-20 form a tract on monastic matters, specifically regarding the vow

and property rights. Causa 21 is a conglomeration of previous topics mixing episcopal, monastic, and secular concerns. Finally, Causae 27-36 form a tract on marriage. While losing the specificity of the clusters, the final product organizes the causae to reflect discernable sections covering a variety of concerns.

Upon completion and final arrangement of the causae in St. Gall, Causae 22 and 23 create an undeveloped tract that would be supplemented in Gratian 1. Gratian's addition of Causa 23 to Cluster E thus recasts the purpose of Causa 22. Amid the core causae Causa 22 laid down the principles that would govern Causa 34; the rules regulating the oath were similar to those regulating the marriage vow. With the addition of Causa 23 the oath of obedience now formed the crux of society. In the event that the oath was broken and discord fell over society, war, physical reprisal or monetary coercion were necessary to compel the guilty party to comply with the sworn contract and to restore the peace. Such measures are not for retaliatory purposes, but rather to correct the wayward and bring them to penance. With this being said, a man of God may not take a role forbidden by his station. A cleric should be content with the tithe, but if not and he becomes a feudal lord, his spiritual role supersedes all others. In terms of liege homage, the pope is the primary lord. The secular realm, which is subordinate to the spiritual, should avail itself to the Church and defend her upon request. Co-opting the principles of feudalism, which Causa 22 laid down, Gratian sought order within society. The pope could bind all to him through the oath of obedience. This oath could be explicit, as in the case of a co-operative bond blatantly subjugating the bishop to the pope, or implicit, as in the case of a friendship alliance subtly subjugating the secular to

the spiritual because the former should understand its inferiority to the latter. While Gratian did not convey this message clearly in St. Gall, he did in Gratian 1 with the addition of Causae 24-26 and the completion of the *Tractatus de fidelitate et obsequio*.

Chapter 6

FROM GRATIAN 1 TO GRATIAN 2: THE *DECRETUM* AS A LIVING TEXT

To this point I have argued that Gratian's *Decretum* evolved in step with his career as *magister*. Gratian began teaching law in Bologna with a core set of cases that tackled the most pressing issues to a priest and soon-to-be lawyer. As the teaching of law progressed so too did Gratian's repertoire of *causae*. Direct or divergent arguments in one cluster of cases inspired the topics addressed in the next cluster. The St. Gall manuscript preserves an early stage of Gratian's teaching career, which began before the manuscript was copied. Now I will turn to the transition from Gratian 1 to Gratian 2 and argue that the *Decretum* was a product of continued development rather than a work published in definitive redactions. The Florence, Barcelona, and Admont manuscripts will provide the evidence for the further evolution of the *Decretum's* text.¹ Until now scholars have ignored this evidence because they have assumed that the methods of augmenting, namely the use of appendices and the margins of the Gratian 1 text, were taken from Gratian 2 (the vulgate *Decretum*) after it began to circulate ca. 1140. I shall demonstrate that this is not the case. The addition of appendices to the Florence and Admont manuscripts and the additions to the margins of Barcelona, Florence, and Admont were part of an ongoing expansion of the *Decretum's* text that took place after Gratian 1 began to circulate widely but prior to the circulation of Gratian 2.

In the last fifteen years scholars have accepted, by and large, Winroth's three-pronged argument for the precedence of a first recension, Gratian 1. Winroth's first prong, an examination of Causa 24, revealed that the texts incorporated into Gratian 1

¹ The Paris manuscript will not play a significant role in this analysis because it contains neither marginal additions nor a supplement with Gratian 2 texts.

frequently came from the *Panormia* and the *Polycarpus*, while the *Tripartita* and the *Collectio III librorum* served as sources for the texts added to Gratian 2.¹ The second prong asserted that the canons contained in Gratian 1 were more akin to the original source than those canons added to Gratian 2, which could be a composite of two sources or have greater textual variants. The first recension version of C.24 q.3 c.6, for instance, reads closer to its source, the *Panormia*, than that found in the second recension where *demonstrat* was changed to *demonstrans* (ln.37) and *dicta* was changed to *predicta* (ln.49).² The final prong maintained that the arguments found in Gratian 1 were crisper and more coherent than the at times distorted and convoluted arguments of Gratian 2. Winroth cited examples of this incoherence in C.11 q.3 whereby the addition of d.p.c.20 – d.p.c.26 to Gratian 2 neglect the distinction between excommunication and anathema, and, in the same questio, incoherence resulting from the Gratian 2 addition of text in d.p.c.40 and the Gratian 2 addition of c.41, c.42, and c.43, which detail instances for excommunication. These canons interrupt the flow of the argument from d.p.c.40 to d.p.c.43, both of which discuss unjust sentences. Finally, d.p.c.54, c.55, and c.56, added

¹ For a full discussion on the sources used in Gratian 1 see, *The Making of Gratian's Decretum*, 125-126. I agree that Gratian may have drawn from different sources when he revised his work. It is natural for scholars to consult different sources as they continue to develop their thoughts. I also believe that Gratian drew from different sources for different causae, a point scholars such as Winroth, Weigand, Sommar, Viejo-Ximénez, Werckmeister, and Paxton have brought to light in their work on sections of the *Decretum*. However, as I have illustrated throughout my dissertation, one cannot say for certain from which collections Gratian drew. All too often one collection, such as the *Collectio XIII librorum*, is just as plausible as another collection, such as Anselm's *Collectio canonum*. The only reason scholars choose the latter over the former is that Winroth and Landau have narrowed the number of collections searched. Gratian very well may have had access to regional collections as well as to widely disseminated collections; we simply cannot know based on the information we have currently. See Chapter 1 for scholars' analysis of Gratian's sources.

² *Ibid.*, 123-125.

to the second recension, appear out of place as they discuss the importance of a good conscience for each person.³

Two factors, Winroth argued, point to Gratian 1 as a finished product rather than a living text where each manuscript represents a different stage in development. That the recension survives in only one version with minor differences between the manuscripts, all of which resulted from scribal mistake or ingenuity, is the first factor. Winroth did not elaborate on what he meant by “scribal ingenuity,” though his point is that the Gratian 1 manuscripts preserve the first recension text. The second factor is that the recension is as polished as possible for the twelfth century.⁴ Florence, Biblioteca Nazionale Centrale, Conv. Soppr. A. 1.402 (Fd) contains the fewest interpolations. In addition to the Gratian 1 text, fol. 1r-104r, it also contains marginal additions found in the second recension and glosses. The latter part of the manuscript, fol. 104r-164r, includes a supplement of canons and dicta, known as the Additiones, added to the second recension. Barcelona, Arxiu de la Corona d’Aragó, Santa Maria de Ripoll 78 (Bc) appears more professional than Florence but, unfortunately, ends after Causa 12. Though lacking a supplement, the margins and additional leaves contain the second recension canons along with glosses. The additional leaves, according to Albert Torra, were not part of the original work.⁵ Admont, Stiftsbibliothek 23 and 43 (Aa) are the most interpolated of the manuscripts, incorporating into the Gratian 1 text material found in Gratian 2. While having fewer

³ For a full discussion on the coherency of the argument in Gratian 1, see *The Making of Gratian’s Decretum*, 78-79, 97-99, 126-127.

⁴ *Ibid.*, 130.

⁵ *Catalunya Medieval: Del 20 de mai al 10 d’agost, Barcelona 1992* (Barcelona 1992), 204-205. So far as I have found, Dr. Torra never published this catalogue. Winroth worked with a black and white photocopy of the description of Bc. See *The Making of Gratian’s Decretum*, 28, fn. 77.

marginal additions, there is, like Fd, a supplement with second recension texts. Paris, Bibliothèque Nationale de France, nouvelles acquisitions latines 1761 (P) is incomplete. It ends in the middle of C.12 q.2 c.39, includes only two very short glosses (fol. 3r and fol. 54v), and lacks second recension texts either in the margins or in a supplement.⁶

The marginal additions and the supplements found in the Gratian 1 manuscripts have drawn significantly less attention than the manuscripts' composition. Winroth has dismissed their significance as simply a user's desire to bring a Gratian 1 manuscript up to date with the second recension. Whether the owner came by the additional texts in a vulgate manuscript or in a supplementary collection that circulated separately, the scribe who copied the additions would link the Gratian 2 texts to the Gratian 1 text by using a variety of markers or letters to indicate what he thought to be the appropriate placement. A monastic house, for instance, might own a copy of the first recension and realize that the version in their possession was out of date and incomplete. Due to the prohibitive cost of making a new copy, a monk would add the material to the margins or in a supplement. He would link the additional text to the main text by using a symbol if the text was in the margin or a letter if the text was in the supplement. Variants among the manuscripts, such as the dislocation of a canon, resulted when copyists interpreted the exemplars differently, which in turn produced different textual traditions.⁷ "The confusion does not, however, mean that there never was a single original of the second recension. The understanding of the complicated textual transmission [that I outlined

⁶ For a full description of the manuscripts, see *The Making of Gratian's Decretum*, 23-32.

⁷ *Ibid.*, 132, 134-135.

above] sufficiently explains the variations among early second-recension manuscripts, which might otherwise be taken to suggest a tradition descending from multiple originals or a living text.”⁸ In a similar vein, Winroth has attributed the appearance of extra canons to “different interpretations of how the first recension should be expanded into the second recension.”⁹ These canons, not included in Gratian 2, appear in the margins and in the supplements of Barcelona, Florence, and Admont. While having an established set of canons from which to draw their material, scribes and scholars made individual choices of what other material to add in addition to the usual pool. Winroth stressed that such additions “do not testify to a living textual tradition in which new snippets of texts are gradually added.”¹⁰ There is “no reason to think that the second recension came about in a piecemeal fashion.”¹¹

Larrainzar and Winroth’s disagreement surrounding the dating of the Florence manuscript has served as the only scholarly discussion, albeit tangential, of the marginal canons and the supplement added to a Gratian 1 text. Larrainzar took note of the various hands that contributed to the manuscript and has dated its various stages, as represented by the various hands, to between 1140 and 1148 and then 1158-1160.¹² The first hand, Hand A (fol.1r-104r), copied the main text. The inclusion of D.63 d.p.c.34 and C.7 q.7 d.p.c.7, both of which stem from II Lateran Council, narrow the date of composition to between 1139 and 1145.¹³ Hand B (fol. 104r-167v) copied the supplement, referred to as

⁸ Ibid., 135.

⁹ Ibid., 133.

¹⁰ Ibid.

¹¹ Ibid.

¹² Larrainzar, “El *Decreto* de Graciano del Codice Fd,” 434.

¹³ Ibid.

the *Additiones bononienses*, before 1148.¹⁴ Hand C included the canons from the Council of Rheims held in 1148 and thus must date from 1148. While Hand D copied the *De consecratione* between 1158 and 1160, Hand E contributed isolated canons. Hand G, which Larrainzar has attributed to Gratian himself even though it appears in five variant forms, made approximately 250 additions as well as some corrections perfecting the redaction through interlinear or marginal notations and glosses. The various additions, according to Larrainzar, resulted in the second recension, that is, the *Decretum*, though without *paleae*.¹⁵ He therefore concluded that: Hand G(ratian) provided reasonable evidence that this was the original work of Gratian and was the first redaction of the *Concordia* used by the compiler for the second redaction; Fd was the original version of Gratian 1 used to build Gratian 2 as the succession of time and inclusion of material indicates; finally, the diverse series of texts pointed to successive additions.¹⁶

Winroth has rejected Larrainzar's conclusions. There is no evidence of Hand C adding the canons promulgated at the Council of Rheims in that same year. The paleographic work of Adriana di Domenico suggested rather that the manuscript was not compiled until the fourth quarter of the twelfth century and thus Hand A and Hand B could not date to before 1148.¹⁷ The corrections made by the various hands in Fd do not,

¹⁴ Ibid., 437-438.

¹⁵ Ibid., 438-441.

¹⁶ Ibid., 471-475.

¹⁷ Winroth, "Le manuscrit florentin du Décret de Gratien," 214-217. Since the vulgate edition was known by 1150, as indicated by a Sienese court decision, one would have to take a leap of faith to believe that only two years separated the text of Gratian 1 and Gratian 2. The work of Werkmeister, Larson, and Pennington has demonstrated that Gratian compiled the first recension in the early 1130s. See Werckmeister, "Les études sur le Décret de Gratien," 373-376; Larson, "Early Stages of Gratian's *Decretum*," 33-34; Pennington, "*Lex Naturalis* and *Ius Naturale*," *The Jurist* 28.2 (2008): 577-578; Winroth, "Recent Work on the Making of Gratian's *Decretum*," 3-4. Winroth was the one who pointed to Nardi's work on the Sienese decision.

according to Winroth, make it the original manuscript of the second recension and thus Fd was not the original text. Instances occur where the corrections do not equate the text of the second recension. The Florence manuscript continues to omit a number of canons found neither interlinear, nor in the margins, nor in the supplement, but are found in other Gratian 1 manuscripts. None of the four manuscripts, Winroth has argued, is the original and thus Fd cannot be Gratian's personal text.¹⁸

Though the debate over the date and origins of the Florence manuscript adds to our knowledge of the *Decretum*, an opportunity to examine the transition from Gratian 1 to Gratian 2 passed by without notice. Scholars, by and large, have expended little energy in this area, sufficing to look deeper into Winroth's two 'Gratian' hypothesis. This theory argues that while Gratian compiled the first recension, someone other than Gratian compiled the second recension. The formulation of internal references in the first recension lack standardization and the compiler wove them into the discussion. The second recension, conversely, made use of more technical language demonstrating a systematized method for cross-referencing canons, which might have developed from teaching canon law based on the first recension.¹⁹ Furthermore, the few dicta added to the second recension were not integrated into the argument, but rather were left as an aside discussion often introducing a new issue.²⁰ Jean Werckmeister has analyzed Winroth's hypothesis in the marriage cases, which comprise Causae 27-36. He compared

¹⁸ Ibid., 217-228. Winroth's lesser criticism lies with Larrainzar's failure to explain how he could attribute the five variant forms of Hand G to Gratian. An examination of C.3 q.1 d.p.c.6 led Titus Lenherr to doubt also that Florence was the original manuscript of Gratian. See "Die Vier Fassungen von C.3 q.1 d.p.c.," 377-378.

¹⁹ Winroth, *The Making of Gratian's Decretum*, 179-183.

²⁰ Ibid., 187-192.

Gratian 1 to Gratian 2 paying attention to the logic of the arguments. Werckmeister found that the shorter version was more homogenous, more structured, and less repetitious than the longer version. He also found a greater diversity of texts in Gratian 1; for instance, eleven percent of the texts derived from penitentials and decretals. Gratian 2, however, added no more than four percent of such texts and added two to three times more Roman law. Werkmeister endorsed Winroth's two 'Gratian' theory maintaining that Gratian compiled the shorter version, having a sense of conciseness and responding clearly to the questions posed. Gratian 2, which could be collective, was more verbose and did not hesitate to digress from the subject at hand.²¹ Based upon an examination of C.3 q.1 d.p.c.2, which has its origins in Roman law, José Viejo-Ximénez has concluded that Gratian of Gratian 1 was a compiler, that is, a collector of texts intended to unite ancient canonical law into a manageable and coherent work. The inclusion of the texts into the second recension gravely distorted the arguments. It was difficult to accept that the same person compiled both texts.²²

The intention of Winroth's project was to prove the precedence of a first recension; the margins and the Additiones of Gratian 1 manuscripts fell outside his study's scope, and scholars have not turned to them as the next logical area for investigation. Focusing on the margins and supplements of the Gratian 1 manuscripts Barcelona (Bc), Florence (Fd), and Admont (Aa), I will make two interrelated arguments in two sections. In the first section I will argue that the additions to these manuscripts

²¹ Werckmeister, "Les deux versions du 'de matrimonio' de Gratien," 301-302, 304, 311.

²² José Viejo-Ximénez, "Concordia y Decretum del maestro Graciano," 339-340, 349. In a fashion similar to Winroth, Werckmeister, and Viejo-Ximénez, Rudolf Weigand has analyzed Causa 25 in each of the recensions and, even though he did not comment on authorship, came to similar conclusions as those previously discussed. See "Causa 25 des Dekrets und die Arbeitsweise Gratians," 277-290.

were more than simply bringing texts of Gratian 1 up to date with Gratian 2, as Winroth has suggested. Treating each manuscript individually it becomes clear that different hands augmented each text over time with some canons added to a particular manuscript later than other canons in the same manuscript. If scribes had added the Gratian 2 texts after the circulation of a completed vulgate recension, one would expect to find all the canons added in the same place, either in the margins or in a supplement, and to have them added at the same time. The textual evidence in the individual manuscripts suggests that scribes added the Gratian 2 canons prior to the circulation of a completed vulgate edition. The implication is that the *Decretum's* development was more complex than previously thought.

In the second section, I support and expand upon the findings of the first section by comparing the three manuscripts. While I have argued for the *Decretum's* evolution based upon Sankt Gallen Stiftsbibliothek 673, internal textual evidence in Gratian 1 further supports the theory for some sort of developmental phase. Gratian 2 was the product of the continued evolution of Gratian 1 rather than a text 'published' as a definitive redaction. The additional texts in the margins of Bc, Fd, and Aa and in the supplements of Fd and Aa did not enter the textual tradition in a uniform fashion, a fashion that would place their addition to after the circulation of the vulgate edition (Gratian 2). The manner in which the canons were added proves the findings of the first section that scribes copied the additional texts in the margins and in the Additiones prior to, and not after, the circulation of a completed Gratian 2 (vulgate edition). Several pieces of evidence support to this conclusion. Broadly speaking it first is possible to

place the manuscripts on an evolutionary timeline by comparing the layers of additions. Canons entered the textual tradition in distinct phases, which could result in the confusion of a canon's placement. Second, different versions of Gratian 2 texts circulated at different times. Third, the margins and supplements contain unique texts not found in Gratian 2. Fourth, the margins and supplements do not contain all of the texts found in the vulgate edition. Gratian originally did not publish the additional material as a finished compendium, but rather Gratian 2 evolved into the vulgate recension over time. This leads me to question Winroth's two 'Gratian' theory. Employing a methodology similar to the one he used to determine the canons of the first recension, I believe that, while Gratian did not add all the canons to what would become the vulgate, he did add most of them.

The latter stages of the *Decretum's* evolution are interesting in that, contrary to Winroth's conclusions, the Gratian 2 canons added to the margins and to the supplements did not circulate as a finished product but rather in somewhat of a piecemeal fashion. Not all places received the exact same version of the additional texts in circulation at the same time. At some point on this evolutionary line, copyists realized that the scattered supplements would render the work impossible to use and thus began to integrate the text, as Admont 23 and 43 demonstrate. Canons deemed particularly important became incorporated, as eventually would all the canons, thus making the vulgate a product of necessity and not a product of design. In some respects the vulgate recension was one of acceptance. The more copyists recopied the canons, specifically those not added by Gratian, the more acceptance they gained. Canons not recopied fell out of circulation.

An attempt to bring order to the text in the thirteenth century by foregoing the continued inclusion of paleae marked the end of the *Decretum's* colored textual tradition.²³

Stages of Augmentation in the Individual Manuscripts

Internal textual evidence from Florence, Barcelona, and Admont reveals that the additions to these manuscripts were more than simply adding Gratian 2 texts to a Gratian 1 manuscript. Layers of correction and augmentation point to different scribes adding the supplementary material at different times. The variety of distinct hands and inks in the Florence manuscript offers the most obvious example of such stages. While it is more difficult to pinpoint definitive stages in the Barcelona manuscript, as it was the product of a professional scriptorium with standardized hands, examples do exist of variations from the normal hand and of canons added at a different point. The Admont manuscript exemplifies the transition from Gratian 1 to Gratian 2. The Gratian 1 text, along with incorporated Gratian 2 texts of particular interest, and the Additiones were copied contemporaneously. Though not as pervasive as in Fd, later hands did add some text to the margins along with glosses. If the canons added to each manuscript postdated Gratian 2 and were simply an attempt to update Gratian 1 manuscripts, one would expect all the canons added at the same time and in the same place. This, however, is not the

²³ To test the correlation between the frequency of a canon's recopying and its acceptance into the vulgate tradition, one must compare the Gratian 1 texts to twelfth century vulgate manuscripts and determine if the Gratian 1 texts served as base texts for vulgate manuscripts. Second, one must examine the paleae and unique canons in early vulgate manuscripts to determine if a connection exists between the frequency of recopying and their inclusion in the *Decretum*. It may be that canons originated in Bologna but if they did not circulate widely, leading to their recopying in manuscripts, they were not considered a part of the *Decretum* and eventually fell out of circulation.

case. Different hands, working at different times, added canons whether in a supplement or in the margins. The text was not incorporated in a uniform manner.

As mentioned previously, Larrainzar analyzed the different hands found in the Florence manuscript. In addition to identifying Hands A, B, C, D, and E, he gave particular prominence to Hand G. Larrainzar subdivided this hand by the variety of tints, such as black and brown, and by what he considered to be very slight variations in script. He concluded that the same scribe, possibly working over a decade, was responsible for each variation.²⁴ Hand G α was the first of the hands. It used very black ink, added partial and full texts to the margins, added some glosses, and made corrections to Gratian 1. Hand G τ^1 was contemporary with and quite similar to Hand G α , but was in brown ink. Larrainzar deduced that it reiterated the Additiones.²⁵ Both Hand G τ^2 and Hand G τ^3 added new canons to the margins in a lighter or darker brown ink. There was little distinction between the two save Hand G τ^2 added short glosses while Hand G τ^3 made corrections to Hand B.²⁶ Hand G ω was the last hand and it may even be a separate hand, Hand F. It added texts, such as those attributed in the inscription to *Iohannes cardinalis et legatus*.²⁷ Hand G sought to perfect the text through corrections and additions that complement the Additiones.

The distinctions among Larrainzar's categories are too subtle. I have found a number of canons for which one could make an argument for placing it in a category

²⁴ Larrainzar, "El Decreto de Graciano del Codice Fd," 432-433.

²⁵ Ibid., 434-437; Appendix 2 §1 (pp. 481-482) lists the canons in G α and Appendix 2 §2 (pp. 482-483) lists the canons in G τ^1 .

²⁶ Ibid., 438-441; Appendix 2 §3 (pp. 483-488) lists the canons copied by G τ^2 and G τ^3 .

²⁷ Ibid., 442-443; Appendix 2 §3 (pp. 483-488) lists the canons copied by G ω .

different from the one assigned by Larrainzar.²⁸ For instance, the canons added by Hand C appear to be the same hand as those added by Hand E.²⁹ Appendix 2, to offer a second example, listed C.24 q.1 c.26 under Hand Gr¹ and under Hand Gr²/ Gr³, which Larrainzar typically grouped together as one category even though they supposedly were two distinct variants. In addition to Larrainzar's list of canons copied by Hand Gα, I also would add C.12 q.1 d.p.c.24, C.15 q.1 d.a.c.1, C.15 q.6 c.1, and C.23 q.4 c.38.³⁰ To clarify some of the ambiguity I have modified his categorization of Hand G, whose variants, I believe, stemmed from different people and reassessed the Gratian 2 additions accordingly. Hand Gα remains the same; written in very black ink, this hand made corrections and added both glosses and some texts. I consider Hand Gr¹ to be the usual marginal hand written in brown ink. Light black ink represents Hand Gr².³¹ I omit Hand Gr³ as a distinct category because it too closely resembles Gr². Without the ability to make a distinction with certainty, one could argue that the same hand both added glosses and made some corrections to the Additiones. I also omit Hand Gω as a distinct category because those canons – such as C.1 q.4 c.5, C.6 q.1 c.3, C.6 q.4 d.p.c.2, C.11 q.3 d.p.c.33, C.11 q.3 c.66 “Bonis male – habitabit,” C.12 q.2 c.54, C.12 q.3 c.3 §1, C.16 q.1 c.9, C.17 q.4 c.5 “et non solum – comprehendit,” and C.19 q.3 c.4 “Qui vero – constitute sunt” –

²⁸ Appendix 2 §4 (i) lists five texts that could be Gr³ or Gω. C.7 q.1 c.32 (fol. 37v), C.7 q.1 d.p.c.32 (fol. 37v), C.7 q.1 c.33 (fol. 37v), and C.14 q.6 c.1 §3-§4 (fol. 48v) all appear to be what I consider Hand Gr²; C.29 q.2 d.p.c.6 ‘Si uero – poterit’ (fol. 83r) appears to be what I consider Hand Gr¹.

²⁹ According to Larrainzar, one finds Hand E on fol. 39v-40r. I place the canons from the Council of Rheims, which Larrainzar consider to be Hand C, under the umbrella of Hand E. Aside from their origin, I can see little difference between the two hands. The canons included as Hand E are: D.60 c.1, fol. 11r; D.65 c.8, fol. 12v; C.3 q.7 c.2 ‘§2-§6 uel qui operas – presents. Nurus,’ fol. 128r; C.12 q.2 d.p.c.58, fol. 45v; C.12 q.2 c.59, fol. 45v; C.12 q.2 c.60, fol. 46r; C.12 q.1 c.27, fol. 136v. See “El Decreto de Graciano del Codice Fd,” 488, Appendix 2 §5.

³⁰ C.12 q.1 d.p.c.24, fol. 44v (lm); C.15 q.1 d.a.c.1, fol. 49r (lm); C.15 q.6 c.1, fol. 50r (rm); C.23 q.4 c.38, fol. 65r (bm).

³¹ Examples are: C.14 q.6 c.1, fol. 48v (right column); C.15 q.1 c.6, fol. 49r; C.15 q.3 d.p.c.3, fol. 49v-50r; C.19 q.2 c.2 ‘sicut de quibusdam – sub lege,’ fol. 56v; C.19 q.3 c.9 (Si mulier), fol. 57r.

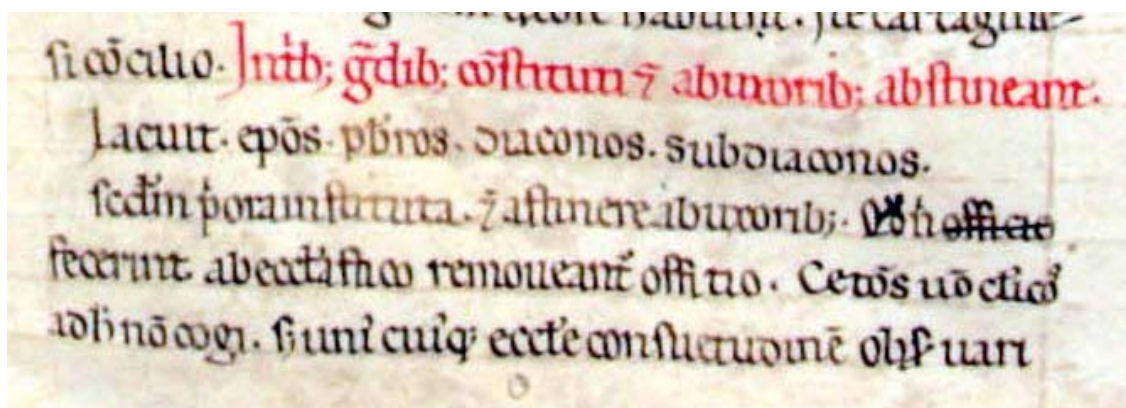
could fit just as easily into one of the other categories.³² Finally, those texts attributed in the inscription to one *Iohannes cardinalis et legatus* do not resemble the other variants of Hand G, and thus are a separate hand entirely.³³

As well as disagreeing with Larrainzar's categorical schema, I also disagree with the way in which he ordered the hands. While he parsed the paleography, I examined the relationship between the hands to determine an order. In-text corrections to Gratian 1 constitute the first layer. These corrections appear to be small erasures and rewrites in a hand very similar to Hand A, which copied the text, though using a lighter shade of brown ink. The same ink drew some of the hands in the margins referring the reader to important passages and are representative of the marginalia found in twelfth century legal manuscripts. The ink of these additions is noticeably different from both the original ink used to copy the text and the ink that Hand G¹ would use for the marginal additions. The following examples illustrate these corrections. D.32 c.3 has the correction of "singulis prout cuique...cogitandum atque prov[idendum]...sunt tenendi ut bonis m[oribus]." ³⁴

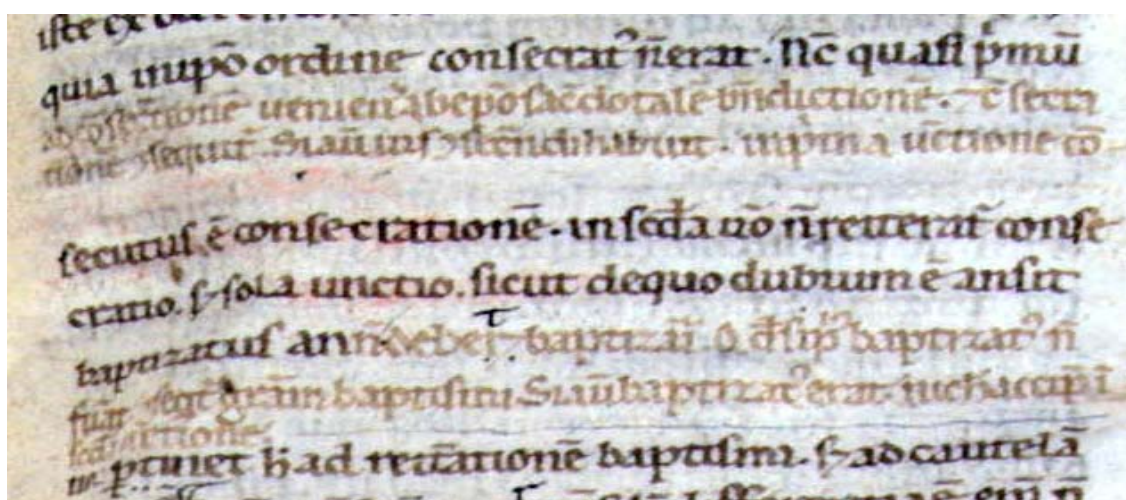
³² C.1 q.4 c.5, fol. 122r (Add.); C.6 q.1 c.3, fol. 129v (Add.); C.6 q.4 d.p.c.2, fol. 130r (Add.); C.11 q.3 d.p.c.33, fol. 41v; C.11 q.3 c.66 'Bonis male – habitabit,' fol. 42r; C.12 q.2 c.54, fol. 45v; C.12 q.3 c.3 §1, fol. 46v; C.16 q.1 c.9, fol. 51r; C.17 q.4 c.5 'et non solum – comprehendit,' fol. 55v; C.19 q.3 c.4 'Qui uero – constitute sunt,' fol. 57r.

³³ Fd, fol. 80r (tm); C.29 q.2 d.p.c.6 'si uero liberum acceperit – redigi poterit,' Fd, fol. 83r; Fd, fol. 83v (lm); Fd, fol. 84r (urm). Larrainzar identified *Iohannes cardinalis et legatus* as Johannes of Naples, who was cardinal of Santa Anastasia, though he did not cite an exact timeframe other than after the 1150s. See "El Decreto de Graciano del Codice Fd," 433, n. 20.

³⁴ Fd, fol. 1v.



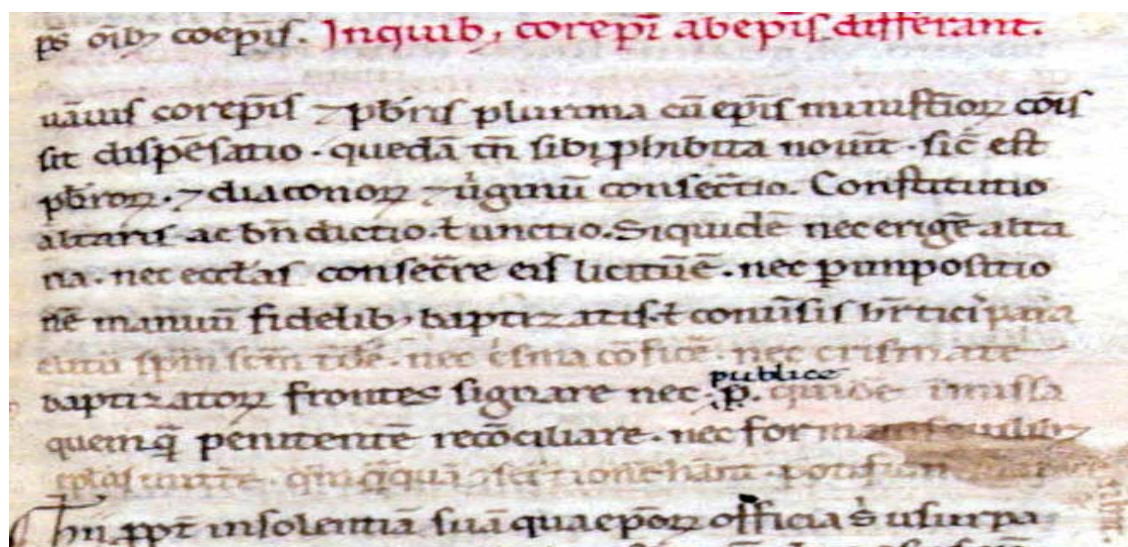
D.68 d.p.c.2 contains an erasure with the correction in brown ink “ad consecrationem veniens – in prima unctione con[secutus]...non debet baptizari – in secunda unctione.”³⁷



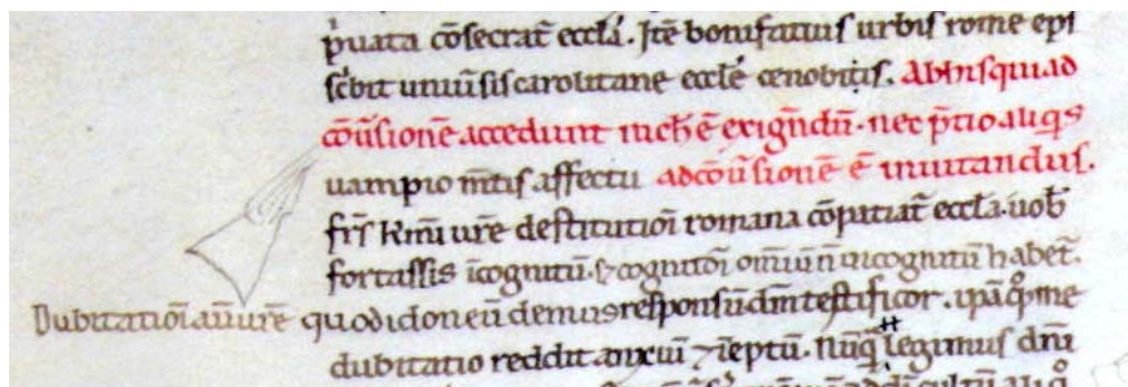
D.68 c.4 has an erasure with the correction in brown ink “paracletum Spiritum – nec crismate...quidem in missa – epistolas mittere.”³⁸

³⁷ Fd, fol. 13r.

³⁸ Fd, fol. 13r.



Finally, C.1 q.2 c.2 contains a correction in light brown ink extending into the left margin “sed cognitori omnium non incognitum habetur. Dubitationi autem vestrae quod idoneum demus.”³⁹

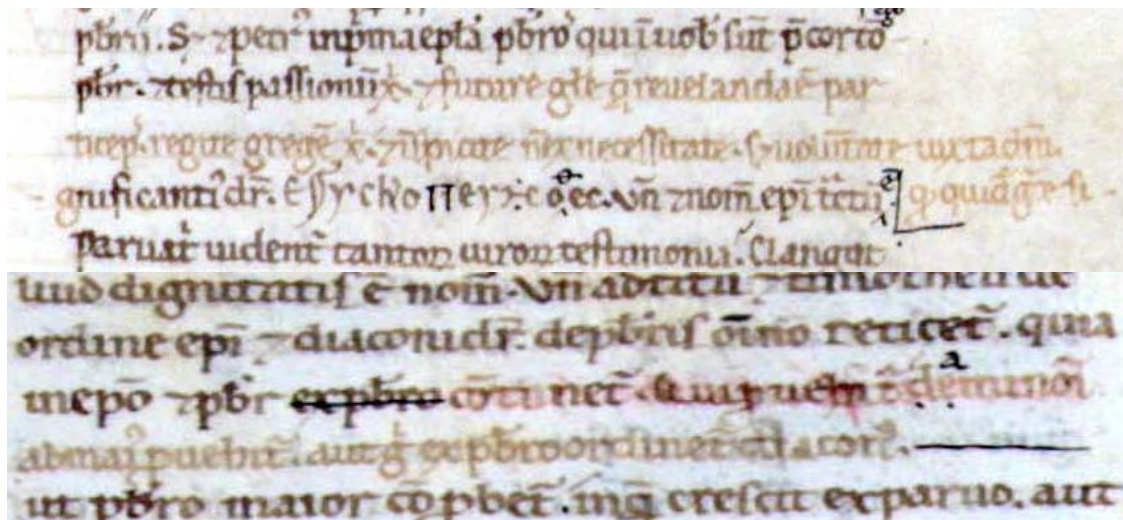


This light brown hand was the first to make corrections to the Gratian 1 text, corrections which do not appear in the other first recension manuscripts. This evidence is further proof that Fd is the earliest of the known Gratian 1 manuscripts as it required more substantial correcting than the others.⁴⁰

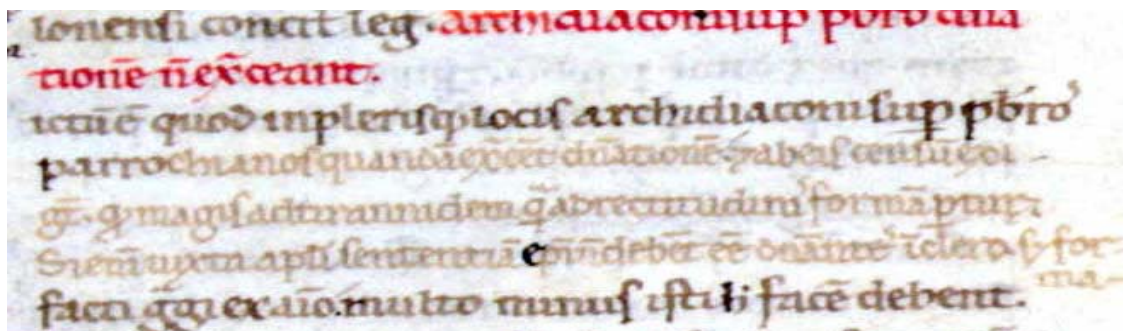
³⁹ Fd, fol. 23v.

⁴⁰ This ink only appears in the *Distinctiones*, C.1 q.2 and again in C.12 q.2. One idiosyncrasy does arise with this light brown ink. Unlike the rest of the Gratian 1 text, this ink is seen as having added C.12 q.2

The light brown hand preceded Hand G α , which corrected the former on a couple of occasions. Hand G α made a correction around the light brown ink in D.93 c.24. Further down in the canon it drew a line to indicate the completion of the sentence and that text was not missing.⁴¹



D.94 c.3 has the erasure and correction of “...parrochianos quendam exercent – clero sed forma” in light brown ink, with Hand G α making a slight correction afterwards.⁴²



Hand B added the supplement of the Additiones after Hand A copied the main text. It is around Hand B that I will discuss Hand Gr¹ and Hand E. Hand Gr¹ worked

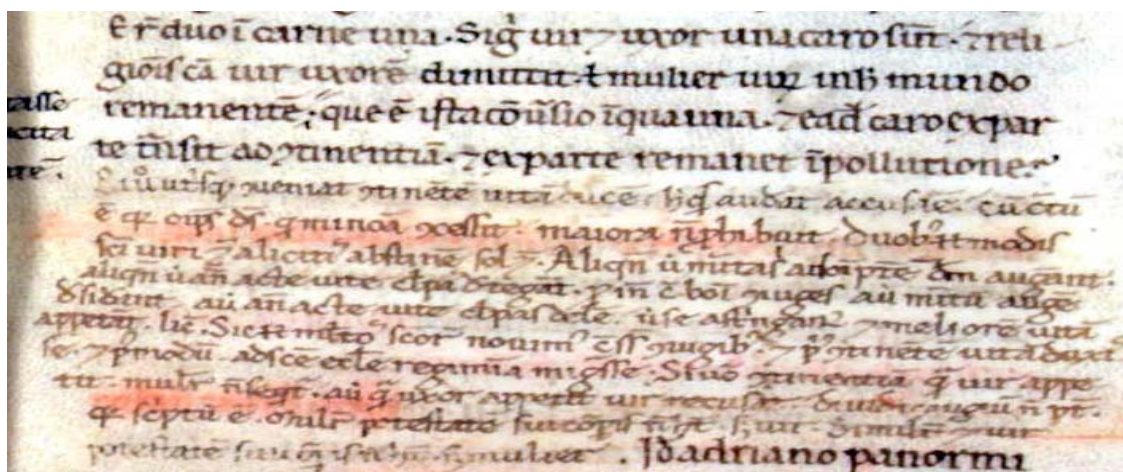
c.33 ‘fortasse tradere – sententia tenantur,’ c.34, c.35, c.36, and c.38 ‘Hec huius – sedis commoda’ (Fd, fol. 45r-45v).

⁴¹ Fd, fol. 17r, fol. 17v.

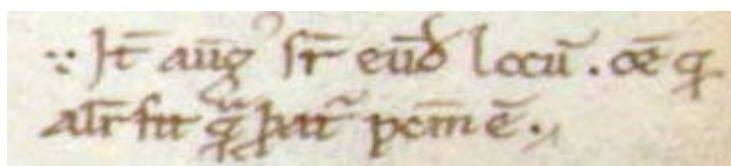
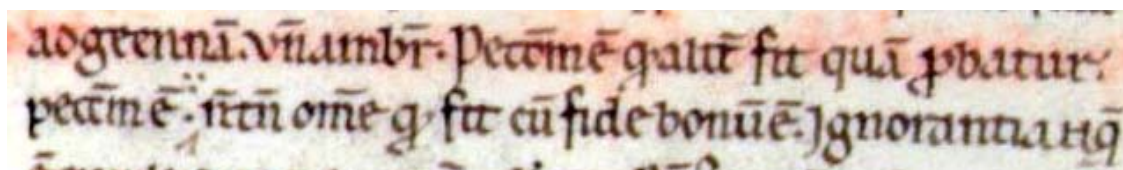
⁴² Fd, fol. 17v.

after Hand B copied the Additiones and Hand E worked after Hand B but prior to Hand Gr¹.

Hand Gr¹ is the principle hand in the margins of the text, though it did make few in-text corrections. As an example of an in-text correction, it erased the original Gratian 1 text of C.27 q.2 c.19 and added “Ea vero utrisque conveniat – sed mulier.”⁴³



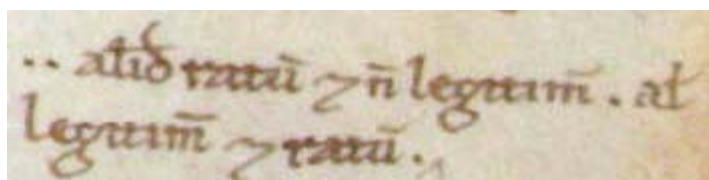
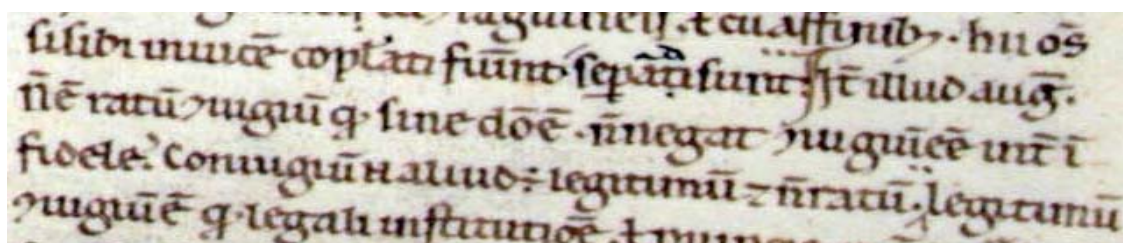
As an example of a marginal addition, Hand Gr¹ added “Item Augustinus super eundem locum. Omne quod aliter fit quam probatur peccatum est” to C.28 q.1 d.p.c.14.⁴⁴



Likewise Hand Gr¹ added to C.28 q.1 d.p.c.17 in the right margin of the main text “aliud ratum et non legitimum aliud legitimum et ratum.”⁴⁵

⁴³ Fd, fol. 80r.

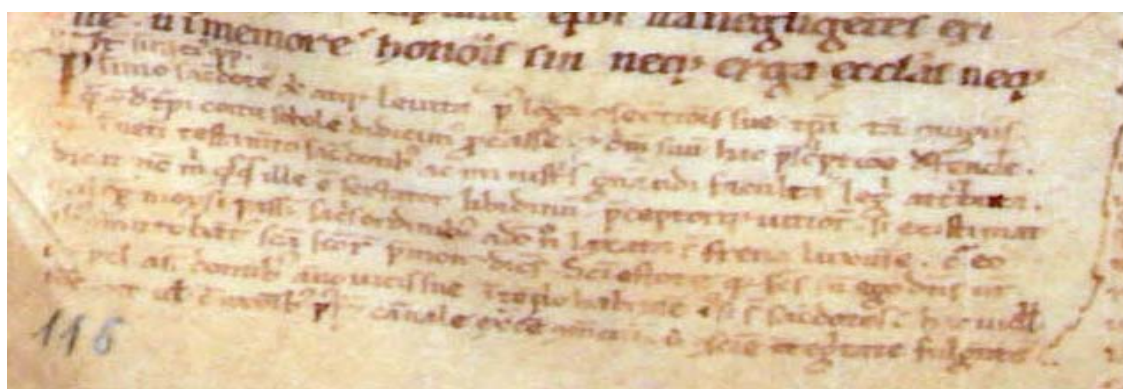
⁴⁴ Fd, fol. 82r.



Only eighteen canons/dicta or partial canons/dicta repeat that found in the Additiones.⁴⁶

Hand Gr¹ adds 181 new texts which the Additiones do not include.

Adding the vast majority of the texts to the margins of the Additiones, it must postdate Hand B. For example, Hand Gr¹ added D.82 c.3 and c.4 in the bottom margin of the Additiones.⁴⁷

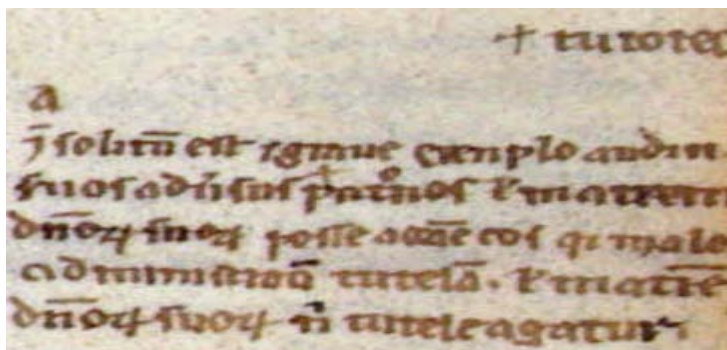


⁴⁵ Fd, fol. 82r.

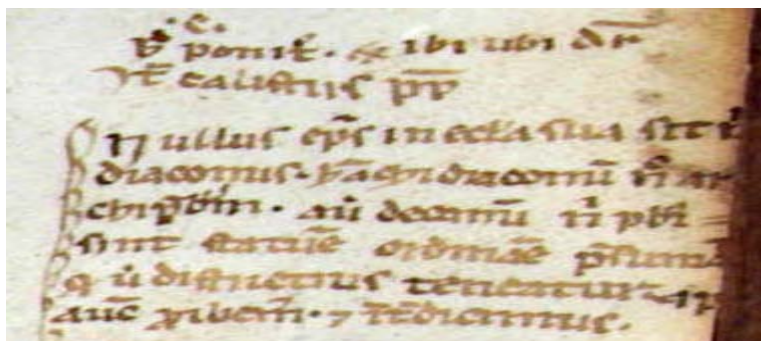
⁴⁶ C.1 q.1 c.16 'Denique Moabitae et ceteri – breui fructu,' C.1 q.1 c.28 'Fertur symoniaca – potius iudicantur,' C.1 q.1 c.47 '§1 Sic in heresi – ydolorum seruitus,' C.1 q.5 d.p.c.1, C.1 q.5 c.2, C.2 q.1 c.7, C.2 q.1 c.13, C.2 q.1 c.17, C.2 q.3 d.p.c.7 'Hinc colligitur autem – illicite nubit,' C.3 q.3 c.4 '§2 Similiter de raptoribus – penitentiam recipimus,' C.3 q.9 d.p.c.15 'III Pars §2 Simul autem necesse – non admittit' (partial text in margins while complete text in Additiones), C.5 q.1 c.3, C.5 q.1 d.p.c.3, C.5 q.4 d.p.c.2, C.7 q.1 c.4 'Episcopus uero qui – et triplicetur,' C.8 q.3 c.1 'Talia quidem iamdudum – propitiante perducere. Et post pauca,' C.24 q.1 c.26 'Que dignior domus – habitationis emeruit,' C.24 q.2 c.5.

⁴⁷ Fd, fol. 116r.

Hand G τ^1 also appears to have worked later than Hand E. The latter's very distinct hand utilized a thick quill adding such texts as: D.65 c.8; C.10 q.2, d.p.c.1, c.2, and c.3; and C.12 q.2 d.p.c.58, c.59, and c.60. C.12 q.2 c.60 serves as an example.⁵¹

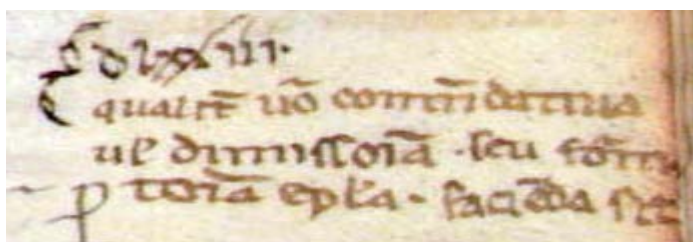


Hand G τ^1 typically augmented a canon with additional text or added new canons. It is not far fetched then to presume that it would correct the placement of D.60 c.1 added by Hand E.⁵²

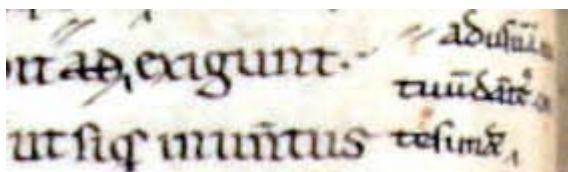


While Hand E predates Hand G τ ¹, it does postdate Hand B. C.3 q.7 c.2 demonstrates that Hand E worked after the Additiones. The Additiones included “In Digestis tit. de postulando – sunt dampnati.” Hand E added the missing portion of the canon “vel quo operas – presents. §7 Nurus” to the right margin.⁵⁴

Hand E, seen below, did make one very interesting addition. In the right margin of fol. 13r it added the incipit to D.73, which Friedberg has marked as a palea. The very end of the Additiones in Admont 43 included the entire distinction, along with a table of Greek letters and their numerical values.⁵⁵



I have discussed briefly Hand G α as it related to the in-text corrections made with light brown ink. Hand G α also acted as the principle corrector. It made the vast majority of in-text corrections, which usually constitute the correction of a word or the addition of a phrase. The correction to D.47 c.2 serves as an example.⁵⁶



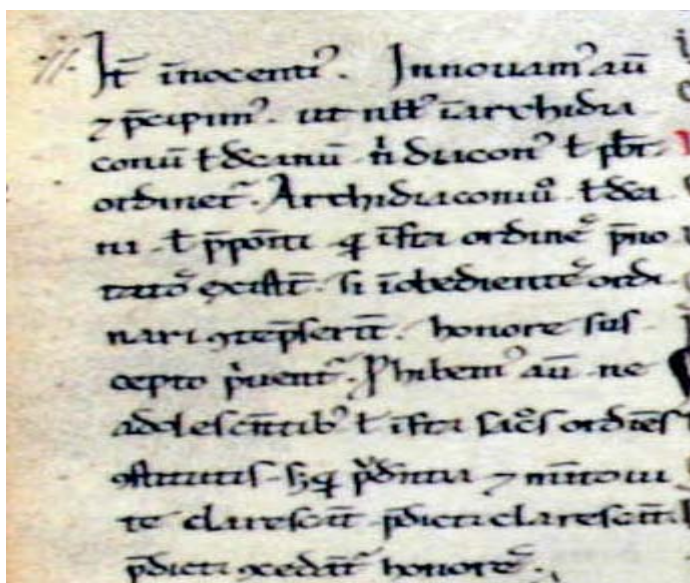
Hand G α also copied some canons, as D.60 c.3 added to the left margin demonstrates.⁵⁷

⁵⁴ Fd, fol. 128r.

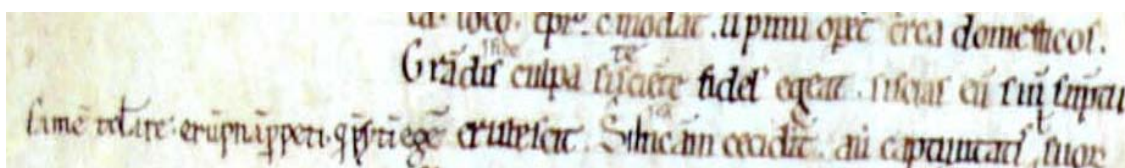
⁵⁵ Fd, fol. 341v.

⁵⁶ Fd, fol. 5v.

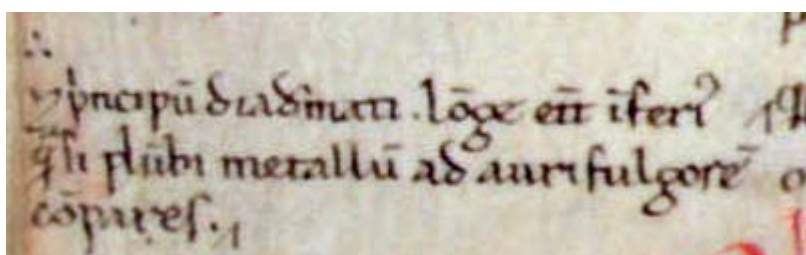
⁵⁷ Fd, fol. 10v.



Making corrections to both the Additiones and to Hand Gr¹, Hand Gα must postdate both of them. For example, Hand Gα made a small in-text addition to D.86 c.14 in the Additiones.⁵⁸



Hand Gα also made an addition to D.96 c.10 in the left margin of the Additiones.⁵⁹

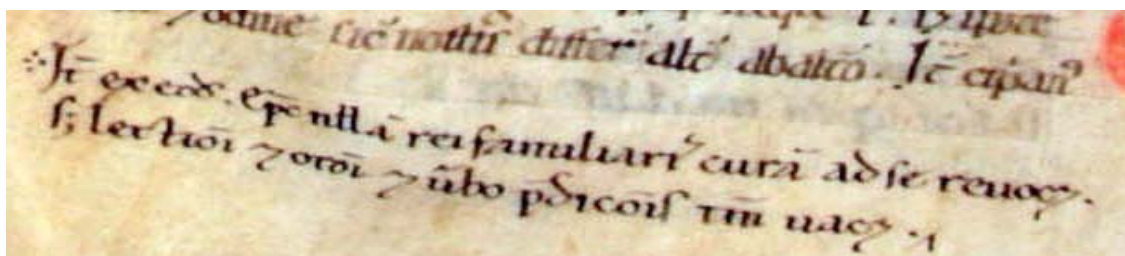


As a final example, Hand Gα added D.88 c.6 to the bottom margin of the Additiones.⁶⁰

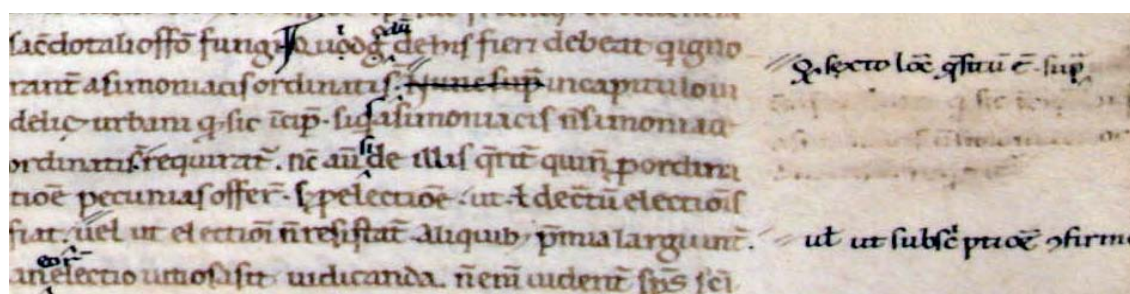
⁵⁸ Fd, fol. 116v. The leaves of the Additiones are thicker and more course than those of the main text resulting in the slight distortion of the ink's dark tint.

⁵⁹ Fd, fol. 118v

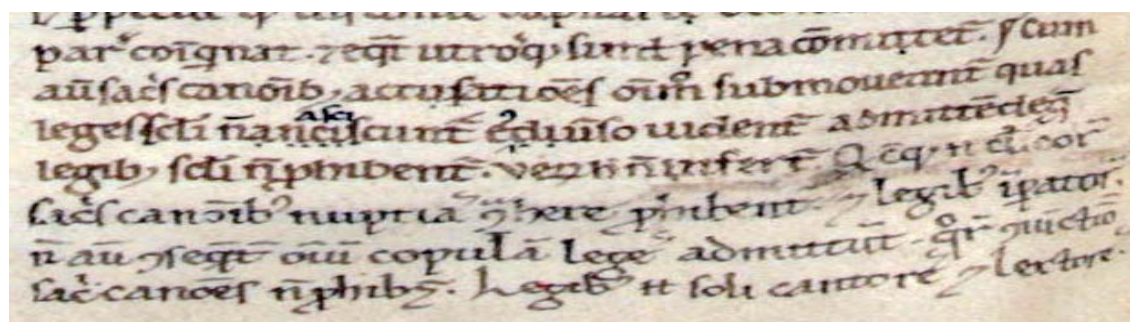
⁶⁰ Fd, fol. 117r.



Hand Gα also made a correction to Hand Gr¹. In addition to in-text corrections to C.1 q.6 d.a.c.1, Hand Gα erased text added to the right margin by Hand Gr¹ and corrected it with “quod sexto loco questium est.”⁶¹



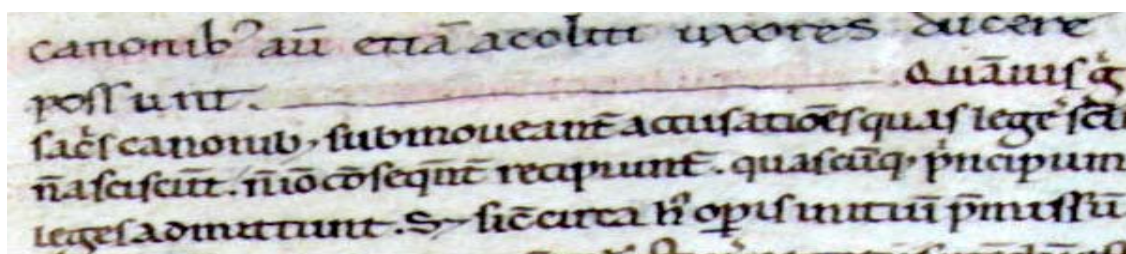
Where Hand Gr² falls in the sequence of additions is somewhat difficult to ascertain. It did make two in-text corrections, which Winroth noted Admont seamlessly incorporated.⁶² With the first correction of C.15 q.3 d.p.c.4, Hand Gr² erased the original text and added “Quicumque enim clericorum – uxores ducere possunt.”⁶³



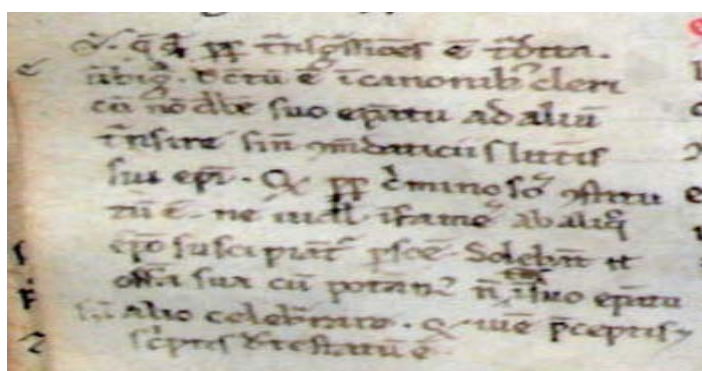
⁶¹ Fd, fol. 25r.

⁶² Winroth, *The Making of Gratian's Decretum*, 214.

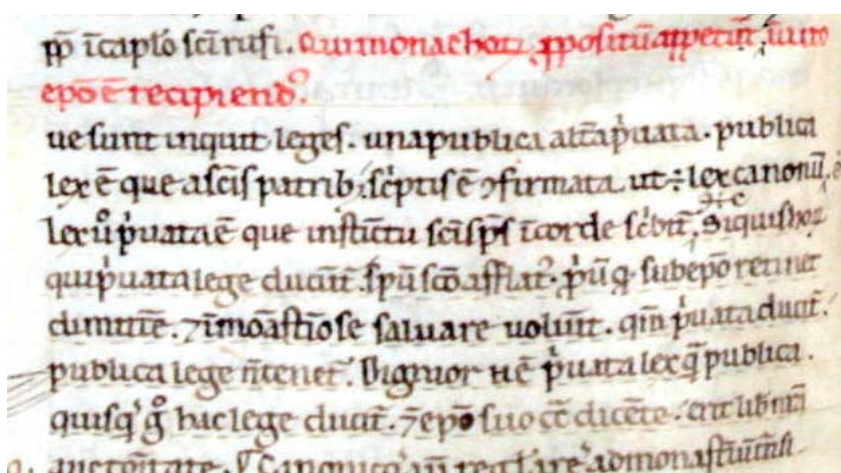
⁶³ Fd, fol. 49v-50r.



The second correction is more complex. Hand Gr¹ added “[lex canonum] que quidem propter transgressiones – detestatum et” to the left margin.⁶⁴

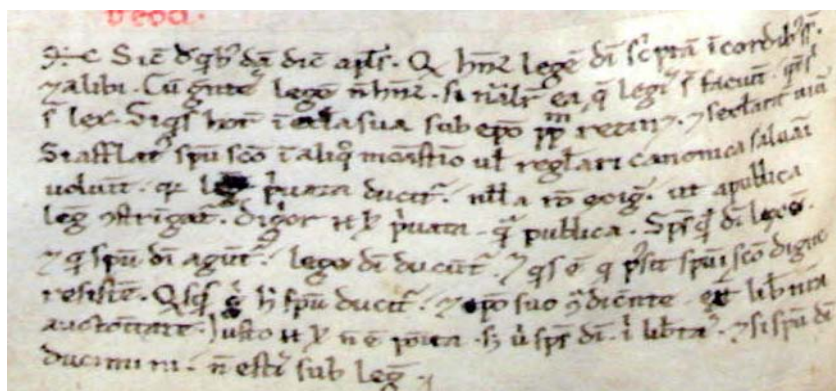


Rather than erasing the original text, Hand Gr² placed dots beneath the Gratian 1 text of C.19 q.2 c.2 “Si quis horum qui – liber nostra auctoritate” to indicate its deletion and then placed “[lex privata] Sicut de quibusdam dicit – estis sub lege” in the bottom margin.⁶⁵

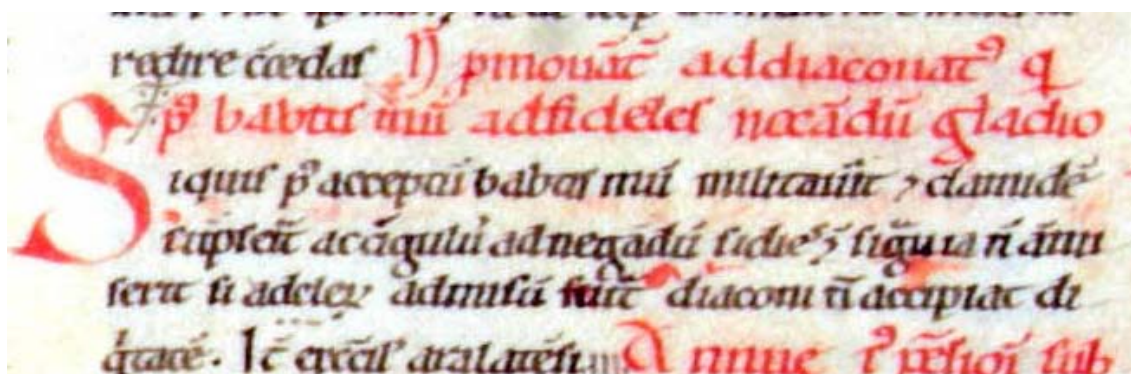


⁶⁴ Fd, fol. 56v

⁶⁵ Fd, fol. 56v.



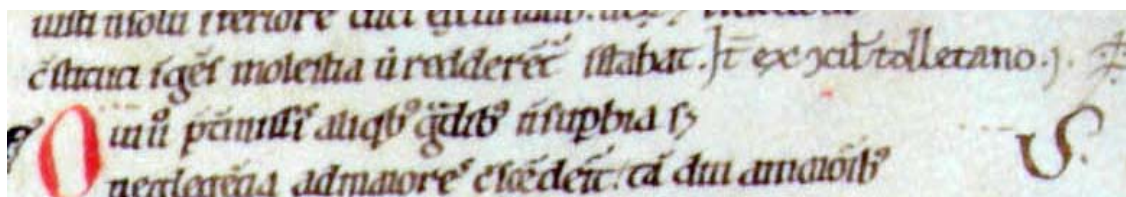
The addition of *lex canonum* and the later addition of the more legally refined *lex privata* in C.19 q.2 c.2 suggest that Hand Gr² may be a late hand and possibly postdates Hand Gr¹, which postdates both Hand B and Hand E. Unlike Hand E and Hand Gr¹, Hand Gr² did not add canons to the Additiones though it made a single correction indicating the correct placement of D.51 c.4. The Additiones originally placed the canon after D.52 c.1.⁶⁶



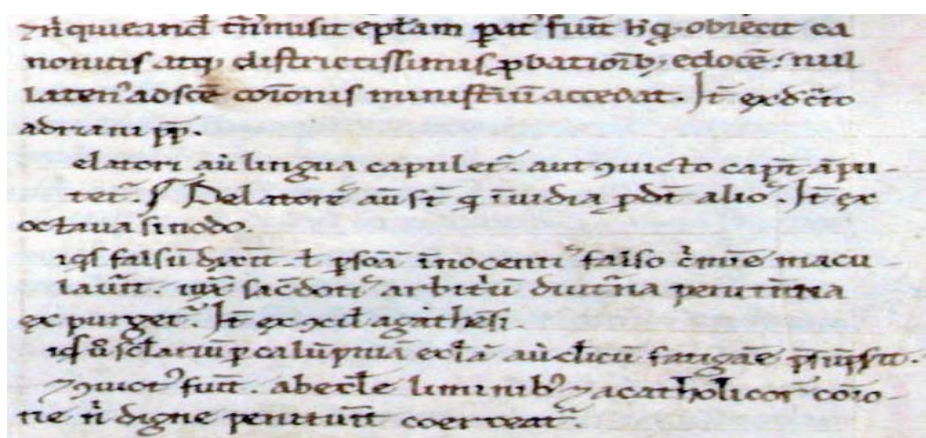
Hand Gr² corrected the canon's placement noting its position between D.51 c.3 and D.52 d.a.c.1.⁶⁷

⁶⁶ Fd, fol. 112r.

⁶⁷ Fd, fol. 112r.



Also unlike Hand E and Hand Gr¹, Hand Gr² had a tendency to add the additional texts in the columns rather than in the margins. C.5 q.6 c.5, c.7, and c.8 below represent examples of the additions to the columns.⁶⁸



Of the eighteen canons added by Hand Gr², the columns contain ten canons while the margins contain seven canons; furthermore, only four of the canons added by Hand Gr² appear in the Additiones.⁶⁹

The layers of corrections and additions to the Florence manuscript were extensive.

The sequence of correction and augmentation may have progressed in the following

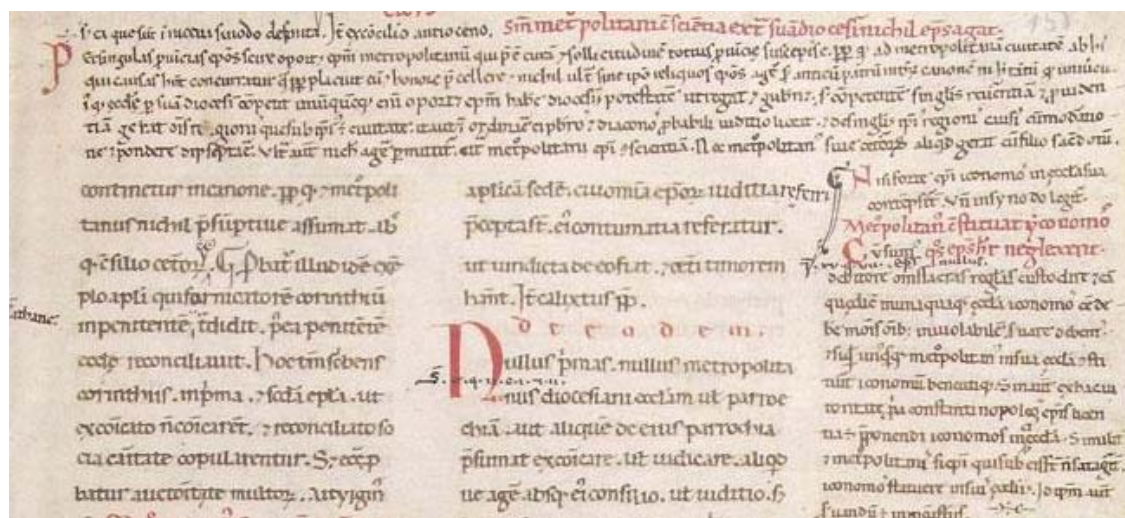
⁶⁸ Fd, fol. 35r.

⁶⁹ Hand Gr² added the following canons in columns: C.4 q.6 c.3, C.4 q.6 c.4, C.5 q.6 c.5, C.5 q.6 c.7, C.5 q.6 c.8, C.7 q.1 c.32, C.7 q.1 d.p.c.32, C.7 q.1 c.33, C.14 q.6 c.1, C.19 q.3 c.9 'Si qua mulier – eius competere.' Hand Gr² added the following canons in the margins: D.45 d.p.c.17 'Percussor quoque – conscientiam uulnerat,' D.45 c.18, C.15 q.1 c.6, C.15 q.1 d.p.c.11 'illud quod inuenitur in penitenciali Theodori,' C.15 q.1 c.12, C.15 q.1 d.p.c.12 'Sed hoc forte – perduxit. §1. Item obicitur.' The Additiones include: C.5 q.6 c.5, C.5 q.6 c.7, C.5 q.6 c.8 and C.19 q.3 c.9. The Additiones do not include: D.45 d.p.c.17 'Percussor quoque – conscientiam uulnerat,' D.45 c.18, C.4 q.6 c.3, C.4 q.6 c.4, C.7 q.1 c.32, C.7 q.1 d.p.c.32, C.7 q.1 c.33, C.14 q.6 c.1 'Et paulo post §3 Illud uero fidentissime – accipere medicinam,' C.15 q.1 c.6 'Illa cauenda sunt – nostra sunt,' C.15 q.1 d.p.c.11 'illud quod inuenitur in penitenciali Theodori,' C.15 q.1 c.12, C.15 q.1 d.p.c.12 'Sed hoc forte – perduxit. §1. 'Item obicitur, C.19 q.2 c.2 '[lex priuate] Sicut de quibusdam dicit – estis sub lege.'

order: in-text corrections in light brown ink, Hand B, Hand E, Hand Gr¹, and Hand Ga. Because Hand Gr² made a second addition to C.19 q.2 c.2, it postdated Hand Gr¹; however, there is no diffinitive evidence to place it securely before or after Hand Ga. It is apparent that the canons of Gratian 2 were added neither at the same time nor by the same person. It thus is difficult to believe that they were copied from a complete text of Gratian 2, which would have contained all the material incorporated into the text.

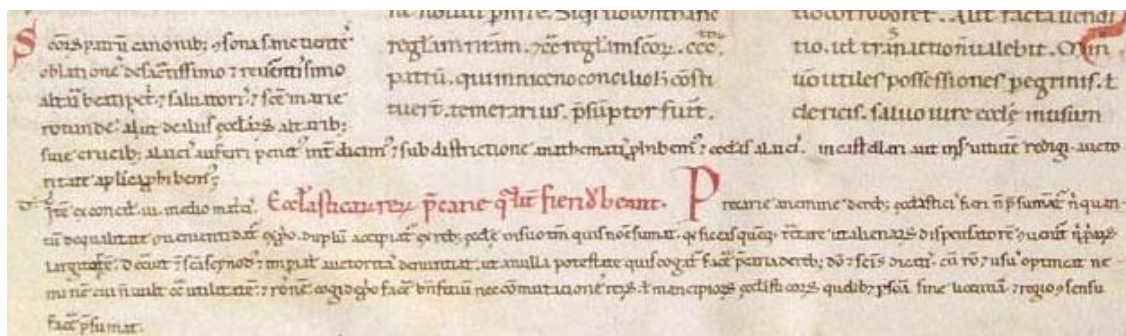
The Barcelona manuscript, which ends after Causa 12, also provides evidence of canons added in stages. Because a professional scriptorium with an emphasis on the standardization of hands produced the manuscript, it is difficult to discern layers of augmentation. Slight differences in hands and internal evidence serve as the best clues.

Even if not as obvious as in Florence, there are slight differences between the hands of the Barcelona. Below is fol. 158r. A different hand seems to have copied C.9 q.3 (Per singulas prouincias) in the top margin than the canons in the right margin.



The same hand that copied C.9 q.3 c.2 also copied C.9 q.2 c.8 (Episcopi qui extra) in the bottom margin of fol. 157v and C.9 q.2 c.9 (Non invitati episcopi) in the bottom of fol.

157v and continuing in the top margin of fol. 158r. C.10 q.1 c.14 (Sanctorum Patrum canonibus), shown below, presents a similar situation.⁷⁰ One hand copied C.10 q.1 c.14 in the lower left margin as opposed to the hand that copied C.10 q.2 c.4 (Precariae a nemine) in the bottom margin.



In both of the above examples, the differences between the hands are subtle, but still visible. However, as I have said, it is difficult to distinguish clearly between individual scribes and thus paint an accurate picture of how many hands contributed additions.

In 1992 Albert Torra identified additional leaves inserted later into the Barcelona manuscript.⁷¹ These leaves, copied in a different hand, contain canons added to Gratian 2.⁷² D.5 c.4, D.6 c.2, and D.77 c.6 illustrate that they were not contemporaneous with the original text. When first copied, D.5 c.4 began on an original leaf, fol. 18v, and was completed on an original leaf, fol. 20r. The canon immediately preceded D.6 d.p.c.3. With the insertion of an additional leaf, fol. 19, a later scribe erased “percipere non – ut esuriamus” on fol. 20r and recopied this portion of D.5 c.4 on fol. 19v. D.6 c.2, a

⁷⁰ Bc, fol. 159v.

⁷¹ *Catalunya Medieval: Del 20 de mai al 10 d'agost, Barcelona 1992* (Barcelona 1992), 204-205. So far as I have found, Dr. Torra never published this catalogue. Winroth worked with a black and white photocopy of the description of Bc. See *The Making of Gratian's Decretum*, 28, n. 77.

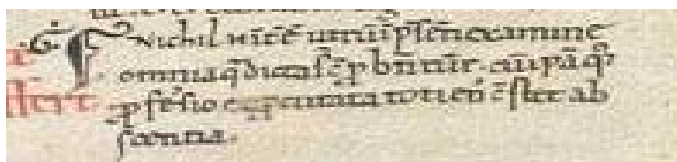
⁷² Winroth, *Making of Gratian's Decretum*, 26, 28. The inserted folios are 19, 23, 29, 30, 31, 36, 38, 63, 70-71 (bifolium), 77, 81, 82, 85, 88, 91, 98, 106.

supposed palea, began on fol. 19v and continued with “[volupta]tibus reluctans – membris meis” over the erasure of D.5 c.4.⁷³ The scribe, however, ran out of space and completed the canon on fol. 19r. I believe the inserted folio, fol. 19r, was to remain blank for the sake of continuity. The scribe, however, had to utilize the space with D.6 c.2, which used three leaves to complete, fol. 19v-20r-19r. In one collection, Vat.lat. 3829, part II (63.217), D.6 c.1 and c.2 are combined as one canon and in the Barcelona manuscript D.6 c.2 follows after c.1.⁷⁴ The Florence and Admont manuscripts omit D.6 c.2 as a palea. Finally, D.77 c.6 began on an inserted leaf, fol. 82v, but was finished on an original leaf, fol. 83r. The inserted leaves were not the last phase of additions, however. Examples exist of canons that postdate them. D.92 c.2 begins on fol. 90v, an original leaf, and is finished in the bottom margin of fol. 91r, an inserted leaf. The same is true of C.1 q.1 c.84, which begins in the top and left margins of the original leaf fol. 105v, continues in the bottom margin of fol. 105v, and is finished on the inserted leaf fol. 106r. The practice of inserting leaves, however, did not last long as it was abandoned toward the end of C.1 q.1. It could be that the inserted leaves were a proto-type of what would become the Additiones as found in Fd and Aa. Finding the work difficult to use, scribes may have discontinued inserting leaves relying on the margins for the additional material.

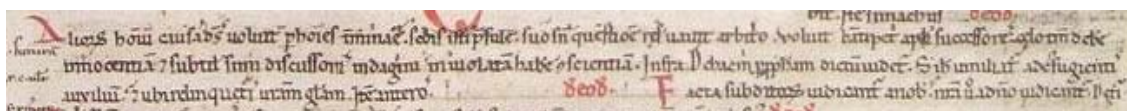
⁷³ Bc, fol. 20r.

⁷⁴ My discussion of the canonical sources rests on information contained in Fowler-Magerl’s *Clavis canonum* [CD-ROM] program. Unless stated otherwise, I have used her database for all references to canonical collections. Fowler-Magerl indicated that Vat.lat. 3829 (63.217) is Roman and papal in orientation. The collection lists the popes through Paschal II and includes canons both from the Lateran council of 1110 and the Lateran council of 1112. See *Clavis canonum*, 216-218.

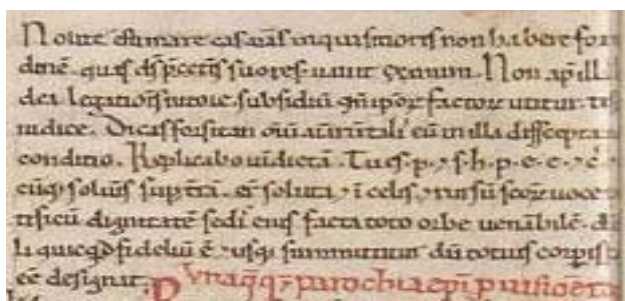
In addition to the scribes adding only texts, at least two different scribes glossed the Barcelona manuscript as well as added some texts. The first scribe used a darker black ink to add glosses. C.3 q.9 c.10 (Decrevimus vestram debere), an example of the first glossator, has the addition of “Nichil enim interest – constet absentia” to complete the canon.⁷⁵



He added canons in a fashion similar to Florence’s Hand Gα and Hand Gr². The first glossator added C.9 q.3 c.14 (Aliorum hominum causas) in two additions that he did not join with a marker. In the bottom margin of fol. 158r is the text “Aliorum hominum causas Deus – habere conscientiam + De hac mihi per – gloriam vestram,” which is the last sentence of the canon.

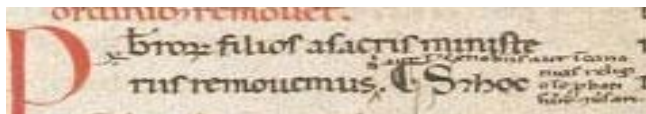


On fol. 158v in the right column is the middle portion of the canon “Nolite existimare eas animas – corporis caput esse designator” with no indication of a connection to the first part.

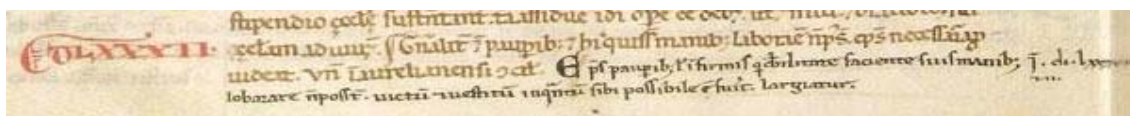


⁷⁵ Bc, fol. 141r.

In the example of D.56 c.1, the first glossator made the interlinear addition of “nisi aut in cenobiis – fuerint conversari” to complete the canon.⁷⁶



Both Florence and Admont omit this addition, which qualifies the removal of sons of priests from the sacred ministries unless having been tried they shall live either in monasteries or with religious canons.⁷⁷ D.56 c.1 also appears as c.14 in the decisions of Melfi, which a council held by Pope Urban II in 1089 promulgated.⁷⁸ The omission of the additional text from Fd and Aa illustrates that Gratian edited his sources as the canonical tradition contains the extended version of canon as found in Bc.⁷⁹ It is possible to say that the first scribe adding glosses in darker ink worked after the additional leaves as demonstrated by D.82 c.1 (*Episcopus pauperibus vel*). The glossator added the canon after D.82 d.a.c.1 (*Generaliter etiam pauperibus*), which is on the inserted leaf fol. 85v.



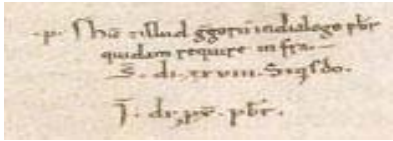
The second scribe added glosses in a lighter black ink. For instance, he added the text “Hinc et illud – require infra” to D.31 d.p.c.11 in left margin of fol. 45v.

⁷⁶ Bc, fol. 68v.

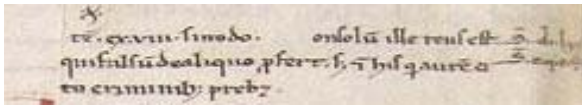
⁷⁷ Again, the Paris manuscript does not factor into the discussion because it contains neither marginal additions nor a supplement with Gratian 2 texts.

⁷⁸ Somerville, *Pope Urban II, The Collectio Britannica, and the Council of Melfi*, 176, 257.

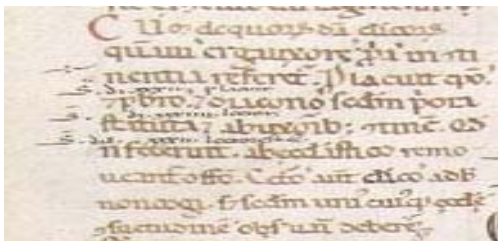
⁷⁹ Ibid., 186-203, 208-209. Somerville lists the following collections which include the canon: JL 5409 (Jaffé, *Regesta pontificum Romanorum*), the *Collectio Britannica*, Monte Cassino, Bibliotheca dell’Abbazia 216, the *Polycarpus*, the *Collectio VII librorum* and supplements (Turin, Biblioteca nazionale e universitaria, D.IV.33), Vatican City, Biblioteca apostolica Vaticana, lat. 478 and lat. 1208, the *Decretum* (6.410) and the *Panormia* (3.51) of Ivo of Chartres, the Paris, Bibl. De l’Arsenal 713B, the *Tripartita* (coll. B.), the *Caesaraugustana* (recension I, II, and III), II Lateran Council (c.21), the *Collectio X partium* (3.18.1), *Second Collection of Châlons-sur-Marne* (3.122), the *Summa Haimonis*, the *Collectio Lanfranci*, the *Collectio III librorum* (2.1.40), and the *Collectio IX librorum* (2.14.11).



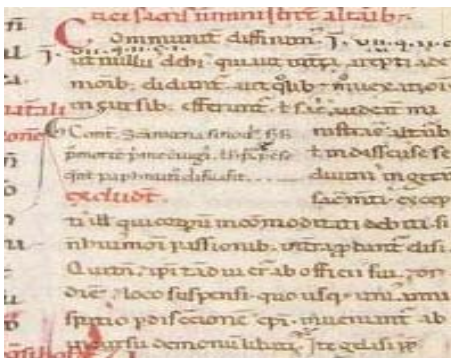
C.11 q.3 c.77 (Non solum ille) offers evidence that the first scribe glossing in darker ink preceded that of the second scribe glossing in lighter ink; the second glossed the addition by the first.⁸⁰



As the second of these two scribes naturally worked after the addition of some canons, as seen by his glossing of D.84 c.4 (Cum de quorundam).⁸¹



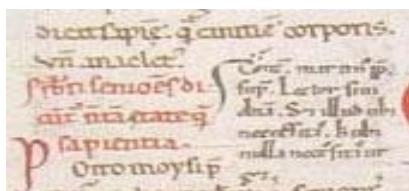
Like the first scribe glossing in darker ink, however, it also worked prior to the addition of some canons. A scribe added D.33 c.3 (Communiter diffinimus ut) in the right margin of fol. 47r around his gloss.



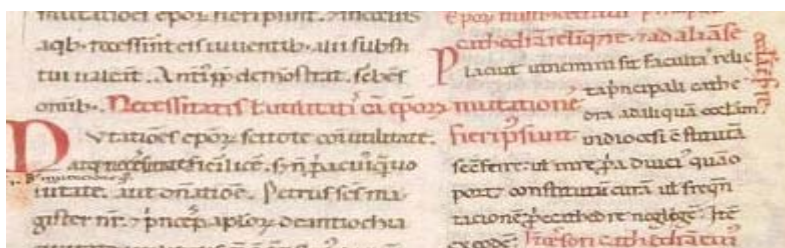
⁸⁰ Bc, fol. 167v.

⁸¹ Bc, fol. 87v.

A scribe likewise added D.84 c.6 (Porro Moysi precipitur) around the gloss of the second.⁸²



As the back and forth relationship between the addition of texts, glosses, addition of texts, glosses, and addition of texts illustrate, the marginal canons were not contemporaneous with the main text. As C.7 q.1 c.21 (Placuit ut nemini), shown below, demonstrates that the marginal canons postdate the main text as the canon is written around a rubric in the right margin.⁸³

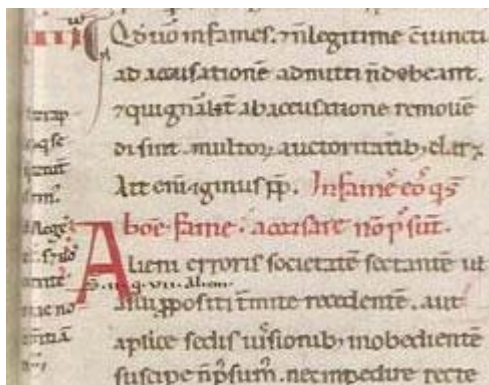


Some canons, in fact, were added quite late. With the top, right, and bottom margins previously filled with text and the zoomorphic drawing of a bird, the only space to add C.3 q.4 c.4 §2 “Similiter de raptoribus – penitentiam recipimus” was tucked in the left margin under the q.4 indicator by the binding.⁸⁴

⁸² Bc, fol. 87v.

⁸³ Bc, fol. 152r.

⁸⁴ Bc, fol. 138r.



The same holds true for C.3 q.4 c.3 “Fides autem et conversatio primum – et non prius,” which also is tucked in the left margin next to q.3 d.p.c.4 by the binding.⁸⁵

Like the Florence manuscript, the Barcelona manuscript was not copied in one fell swoop. The additions, though difficult to assign a point of integration, were ongoing. It seems that certain scribes added text, inserted leaves with more text, a separate scribe glossed the text, again those certain scribes added texts, a second separate scribe glossed the text again, and those scribes having made the vast majority of the additions continued to include text. It very well may be that Barcelona experienced the longest stretch of additions, though this is difficult to determine since the manuscript is incomplete. Regardless, the additions made to the Barcelona manuscript were more complicated than simply copying additional Gratian 2 texts.

Admont is unique in that it incorporates Gratian 2 texts into Gratian 1, includes an Additiones copied at the same time as the main text, and contains marginal additions. Winroth offers two explanations for Admont’s peculiar nature. In the first he maintains that the exemplar used to copy the text contained marginal additions along with a supplement. The copyist of Admont simply incorporated the marginal additions. His

⁸⁵ Bc, fol. 138r.

second explanation holds that Admont's exemplar may reflect the first additions Gratian made after his text circulated in the form found in the Barcelona, Paris, and Florence manuscripts.⁸⁶ The text in the main section of Admont would then represent a recension that is between the first and the second recensions.

The incorporation of canons was not systematic. In other words, Admont did not interpolate only canons found in the margins of Florence or on inserted folios in Barcelona. Admont rather incorporated texts sporadically throughout the manuscript either as a single canon, as with D.18 c.4 on Aa 23, fol. 22r, or as a cluster of canons, as with D.86 d.p.c.6-c.22 and d.p.c.24-c.25 on Aa 23, fol. 80v-82r. It appears that Admont's copyist compiled the manuscript using both Gratian 1 and supplementary texts interpolating what was desired and keeping the rest separate.

With the exception of two instances, the canons incorporated into the main text of Admont are not repeated in the Additiones. The first instance arises in situations where there are two different versions of the canon, as is the case with: C.2 q.6 d.p.c.31, C.3 q.9 d.p.c.15, C.14 q.5 d.p.c.14, and C.14 q.6 c.1. For example, the text incorporates the complete version of C.2 q.6 d.p.c.31 whereas the other Gratian 1 texts omit "Forma apostolorum hec est – his apostolis dimitto."⁸⁷ The canon as it appears in the Additiones only includes the addition "Forma apostolorum hec est – his apostolic dimitto."⁸⁸ This portion of the canon appeared previously at the bottom of Aa 23, fol. 256v after

⁸⁶ Winroth, *Making of Gratian's Decretum*, 128, 131-132. Winroth notes survivals of first recension manuscripts in second recension manuscripts: Bremen, Staats- und Universitätsbibliothek a. 142 (Br); Jena, Thüringer Universitäts- und Landesbibliothek, El. Fol. 56 (Je); Mainz, Stadtbibliothek II 204 (Mz); Innsbruck, Universitätsbibliothek 90 (In); Munich, Bayerische Staatsbibliothek, clm 13004 (Me); Salzburg, Stiftsbibliothek St. Peter a.XI.9 (Sa); Biblioteca Apostolica Vaticana, Vat. Lat. 3529 (Vd); and Cambridge, Mass., Harvard Law Library 64 (Cg).

⁸⁷ Aa 23, fol. 132v.

⁸⁸ Aa 23, fol. 257v-258r.

d.p.c.19.⁸⁹ According to Winroth, C.14 q.6 c.1 in Gratian 1 should read “Si res aliena – hominem seuiat” with the text “§3 Illud uero fidentissime – accipere medicinam” added to Gratian 2. This is the only Gratian 1 canon in C.14 q.6.⁹⁰ The canon in the Florence manuscript follows this pattern, with the Gratian 2 addition copied in the right column.⁹¹ The canon in Sankt Gallen is shorter than that in Florence, reading “Si res aliena – restitui potest” and omitting “§1 Huic certe non – hominem seuiat.” It too is the only C.14 q.6 text in St. Gall.⁹² Admont contains a third version of the canon. C.14 q.6 c.1 is the last first recension canon in Aa 23 before the start of the Additiones on fol. 200r; Causa 15 begins Aa 43. The canon appears in its Gratian 1 form (Si res aliena – hominem seuiat) in Admont along with additional text from two different canons. “Item in libro de officiis Denique si non – solius Dei est” is a part of C.14 q.5 c.10 and “Nummi tui convertuntur in bonum et tu remanes malus” is the last sentence of C.14 q.5 c.14.⁹³ The second recension addition to C.14 q.6 c.1 – “§3 Illud uero fidentissimi – accipere medicinam” – was copied in the Additiones of Admont.⁹⁴ The augmentations to C.14 q.6 c.1 illustrate the on-going development of the *Decretum*. The canon original read “Si res aliena – restitui potest.” Gratian would add “§1 Huic certe non – hominem seuiat” to the first recension. In spite of the Gratian 2 addition of “§3 Illud uero fidentissimi – accipere medicinam,” the text circulated at some point in a corrupted form to include text from C.14 q.5 c.10 and C.14 q.5 c.14. While Sankt Gallen, Gratian 1 in Florence, and Gratian

⁸⁹ Added to Aa 23 by Hand Aa²

⁹⁰ Winroth, *The Making of Gratian's Decretum*, 214.

⁹¹ Fd, fol. 48v. Added to Fd by Hand Gr².

⁹² Sg, p. 118a.

⁹³ Aa 23, fol. 199r-199v.

⁹⁴ Aa 23, fol. 296r.

1 in Admont omit C.14 q.5 c.10, Fd Additiones and Aa Additiones include it. Sankt Gallen, Gratian 1 in Florence, and Gratian 1 in Admont, however, include C.14 q.5 c.14, and thus there would be no reason to repeat the last sentence in another canon.⁹⁵ No collection contains a version of the canon as found incorporated in Admont Gratian 1.

The second exception arises in situations where the canon was misplaced in either the main text or in the Additiones, as is the case with: D.86 d.p.c.24-c.25; D.90 c.9-c.10; C.2 q.6 d.p.c.31; C.12 q.2 c.10, d.p.c.10, c.11, d.p.c.11; C.16 q.7 c.35-c.36; C.16 q.7 c.41-c.42. For example, C.12 q.2 c.10, d.p.c.10, c.11, d.p.c.11 were incorporated into Admont between c.13 and c.14, though they appear to be crossed out with a line though the canons.⁹⁶ In the Additiones these canons correctly follow c.8.⁹⁷ C.16 q.7 c.35 and c.36 were incorporated between c.10 and c.12, while properly placed in the Additiones after d.p.c.34.⁹⁸ In the case of Admont, duplicates of canons arose from different versions of the text or from misplacement. Otherwise, canons either were incorporated into the manuscript or placed in the Additiones.

Although four separate hands contributed both marginal texts and glosses, Admont as a whole omitted more canons than either Florence or Barcelona. Similar to the Barcelona manuscript but quite unlike the Florence manuscript, in-text corrections are few in number. The responsibility for these corrections, which typically involved adding a word interlinear or correcting an eye-skip, fell to Hand Aa². Using red ink, it added the

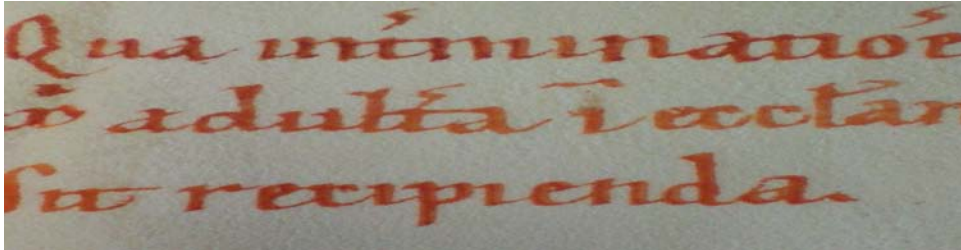
⁹⁵ Sg, p. 118a; Fd, fol. 48v; Aa 23, fol. 199r.

⁹⁶ Aa 23, fol. 186r.

⁹⁷ Aa 23, fol. 289r.

⁹⁸ Aa 43, fol. 36r; Aa 43, fol. 286v.

rubric “Qua interim natione Christi adultera in ecclesiam sit recipienda” of C.27 q.1 c.5 in the right margin of Aa 43, fol. 317r.

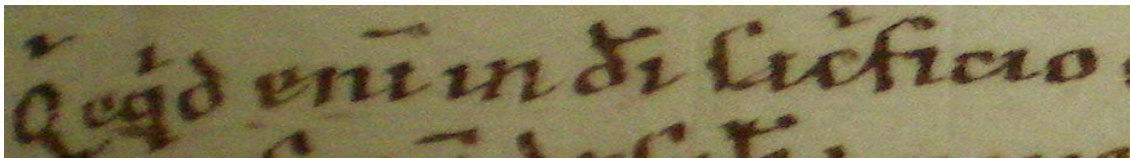


Hand Aa² added a number of texts as well as corrections. To the bottom margin, it added the second recension text “Scimus autem quod edificati parietes non prius tignorum pondus accipiant nisi a novitatis accipiant cunctam simul fabricam ad terram deponat” to D.48 c.2.⁹⁹



Slightly less than one-half of the texts added to the margins of Admont came from the pen of Hand Aa²

Hand Aa¹ added a considerable number of texts as well, though not as many as Hand Aa². It added the second recension addition “Quicquid enim in Dei – hereseos perpetrare + Et post pauca §3 Quisquis – existimat accedat” to C.1 q.1 c.27 in the bottom margins of Aa 23, fol. 95v and Aa 23, fol. 96r.

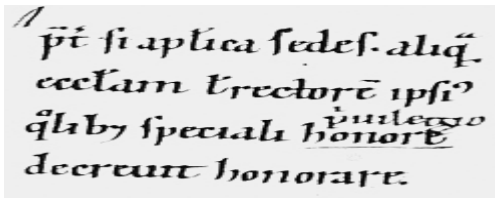


⁹⁹ Aa 23, fol. 52v. I have provided the incipit.

C.11 q.1 [d.p.c.9] serves as another example. Hand Aa¹ added the text to the bottom margin of Aa 23, fol. 170v.



Hand Aa¹ worked at some point after Hand Aa² as the former corrected the marginal text of the latter. For instance, Hand Aa² added the addition “preterquam si apostolica – decreverit honorare” to C.9 q.3 c.8 in the right margin. Hand Aa¹ later copied *privilgio* above *honore*.¹⁰⁰



Hand Aa¹ also added the abbreviation for *et* to D.88 d.a.c.1 “Prohibentur ergo clerici cupiditatis negocia suscipere, non pietatis curam viduis et orphanis inpendere” copied by Hand Aa² in the right margin.¹⁰¹

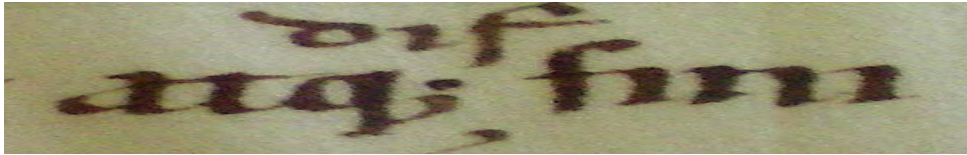


Hand Aa¹ made two corrections to the second recension addition of “si aliquis quod – expectanda censura” to C.2 q.6 c.11 in the bottom margin. First, it added *diff[finere]* (ln. 8).¹⁰²

¹⁰⁰ Aa 23, fol. 166r.

¹⁰¹ Aa 23, fol. 83r.

¹⁰² Aa 23, fol. 130r.

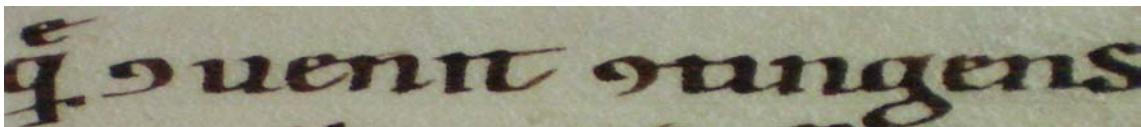


Second, Hand Aa¹ changed *actiones* (ln. 8) to *accusationes*.¹⁰³

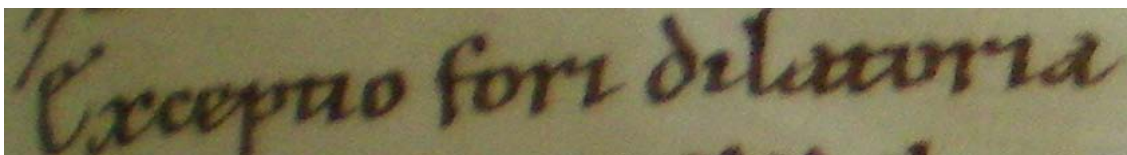


This second correction neither corresponds to the vulgate, which reads *actiones*, nor is it an alternative possibility.¹⁰⁴ This reference shows that different versions of Gratian's text circulated and scribes corrected their version against the exemplar on hand at that time.

The final example is the two sets of additions made to C.3 q.3 d.p.c.4. In the right margin, Hand Aa² added the text "qui convenitur contingens – XX dierum."¹⁰⁵



In the bottom margin, Hand Aa¹ added "§7 Exceptio fori dilatoria – litis contestari."¹⁰⁶



The Correctores noted that many older examples omit this latter text added by Hand Aa¹.¹⁰⁷

¹⁰³ Aa 23, fol. 130r.

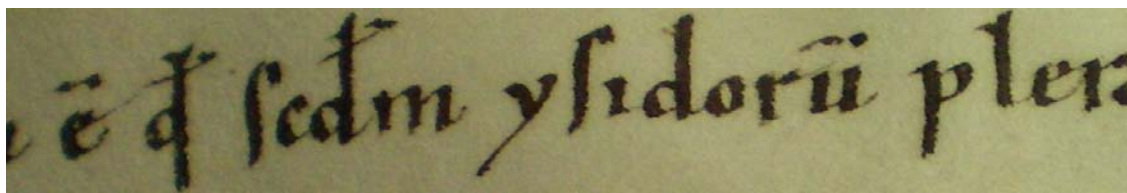
¹⁰⁴ Vgl. *ed.F*, col. 469.

¹⁰⁵ Aa 23, fol. 143r.

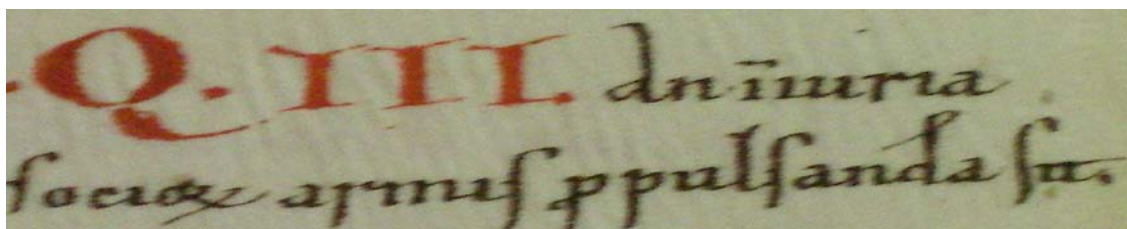
¹⁰⁶ Aa 23, fol. 143r.

¹⁰⁷ Vgl. *ed.F*, col. 511.

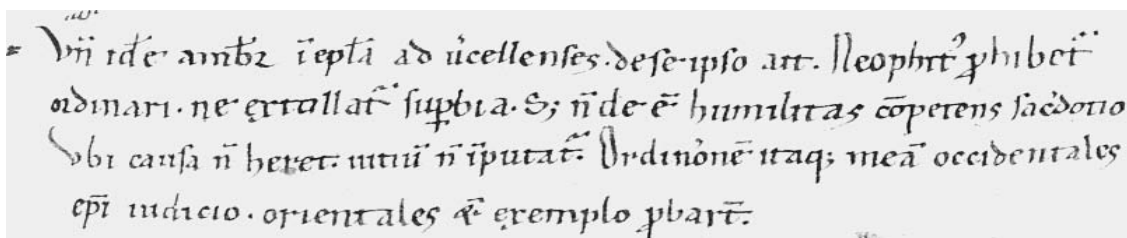
While contributing a number of glosses, a third scribe, Hand Aa³ added a few texts. For example, it added D.29 d.a.c.1 “Sed notandum est, quod secundum Ysidorum pleraque capitula ex causa, et loco, et tempore, considerata sunt” to the bottom margin of Aa 23, fol. 36v.



Hand Aa³ contributed a paltry number of glosses to Admont 43 and these were situated next to question markers. For instance, it added a brief remark next to the C.23 q.3 indicator in the Additiones.¹⁰⁸

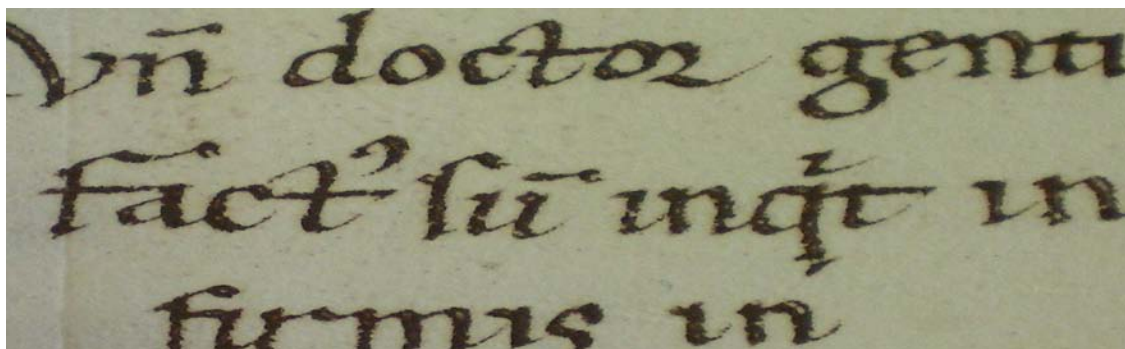


Like Hand Aa³, Hand Aa⁴ added glosses but only few texts. For example, it added D.61 c.9 to the bottom margin of Aa 23, fol. 67r.



In the right margin of the Additiones it added the text “Unde doctor: gentium Factus sum inquit infirmus infirmis” to D.45 c.16.¹⁰⁹

¹⁰⁸ Aa 43, fol. 298r.



Admont, like Florence and Barcelona, went through stages of augmentation. Unlike the other two manuscripts, however, Admont's period of augmentation quite possibly was shorter. Only Hand Aa² added texts to Admont 43, though not in any significant amount. As previously mentioned, Hand Aa³ contributed a paltry number of glosses but no texts. Hand Aa¹ and Aa⁴ added nothing to Admont 43. Admont neither incorporates marginal canons nor the first additions made after the text circulated, as I will illustrate in my comparison of the three manuscripts, and it surely was not a case of simply including Gratian 2 texts. It reflects, rather, the transformation from Gratian 1 to Gratian 2 and how this transformation occurred.

An analysis of the Gratian 2 additions made to each Gratian 1 manuscript shows that multiple hands augmented each text over time with some of the second recension canons added to a particular manuscript later than other second recension canons in the same manuscript. Different scribes progressively added the Gratian 2 texts and thus the additions could not have postdated the circulation of a completed vulgate edition. The textual evidence in the individual manuscripts suggests rather that scribes added the

¹⁰⁹ Aa 23, fol. 218r.

Gratian 2 canons prior to the circulation of a completed vulgate edition. The *Decretum* then was the product of a continued evolution.

Comparison of the Manuscripts

Relying on a comparison of the three manuscripts, I support and expand upon the conclusions of the previous section; the *Decretum* was a work which progressively developed over time. Textual evidence in the Gratian 1 manuscripts support the arguments made in previous chapters that the first recension developed from an earlier phase, such as that preserved in Sankt Gallen 673. Gratian 2 was similarly the product of the continued evolution of Gratian 1 rather than a text ‘published’ as a definitive redaction. A comparison of the manuscripts again reveals that the additional texts in the margins and in the supplements did not enter the textual tradition in a uniform fashion, a fashion that would suggest their addition after the circulation of the vulgate edition. The manner in which the canons entered the textual tradition suggests rather that scribes copied the additional texts in the margins and in the Additiones prior to the circulation of a completed vulgate edition. Several pieces of evidence support this conclusion initially proposed in the previous section. In a broad sense, it is possible to place the manuscripts on an evolutionary timeline by comparing the layers of additions and the points at which canons entered into the textual tradition. The misplacement of canons was a potential byproduct of the ongoing additions. Second, different versions of Gratian 2 texts circulated at different times. Third, the margins and supplements contain unique texts not found in Gratian 2. Fourth, the margins and supplements do not contain all of the texts

found in the vulgate edition. Because scribes copied the additional Gratian 2 texts prior to the circulation of a completed vulgate edition, Gratian originally did not publish the additional material as a finished compendium but rather Gratian 2 evolved into the vulgate recension over time. Finally, in an examination of Winroth's two 'Gratian' theory, I employ a methodology similar to the one he used to determine the canons of the first recension. The vast majority of texts entered a manuscript's textual tradition at one point or another, which suggests that Gratian was responsible for this material. Some canons, however, entered one tradition but not another. I question whether Gratian was responsible for these canons.

Textual evidence in the Gratian 1 manuscripts supports the argument that the text passed through a period of development. The few instabilities found amid the Gratian 1 texts suggest that it may not have been compiled in its complete form and then published. Furthermore, each of the manuscripts includes duplicate canons, that is, canons found both in the margins or in the Additiones and also in the Gratian 1 text without displacement. This suggests that the Gratian 1 tradition may have lacked a consensus and some non-extant manuscripts did not contain these canons. There was no reason to add the same canon in the same place unless all the manuscripts did not include it originally, thereby resulting in their duplication in some of the extant manuscripts.

Winroth's Appendix 2, by and large, accurately represents the canons in each of the Gratian 1 texts. Instances do occur, however, where Winroth took some liberties by including a canon as part of Gratian 1 though it is not present in all of the manuscripts. D.100 d.a.c.1 and c.1 serve as the best examples. While Winroth included them in his

appendix as a part of the first recension, evidence suggests that the manuscripts in fact may not have contained these texts originally. The Paris manuscript omitted both the dictum and the canon. In Florence the texts were found in the Additiones as well as in the columns of the main text. Barcelona included the canons on an inserted leaf. Only the Admont manuscript incorporated the text into the body of Gratian 1.¹¹⁰ What this evidence demonstrates is that the text Winroth calls Gratian 1 resulted from a period of development that dates from the work's beginning. As Admont is not a true representation of Gratian 1 because of the incorporation of Gratian 2 texts, it is unlikely that these canons were an original feature of Gratian 1.

In addition to D.100 d.a.c.1 and c.1, a few other instances arise in which Winroth listed the canon as complete in Gratian 1 though the text was not complete in all manuscripts. The Paris manuscript omitted D.28 c.6 though each of the other Gratian 1 texts included the canon. Paris also omitted C.2 q.6 c.39, while a hand other than the usual looks to have copied the canon in the right column of the Barcelona manuscript. The canon was added to the right margin of Admont.¹¹¹ The same applies to C.2 q.6 d.p.c.39 "Cum autem in – suam agere oportet (ln. 11-13)," which is the version of the dictum in Gratian 1. Omitted from Paris, it was added to the right margin of Admont. Barcelona included it in the right column, though it appears to be added later.¹¹² Admont included C.2 q.6 c.40 though, like the two preceding texts, it appears as a later addition in

¹¹⁰ P, fol. 83r-83v; Fd, fol. 18v-19r; Fd, fol. 119r; Bc, fol. 98r; Aa 23, fol. 92r-92v. Added to Fd by Hand Gα.

¹¹¹ P, fol. 114v-115r; Bc, fol. 129v; Aa 23, fol. 133r. Added to Aa by Hand Aa².

¹¹² P, fol. 114v-115r; Aa 23, fol. 133r; Bc, fol. 129v. Added to Aa by Hand Aa².

the right column of Barcelona and was omitted from Paris.¹¹³ Florence was the only manuscript to contain C.2 q.6 c.39, d.p.c.39, and c.40 originally.¹¹⁴ Winroth notes that C.2 q.7 d.p.c.22 is complete in Gratian 1. While Paris included the Gratian 2 version of the dictum, Barcelona, Florence, and Admont contain the same addition of “Ceterum si a fide exorbitauerit (ln.4-5)” to complete the text. Barcelona included the text interlinear, and Florence and Admont included it in the margins.¹¹⁵ A scribal eyeskip is not plausible as as three of the four manuscripts originally omitted the text and had to add it later. As a final example, Winroth lists D.32 c.1 as part of Gratian 1, but the canon was not complete in any of the manuscripts.¹¹⁶ The left margin of Florence contained “Cum sacerdotum – habeatur illicit (ln. 1-3),” while it was added later to right margin of Barcelona and in the bottom margin of Admont. Paris omitted this text entirely.¹¹⁷ These instances in which a complete canon appears in one of the Gratian 1 texts but not all suggests that the text developed and that Gratian did not compile the entire work and then publish it in its finished form.

A limited number of instances arise in which more than one manuscript contains corrections to the same Gratian 1 text, though the corrections are not necessarily the same. D.54 c.23 appeared in the Paris manuscript as it is in Gratian 1 and in Gratian 2. A later hand, however, added “tempora iam ad quodlibet ecclesiasticum offitium provehatur si tamen illis non fuerit criminibus (ln. 17-19)” to the bottom margin of the

¹¹³ P, fol. 114v-115r; Bc, fol. 129v.

¹¹⁴ Fd, fol. 30r.

¹¹⁵ P, fol. 116r, Bc, fol. 130v; Fd, fol. 30r; Aa 23, fol. 134v. The scribe glossing in black ink copied the text interlinear in Barcelona, Hand Gα copied the text in Florence, and Hand Aa² copied the text in the left margin of Admont.

¹¹⁶ Winroth, *Making of Gratian's Decretum*, 200.

¹¹⁷ Fd, fol. 1v; Bc, fol. 46r, Aa 23, fol. 38r. Added to Bc by the second glossator; added to Fd by Hand Gr¹ and again later by Hand Gα; added to Aa by Hand Aa².

Florence manuscript.¹¹⁸ The Barcelona manuscript contained an erasure with a correction in brown ink: “[hu]mano servitio liber recedat qui divino amore districtiorem appetit subire servitutem. Si autem in monachico habitu (ln. 13-15)”.¹¹⁹ Admont included “ut ab humana – ad omnipotentis” (ln. 2-6) in the bottom margin.¹²⁰ C.1 q.1 c.97 appeared in Barcelona with erasure and correction in brown: “[ac]cepit non amittit qui recedit ab ecclesia ius tamen dandi quod accepit amittit multis modis apparet frustra et inaniter dici. Primo quia nulla ostenditur (ln. 1-4).”¹²¹ Florence contained a number of corrections to C.1 q.1 c.97: “vel iubeatur (ln. 17, Gratian 2 reads ‘videatur’)...depulsa pernicie (ln. 29)...vel me esse rebaptizandum (ln. 33-34, Gratian 2 reads ‘pie esse repetendum’)...necessitate (ln. 36).”¹²² Admont’s correction was much less involved, with “depulsa pernicie” added in the margins.¹²³ Barcelona made two separate corrections to C.2 q.7 c.28 adding “in eo servanda (ln. 2)” in black ink and rewriting over an erasure “exemplo non trahit – centum annorum. Item Ieronimus ad Eliodorum (ln. 3-7)” in brown ink.¹²⁴ Admont included a correction to the same canon with “in eo est reservanda....Nam scriptum est (ln. 2-5)” in the right margin.¹²⁵ To *De penitentia*. D.2 c.40 a later hand added in the Florence manuscript: “ne eos dicere non plena fide baptismata consecutos sed advocatum inquit habemus apud patrem Iesum Christum et ipse est propitiatio pro peccatis nostris (ln. 28-30)...vel quisquam non habent doctrinarum

¹¹⁸ Fd, fol. 9v.

¹¹⁹ Bc, fol. 67v.

¹²⁰ Aa 23, fol. 63v. Added to Aa by Hand Aa².

¹²¹ Bc, fol. 107r

¹²² Fd, fol. 22r. Corrections made to Fd by Hand Gα.

¹²³ Aa 23, fol. 102r. Added to Aa by Hand Aa².

¹²⁴ Bc, fol. 132r. The *Editio romana* noted the first correction (col. 491, n. a).

¹²⁵ Aa 23, fol. 136r. Added to Aa by Hand Aa⁴. The use of ‘reservanda’ in lieu of ‘servanda’ is not a noted possibility.

promittunt (ln. 32).”¹²⁶ Added in the right margin of Admont was the text “Aurum opus decoris tui et foramina tua in die qua conditus es preparata sunt.”¹²⁷ Barcelona did not include this canon as the manuscript ends prematurely after C.12 q.5. Sankt Gallen did not include D.54 c.23, C.1 q.1 c.97, and *De penitentia*. D.2 c.40. It was highly unusual for different manuscripts to have corrections to the same canon.

C.8 q.1 c.20 in Gratian 1 presents an interesting example of not only Gratian’s rubrication technique but also of changes taking place within the Gratian 1 text. This canon, not found in St. Gall, has three different rubrics amid three different manuscripts. Barcelona used the rubric “Gradus examinat non meliorem facit.”¹²⁸ Florence used the rubric “In electione episcopi nec munus datio nec aliquorum patrocinia conualescant.”¹²⁹ The original rubric in Admont corresponded to that of Florence, but a marginal hand underlined the rubric for deletion and in the right margin replaced it with “Non electione preficiuntur episcopi sed conprobantur.”¹³⁰ None of the three rubrics correspond with the vulgate version, which is “Ex electione non preficiuntur episcopi sed conprobantur.”¹³¹ While each of the copyists could have changed the rubric, it is more likely that this anomaly signifies an evolution of the text.

Just as instances arise where more than one manuscript corrects a particular text, instances also arise where the Gratian 1 text appears slightly different in one of the manuscripts. In Admont the Gratian 1 version of C.16 q.3 d.p.c.5 reads “Territorium

¹²⁶ Fd, fol. 93r. Added to Fd by Hand Gα.

¹²⁷ Aa 43, fol. 165r. Added to Aa by Hand Aa².

¹²⁸ Bc, fol. 155v.

¹²⁹ Fd, fol. 38v.

¹³⁰ Aa 23, fol. 163r. Correction made to Aa by Hand Aa².

¹³¹ Vgl. *edF*, col. 596.

etiam – ordinatum,” which is the last sentence from c.5, then continued “haec nullo modo – prescriptione tolluntur (ln. 2-5).” It omitted “Hoc multipliciter – distinctae sunt (ln. 1-2).”¹³² Admont’s exemplar must have contained a different version of this Gratian 1 text. Admont also contains alternative placements for some Gratian 1 texts. C.27 q.2 c.31 followed c.32 in Admont while C.27 q.2 c.37 followed c.39.¹³³ Admont also misplaced “Hoc autem intelligendum est – §1 Aliquando enim criminalis (ln. 1-7)” of C.3 q.11 d.p.c.3, which should appear in Gratian 1, which followed d.p.c.4.¹³⁴ Finally, Admont incorporated the text of C.23 q.5 c.3 §1. “Ex occasione – peniteat pecavisse (ln. 8-12)” twice in Gratian 1. In the first instance, the text appeared in the correct place with C.23 q.5 c.3. In the second instance, it appeared as a separate canon between q.5 c.6 and q.5 c.7.¹³⁵ Florence, unlike Admont, contained a number of corrections. Correcting C.28 q.1 d.p.c.14 is the addition of adding: “Item Augustinus super eundem locum. Omne quod aliter fit quam probatur peccatum est (ln. 7-8).”¹³⁶ Shortly afterwards is the correction “aliud ratum et non legitimum aliud legitimum et ratum” (ln. 3-4) to C.28 q.1 d.p.c.17.¹³⁷ Hand Gr¹ made a number of corrections in Florence to the *De penitentia* Gratian 1 text.¹³⁸ One of the later hands working in Florence crossed out text of C.13 q.1 d.p.c.1

¹³² Aa 43, fol. 31r.

¹³³ Aa 43, fol. 118r; Aa 43, fol. 118v.

¹³⁴ Aa 23, fol. 149r.

¹³⁵ Aa 43, fol. 76r.

¹³⁶ Fd, fol. 82r.

¹³⁷ Fd, fol. 82r.

¹³⁸ To *De pen.* D.2 c.5 (Fd, fol. 91r) Hand Gr¹ added the correction in the upper right added ‘et omnia que difficilia humane fragilitati sunt uel aspera etiam cum dilectione perficimus (ln. 22-24).’ To *De pen.* D.3 c.28 (Fd, fol. 95r) Hand Gr¹ included in the right margin: ‘tamen et quamlibet breui tempore gestam non respuat penitentiam suscipit etiam ipsam nec patitur quamuis exiguae conuersionis perdere mercedem. Hoc enim michi (ln. 8-10).’ To *De pen.* D.4 c.12 (Fd, fol. 98r) Hand Gr¹ made yet another correction to the right margin: ‘expectat. Et infra. Ipsa creatura liberabitur a seruitute corruptionis in libertatem gloriae filiorum Dei. Et infra. Ipsi intra nos gemimus adoptionem filiorum Dei (ln. 38-39).’ *De pen.* D.4 c.8 (Fd, fol. 97r) experienced two sets of the corrections. In the right margin Hand Gr¹ added: ‘sed si fuissent inquit

that should a part of the canon: “Quia ergo nos servimus Domino in tabernaculo offerendo pro istis preces et sacrificia (ln. 5-7).”¹³⁹ This scribe apparently came across an exemplar that did not contain this text. Conversely, his exemplar contained additional text not found in the vulgate between “terrae promissionis” and “Ignorabant siquidem” (ln. 13) in C.22 q.4 d.p.c.23.¹⁴⁰ Finally, yet another marginal hand in Florence made one in-text correction to C.15 q.3 d.p.c.4 adding: “Quicumque enim clericorum – uxores ducere possunt (ln. 4-8).”¹⁴¹

The inclusion of the same canon in both the margins or in the supplements as well as in the main text of Gratian 1 reinforces the thesis that Gratian 1 passed through a developmental period. Some non-extant Gratian 1 manuscripts originally may have omitted these canons and thus they were added as part of the Gratian 2 text. When the hands copying Florence, Admont, and, in one instance, Barcelona, copied canons that became part of Gratian 2 they inadvertently recopied a canon already contained in their version of Gratian 1 thereby resulting in duplicates. The Florence and Admont manuscripts include the majority of replicated Gratian 1 canons. Florence duplicated: D.10 c.12, D.23 c.11, D.61 c.5, D.83 c.5, D.91 d.a.c.1, D.93 c.3, D.93 c.23 “Mendicat infelix in plateis – miseretur Deus,” D.98 d.a.c.1, C.1 q.1 c.105, C.1 q.7 c.2 §7, C.2 q.6 d.p.c.19, C.2 q.7 c.5, C.3 q.4 c.5, C.3 q.7 c.1, C.6 q.4 d.p.c.4, C.5 q.6 d.a.c.1, C.23 q.8 d.p.c.22, C.6 q.4 c.5, C.6 q.4 d.p.c.5, C.11 q.3 c.57, C.12 q.1 c.5, C.23 q.8 c.18, C.23 q.8

ex nobis permansissent utique nobiscum.’ Hand Gα later squeezed in: ‘Si ex bono in – si possunt cur illos seems squished in (ln. 1-2)’ and added in the left margin: ‘et ne fictio deciperet animam eius (ln. 12-13)...aliis non detur (ln.19)...nec tantum pro gente sed ut (ln. 31).’

¹³⁹ Fd, fol. 47r. Crossed out by Hand Gα.

¹⁴⁰ Fd, fol. 60v.

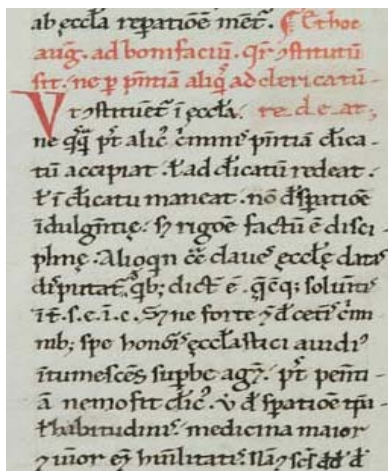
¹⁴¹ Fd, fol. 49v-50r. Correction made by Hand Gr².

d.p.c.18, *De penitentia* D.7 d.a.c.1, C.33 q.4 c.6, C.33 q.4 c.12, and C.36 q.2 c.5.

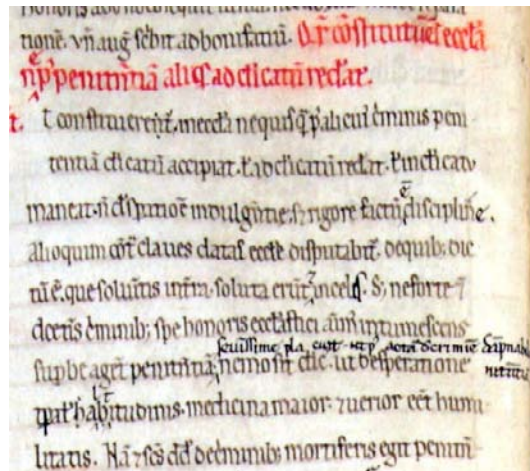
Admont duplicated: D.21 d.p.c.3, D.21 c.4, D.21 c.5, D.46 d.a.c.1, C.1 q.4 d.p.c.13, C.2 q.8 d.a.c.1, C.2 q.8 c.3, C.4 q.4 c.2 §1 “Inscriptio semper fiat – eadem retineant,” C.11 q.3 d.p.c.90, C.15 q.4 d.a.c.1, C.16 q.2 d.a.c.1, C.23 q.5 c.3 §1, C.23 q.8 d.p.c.6, C.23 q.8 d.p.c.22 (a version of it), C.30 q.1 c.5, C.31 q.2 d.a.c.1, and C.32 q.2 d.p.c.1. Barcelona duplicated only C.12 q.1 c.8 §1 “Si qui vero sunt clerici extra – sunt vobis.” As the product of a scriptorium, the scribes’ professionalism apparently led them to compare the additional material to Gratian 1 as they copied it in order to guard against identical texts. The Barcelona copyists were successful in their endeavor.

The most convincing argument for the evolution of Gratian 1 lay with corrections that correspond to an earlier version of the text. In three instances corrections to the Florence manuscript altered the text from a version preserved in Sankt Gallen, Stiftsbibliothek 673. The first example is D.50 c.25. St. Gall omitted “severissime placuit ut post actam de crimine dampnabili penitenciam,” which Hand Gα added to Florence.

Sg, fol. 16b



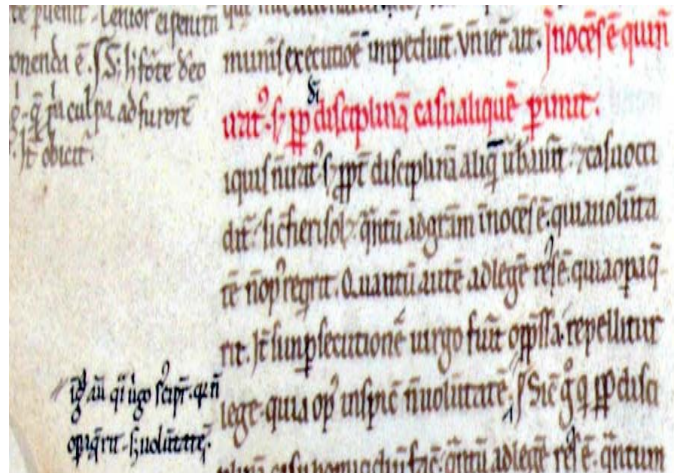
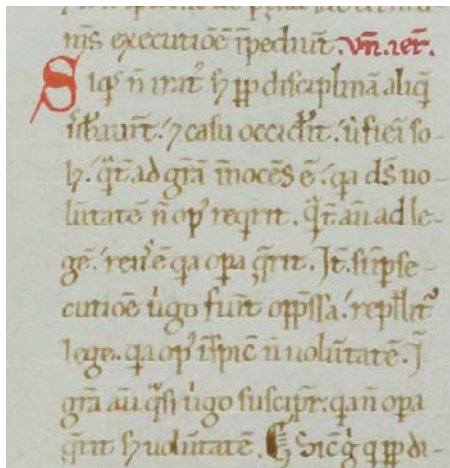
Fd, fol. 7v



C.15 q.1 c.13 serves as the second example. Although Larrainzar listed the canon as complete in his appendix, St. Gall omitted the text “in gratia autem quasi virgo suscipitur quia non opera querit sed voluntatem,” as did Florence. Hand Ga added the text to the left margin.¹⁴²

Sg, fol. 120a

Fd, fol. 49v

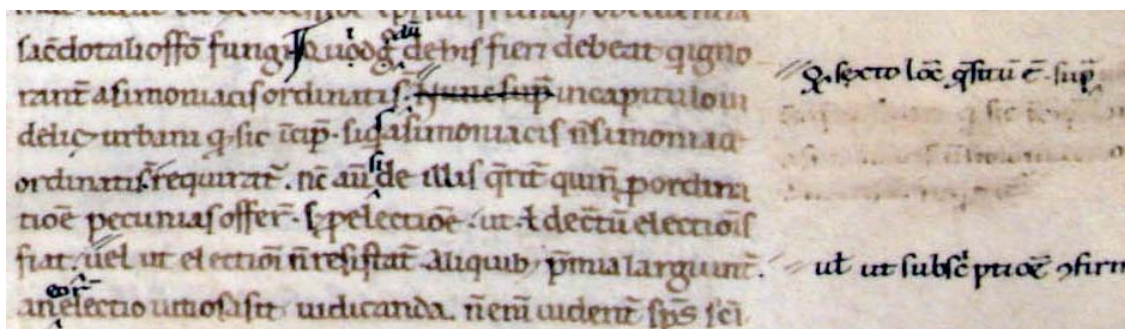


In the final example, Florence has a series of corrections to C.1 q.6 d.a.c.1 which seem to update the text from that found in St. Gall.¹⁴³ The dictum begins in St. Gall by reading: “Qui autem de his fieri debeat qui ignoranter a symoniacis ordinati sunt, quod quidem sexto loco questium est, supra in capitulo Urbani dictum est quod, quia forte ibi quantum ad negotium pertinebat integre poni non fuit necessarium, in presenti ad evidentiam in medium adducamus.” Following this St. Gall included C.1 q.1 c.108.

¹⁴² Larrainzar, “El borrador de la *Concordia* de Graciano,” 658.

¹⁴³ Vgl. *edF*, col. 424-425; *Fd*, fol. 25r.

Fd, fol. 25r

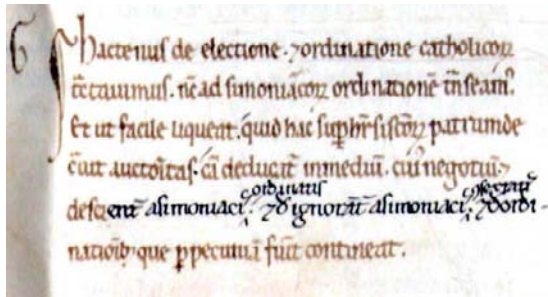


Marginal hands, such as Hand Gr¹, added Gratian 2 texts; therefore, the scribe copying St. Gall could not have had as an exemplar a Gratian 1 manuscript akin to Florence. Rather, Hand Gr¹ must have seen the text elsewhere and added it. To reconcile Winroth's analysis with what is found in Florence one must explain why Hand Gr¹, which added 198 texts, would have worked from an exemplar based on an abbreviation. Furthermore, Gratian stated at the beginning of Causa 1 that he would address this issue in q.6, where the canon in fact appears.¹⁴⁵ These three examples rather illustrate that as an early version of Gratian 1, Florence retained textual characteristics of an earlier version and thus required extensive corrections to bring it in line with more polished editions of Gratian 1. By seamlessly incorporating these corrections, Barcelona and Admont required only superficial modifications.

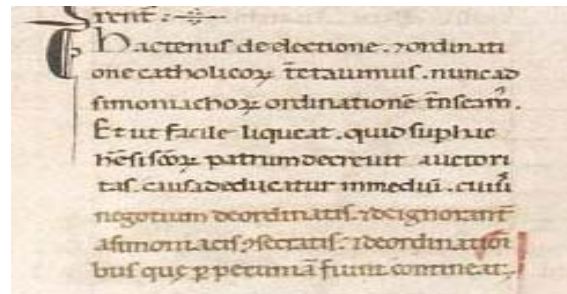
I would like to illustrate one final example, that of D.101 d.p.c.1. Florence and Barcelona each contain a different correction to the dictum in Gratian 1.

¹⁴⁵ Sg, p. 29a. Causa 1 d.init.: 'Sexto, an illi, qui ab eo iam symoniaci ignoranter sunt ordinati, abici debeant?'

Fd, fol. 19r



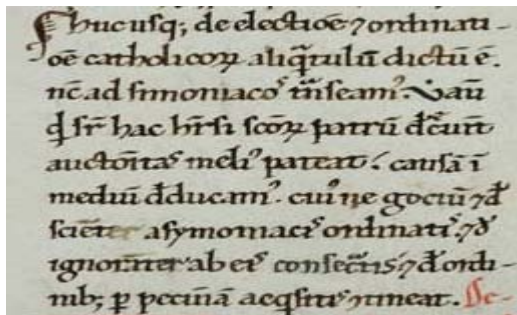
Bc, fol. 97v



The correction made by Hand Ga corresponded to the Paris, Admont, and the vulgate versions, which read: “negotium de scienter a symoniacis ordinatis et de ignoranter a symoniacis consecratis et de ordinationibus que per pecuniam fiunt continetur.”

Barcelona erased the original text and in light-brown ink corrected it though the correction does not match the other editions as it continued to omit “scienter a symoniacis.”¹⁴⁶ The corrected version in Florence begins as that in St. Gall, though St. Gall simplified “a symoniacis” by substituting “ab eis.”

Sg, fol. 28b



The example of D.101 d.p.c.1 shows that corrections to the Gratian 1 text were on-going, and, at times, corrections did not always coincide with the vulgate text.

¹⁴⁶ P, fol. 83v; Aa 23, fol. 92v; Vgl. *edF*, col. 356.

Gratian 1 seems to have been more varied than Winroth has acknowledged previously. It is understandable how he could have included D.100 d.a.c.1 and c.1 in Florence among the Gratian 1 texts since he was working with a black and white photocopy; however, he did not take into account their omission from both Paris and Barcelona. I have illustrated a handful of instances where the ‘Gratian 1 text’ appears differently in the manuscript tradition. Winroth should have noted these differences. His goal, however, was to prove the precedence of this first recension and anomalies such as these, though few, could have derailed his efforts. It is myopic to dismiss the variants and corrections as nothing more than scribal error. The Barcelona and Paris manuscripts were the products of professional scribes. It is highly irregular for different manuscripts to make significant corrections to the same canon. In the case of the Florence manuscript, one would expect the same scribe – be it Hand $G\tau^1$, Hand $G\alpha$, or Hand $G\tau^2$ – to make the vast majority of those corrections, but not all three working at three different points. The examples of different versions of a canon or alternative placements of text show that Gratian 1 was not yet in its finalized form when Fd, Aa, and Bc were copied. Each set of additions and corrections and each alternative placement of a canon reflect the use of a different exemplar with a different version of Gratian 1. These anomalies show that the Gratian 1 was the product of development, a product that continued to evolve through corrections even after it circulated.

This evolution continued with the addition of Gratian 2 material. Had scribes copied the additional canons after the completion of Gratian 2, as Winroth has asserted, they would have had little room to interpret their exemplar differently – resulting in

different textual traditions and the dislocation of some canons – because the text already would have incorporated all the canons. Four pieces of evidence will support and expand upon the conclusion of the first section: the second recension canons did not enter into the textual tradition of the manuscripts in a uniform fashion and thus the additional texts in the margins and in the Additiones of Gratian 1 manuscripts predate the circulation of a completed Gratian 2.

I will present the first piece of evidence to prove the theory posited above. The additional texts in the margins and in the Additiones of Gratian 1 manuscripts entered into the textual tradition in distinct phases, and thus, in a broad sense, it is possible to place the manuscripts on an evolutionary timeline by ordering the layers of additions. The phases of addition are as follows: Barcelona and the Additiones of Florence, then Admont (main text and Additiones), the marginal hands in Florence and in Barcelona, and finally the marginal hands of Admont.¹⁴⁷ The Paris manuscript does not factor into my analysis because it does not include any Gratian 2 texts.

The copying of Admont will anchor this discussion. Wedged snugly between the Gratian 1 and the Gratian 2 traditions, it serves as a reference point and as evidence for the development of Gratian's text. By its very nature Admont, with its main text and Additiones copied at the same time, does not fit neatly into either tradition because it incorporates some Gratian 2 text amid the Gratian 1 recension. I limit this discussion to only those canons copied in all relevant manuscripts.

¹⁴⁷ As discussed in the first section, Hand G τ^1 was the first and primary marginal hand. It postdated the Additiones as it added canons to the margins of the Additiones. Hand G α postdated Hand G τ^1 as the former made a correction to the latter. It is difficult to pinpoint exactly at what point Hand G τ^2 worked. The marginal hands in Admont are: Aa¹, Aa², Aa³, and Aa⁴.

Early additions to Barcelona and the Florence Additiones predate Admont, which either incorporated these canons or included them in the Additiones, and represent the first phase of additions. D.12 c.10, copied in the upper right margin of an original leaf, is one example of an early edition to the Barcelona manuscript. D.11 c.8-c.11 and D.12 d.a.c.1-c.4, which precede D.12 c.10, and D.12 c.13-c.14 and D.14 d.a.c.1-c.1, which follow D.12 c.10, appear on an inserted leaf. If a scribe had copied D.12 c.10 at the same time as the preceding and subsequent canons, it would appear on an inserted leaf rather than on an original leaf. As an early addition to Barcelona, it preceded the canons on the inserted leaves.¹⁴⁸ D.10 c.10 is another example of an early addition to Barcelona. Copied in the left margin of an original folio, the canons preceding it appear on an inserted leaf where there remained extra space. Had a scribe added D.10 c.10 at the same time as the canons preceding it, it would have appeared on the inserted leaf.¹⁴⁹

Likewise the Additiones of Florence were copied prior to the copying of Admont. In such instances, the Additiones of Florence did not contain the complete Gratian 2 version of the text though it was in Admont. The Additiones of Florence contained a truncated version of C.2 q.6 c.12, which included only one – “Unde omnium appellantium – noverit redditurum (ln. 5-11)” – of the two sections added to Gratian 2. The Additiones of Admont included the entire dictum as did Barcelona.¹⁵⁰ The Florence Additiones omitted a portion of the Gratian 2 text added to *De penitentia*. D.1 c.30.

¹⁴⁸ Bc, fol. 23 (inserted leaf), fol. 24r; Aa 23, fol. 201v-202r. The Additiones of Florence (Fd, fol. 105r) reflect the placement in Barcelona. D.11 c.8-D.12 c.2 are under placement marker G and D.12 c.4 is under placement marker H. D.12 c.10, however, is under placement marker G with D.12 c.13-c.14 are under placement marker I.

¹⁴⁹ Bc, fol. 33v; Fd, fol. 106v; Aa 23, fol. 204v.

¹⁵⁰ Fd, fol. 124v; Aa 23, fol. 256v; Bc, fol. 127r. Hand Gr¹ added later the remainder of the text – ‘Qui si scit – plenitudinem potestatis’ – to the left margin of Fd.

While it should include “Si cui etiam non contingat –facto deprehenderetur (ln. 1-4),” it added only “in ipso facto deprehenderetur (ln. 4)” and omitted “Si cui etiam non contingat – est quam si (ln. 1-4).” The Additiones of Admont included the complete canon.¹⁵¹ C.24 q.1 c.26 serves as a last example. The Additiones of Florence contained the entire canon. The Additiones of Admont followed suit by adding the Gratian 2 text “Que dignior domus – habitationis emeruit (ln. 1-11),” which was added again later in the margins of Florence.¹⁵² The incompleteness of some Gratian 2 canons in the Additiones of Florence places it originally to some point before the compilation of Admont, which would include the complete text. Some variant of Hand G later completed the text in Florence.

A canon could enter the tradition first in its Gratian 1 form in Florence, have a complete Gratian 2 version included in Admont, and finally have the additional Gratian 2 portion added later to the margins of Florence, or it could enter the tradition in its Gratian 2 form with Admont and be added later to the margins of Florence. In either instance the complete Gratian 2 text entered the tradition at the time that Admont was copied.

Admont was the first to incorporate the Gratian 2 addition to D.31 d.p.c.11 “Hinc ex illud – require infr. (ln. 1-2).” The text would appear later in the left margin of Florence and in the left margin of Barcelona.¹⁵³ In the chart below the underlined text illustrates the Gratian 2 additions to three Gratian 1 texts: C.15 q.1 c.6 “Illa cavenda sunt – nostra sunt,” C.15 q.1 d.p.c.11 “illud quod invenitur in penitenciali Theodori,” C.15 q.1 c.12, and C.15

¹⁵¹ Fd, fol. 160r; Aa 43, fol. 331v.

¹⁵² Fd, fol. 150v; Fd, fol. 71r; Aa 43, fol. 308v. Hand Gr¹ later would add ‘Que dignior domus – habitationis emeruit’ to Fd.

¹⁵³ Aa 23, fol. 37v; Fd fol. 1v; Bc, fol. 45v. Hand Gr¹ added the text to Fd and the second glossator added the text to Bc.

q.1 d.p.c.12 “Sed hoc forte – perduxit. Item obicitur.” The Additiones of Admont included the Gratian 2 additions, though they did not find their way into Florence until Hand G τ^2 added them to the margins.¹⁵⁴

Table 17: Gratian 2 additions to C.15 q.1 c.6, d.p.c.11, c.12, and d.p.c.12

C.15 q.1 c.6 Reus uoluntate, non necessitate constringitur	C.15 q.1 d.p.c.11	C.15 q.1 c.12 In se reuersus penitenciam agat qui insaniens aliquem occiderit	C.15 q.1 d.p.c.12
Item Ambrosius in Exameron, in tractatu primi diei. <u>Illa cavenda sunt, que ex nostra uoluntate prodeunt delicta iuuentutis et irrationabiles corporis passionibus. Quorum igitur nos sumus domini, eorum principia extrinsecus non requiramus, nec deriuemus in alios, sed agnoscamus ea, que proprie nostra sunt.</u> Quod possumus non facere, si volumus, huius electionem mali potius nobis debemus ascribere quam aliis. Ideo etiam in iudiciis istiusmodi voluntarios reos, non necessitate compulsos culpa constringit, pena.	Cum itaque qui inuitus hominem interfecerit minister Dei sit, cum innocentem furore perimens morti nequaquam obnoxius sit, cum subito dementes eorum, que faciunt, reatum minime gestent, patet hunc sacerdotem homicidii reum non esse, unde nec sacerdotio privari debet. Obicitur autem <u>illud, quod inuenitur in penitenciali Theodori</u>	<u>Si quis insaniens aliquem occiderit, si ad sanam mentem pervenerit, levior ei penitencia inponenda est.</u>	<u>Sed hoc forte de eo intelligitur, quem propria culpa ad furorem perduxit. Item obicitur: Sunt quedam, que, etsi non inputentur ad penam, tamen inpediunt sacramenti signaculum. Ambicio namque parentum filio non inputatur ad penam, cui tamen obest ad ecclesie munus accipiendum. Sic que mente alienata fiunt, etsi non inputentur ad penam, tamen sacri muneris executionem inpediunt.</u>

¹⁵⁴ Aa 43, fol. 280r-280v; Fd, fol. 49r-49v.

C.15 q.1 c.6	C.15 q.1 d.p.c.11	C.15 q.1 c.12	C.15 q.1 d.p.c.12
Reus uoluntate, non necessitate constringitur condempnat. Neque enim, si per furorem – malorum sorte numerauerit.			

A number of Gratian 2 additions to Gratian 1 texts appear to date from the copying of Admont as Admont includes the text and a later scribe added the supplementary text to the margins of Florence.¹⁵⁵ Likewise, a number of Gratian 2 canons date from the copying of Admont with the entire text copied in the margins of Florence.¹⁵⁶ For instance, D.82 c.3-c.4 appeared in the Additiones of Admont while they were in the margins of the Florence Additiones. In Barcelona they were found in the left and bottom margins.¹⁵⁷ The stage of Admont's copying saw a number of texts added to Causa 23

¹⁵⁵ Admont incorporated the complete version of C.14 q.2 d.p.c.1 (Aa 23, fol. 197v) while Hand Gr¹ (Fd, fol. 48r) added only the necessary section 'In conficiendis autem – testimonium dicant (ln. 5-8).' Admont incorporated the complete text of C.27 q.1 c.18 (Aa 43, fol. 112v) whereas Hand Gr¹ (Fd, fol. 78v) only added the relevant section 'Si custos religiosi – ubi omnino districte (ln. 1-20).' The Admont Additiones (Aa 43, fol. 320r) included the addition of 'si uero liberum acceperit – redigi poterit (ln. 4-7)' to C.29 q.2 d.p.c.6 though Hand Gr¹ added it in the right column (Fd, fol. 83r). Admont also incorporated the complete version of C.15 q.6 c.1 (Aa 43, fol. 17r) with Hand Ga (Fd, fol. 50r) only making the in-text correction of "Confessio enim in talibus non – fides non est (ln. 8-11)."

¹⁵⁶ D.92 c.6-c.8 were copied in the Additiones of Admont (Aa 23, fol. 239v) and on an additional leaf in Barcelona (Bc, fol. 91v). They found their way into the Additiones of Florence (Fd, fol. 117v) courtesy of Hand Gr¹. The Admont Additiones (Aa 23, fol. 268r-268v) included C.6 q.1 c.2 and c.3 while Hand Gr¹ added them to the left margins of the Florence Additiones (Fd, fol. 129v). C.27 q.1 c.40 was incorporated into Admont (Aa 43, fol. 113v) but not added to Florence (Fd, fol. 154r) until Hand Gr¹. Incorporated into Admont (Aa 23, fol. 83r), Hand Ga added D.88 c.6 to Florence (Fd, fol. 117r). Added to the Additiones of Admont (Aa 23, fol. 267v), Hand Gr² added C.4 q.6 c.3 in the left column (Fd, fol. 34v). Admont included a partial version of the addition to D.62 c.1. Rather than adding 'Nec a conprouincialibus – causa simoniacorum (ln. 2-8),' the Additiones of Admont (Aa 23, fol. 226r) read only 'Unde cum sepe – causa simoniacorum with nec a conprouincialibus – iudicio consecrati (2-3)' added later to the bottom margin of the main text (Aa 23, fol. 67v). Hand Gr¹ would add the entire addition to the bottom margin of the main text (Fd, fol. 11r), and Barcelona would include the canon on an inserted leaf (Bc, fol. 71v).

¹⁵⁷ Aa 23, fol. 236r; Fd, fol. 116r; Bc, fol. 86v. Added to Fd Additiones by Hand Gr¹.

and to Causa 24 with a marginal hand adding them later to Florence.¹⁵⁸ Whether Gratian 2 additions to Gratian 1 canons or complete Gratian 2 canons, Admont contains a number of vulgate recension texts that first appear during this period with Florence acquiring them later and adding them to the margins.

The origin of still other Gratian 2 texts arise after the completion of Admont. The left margin of Florence Additiones contained the addition of “Alba vero tantum – lectionis utatur (ln. 3-4)” to D.93 c.19 while it was in the left margin of Barcelona and in the left margin of Admont.¹⁵⁹ The top margin of Florence had the addition of “Nichil enim interest – constet absentia (ln. 7-10)” to C.3 q.9 c.10, while it appeared in the right margin of Admont and as a late addition to the right margin of Barcelona.¹⁶⁰ The right margin of Florence added “preterquam si apostolica – decreverit honorare (ln. 15-17)” to C.9 q.3 c.8; it entered later into the right margin of Admont and appeared as an interlinear addition in Barcelona.¹⁶¹ Both Florence and Barcelona included “contra fas sine – pietatis consideratione dispergit (ln. 22-23)” of C.12 q.2 c.21 as an interlinear addition. The text appeared later in the left margin of Admont.¹⁶² The Gratian 2 addition of

¹⁵⁸ C.23 q.3 c.9: Aa 43, fol. 298 entire canon; Fd, fol. 63r ‘quatinus ceteri talia – profecto nocebitur’; C.23 q.4 d.p.c.27: Aa 43, fol. 69r entire canon; Fd, fol. 147v ‘Hinc idem in omeliis’; C.23 q.7 c.4 ‘Quemadmodum membrum si – multitudinem peccatorum’ (both are missing ‘quantum ualemus inquirimus’): Aa 43, fol. 305v; Fd, fol. 149r; C.23 q.8 d.p.c.30: Aa 43, fol. 85v; Fd, fol. 149v; C.24 q.1 c.2: Aa 43, fol. 307v; Fd, fol. 150r; C.24 q.1 c.39: Aa 43, fol. 309r; Fd, fol. 151r; C.24 q.2 c.2 ‘Legatur ex quo est – esse mandatur’; Aa 43, fol. 309r-309v; Fd, fol. 72r includes the remainder of the inscription and ‘Legatur ex quo est’ as an interlinear addition with ‘religio Christiana – esse mandatur’ in the right margin; C.24 q.3 c.32: Aa 43, fol. 311r; Fd, fol. 151r; C.24 q.3 c.40: Aa 43, fol. 312r; Fd, fol. 151v.

¹⁵⁹ Fd, fol. 117v; Bc, fol. 92v; Aa 23, fol. 85v. Added to Fd by Hand Gr¹ and added to Aa by Hand Aa¹.

¹⁶⁰ Fd, fol. 33v; Aa 23, fol. 148r, Bc, fol. 141r. Added to Fd by Hand Gr¹, to Aa by Hand Aa², and to Bc by the second glossator.

¹⁶¹ Fd, fol. 38r; Aa 23, fol. 166r; Bc, fol. 158v. Added to Fd by Hand Gr¹ and to Aa by Hand Aa².

¹⁶² Fd, fol. 45r; Bc, fol. 173v; Aa 23, fol. 187v. Added to Aa by Hand Aa².

“Rachel quoque non in – tumultata legitur (ln. 23-24)” to C.13 q.2 d.p.c.3 appeared in the left margin of Florence, while it was copied later in the bottom margin of Admont.¹⁶³

It is possible to place the manuscripts on a general evolutionary timeline by ordering the layers of additions. Barcelona and the Additiones of Florence seem to have the earliest additions, followed by Admont (main text and Additiones), then the marginal hands in Florence and Barcelona, and finally the marginal hands of Admont.¹⁶⁴ If a canon appeared in the Additiones of Florence, it would appear in Admont. A canon seemed to enter the textual tradition at the stage of Admont if Admont included text and a marginal hand copied it to Florence. If a marginal hand added the text to Florence and one the marginal hands added it to Admont, the canon probably entered the tradition after the copying of Admont. Admont seems to fall in-between the copying of the Florence Additiones and the point at which the the marginal hands of Florence worked. The evolutionary timeline serves as the first piece of evidence that the canons did not enter into the textual tradition of the manuscripts in a uniform fashion and thus the additional texts in the margins and in the Additiones of Gratian 1 manuscripts predate the circulation of a completed Gratian 2.

Barcelona poses a particular problem. In many cases, it is too difficult to tell exactly at what phase the canon was added. I have noted early examples in Barcelona, i.e. those examples that seem to predate the Florence Additiones, only when some textual evidence presented itself to that effect. There are a number of instances when a canon

¹⁶³ Fd, fol. 47v; Aa 23, fol. 195r. Added to Fd by Hand Gr¹ and to Aa by Hand Aa¹.

¹⁶⁴ In Florence, Hand Gr¹ was the first and primary marginal hand. It postdated the Additiones as it added canons to the margins of the Additiones. Hand Gα postdated Hand Gr¹ as the former made a correction to the latter. It is difficult to pinpoint exactly at what point Hand Gr² worked. The marginal hands in Admont are: Aa¹, Aa², Aa³, and Aa⁴.

could be added to Barcelona at different points.

One then should not hold too fast to a rigid schema of how the text developed. Four variants demonstrate this point. In the first variant Barcelona added only the Gratian 2 portion of C.11 q.1 c.29 – “Te quidem oportet – negotii occasione perplexus (ln. 1-5)” – to the left margin. Admont and the Additiones of Florence included the entire canon.¹⁶⁵ The addition could come first with Barcelona and then the Additiones of Florence could have incorporated the entire canon followed by Admont. Another possibility is that the addition originated around the time of the Florence Additiones with Barcelona receiving it as a later addition. One could make a case for either scenario. The point of origin for the inserted leaves of Barcelona serves as the second variant. One could make a case that these leaves were added some time prior to the Additiones of Florence. Because we have evidence for the technique of inserting leaves only in the Barcelona manuscript and because this practice seems to have ended early, they may represent a first stage of grappling with the expansion of the *Decretum*. In most cases the text contained on the leaves appears in the Florence Additiones and thus in Admont. A small number of texts found on inserted leaves in Barcelona, however, appear to postdate Admont. These texts were either omitted from Admont or were copied in margins of Admont.¹⁶⁶ Three other texts found on an inserted leaf – D.23 d.p.c.20, c.21, and c.22 – were included in the Admont Additiones but were omitted from the Florence

¹⁶⁵ Bc, fol. 163r; Fd, fol. 134r; Aa 23, fol. 172r.

¹⁶⁶ Aa 23, fol. 15v: D.12 c.4 (bm); Aa 23, fol. 202v: D.17 d.p.c.6 ‘Illud de clericis – habere coligitur’ (lm); Aa 23, fol. 202v: D.17 c.17 (lm); Aa 23, fol. 202v: D.17 d.p.c.17 (lm); Aa 23, fol. 225r: D.61 c.3 ‘Emendatiorem esse conuenit – sacerdotii dignitatem’ (omit); Aa 23, fol. 67v, Aa 23, fol. 226r: D.62 c.1 ‘Nec a conprovincialibus – causa simoniacorum (Unde cum sepe – causa simoniacorum’ in Additiones; ‘nec a conprovincialibus – iudicio consecrati’ in bottom margin of main text).

Additiones.¹⁶⁷ Furthermore the palea D.6 c.2, which follows D.6 c.1, was included on an inserted leaf. One collection, Vat.lat. 3829, part II (63.217), included D.6 c.1 and c.2 as a combined canon. If the inserted leaves predated Florence Additiones and Admont, then both manuscripts should contain the canon. This, however, was not the case; both manuscripts omitted D.6 c.2 as a palea. In the third variant, Gratian 2 added the three following texts of the *Codex* and of Jerome and others to C.16 q.1 d.p.c.40: “§3 Nouarum etiam collationum – supra in tractatu ordinandorum (ln. 1-23),” “Hinc idem Ieronimus alibi – Gloria episcopi (ln. 35-39),” and “§3 Ceterum absque episcoporum – executio interdicitur (ln. 52-53).” In the right margin of Florence the text was added in three separate parts: “Hoc idem datur – tractatu ordinandorum (ln. 20-23);” “Hinc idem Ieronimus – Gloria episcopi (ln. 35-39);” “Ceterum absque episcoporum – executio interdicitur (ln. 52-53).” The problem arises because a marginal hand made only a reference [*Iuxta sanctionem quam*] in the left margin of Florence to the decree of Constantius in §3 and it left the dictum incomplete omitting “Novarum etiam collationum – perpetuae deporationis uratur (ln. 1-19).”¹⁶⁸ According to the chronological schema, the marginal additions to Florence follow Admont. If Admont includes the entire dictum, the margins of Florence should have the entire dictum, but this is not the case with C.16 q.1 d.p.c.40. The fourth and final variant comes with the addition of Gratian’s dictum “Sic et Bersabee permissa – in Neocesariensi Concilio legitur (ln. 13-19)” to C.31 q.1 d.p.c.7. Florence included the entire dictum in the Additiones, which suggests that Admont also should include the entire dictum. It, however, omitted the addition

¹⁶⁷ Bc, fol. 38v (lm); Aa 23, fol. 207v-208r; Fd, fol. 107v.

¹⁶⁸ Cod. 1.3.1, Cod. 1.2.5; Aa 43, fol. 282v; Fd, fol. 52r. Added to Fd by Hand Gr¹.

entirely.¹⁶⁹ It was not uncommon for the margins of Florence to add a text that Admont omitted, a point I will discuss more below, but it was unusual for the Additiones of Florence to include a text that Admont omitted. The four variants to the evolutionary timeline further illustrate the progressive incorporation of Gratian 2 material and illustrate problems with isolating points of origin for every canon.

Because the Gratian 2 canons did not enter into the textual tradition of the manuscripts in a uniform fashion due to the different phases in which they were copied, it should not be a surprise to find confusion in the placement of canons. Four examples exist – D.12 c.4, D.50 c.45, D.50 d.p.c.45, and D.60 c.1 – where canons included on an inserted leaf in Barcelona could appear in a peculiar place in the other manuscripts.¹⁷⁰

Placement confusion in Admont could result in the duplication of canons,¹⁷¹ though that

¹⁶⁹ Fd, fol. 155v; Aa 43, fol. 320v. Added to Fd by Hand Gr¹.

¹⁷⁰ Admont added D.12 c.4 to the bottom margin (Aa 23, fol. 15v) and the Additiones of Florence (Fd, fol. 105r) placed it under placement marker H when the canons before it – D.11 c.8 to D.12 c.2 – and the canon after it – D.12 c.10 – were under placement marker G. The canon appears on an inserted leaf in Barcelona (Bc, fol. 23r). D.50 c.45 and D.50 d.p.c.45, which are on an inserted leaf of Barcelona (Bc, fol. 63r-63v) appear in Florence of the Additiones on fol. 111v but the three canons before them and the four after them are on fol. 112r. In the Florence manuscript Hand E incorrectly placed D.60 c.1 (Fd, fol. 11r), which is on an inserted leaf in Barcelona (Bc, fol. 70), while Hand Gr¹ later recopied it in the correct place (Fd, fol. 10v).

¹⁷¹ The scribe incorporated D.86 d.p.c.24 and D.86 c.25 into the text between D.86 c.22 and d.p.c.22 (Aa 23, fol. 82r) though the Additiones has the correct placement (Aa 23, fol. 237r). The main text placed D.90 c.9 and D.90 c.10 between D.89 c.5 and D.90 d.a.c.1 (Aa 23, fol. 84r). The version in the main text was underlined for deletion because they were placed correctly in the Additiones (Aa 23, fol. 238v). C.16 q.7 c.41 and c.42 were added correctly in both the Additiones of Florence (Fd, fol. 142r) and of Admont (Aa 43, fol. 286v), but incorporated into the main text of Admont between q.7 c.34 and q.7 d.p.c.36 (Aa 43, fol. 37v). Barcelona included the text of C.2 q.6 d.p.c.31 added to Gratian 2 “Forma apostolorum hec est – his apostolis dimitto (ln. 1-4)” in the upper-left margin. The same text was incorporated into Admont but repeated twice in the Additiones, once in the correct place (Aa 23, fol. 257v-258r) and again by Hand Aa² after C.2 q.6 d.p.c.19 (Aa 23, fol. 256v). Florence also included this canon twice in the Additiones once in the correct place (fol. 125r) and again by a hand not seen before in the right margin with Causa 3 (fol. 128r). C.12 q.2 c.10, d.p.c.10, c.11, and d.p.c.11 were placed correctly in the margins of Barcelona (Bc, fol. 172v), the Additiones of Florence (Fd, fol. 137r), and the Additiones of Admont (Aa 23, fol. 289r). These canons were incorporated into the main text of Admont but between c.13 and c.14 and they appear to be crossed out (Aa 23, fol. 186r). Both the Additiones (Fd, fol. 142r; Aa 43, fol. 286v) correctly placed C.16 q.7 c.35 and c.36, though Admont incorporated them between q.7 c.10 and q.7 c.12 (Aa 43, fol. 36r).

was not always the case.¹⁷² Florence, like Admont, contains a number of misplaced canons resulting from the progressive addition of text to Gratian 2.¹⁷³ For example, the Additiones of Admont include C.22 q.4 c.19 as two separate entries, which reflect the canonical tradition. The first part of the canon “Si quis preventus fuerit – in pium iuramentum (ln. 1-3)” was attributed to Isidore of Seville and circulated as a canon. The second part of the canon, “§1 Tribus siquidem – habens virtutem (ln. 4-9),” attributed to Jerome also circulated as a canon. In the Additiones of Florence the first part of the canon (Si quis preventus) is found on fol. 146r; however, the second part of the canon (Tribus siquidem) was placed earlier between q.2 d.p.c.18 and q.2 c.19.¹⁷⁴ The most egregious misplacement of canons appears with C.24 q.1 c.21 – C.24 q.3 c.37, in which the Additiones of Florence misrepresented the order of the canons.¹⁷⁵ The main text, however, represented the correct order of the canons. Like the different versions of texts in circulation, the placement confusion of C.24 q.1 c.21 – C.24 q.3 c.37 is evidence of

¹⁷² Incorporated between C.5 q.2 c.2 and c.3 of Admont is d.p.c.3 (Aa 23, fol. 151r), which is a decree of Emperor Valerian. The scribe misplaced C.17 q.4 c.7 by incorporating the canon into the main text of Admont between c.20 and c.39 (Aa 43, fol. 39r), while Florence contained the correct placement (Fd, fol. 142v). C.21 q.2 d.p.c.4, which appears as a canon, and c.5 were misplaced in Admont by being incorporated between q.3 c.2 and c.3 (Aa 43, fol. 47v-48r), though Florence has the correct placement (Fd, fol. 144v). Peculiar placement occurred with C.30 q.1 d.p.c.7, c.8, c.9, and c.10. While correctly placed in the Additiones of Florence, the scribe incorporated these canons between c.4 and c.5 of Admont. The same occurred with C.30 q.3 c.3, d.p.c.3, c.4, c.5, and d.p.c.6. While correctly placed in the Additiones of Florence (Fd, fol. 155r-155v), the scribe incorporated d.p.c.3 and c.4 into the main text of Admont and combined them with c.2 (Aa 43, fol. 128r). Canon three was incorporated and included after c.2/d.p.c.3/c.4 and followed by d.p.c.6. C.30 q.3 c.5 followed c.7 in the main text (Aa 43, fol. 129v).

¹⁷³ C.17 q.2 c.3, while omitted by Admont, was misplaced in the Additiones of Florence, added between C.16 q.7 c.41 and C.16 q.7 c.42 (Fd, fol. 142r). C.32 q.1 d.p.c.4 and c.5, which Admont omitted, were found in the Additiones of Florence between q.1 c.7 and q.1 d.p.c.10 (Fd, fol. 156v.). C.25 q.2 c.14-c.16, which Admont omitted, was added to the right margin of the Additiones (Fd, fol. 152r) by Hand Gr¹ with the placement in the main text indicated between c.11 and c.12 (Fd, fol. 75r).

¹⁷⁴ Aa 43, fol. 297v; Fd, fol. 145v (marker H), fol. 146r (marker K).

¹⁷⁵ Fd, fol. 150v-151r. In the Additiones the order of placement markers appears as: C (q.1 c.21), D (q.1 c.24, c.26), E (q.1 c.27, c.28, c.29), L (q.3 c.10, c.11), M (q.3 c.13, c.14, c.15, c.16, c.17, c.18, c.19, c.20, c.21, c.23, c.24, c.25), F (q.1 c.32), G (q.1 c.37), H (q.1 c.39 added in top margin by Hand Gr¹), I (q.2 c.5; q.3 c.3, c.4), K (q.3 c.8, c.9), and N (q.3 c.30, c.31, c.32 that Hand Gr¹ added in right margin, c.33, c.34, c.35, c.36, c.37). The main text placed the letters in the correct order.

Gratian 2 canons not entering the textual tradition in a uniform fashion. As a result, the order was not stabilized completely because the canons did not circulate originally in a finished compendium.

C.22 q.5 c.1 through d.p.c.7, which recommend a period of penance for perjury, exemplify how placement confusion could occur with the addition of Gratian 2 texts. In St. Gall and in Gratian 1, c.1, attributed to Pope Pius, simply reads: “Qui compulsus a domino sciens periurat, utrique sunt periuri, et dominus, et miles: dominus, quia precepit; miles, quia plus dominum quam animam dilexit.”¹⁷⁶ With canons two and three omitted, the question continues with c.4, a letter of Pope Gelasius: “Si quis se periuraverit, et alios sciens in periurium duxerit, quadraginta dies peniteat in pane et aqua, et septem sequentes annos, et numquam sit sine penitencia. Et alii, si conscii fuerint, similiter peniteant.”¹⁷⁷ The text progressed logically. If one recognized that his lord had compelled him into taking an oath, both the lord and his vassal were guilty of perjury. The lord was guilty because he had ordered it and the vassal was guilty because he had valued his lord more than his soul. The one, in this case the lord, who perjured himself by knowingly leading others into perjury, should perform a penance of fasting on bread and water for forty days a year for the next seven years. If the other, in this case the vassal, was conscious of what the lord was doing, he should perform a similar penance. Canon five, from Augustine’s sermon on the beheading of John, continued by noting that if one challenged another to swear and he knew that the individual would perjure himself, he is worse than a murderer. Whereas a murderer killed the body, he kills both his own soul and that of the

¹⁷⁶ Sg, p. 156b.

¹⁷⁷ Ibid.

one whom he compelled to swear knowing that he would perjure himself.¹⁷⁸ With c.6 and c.7 omitted, d.p.c.7 moved the discussion to a third party who knew that someone was guilty of perjury but remained silent.¹⁷⁹

Scribes copying the text differed as to the placement of the addition to c.1 and the addition of c.2, c.3, and c.6. The Admont manuscript incorporated both the additional text of c.1 “Si liber est, quadraginta dies in pane et aqua peniteat, et septem sequentes annos; si seruus eiusdem, tres quadragesimas et legitimas ferias peniteat” as well as c.2 and c.3 seamlessly into the body of the work between c.5 and d.p.c.7 while incorporating c.6 between c.9 and c.11.¹⁸⁰ Florence, however, placed the text differently. Canons two and three, which were in reversed order, were placed between c.4 and c.5. Canons six and seven were placed between c.5 and d.p.c.7. Finally, a marginal hand later copied the additional text to c.1 in the right margin of the main text.¹⁸¹

With Gratian 2 material progressively entering into the textual tradition the placement may have resulted from disagreement or confusion about where the canons fit into the argument. The additional texts of c.1 and c.2 and c.3 deal with penance for perjury, and not with the subject of a lord compelling his vassal to swear and perjure himself. The text of c.1 ‘Si liber est – ferias peniteat’ prescribed a period of forty days a year on bread and water for the next seven years if the perjurer was a freeman and three Lenten seasons of penance as well as on legal holidays if he was a slave. By the twelfth

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Aa 43, fol. 57v-58v.

¹⁸¹ Fd, fol. 61r, fol. 146r. The letters corresponding to the Additiones of Florence indicate the placement of the Gratian 2 additions. Marker L, placed after c.4 and before c.5, indicated the addition of c.3 and c.2, which were in reversed order. Marker M, placed after c.5 and before d.p.c.7, indicated the addition of c.6 and c.7. Hand Gr¹ later copied the additional text to c.1 in the right margin of the right margin.

century a vassal would not have been a slave, thus topically the text did not fit neatly into the overall argument. Canon two stipulated penance for three years for he who perjured himself at the hand of a bishop and before a consecrated cross, one year if the cross was not consecrated. Canon three applied specifically to the coerced oath-taker. While some judges required three Lenten seasons of penance for those who valued their body more than their soul, others require three years of penance with one of those years on bread and water. Canon six argued that it made all the difference if the one requiring the oath knew that the other was going to swear falsely. If the oath-taker did not know, he was not at fault. However, if he was aware of the act, it was tantamount to murder. While the oath-taker destroyed himself by his perjury, the receiver both directed his hand and pressed it home. Some incorporated this canon after c.9, which stated that God was the witness to one's conscience thus making him doubly guilty when he took the name of God in vain and his neighbor in deceit. Others felt that the canon corresponded more closely to the discussion on compelling someone to take an oath even when it was known that the taker would perjure himself and therefore moved it to follow c.5, which argued that the receiver who compels the oath is guilty of killing two souls. In terms of the argument's logical coherence the latter placement found in Florence makes sense.

Because the Gratian 2 additions did not enter into the textual tradition in a uniform fashion, the different phases of adding canons could wreak havoc on their placement. As canons circulated in the textual tradition alternative placements likewise circulated. As Admont demonstrates, the incorporation of canons did not happen all at once and when it did there were variations in placement that time would work out. C.22

q.5 c.1 through d.p.c.7 exemplify how confusion could result from disagreements as to where the extra material best fit into the argument. Such confusion regarding canon placement would not have been a problem if the canons were added all at once after the circulation of the vulgate edition. Placement confusion, however, would have been a problem if additional text were added in phases prior to the circulation of a vulgate edition. The additional canons were not yet incorporated into the Gratian text, but appear, at this phase, to be separate and this incorporation was something which happened over a period of gestation. The question remains, however, whether or not it was Gratian who incorporated his canons.

Serving as the second piece of evidence for the argument that the additional Gratian 2 canons did not enter into the textual tradition of the manuscripts in a uniform fashion and thus predate the circulation of a completed vulgate edition are the instances in which the margins or the supplements contain a different version of the additional texts.

In some instances all three manuscripts contain a different version of a Gratian 2 canon. D.6 c.1 was added to Gratian 2. While Admont incorporated the entire vulgate version of the canon, the Florence Additiones omitted the portion of text “percipiendi vel missarum sollempnia – misterii ut arbitror (ln. 20-26).” A later hand added it in the left margin. The version of D.6 c.1 contained on an inserted leaf in Barcelona included additional text: “propter talem pollutionem a sacro mysterio ea die abstinere oportet.”¹⁸² Two collections, the *Collectio VII librorum* (Vienna ÖNB 2186, 3.78.1) and the *Polycarpus* (Version I, 3.16.19), include a version of D.6 c.1 with the addition. The

¹⁸² Aa 23, fol. 11v; Bc, fol. 19v; Fd, fol. 104v. Added to Fd by Hand Gr¹.

inscriptions and the incipits, however, do not correspond to the *Decretum*.¹⁸³ To C.11 q.1 c.41 Gratian 2 added the text “In qua sententia sibi – ille laudabit (ln. 22-38),” which appeared correctly in Florence. Barcelona, however, began the addition by including the preceding clause “In quia dignum non est (ln. 21)” and Admont began the addition even earlier in the canon with “§1 Ecclesiastica quoque testatur ystoria (ln. 14).”¹⁸⁴ D.92 c.3 contained the curious addition of “Nisi monachus cui abbas – quam multas” at the beginning of the canon. Though neither in the vulgate nor in the canonical tradition, Paris included the text in Gratian 1 while the Florence Additiones and Admont included it as an addition in the left margin.¹⁸⁵ D.10 c.1 serves as the final example. Gratian 2 added the text “§1. Ad quod ostendendum – divina prohibuit (ln. 6-21).” Each of the three manuscripts, however, contained different versions of this addition.

Table 18: Gratian 2 addition to D.10 c.1

Vgl. <i>edF</i> , col. 19	Bc, fol. 22r	Fd, fol. 104v	Aa 23, fol. 200r-200v
Ad quod ostendendum, duorum horum, Innocentii scilicet et Gregorii, satis sufficiunt testimonia. Sanctus quidem Innocentius in decretali epistola sua ad Alexandrum Antiochenum	Innocentii scilicet et Gregorii, satis sufficiunt testimonia. Sanctus quidem Innocentius in decretali epistola sua ad Alexandrum Antiochenum		<u>Imperiali iudicio non possunt iura ecclesiastica dissolvi.</u> Ad quod ostendendum, duorum horum, Innocentii scilicet et Gregorii, satis sufficiunt testimonia. Sanctus quidem Innocentius in

¹⁸³ D.6 c.1: (inscrip) ‘B. Gregorius Augustino Anglorum Episcopo,’ (incip) ‘Testamentum ueteris legis’; *Collectio VII librorum* (Vienna ÖNB 2186, 3.78.1): (inscrip) ‘Gregorius Augustino,’ (incip) ‘Et quidem hunc presbiterum testamentum ueteris’; *Polycarpus* (Version I, 3.16.19): (inscrip) ‘Gregorius respondit,’ (incip) ‘Et quidem hunc testamentum ueteris.’

¹⁸⁴ Fd, fol. 134r; Bc, fol. 164r; Aa 23, fol. 282r.

¹⁸⁵ P, fol. 76v; Fd, fol. 117v; Aa 23, fol. 84v. Winroth did not note the possibility of the additional text. See *The Making of Gratian’s Decretum*, 204.

Vgl. <i>edF</i> , col. 19	Bc, fol. 22r	Fd, fol. 104v	Aa 23, fol. 200r-200v
<p>episcopum ait: "Quod sciscitaris," inquiens, "utrum divisis imperiali iudicio provinciis, ut duae metropoles fiant, si duo metropolitani debeant nominari: non visum est nobis ad mobilitatem necessitatum mundanarum Dei ecclesiam conmutari, honoresque aut divisiones perpeti, quas pro suis faciendis causis duxerit imperator." Beatus Gregorius scribens ad Theotistam patriciam inter cetera: "Si", inquit, "religionis causa vincula matrimonii debere dissolui dicantur, sciendum est, quia etsi hoc lex humana concessit, lex tamen diuina prohibuit."</p>	<p>episcopum ait: "Quod sciscitaris," inquiens, "utrum divisis imperiali iudicio provinciis, ut duae metropoles fiant, si duo metropolitani debeant nominari: non visum est nobis ad mobilitatem necessitatum mundanarum Dei ecclesiam conmutari, honoresque aut divisiones perpeti, quas pro suis faciendis causis duxerit imperator." Beatus Gregorius scribens ad Theotistam patriciam inter cetera: "Si", inquit, "religionis causa vincula matrimonii debere dissolui dicantur, sciendum est, quia etsi hoc lex humana concessit, lex tamen diuina prohibuit." Ecce quemadmodum imperiali iudicio non possunt ecclesiastica iura dissolui. Ecce qualiter, quod lex humana concessit, lex divina prohibuit. Non quod</p>	<p>faciendis causis duxerit imperator." Beatus Gregorius scribens ad Theotistam patriciam inter cetera: "Si", inquit, "religionis causa vincula matrimonii debere dissolui dicantur, sciendum est, quia etsi hoc lex humana concessit, lex tamen diuina prohibuit." Ecce quemadmodum imperiali iudicio non possunt ecclesiastica iura dissolui. Ecce qualiter, quod lex humana concessit, lex divina prohibuit.</p>	<p>decretali epistola sua ad Alexandrum Antiochenum episcopum ait: "Quod sciscitaris," inquiens, "utrum divisis imperiali iudicio provinciis, ut duae metropoles fiant, si duo metropolitani debeant nominari: non visum est nobis ad mobilitatem necessitatum mundanarum Dei ecclesiam conmutari, honoresque aut divisiones perpeti, quas pro suis faciendis causis duxerit imperator." Beatus Gregorius scribens ad Theotistam patriciam inter cetera: "Si", inquit, "religionis causa vincula matrimonii debere dissolui dicantur, sciendum est, quia etsi hoc lex humana concessit, lex tamen diuina prohibuit." Ecce quemadmodum imperiali iudicio non possunt ecclesiastica iura dissolui. Ecce qualiter, quod lex</p>

Vgl. <i>edF</i> , col. 19	Bc, fol. 22r	Fd, fol. 104v	Aa 23, fol. 200r-200v
	imperatorum leges	Non quod imperatorum leges quibus sepe ecclesia utitur	humana concessit, lex divina prohibuit.

In the lower left and bottom margins of Barcelona was the text “Innocentii scilicet et Gregorii – Non quod imperatorum leges (ln. 7-22).” The Additiones of Florence included “faciendis causis dixit imperator Beatus Gregorius scribens – quibus sepe ecclesia utitur (ln. 14-22)” and omitted “Ad quod ostendendum – quas pro suis (ln. 6-14).” The Additiones of Admont included the preceding sentence “Imperiali iudicio non possunt iura ecclesiastica dissolui (ln. 5)” along with the Gratian 2 text.¹⁸⁶

In other instances the Gratian 2 text circulated in two different versions. While Barcelona included the Gratian 2 version of D.84 c.4, both Admont and Florence included at the end of the canon the added text “Contra Martinus Papa si lector viduam duxerit ut supra legitur. Sed illud ubi necessitas hoc ubi nulla necessitas urget” in the margins.¹⁸⁷ The Correctores noted the possibility of this addition as did Friedberg.¹⁸⁸ No collection contained the alternate explicit. The Correctores also noted alternative versions of D.86 c.24 and of D.89 d.p.c.2.¹⁸⁹ C.3 q.7 c.2, which was added to Gratian 2,

¹⁸⁶ Bc, fol. 22r; Fd, fol. 104v; Aa 23, fol. 200r-200v. Florence is missing the first quire and the text could have been added to the margins.

¹⁸⁷ Bc, fol. 87v; Fd, fol. 116r, Aa 23, fol. 80r. Added to Aa by Hand Aa¹; added to Fd by Hand Gr¹.

¹⁸⁸ Vgl. *edF*, col. 296, n.70. Friedberg noted the inclusion of the text in Manuscript D, Cod. lat. No. 4505 Bibliothecae Monacensis.

¹⁸⁹ Hand Aa⁴ added in the right margin the additional text to D.86 c.24 “ne his in malis discipulus fias quibus in bonis magister esse debes (Aa 23, fol. 82v).” This text was a shortened version of that noted by the *Editio romana*: “existe; te quoque sollicite custodi, ne, si eis in malo discipulus fueris, quibus in bono magister esse debuisti, nec simplicitati tuae ulterius, nec senectuti parcamus (Vgl. *edF*, col. 303, n. t).” The *Editio romana* also noted the additional text to D.89 d.p.c.2 (Vgl. *edF*, col. 311, n. e): “Hinc colligi potest archidiaconi electionem a cuncto clero si episcopus negligens uel differens fuerit canonice fieri posse.” Hand Aa1 added this in the left margin of Admont (Aa 23, fol. 83v).

is a composite of texts taken primarily from the the *Digest* “De postulando (3.1)” and the *Codex* “De postulando (2.6). In this canon the *Decretum* rarely quoted the text exactly, but rather summarizes the ideas. Whereas Barcelona and Admont contained the entire canon, the Florence Additiones included “In Digestis tit. de postulando – sunt dampnati” and a marginal hand added “vel qui operas – presentes. §7.Nurus (ln. 14-33).” The remainder of the canon, “et generi appellatione – uxorem duxit (ln. 33-86)”, was omitted.¹⁹⁰ As a final example, Admont included a curious addition to C.8 q.1 c.7. The canon is attributed to Pope Innocent II and stemmed from the Council of Rheims in 1139 over which he presided. A marginal hand erased the pen initial, rewriting it in lower case, and in the bottom margin added the text “Illud indubitatum est – Eas propter.”¹⁹¹ The *Collectio XIII librorum* (Vat.lat.1361, 4.47), also attributed to Innocent II, begins similarly with the incipit “Indubatum est.” More than either Barcelona or Florence, Admont contains a large number of Gratian 2 canons that circulated in a version other than that found in the vulgate edition.¹⁹²

¹⁹⁰ Bc, fol. 140r-140v; Aa 23, fol. 145r-146r; Fd, fol. 128r). Added to Fd by Hand E.

¹⁹¹ Aa 23, fol. 275v. Added to Aa by Hand Aa¹.

¹⁹² Gratian 2 added two sections of text to C.1 q.1 c.27: ‘Quicquid enim in Dei – ex rapina tribuitur (ln. 11-21)’ and ‘Nam aliud est propter – sufficere existimat accedat (ln. 23-29).’ The Additiones of Florence (Fd, fol. 119v) added the Gratian 2 version of the text, and Barcelona (Bc, fol. 101v) contained an erasure and the addition of ‘Quicquid enim in Dei – ergo male tollit (ln. 11-14)’ with ‘ut quasi bene – existimat accedat (ln. 14-29)’ continuing in the left margin. The *-t* of *tollit* was written over the *P-* of *Pastor*, which begins the rubric of c.28, further signaling that the original text was erased. Admont (Aa 23, fol. 95v-96r) has underlined for deletion ‘Nimis ergo declinandum – hereseos perpetrare (ln. 21-23)’ in the Gratian 1 version of the text. Hand Aa¹ added to bottom margin of Admont the text ‘Quicquid enim in Dei – hereseos perpetrare (ln. 11-23)’ and ‘Et post pauca §3 Quisquis – existimat accedat (ln. 25-29).’ Admont omitted ‘Nam aliud est – peccata committere (ln.23-25).’ The Additiones of Admont (Aa 23, fol. 261r) also included an addition to the Gratian 2 text C.2 q.7 c.52. The addition, which was underlined for deletion, reads: ‘Item ut semper aliqui ex clericis uel monachis in ministrio cubilis pontificalis obsequuntur.’ C.3 q.3 c.1 ends in Admont (Aa 23, fol. 142v) with the additional text: ‘Qui partem aduersariorum – sunt testes.’ The canon, which is a Pseudo-Isidorian text, circulated in the canonical collections with variations to the incipit though it did not circulate with the additional text. The lengthy addition of ‘Prescriptionum aliae sunt – non possunt’ is found at the end of C.10 q.3 c.10 in Admont (Aa 23, fol. 163r-170r), though neither included in the vulgate nor in the canonical tradition. Admont contained two versions of the addition to

A number of Gratian 2 canons in the manuscript tradition appear in a variant form whether including extra text or omitting text. In some instances, three different versions of the Gratian 2 text circulated with Florence, Barcelona, and Admont each containing a variant. In other instances, two different versions of the Gratian 2 text circulated. It is clear that Gratian 2 canons neither entered into the textual tradition in a uniform fashion nor circulated in a finished compendium. If the variations were not recopied, they eventually fell out of circulation because they were not considered a part of the vulgate tradition.

Serving as the third piece of evidence for the theory that the Gratian 2 canons did not enter into the textual tradition of the manuscripts in a uniform fashion and thus must predate the circulation of a completed Gratian 2 are the additional canons in each manuscript that are unique to that particular manuscript and not incorporated into the vulgate.

C.12 q.3 c.3. The Additiones of Admont (Aa 23, fol. 292r) included the addition 'iustum est ut sicut – retinere non poterit (ln. 7-12),' which began earlier in the canon and was underlined for deletion. Hand Aa¹ and Hand Gr¹ copied the correct version of the text in the margins of Admont and Florence (Aa 23, fol. 192r; Fd, fol. 46v): '§1 Sane quicquid per – non poterit (ln. 9.12).' Admont also contained two versions, neither of which are correct, of the addition to C.14 q.5 d.p.c.14 (Aa 23, fol. 199r; Aa 23, fol. 296v). Hand Gr¹ correctly added in the margins of Florence (Fd, fol. 48v) the Gratian 2 addition 'De peccato etiam – iuste erogantur (ln. 9-10).' Admont, however, incorporates the extra text 'Nota quia aliud est – procipiendum est' while the Additiones includes 'Quaedam uero de malo sic acquiruntur – iuste erogantur (ln. 8-10),' which begins with the preceding sentence. Gratian 2 adds to C.16 q.7 c.31 the text: 'Quod si talia episcopus – non differant (ln. 6-8) + non rapinam et fraudem – sententiam sustinebit (ln. 10-17).' Admont (Aa 43, fol. 286r-286v), however, only adds '§1. Ipsi tamen hereditibus – sententiam sustinebit (ln. 9-17)' and omits 'Quod si talia – non differant (ln. 6-8).' Hand Gr¹ included the correct Gratian 2 addition in the margins of Florence (Fd, fol. 55r). The Gratian 2 addition to C.21 q.1 c.1 is 'et his qui mecum sunt (ln. 13) + Et hec quidem – hominum indulgeatur (ln. 14-16).' Hand Gr¹ added 'Et hec quidem – hominum indulgeatur (ln. 14-16)' in the margins of Florence (Fd, fol. 58r) though it omits 'et his qui mecum sunt (ln. 13).' Hand Aa² added "et his qui mecum sunt (ln. 13)" to the margins of Admont (Aa 43, fol. 47r) though it omits 'Et hec quidem – hominum indulgeatur (ln. 14-16).' Each manuscript omitted the exact opposite text. Gratian 2 added C.35 q.8 d.p.c.2. Admont (Aa 43, fol. 339v) includes a variant reading that begins with 'Sane quibus – melioris libertatem (ln. 13)' of c.2 and continues with the dictum 'nisi in eodem – perseuerauerint.'

Barcelona incorporates four unique texts not found in the vulgate edition. The first is a dictum that followed D.50 c.60 in the lower left margin: “Solempnis penitentia nulli clerico manenti in ordine clericali imponeri debet.” This same text appears as a gloss in the left margin of Admont next to D.50 c.66.¹⁹³ C.2 q.6 contains the addition of a canon and a dictum in a hand that only worked in these two instances. The first addition, found in the top margin, is a letter attributed to Jerome and addressed to Damascus: “Quotiens iudicii – est.”¹⁹⁴ The second addition, a dictum in the left margin, is ascribed to a Council of Carthage: “Lata a iudice – esse non potest.”¹⁹⁵ A search of known canonical collections yielded no results for either entry. The final addition is in the right margin following C.2 q.7 c.52. The canon cites Pope Gregory “Sanctientes sanctimus et mandando – monachis uti.”¹⁹⁶ This text could not be found in earlier collections.

Florence contains four unique canons not found in Gratian 2.¹⁹⁷ The first addition, found in the left margin of the Additiones with no attribution, precedes D.92 c.6: “Sepe relatum est ad sedem – non inferant.”¹⁹⁸ Earlier collections do not contain the addition. Copied in the right margin of the Additiones and in the middle of C.1 q.4

¹⁹³ Bc, fol. 64v; Aa 23, fol. 60v.

¹⁹⁴ Bc, fol. 128r.

¹⁹⁵ Bc, fol. 129v.

¹⁹⁶ Bc, fol. 135r.

¹⁹⁷ There are two additional texts (Fd, fol. 8r) that are much later additions. Both letters are attributed to Pope Adrian IV (1154-1159). The first letter begins a benediction and the incipit ‘Quoniam’ and is addressed to to Amadeus (Amadeus), the bishop of Vigiliensis from approximately 1153 to 7 July 1182. It is modern day Bisceglie and is located north of Bari. The second letter, also beginning with a benediction, has the incipit ‘Litteras quis’ and simply states the senders name as Bishop Adrian but the recipient is the same, Bishop A. They are in the right margin and copied around an earlier addition to D.50 c.35 made by Hand Gα. Though these additions postdate Gratian, it is good evidence for localizing Fd to southern Italy. Larrainzar mentions the inclusion of the two letters. See “El Decreto de Graciano del Codice Fd,” 433, n.20.

¹⁹⁸ Fd, fol. 117v.

d.p.c.9/c.6 between “quarta generatio evenerit (ln. 10)” and “Digestis tit. De penis [c.VI] (ln. 10)” is the second addition, a letter from Pope Leo IV to Eliuuirinus and Adelfredus “Quia praesulatus nostri – fiat remissio.” Admont reversed the order of the text placing the legislation from the *Digest* first.¹⁹⁹ The third addition, “Illum staniendum cesuimus,” is in the Additiones between C.25 q.1 c.15 and c.16. It is another canon attributed to Pope Gelasius but in fact was a canon from the Council of Orleans. The *Collectio Sancte Marie Novelle* (51.03) includes the canon with the incipit “Illud censuimus statuendum.” This text would become the palea C.16 q.6 c.7.²⁰⁰ As the fourth addition, “Ex concilio Ylerdensi. Non oportet a septuagesima – factum fuerit separentur” was copied in the upper right margin as a part of C.30 q.5.²⁰¹

Admont contains more unique texts than either Barcelona or Florence. Between D.32 c.15 and c.16 is a dictum “Contra sancta nicena synodus. Sed hoc post mortem prime coniugius vel hoc prius quid post consequenter [pasnutius] dissuasit.”²⁰² As Winroth noted, Admont also incorporated a string of canons between C.1 q.7 c.24 and C.2 q.2 d.p.c.2. These canons, beginning *Firmissime tene*, derive from Fulgentius of Ruspe and are ascribed oftentimes to Augustine. Ivo’s *Decretum* (1.5-1.43) contains all of these canons.²⁰³ A note at the end of C.24 q.3 c.39 states: “Capitula que sic incipiunt

¹⁹⁹ Dig. 48.19.26; Fd, fol. 122r; Bc, fol. 114v; Aa 23, fol. 250v-251r. The *Tripartita* of Ivo of Chartres (1.61.19), *Collectio X partium* (Cologne HA 199, 6.6.1) *Collectio Britannica* (10.39), and *Paris Bibl. de l’Arsenal* 713 include the canon.

²⁰⁰ Fd, fol. 152r. I would like to thank Prof. Pennington for bringing the changes in the incipit and their inclusion in earlier collections to my attention.

²⁰¹ Fd, fol. 84r. Added to Fd by Hand Gr¹. The collections that include this canon are: *Collection of canonry of St-Hilaire-le-Grand* (6.93), *Collectio Ambrosiana II* (103), *Collectio XIII librorum* (Berlin Savigny 3, 12.95), *Collectio Tarraconensis* (Version II, 1.242), *Collectio II librorum/VIII partium* (end, 7.4)

²⁰² Aa 23, fol. 39v.

²⁰³ Aa 23, fol. 116v-122r; Winroth, *The Making of Gratian’s Decretum*, 133-134.

‘Firmissime tene’ require post primam causam et huic vicesime quartae causae in fine adiunge.”²⁰⁴ It informs the reader that the canons at the end of Causa 1 should be moved to the end of Causa 24.²⁰⁵ Incorporated between C.2 q.8 and before Causa 3 is the canon “Sciunt eunch accusatores – clarioribus expedita.”²⁰⁶ A search of earlier collections revealed an attribution to Emperors Valentinian, Gratianus, and Theodosius to Prefect Pretorius Florus in *Mantua* BM 439 (D.III.13, 33) with the incipit reading “Sciunt cuncti accusatores” rather than “Sciunt eunch accursatores.” Following C.10 q.3 c.10, which is a letter from Pope Pelagius to Cresconius, is the additional text “Praescriptionum aliae sunt – non possunt.” This text is not found in earlier collections.²⁰⁷ Following this addition and preceding Causa 11 is another additional canon, which is a composite of three texts deriving from Roman law. The first two texts “Iubemus qui rem aliquam” and “Decime deos mandante” are attributed to Emperor Anastasius. The third text “Universas terras que” is attributed to Emperors Valentinus and Theodosius.²⁰⁸ Only the third text – “Universas terras” is found in the canonical tradition with the correct attribution, the *Polycarpus* (Version II, 3.13.60). The *Collectio Tarraconensis* (Version II, 1.54) and München Clm 12612 (2.58) contain the text but with no attributions. Causa 35 sees two additional dicta added to the Additiones. The first follows C.35 qq.2-3 c.11 and reads: “Incestuosos vero nullo – ordinarie non sic.”²⁰⁹ The second follows C.35 q.9 c.5 and reads: “Quod tamen observandum est – retractare noluerint.”²¹⁰ The final

²⁰⁴ Aa 43, fol. 99r.

²⁰⁵ Winroth, *The Making of Gratian’s Decretum*, 133-134.

²⁰⁶ Aa 23, fol. 140v.

²⁰⁷ Aa 23, fol. 169r-170r.

²⁰⁸ Aa 23, fol. 170r.

²⁰⁹ Aa 43, fol. 339r.

²¹⁰ Aa 43, fol. 340v.

addition is incorporated into the main text with no attribution after C.36 q.2 d.p.c.11 and reads: “Rapuisti uxorem tibi – permaneat.”²¹¹ A search of earlier collections did not yield a source for any of these additions.

Additional canons in each manuscript that are unique to that particular manuscript and not incorporated into the vulgate edition illustrate that the Gratian 2 canons did not circulate in a finished compendium. Nor did these unique texts enter as late additions that postdated the copying of the additional Gratian 2 canons; rather, they circulated alongside the second recension canons. Like the second recension texts added to the *Decretum*, the material stems from papal letters, church councils, writings of the fathers – though misattributed in the case of *Firmissime tene* – and Roman law. These texts added supplementary support to the argument in question. Also like the other second recension texts added to the *Decretum*, these additional canons entered into the textual tradition as a part of the various phases of addition. Sometimes they were added to the margins by various hands, other times they were incorporated into the Additiones. Admont incorporated some of these texts into the main Gratian 1 text. Because these unique texts did not enter the vulgate tradition, they introduce the possibility that Gratian may not have compiled all the texts in the *Decretum*.

Serving as the fourth piece of evidence for the theory that the Gratian 2 canons did not enter into the textual tradition of the manuscripts in a uniform fashion and thus must predate the circulation of a completed vulgate edition are the omitted Gratian 2 canons. The margins and supplements do not contain all of the text found in the second

²¹¹ Aa 43, fol. 198r.

recension.²¹² Neither Barcelona, nor Florence, nor Admont contain D.23 c.23 (though the first quire of Florence is missing), the corrections to C.3 q.1 d.p.c.2, or the addition of C.4 qq.2-3 d.p.c.3. Florence and Admont omit: C.14 q.1 c.3, C.17 q.2 d.p.c.2, C.25 q.2 d.p.c.16 which is Roman law, C.27 q.2 c.46 “etiam si eis – vis illata constiterit,” C.30 q.5 c.3 “Item §1 Hec sunt preter – non dicimus,” and *De penitentia* D.4 c.24. If the Gratian 2 texts were copied in the margins and supplements of Gratian 1 texts after the circulation of a completed vulgate edition, than the Gratian 1 manuscripts would have included them along with the other second recension texts.

When proving the precedence of a first recension, Winroth took note of the similar readings and textual consistency between the four Gratian 1 manuscripts. Throughout my argument, I have relied on this basic methodology. Aside from a passing mention, I have focused on canons that have entered the textual traditional of all relevant manuscripts. In other words, Barcelona, Florence, and Admont, or, beginning with Causa 13, Florence and Admont have included the text in question. Because each of the manuscripts included the canon, regardless of when it entered that particular tradition, we can presume, as Winroth did for the first recension, that Gratian was responsible for them.

Gratian originally did not publish the additional second recension material as a finished compendium, but rather continued to polish his work with texts entering the tradition at different points and in different forms. Even though Admont contains more additional canons, it omits overall more second recension texts than the other Gratian 1

²¹² See Appendix 4.

manuscripts.²¹³ In total Admont omits ninety-three Gratian 2 texts from the margins and Additiones while Florence omits sixty-one Gratian 2 texts. In terms of the *Distinctiones* the three manuscripts omit a comparable number of texts: nine in Admont, fourteen in Florence, and six in Barcelona. Semi-stable through Causa 12, at which point Barcelona ends, the three manuscripts continue to omit a comparable number of Gratian 2 texts: thirty-three in Admont, thirty-two in Florence, and thirty in Barcelona. In the *De penitentia*, Florence actually omits more Gratian 2 texts than Admont, fourteen and six respectively. The difference, however, lies with the section of the *Decretum*, not including the *De penitentia*, between Causa 13 and Causa 36. Admont omits an astounding fifty-four Gratian 2 texts, particularly in Causa 23, Causa 25, and Causa 35, as compared to Florence's fifteen. The number of omitted Gratian 2 texts in Admont, particularly in Admont 43, illustrates irregularities between the manuscripts.

The question now can turn to a re-examination of Winroth's two 'Gratian' theory based upon an analysis of those canons, or versions of canons, that should appear in Gratian 2 but do not appear in all relevant manuscripts.²¹⁴ If we can presume that Gratian was responsible for adding those canons that entered the textual tradition of Barcelona, Florence, and Admont, then we should question whether Gratian was responsible for those canons that entered one tradition but not another even though the Gratian 2 manuscripts included them among the vulgate tradition. Raising the possibility are the handful of texts that Friedberg included in the vulgate though they do not appear in any

²¹³ See Appendix 4.

²¹⁴ See Appendix 4.

of the relevant manuscripts. Amid the 158 canons in question,²¹⁵ an addition was not made to one of the manuscripts in two instances.²¹⁶ Twenty-three canons omit a snippet of text and in a few instances more than one manuscript omits the same snippet. Gratian may not have added the remaining 133 texts added to the vulgate.

With the unique text included in each manuscript introducing the idea that Gratian did not have a hand in adding every text, we can question the authenticity of some texts included in the Gratian 2 tradition. The most obvious texts in question are those omitted from all the relevant manuscripts. These nine texts are: the corrections to C.3 q.1 d.p.c.2, the addition of C.4 qq.2-3 d.p.c.3, C.14 q.1 c.3, C.17 q.2 d.p.c.2, C.25 q.2 d.p.c.16 which is Roman law, C.27 q.2 c.46 “etiam si eis – uis illata constiterit,” C.29 q.1 d.a.c.1 et aliam ducere, C.30 q.5 c.3 “Item §1 Hec sunt preter – non dicimus,” and *De penitentia* D.4 c.24. The second group of questionable Gratian additions are those canons or additions to canons that appear in some relevant manuscripts though not all. Due to the number of canons, 124 in all, I will not list them here but rather refer the reader to Appendix Four.

Twenty-three canons omit a segment of text. Because Friedberg compiled the vulgate text from eight twelfth-century German manuscripts, it will contain texts that are in fact not part of the tradition and thus not the work of Gratian. With this in mind later jurists may have been responsible for the changes to four canons. D.93 c.14 saw the addition of the text “Pervenit ad sanctum – Hec ergo omnia amputentur” to Gratian 2.

²¹⁵ Beginning from D.28 c.13 due to the missing first folio in Florence.

²¹⁶ As Winroth noted C.11 q.1 c.33 and d.p.c.34 comprise one canon that begins with c.33, switches to d.p.c.34, and then finishes with c.33. All the text is present. See *The Making of Gratian's Decretum*, 211. Admont (Aa 23, fol. 281v) does not make the necessary correction. The Florence manuscript did not note the correction to the hypthotecial of Causa 19. Hand Aa² added ‘unus relicta propria ecclesia eo inuito alter dimissa regulari canonica cenobio se contulit’ to the lower left margin of Admont (Aa 43, fol. 42v).

While Florence included the text, Barcelona omitted it and Admont only omitted “Hec ergo omnia amputentur.”²¹⁷ I have already mentioned above C.16 q.1 d.p.c.40, which contains texts of the *Codex* and of Jerome and others. Gratian 2 added the text “§3 Novarum etiam collationum – supra in tractatu ordinandorum + Hinc idem Ieronimus alibi – Gloria episcopo + §3 Ceterum absque episcoporum – executio interdicatur.” While Admont incorporated the entire dictum, Florence made only a reference [*Iuxta sanctionem quam*] to the decree of Constantius in §3 and leaving the dictum incomplete by omitting “Novarum etiam collationum – perpetuae deporationis uratur.”²¹⁸ In C.16 q.3 d.p.c.16 Gratian 2 added the text “Licet predia sive sint – suum locum habentibus.” While Florence included the complete text in the Additiones, Admont omitted “IX pars De prescriptionibus – locum habentibus” stemming from an *authentica* to the *Codex*.²¹⁹ Finally, as discussed above, Florence omitted “et his qui mecum sunt” (Vgl. ln.13) and Admont omitted “Et hec quidem – hominum induleatur,” which are the last two sentences, from C.21 q.1 c.1. Each text is missing the exact opposite text. In other words, a marginal hand included “Et hec quidem – hominum induleatur” in the bottom margin of Florence, while Admont added “et his qui mecum sunt” in the right margin.²²⁰ The *Decretum* was not stabilized until the thirteenth century in the sense that jurists continued to add canons to the text. Scholars, such as Titus Lenherr and Rudolf Weigand, have worked to expand our understanding of paleae.²²¹

²¹⁷ Fd, fol. 117v; Bc, fol. 92v; Aa 23, fol. 240r.

²¹⁸ Aa 43, fol. 282v; Fd, fol. 52r.

²¹⁹ *authentica* to the Cod. 1.2.23 [=Nov. 131.6]; Fd, fol. 141r; Aa 43, fol. 285r; Vgl. *edF*, col. 796.

²²⁰ Fd, fol. 58r; Aa 43, fol. 47r. Added to Fd by Hand Gr¹ and added to Aa by Hand Aa².

²²¹ Titus Lenherr, “Fehlende ‘Paleae’,” 495-507; Rudolf Weigand, “Versuch einer neuen, differenzierten Liste der Paleae und Dubletten im *Dekret* Gratians,” *Bulletin of Medieval Canon Law* 23 (1999): 114-128.

Nineteen of the twenty-three canons omitted a few words. Two cases present themselves where the relevant manuscripts, Florence and Admont, omit the exact same snippet of text. In the first instance, both texts omit the final three words – “quantum valemus inquirimus” – of C.23 q.7 c.4.²²² In the second instance is the omission of the last half of the last sentence “et ideo apud Grecos – scriptum est” from *De penitentia* D.1 c.19.²²³ Both the manuscripts omit the same text which appears at the end of the dictum or canon. Seventeen examples present themselves where a snippet of text does not appear in one of the manuscripts.²²⁴

No doubt the *Decretum* is a monumental work and Gratian cannot be expected to have completed it all at once or to have added every single canon. While he added the vast majority of the texts, others contributed 133 texts and snippets to four texts. These were early editions hence why Friedberg believed them to be a part of the original text and not paleae. Contrary to Winroth’s assertion, the two ‘Gratian’ theory does not apply to the whole of the second recension. As the absence of canons from Admont 43 suggest, Gratian either may not have had the opportunity to complete his additions to the latter

²²² Fd, fol. 149r; Aa 43, fol. 305v.

²²³ Fd, fol. 160r; Aa 43, fol. 331r.

²²⁴ D.62 d.a.c.1: Bc omits ‘elegendi. Nunc uidendum est a quibus sunt’; D.88 d.a.c.1 : Aa omits ‘non pietatis curam uiduis et orphanis inpendere’; C.1 q.1 c.28: Fd omits ‘Vulneratuo namque – fructum de se pro[ducturus]’; C.1 q.1 c.51: Aa omits ‘cum antea baptizanti – confirmandi sunt’; C.1 q.1 d.p.c.122: Aa omits ‘Non itaque quorumlibet – suplicans extorque’; C.1 q.1 d.p.c.123: Aa omits ‘Ut enim ait – nec redimendi’; C.1 q.4 d.p.c.12: Fd omits ‘§3. non ita si delictum’; C.2 q.1 c.7: Aa omits ‘Qui igitur Stephanus episcopus in odio suo quaedam ficta et’; C.3 q.6 c.10: Bc omits ‘inuicem et in omnes’; C.3 q.7 c.2: Fd omits ‘et generi appellatione – uxorem duxit’; C.3 q.7 d.p.c.2: Aa omits ‘Idem testatur Felix Papa et eisdem uerbis’ though the text is found with d.p.c.1 and underlined as if for deletion; C.8 q.1 d.p.c.19: Fd leaves the beginning of the dictum incomplete; C.12 q.2 c.33: Aa omits ‘et communione priuetur – sententia teneantur’; C.16 q.5 c.1: Fd omits ‘anathema sit. Et responderunt omnes: Anathema si’; C.21 q.2 c.4: Aa omits ‘sicut Papa Calixtus testatur’; C.26 q.6 c.13: Aa omits ‘quasi non possit ad se – et liberari’; *De penitentia* D.1 c.30: Fd omits ‘Si cui etiam non contingat – est quam si.’

causae or he may have been satisfied with the arguments as they stood.²²⁵

The steady inclusion of Roman law into second recension best serves as a case study to illustrate the arguments outlined above. Its inclusion into the textual tradition follows the same pattern as the other Gratian 2 canons. The Gratian 2 Roman law texts did not enter the textual tradition in a uniform fashion, but rather entered the tradition at different times and in different forms. Gratian remained, however, responsible for the vast majority of the canons. The addition of Roman law, like the conciliar and papal decrees, and the writings of the church fathers, was a progressive process. My analysis has confirmed the conclusions of Kenneth Pennington, whose examination of Causa 3 q.7, Causa 15 q.3, Causa 29 q.1, and the marginal additions of Roman law in Sankt Gallen 673 has led him to conclude that Gratian's use of Roman law grew in step with his teaching in Bologna.²²⁶ Gratian included Roman law material from the entire *Corpus iuris civilis*: the *Digest*, the *Codex*, *authenticae* added to the margins of the *Codex*, and the *Novella* (*Authenticum*).²²⁷ Again using the copying of Admont as an anchor, some canons entered the manuscript tradition around the time of either Barcelona and the Florence Additiones while other canons appeared with the copying of Admont. Still other canons illustrate the variations to the evolutionary timeline. Because Gratian 2 Roman law texts entered the textual tradition in phases, like the other Gratian 2 texts, placement dislocation could occur. A number of Roman law texts appeared in different

²²⁵ I find it difficult to believe that Admont simply did not receive the supplements to the latter causae. Had they been available, one of the four marginal hands would have added them.

²²⁶ Pennington, "The 'Big Bang'," 48-52.

²²⁷ I based my analysis on the canons analyzed by Adam Vetulani and Stephan Kuttner, though I did supplement it with others Roman texts. See Vetulani, "Gratien et le droit romain," *Revue historique de droit français et étranger* 24/25 (1946/1947): 16-28, 34-36. See Kuttner, "New Studies on the Roman Law in Gratian," *Seminar* 11 (1953): 12-50; reprinted in *Gratian and the Schools of Law, 1140-1234*, no. iv (London: Variorum Reprints, 1983), 19, 28-50.

versions again demonstrating that the Gratian 2 texts were not copied after a completed vulgate edition circulated. Finally, there are those canons which Gratian may not have added because they did not appear in all relevant manuscripts.

Some Gratian 2 Roman law texts entered the manuscript tradition prior to the stage of Admont. A large number of these texts entered smoothly appearing in the Additiones of Florence, and also in the Additiones of Admont or incorporated into the main text.²²⁸ Other Gratian 2 Roman law texts, while entering prior to the stage of

²²⁸ C.1 q.1 c.126 (Bc, fol. 111r; Fd, fol. 121v; Aa 23, fol. 106r): Cod. 9.27.4; C.1 q.1 c.127 (Bc, fol. 111r; Fd, fol. 121v; Aa 23, fol. 106r): Dig. 3.6.1.pr.; C.1 q.1 c.128 (Bc, fol. 111r; Fd, fol. 121v; Aa 23, fol. 106r): Dig. 47.13.2; C.1 q.1 c.129 (Bc, fol. 111v; Fd, fol. 121v; Aa 23, fol. 106r): Dig. 48.11.3; C.1 q.7 c.26 (Bc, fol. 119v; Fd, fol. 122v; Aa 23, fol. 252v): Cod. 9.27.6, Cod. 9.27.6.1; C.2 q.1 c.14 (Bc, fol. 122r; Fd, fol. 123r; Aa 23, fol. 123r): Dig. 48.2.8, Dig. 48.2.9, Dig. 48.2.10, Dig. 48.2.11.pr., Dig. 48.2.11.1, Dig. 48.2.11.2, Dig. 48.2.13; C.2 q.6 c.29 (Bc, fol. 128v; Fd, fol. 124v; Aa 23, fol. 257r-257v. Hand Aa¹ corrected an eye-skip – ‘non fuisse adeundi. Si quis ipsius quidem a quo appellauit adeundi facultatem’ – in the right margin of fol. 257r): Dig. 49.4.5, Dig. 49.4.6, [following Dig. 49.4.6 *Decretum* reads ‘ut cum quis ad tutelam uel ad alia ciuilia munera nominatur, eius excuatio non admittitur’ which is neither in Dig. 49.4.6 nor in Dig. 49.4.7], Dig. 49.4.7, Dig. 48.4.8, Dig. 48.4.9, Dig. 48.4.10, Dig. 48.4.11 (Propriam causam – nomine pertinet), Dig. 48.4.15, Dig. 49.4.1.pr. (Si quidem in – calliditatem proucauit), Dig. 49.4.3; C.2 q.6 c.30 (Bc, fol. 128v-129r; Fd, fol. 124v-125r; Aa 23, fol. 257v): Dig. 49.5.1.pr., Dig. 49.5.1.1, Dig. 49.5.2, Dig. 49.5.4 (Eius qui ideo – prohibetur); C.2 q.6 c.31 (Bc, fol. 128v-129r; Fd, fol. 124v-125r; Aa 23, fol. 257v): Dig. 49.6.1.pr., Dig. 49.6.1.1, Dig. 49.6.1.2, Dig. 49.7.1.pr (Appellatione interposita – nouari oportet), Dig. 49.7.1.5; C.3 q.7 d.p.c.1 (Bc, fol. 139v; Fd, fol. 127v; Aa 23, fol. 264v): Dig. 5.1.12.2; C.3 q.9 d.p.c.18 (Bc, fol. 141r; Fd, fol. 128r; Aa 23, fol. 265v); Cod. 9.35.11 (dictum is a reference to this text) C.4 qq.2-3 c.3 (Bc, fol. 142v-143v; Fd, fol. 128v-129r; Aa 23, fol. 266r-267r): Dig. 22.5.21.3, Dig. 22.5.2, Dig. 22.5.3.pr., Dig. 22.5.3.5 (Lege Iulia – conuictus erit), Dig. 22.5.4, Dig. 22.5.5, Dig. 22.5.6, Dig. 22.5.7, Dig. 22.5.8, Dig. 22.5.19.pr., Dig. 22.5.19.1, Dig. 22.5.20, Dig. 22.5.21.pr., Dig. 22.5.21.1 (Si res – adulterii causa), Dig. 22.5.21.2, Dig. 22.5.24, Dig. 22.5.25 (Patroni in causa – obseruandum est); Dig. 22.5.16, Dig. 22.5.17, Dig. 22.5.15.pr., Dig. 22.5.9, Dig. 22.5.10, Dig. 22.5.11, Dig. 22.5.12, Dig. 22.5.3.1 (qui simpliciter – uerisimilia responderint), Dig. 22.5.3.2 (saepe sine publicis – opinari; Decretum does not match exactly), Cod. 4.20.2 (reworded in Decretum), Cod. 4.20.3, Cod. 4.20.4, Cod. 4.20.6, Cod. 4.20.7, Cod. 4.20.8, Cod. 4.20.9, Cod. 4.20.9.10, Cod. 4.20.11, Cod. 4.20.11.1, Cod. 4.20.12, Cod. 4.20.17, Cod. 4.20.17.1; C.4 q.4 d.p.c.2 (Fd, fol. 129r, fol. 34v; Aa 23, fol. 267v; Bc, fol. 144v left margin): Cod. 9.2.7 (Ea quidem – non est), Cod. 9.9.6, Cod. 9.37.1, Cod. 9.2.8, Cod. 9.2.16; C.6 q.1 c.22 (Bc, fol. 148r; Fd, fol. 130r; Aa 23, fol. 26v, fol. 270r. In the right margin of Aa Hand Aa¹ corrected the eye-skip of ‘ad nullos unquam honores nulla prorsus sacramenta perueniant’): Cod. 9.8.5, Cod. 9.8.5.1, Cod. 9.8.5.2, Cod. 9.8.5.7; C.6 q.1 c.23 (Bc, fol. 148r; Fd, fol. 130r; Aa 23, fol. 26v, fol. 270r): Cod. 9.8.4; C.15 q.1 c.2 (Fd, fol. 140r; Aa 43, fol. 280r): Dig. 47.10.3.pr., Dig. 47.10.3.1, Dig. 47.10.3.2, Dig. 47.10.3.3, Dig. 47.10.3.4; C.16 q.3 d.p.c.15 VIII Pars Prescriptionum aliae – uel quadraginta’ (Fd, fol. 141v; Aa 43, fol. 284r-285r): Cod. 7.40.2, Cod. 7.40.2.1, authentica to Cod. 1.2.23 [=Nov. 131.6]; Nov. 131.6; C.16 q.3 c.16 (Fd, fol. 141v; Aa 43, fol. 284r-285r): Cod. 7.39.6.1; C.19 q.3 c.9 (Fd, fol. 144r; Aa 43, fol. 293r. Hand Gr² recopied added ‘Si qua mulier – eius competere’ to the left column of fol. 57r): authentica to Cod. 1.2.13 [=Nov. 123.38], authentica to Cod. 1.5.20 [=Nov. 5.5]; C.19

Admont, entered with some peculiarity accompanying them. Gratian 2 added D.50 c.45, which is found in the *Digest* “De furtis.” Barcelona included the text on the inserted leaf.²²⁹ The Florence Additiones also included the text, although the three canons preceding D.50 c.45 and the four canons following it appear on the subsequent folio.²³⁰ The Admont Additiones, however, included the canon with the correct placement.²³¹ While the left margin of Barcelona and the Additiones of Florence included C.5 q.3 [d.p.c.1], a text from the *Codex* “De accusationibus et inscriptionibus,” a marginal hand in Admont made a reference to the text “Reos capitalium – iudiciorum permittunt” in the left margin by copying the inscription with the note *unde super hic inferatur*.²³² Finally, the *De penitentia* added the string of canons D.1 c.6-c.21 from the *Codex* and the *Digest*. Minus one dictum (*De penitentia* D.1 d.p.c.9) and a partial canon (*De penitentia* D.1 c.19 “et ideo apud Grecos – scriptum est”), both the Additiones of Florence and of Admont included the canons.²³³ Of the Gratian 2 Roman law texts that entered the tradition early the *Digest* contained twenty-two of them, the *Codex* contained sixteen of them, the *authenticae* of *Codex* contained two of them, and the *Novella* contained two of them.²³⁴

q.3 c.10 (Fd, fol. 144r; Aa 43, fol. 293r); Nov. 115.62, Nov. 115.63; C.36 q.2 c.3 (Fd, fol. 164r; Aa 43, fol. 340v); Cod. 1.3.5.

²²⁹ Dig. 47.2.78; Bc, fol. 63r.

²³⁰ Fd, fol. 111v, fol. 112r.

²³¹ Aa 23, fol. 221r.

²³² Cod. 9.2.3; Bc, fol. 145r; Fd, fol. 129r; Aa 23, fol. 151v. Added to Aa by Hand Aa³.

²³³ *De pen.* D.1 c.6: Cod. 1.3.5; *De pen.* D.1 c.7: Cod. 2.6.8; *De pen.* D.1 c.8: Cod. 2.6.8; *De pen.* D.1 c.9: Cod. 9.8.5; *De pen.* D.1 c.10: Cod. 9.16.7; *De pen.* D.1 c.11: Cod. 9.16.8; *De pen.* D.1 c.12: Dig. 47.10.9.4, Dig. 47.10.10, Dig. 47.10.11.pr.; *De pen.* D.1 c.13: Dig. 47.10.15.1; *De pen.* D.1 c.14: Dig. 48.19.18; *De pen.* D.1 c.15: Dig. 47.11.1.pr., D.47.11.1.2; *De pen.* D.1 c.16: Dig. 47.2.21.pr; *De pen.* D.1 c.17: Dig. 2.2.1.2 (Haec autem uerba – non coeptam); *De pen.* D.1 c.18: Dig. 48.19.42; *De pen.* D.1 c.19: Dig. 49.19.16.pr, Dig. 49.19.16.1, Dig. 49.19.16.1, Dig. 49.19.16.3, Dig. 49.19.16.4, Dig. 49.19.16.5, Dig. 49.19.16.6, Dig. 49.19.16.7, Dig. 49.19.16.8; Fd, fol. 159v-160r; Aa 43, fol. 329v-331r.

²³⁴ *Digest*: D.50 c.45; C.1 q.1 c.127, c.128, c.129; C.2 q.1 c.14; C.2 q.6 c.29, c.30, c.31; C.3 q.7 d.p.c.1; C.4 qq.2-3 c.3; C.4 q.4 d.p.c.2; C.15 q.1 c.2; *De penitentia* D.1 c.12, c.13, c.14, c.15, c.16, c.17, c.18, d.p.c.18, c.20, c.21.

Another group of Gratian 2 Roman law material entered the textual tradition with the copying of Admont. A marginal hand added C.12 q.2 d.p.c.58, c.59, and c.60 late to the Florence manuscript, while the Additiones of Admont and the margins of Barcelona contained the canons. These texts are found in the *Digest* and *Codex*.²³⁵ A marginal hand added C.30 q.5 c.9, found in the *Authenticum (Novella)*, in the right margin of Florence though Admont incorporated the canon.²³⁶ While in the margins of Barcelona and incorporated into Admont, a marginal hand added D.54 c.20, which are three *authenticae* to the *Codex*, to the lower left margin of Florence.²³⁷ This particular scribe inadvertently recopied C.1 q.1 c.126-c.130 in the margins, not realizing the Additiones already included them.²³⁸ The same marginal hand recopied a complete version of C.2 q.3 d.p.c.8 in the margins of Florence, which brought the canon in line with the Additiones of Admont and the margins of Barcelona. The Additiones of Florence only included only a partial version.²³⁹ The Additiones of Admont and Florence contained the Gratian 2 addition of “Post secundam provocationem – vim obtinente (ln. 1-11)” to C.2 q.6 d.p.c.39, but a later marginal hand recopied it in the right margin of Florence. Barcelona included an intriguing addition. One hand appears to have copied one part of

Codex: C.1 q.1 c.126; C.1 q.7 c.26; C.3 q.9 d.p.c.18; C.5 q.3 [d.p.c.1]; C.6 q.1 c.22, [d.p.c.22], c.23; C.16 q.3 d.p.c.15; C.16 q.3 c.16; *De penitentia* D.1 c.6, c.7, c.8, c.9, c.10, c.11; C.36 q.2 c.3.

authenticae: C.16 q.3 d.p.c.15, C.19 q.3 c.9.

Novella (Authenticum): C.16 q.3 d.p.c.15, C.19 q.3 c.10.

A canon or dictum in the *Decretum* can contain legislation drawn from different Roman codes. For instance, C.16 q.3 d.p.c.15 contains legislation from both the *authenticae* and from the *Novella (Authenticum)*.

²³⁵ C.12 q.2 d.p.c.58: Dig. 2.4.25, Dig. 2.4.10.4, Cod. 9.1.20, Cod. 9.11.1, Cod. 9.11.1.1; Fd, fol. 45v-46r; Aa 23, fol. 290v; Bc, fol. 176r. Added to Fd by Hand E.

²³⁶ Nov. 67.4; Fd, fol. 84r; Aa 43, fol. 131v. Added to Fd by Hand Gr¹.

²³⁷ *authenticae* to Cod. 1.3.26 [= Nov. 123.17], to Cod. 1.3.37 [= Nov. 123.2], and to Cod. 1.3.37 [= Nov. 5.4]; Bc, fol. 67r; Fd, fol. 9v; Aa 23, fol. 63r. Added to Fd by Hand Ga.

²³⁸ Fd, fol. 23r, fol. 121v.

²³⁹ Bc, fol. 123v; Fd, fol. 123v-124r, fol. 28r; Aa 23, fol. 126r-126v. Admont contains the correction of an eye-skip – ‘Quorum alterutrum ipsis uerbis pronuntiationis manifestatur’ – in the right margin of fol. 126r

the addition to C.2 q.6 d.p.c.39 in the right column; a different hand copied the text from the *Codex* “Qui bonis cedere possunt” in the lower left margin.²⁴⁰ This is not the only late addition of Roman law to Barcelona. A scribe different from the usual added C.2 q.6 c.41 and d.p.c.41 to Barcelona. C.2 q.6 c.41 contains an *authentica* to the *Codex* and C.2 q.6 d.p.c.41 includes texts from the *Codex*. Like C.2 q.6 d.p.c.39, both the Additiones of Florence and Admont included the canons though a later marginal hand recopied them in Florence.²⁴¹ Of the Gratian 2 Roman law texts that entered some manuscripts at a later point the *Digest* contained two of them, the *Codex* contained six of them, the *authenticae* of the *Codex* contained three of them, and the *Novella* (*Authenticum*) contained one of them.²⁴²

Like other second recension texts, some second recension Roman law texts remind us that we cannot cling too tightly to the evolutionary timeline. The Additiones of Florence included C.2 q.8 d.p.c.5, which are found in the *Digest* “De accusationibus et inscriptionibus” and it was incorporated into Admont. It is impossible to tell, however, at what point the dictum appeared in Barcelona. A different scribe added it to the left column in black ink.²⁴³ The same situation occurs with C.3 q.11 c.4 and d.p.c.4, both of which are from the *Codex*. Included in the Additiones of Florence and incorporated into

²⁴⁰ Cod. 7.70.1; Aa 23, fol. 258r-258v; Fd, fol. 125r, fol. 30r; Bc, fol. 129v. Hand Gα recopied the text in Fd.

²⁴¹ C.2 q.6 c.41: *authentica* to Cod. 7.63.2 [= Nov. 23.2]; C.2 q.6 d.p.c.41: Cod. 7.62.28; Cod. 7.62.27, Cod. 7.45.3, Cod. 7.45.4, Cod. 7.64.1, Cod. 7.64.2, Cod. 7.64.4, Cod. 7.64.5, Cod. 7.64.7, Cod. 7.64.8, Cod. 7.65.1, Cod. 7.65.2, Cod. 7.65.3, Cod. 7.65.4, Cod. 7.65.5, Cod. 7.65.6, Cod. 7.69.1, Cod. 7.68.1, Cod. 7.68.2, Cod. 7.62.24, Cod. 7.62.14, Cod. 7.62.6; Aa 23, fol. 258v-259v; Fd, fol. 125r-125v, fol. 30r; Bc, fol. 129v-130r. Hand Gα recopied the text in Fd.

²⁴² *Digest*: C.2 q.3 d.p.c.8, C.12 q.2 d.p.c.58.

Codex: C.2 q.3 d.p.c.8; C.2 q.6 d.p.c.39; C.2 q.6 d.p.c.41; C.12 q.2 d.p.c.58, c.59, c.60.

authentica: D.54 c.20, C.2 q.6 c.41, C.3 q.3 d.p.c.4.

Novella (*Authenticum*): C.30 q.5 c.9.

²⁴³ Dig. 48.2.3.pr, Dig. 48.2.3.1, Dig. 48.2.3.2, Dig. 48.2.3.3, Dig. 48.2.3.4; Fd, fol. 126r; Aa 23, fol. 140v; Bc, fol. 136r.

Admont, someone other than the usual marginal scribe added them in Barcelona.²⁴⁴ C.3 q.3 d.p.c.4, which contained texts from the *Codex* “De dilationibus” and *authenticae* to the *Codex*, were a late addition to Admont. Both Barcelona and the Additiones of Florence contained the complete version of the dictum, and thus one would expect Admont to either incorporate the entire dictum or include it in the Additiones. This was not the case. Two separate marginal hands completed the dictum, which initially appeared in Admont as a partial text. One marginal hand added “qui convenitur contingens – XX dierum (ln. 30-33)” to the right margin of Admont and another added “§7 Exceptio fori dilatoria – litis contestari (ln. 47-50)” in the bottom margin.²⁴⁵ The same occurs with C.6 q.4 c.7. Though included in the Additiones of Florence, a marginal hand added to the top margin of Admont the additional text, “Codicis lib. IV tit. de probationibus – nulla sit,” which is found in the *Codex* “De probationibus.”²⁴⁶ One should not view these particularities in the evolutionary timeline as evidence for the late addition of Roman law into the second recension. They are not different from other particularities previously discussed.

Because the Roman law additions entered into the textual tradition much like other Gratian 2 additions, in a non-uniform fashion prior to the circulation of a completed vulgate edition, placement dislocation could occur. The Gratian 2 version of C.5 q.1 [d.p.c.3], for example, entered into Barcelona and into the Florence Additiones with the

²⁴⁴ C.3 q.11 c.4: Cod. 9.1.1; C.3 q.11 d.p.c.4: Cod. 7.19.2 (Si crimen – libertatis debet), Cod. 7.19.3, Cod. 9.1.20, Cod. 9.1.21; Fd, fol. 128r; Aa 23, fol. 148v-149r; Bc, fol. 142r.

²⁴⁵ Cod. 3.11.1.1, Cod. 3.11.1.2, Cod. 3.11.2, authentica to Cod. 3.9.1 [= Nov. 96.1], a second authentica to Cod. 3.9.1 [= Nov. 53.3], authentica to Cod. 3.11.2 [=Nov. 53.1]; Bc, fol. 138r; Fd, fol. 127r; Aa 23, fol. 142v-143r. Added to the right margin of Aa by Hand Aa²; added to the bottom margin of Aa by Hand Aa¹.

²⁴⁶ Cod. 4.19.23; Bc, fol. 149v; Fd, fol. 130r; Aa 23, fol. 156r. Added to Aa by Hand Aa³.

correct placement. Admont, however, incorporated the text between q.2 c.2 and q.2 c.3.

A marginal hand later added the reference “Codice lib. IX tit. de famosis libellis” in the left margin on the previous folio in the correct placement between q.1 c.2 and q.2 d.a.c.1.²⁴⁷

Some Gratian 2 Roman law texts canons entered the manuscript tradition in different versions. I have discussed, for example, the peculiar situation with C.16 q.1 d.p.c.40 above, whereby Florence omitted text included in Admont by only referencing a decree of Constantius, which is found in the *Codex*.²⁴⁸ Also previously discussed, the Additiones of Florence included a partial version of C.3 q.7 c.2 taken primarily from the *Digest* “De postulando (3.1)” and the *Codex* “De postulando (2.6). While a later marginal hand added “vel quo operas – presentes. §7.Nurus (ln. 14-33)” in the right margin but the text continued to omit “et generi appellatione – uxorem duxit (ln. 33-86).”²⁴⁹ Admont also included a different version of some Roman legislation. The Admont version of C.1 q.1 c.130, from the *Digest* “De lege Iulia repetundarum,” included an additional sentence “Quolibet ergo munere intueniente falsa di vidicatur ordinatio,” which is not found in the Roman text.²⁵⁰ While both Barcelona and the Additiones of Florence included the complete version of C.3 q.9 d.p.c.15, Admont included two

²⁴⁷ Cod. 9.36.2, Cod. 9.36.2.1, Cod. 9.36.2.2, Cod. 9.36.2.3; Bc, fol. 144r; Fd, fol. 129r, fol. 34v; Aa 23, fol. 150v; Aa 23, fol. 151r. Correct placement in Aa indicated by Hand Aa³. Hand Gr¹ recopied C.5 q.1 c.3 from the Council of Elvira and only the rubric and incipit of C.5 q.1 [d.p.c.3] in the top margin of the main text of Florence.

²⁴⁸ Cod. 1.3.1, Cod. 1.2.5; Fd, fol. 52r; Aa 43, fol. 282v.

²⁴⁹ Dig. 3.1.1-Dig. 3.1.11 (Friedberg notes the Decretum text was an adapted version, col. 526, n. 16), Dig. 3.1.4, Dig. 3.1.5, Dig. 3.1.6, Dig. 3.1.3, Cod. 2.6.5, Cod. 2.6.6.1, Cod. 2.6.6.2, Cod. 2.6.6.4, Cod. 2.6.6.5, Cod. 2.6.7.1, Cod. 2.6.7.2, Cod. 2.6.7.3, Cod. 2.9.1, Dig. 3.1.10, Dig. 4.8.3.3, Dig. 4.8.7.pr, Dig. 4.8.6, Dig. 4.8.9.2, Dig. 4.8.9.pr, Cod. 2.12 (not exact quotation from Cod.) Fd, fol. 128r; Bc, fol. 140r-140v; Aa 23, fol. 145r-146r. Added to Fd by Hand E.

²⁵⁰ Dig. 48.11.6.pr, Dig. 48.11.6.2, Dig. 48.11.7.pr, , Dig. 48.11.7.3, Dig. 48.11.6.1; Bc, fol. 111v; Fd, fol. 121v, fol. 23r; Aa 23, fol. 106r-106v.

versions of the canon. It incorporated the partial text of the *authentica* “De his etiam que – ratione ualere censemus (ln. 1-12)” and then added the non-Roman law “III Pars §2 Simul autem necesse – non admittit” in the Additiones.²⁵¹ Of the texts that entered the tradition in different versions, the *Digest* contained three of them, the *Codex* contained four of them, the *authenticae* to the *Codex* contained one of them, and the *Novella* (*Authenticum*) contained none of them.²⁵²

I argued earlier that because the vast majority of canons entered the textual tradition of all relevant manuscripts, Gratian might not have added those canons omitted from at least one relevant manuscript. The same assertion holds true for those texts originating with Roman law. Barcelona omitted C.3 q.11 c.2, from the *Codex* “Qui accusare non possunt.”²⁵³ Florence omitted D.50 c.46, a text from the *Codex* “Ad legem Corneliam de sicariis.”²⁵⁴ As with other Gratian 2 texts, Admont omitted a number of Roman law texts. A marginal hand added C.10 q.2 c.2 and q.2 c.3, which are a series of *authenticae* to the *Codex*, to Florence though Admont omitted them.²⁵⁵ Admont omitted “IX pars De prescriptionibus – locum habentibus (ln. 1-6)” from C.16 q.3 d.p.c.16. Like C.10 q.2 c.2 and c.3, this is an *authenticae* to the *Codex*.²⁵⁶ Admont also omitted C.25 q.2 c.14, c.15, and c.20 while these texts were added to the right margin of the Additiones

²⁵¹ *authentica* to Cod. 4.20 [= Nov. 90.2]; Bc, fol. 141r; Fd, fol. 128r, fol. 33v; Aa 23, fol. 148v; Aa 23, fol. 265r. Hand Gr¹ recopied the same non-Roman law part of the text in the left margin of Florence.

²⁵² *Digest*: C.1 q.1 c.130, C.1 q.4 d.p.c.9, C.3 q.7 c.2

Codex: C.1 q.4 d.p.c.12, C.3 q.7 c.2, C.5 q.1 [d.p.c.3], C.16 q.1 d.p.c.40.

authenticae: C.3 q.9 d.p.c.15.

Novella (*Authenticum*): --

²⁵³ Cod. 9.1.19; Aa 23, fol. 148v; Fd, fol. 128r.

²⁵⁴ Cod. 9.16.4; Bc, fol. 63v (inserted leaf); Aa 23, fol. 221r.

²⁵⁵ C.10 q.2 c.2: *authenticae* to Cod. 1.2.14 [=Nov. 7.1, Nov. 7.12, Nov. 120.8, Nov. 7 c.2, Nov. 54.2, Nov. 7.3, Nov. 120.1 §2, Nov. 7.5]; C.10 q.2 c.3: *authenticae* to Cod. 1.2.14 [=Nov. 120.5, Nov. 120.2]; Bc, fol. 161r-161v; Fd, fol. 39v-40r. Added to Fd by Hand E.

²⁵⁶ *authenticae* to Cod. 1.2.23 [= Nov. 131.6]; Aa 43, fol. 285r; Fd, fol. 141r.

of Florence. While q.2 c.14 and q.15 derive from the *Codex* “De sepulchro violato,” q.2 c.20 contains texts from the *Theodosian Code* as well as from the *Codex* “De episcopis et clericis.”²⁵⁷ Admont omitted C.3 q.11 d.p.c.3 §1 “Aliquando enim criminalis – minori prefertur (ln.6-10)” while it appeared as a later addition in Barcelona and was included in the Additiones of Florence.²⁵⁸ Admont likewise omitted “Quod si in adulterio – privilegium detulit (ln. 1-13)” from C.32 q.1 d.p.c.10. The text originated with the *Codex* “Ad legem Iuliam de adulteriis et de stupo.”²⁵⁹ Both Admont and Florence omitted C.25 q.2 d.p.c.16, which derived from the *Codex*.²⁶⁰ From the *De penitentia*, Florence omitted D.1 d.p.c.9 and, as discussed previously, both Florence and Admont omitted “et ideo apud Grecos – scriptum est” from D.1 c.19.²⁶¹ Of the Gratian 2 Roman law texts that entered the tradition of one manuscript but not another, thereby raising the question as to whether Gratian was responsible for their addition, the *Digest* contained one of them, the *Codex* contained nine of them, the *authenticae* to the *Codex* contained three of them, and the *Novella* (*Authenticum*) contained none of them.²⁶²

The evidence from the margins and supplements of Gratian 1 manuscripts suggests an alternative to the conclusions offered by Vetulani and Winroth. Both have

²⁵⁷ C.25 q.2 c.14: Cod. 9.19.3; C.25 q.2 c.15: Cod. 9.19.7; C.25 q.2 c.20: Cod. Theod. 16.2.29, Cod. Theod. 16.2.30, Cod. 1.3.13; Fd, fol. 152r. Added to Fd by Hand Gr¹. Friedberg noted the use of the Theodosian Code, see Vgl. *edF*, col. 1017, n. 149.

²⁵⁸ Cod. 3.8.4; Fd, fol. 128r; Bc, fol. 141v-142r.

²⁵⁹ Cod. 9.9.2, Cod. 9.9.1; Fd, fol. 156v.

²⁶⁰ Cod. 1.22.2, Cod. 1.22.3, Cod. 1.22.5, Cod. 1.22.4, Cod. 1.22.6, Cod. 1.23.3, Cod. 1.23.4, Cod., 1.23.7, Cod. 1.23.7.1

²⁶¹ *De pen.* D.1 d.p.c.9: Cod. 9.16.6; *De pen.* D.1 c.19: Dig. 49.19.16.8; Fd, 159v-160r; Aa 43, fol. 330r (D.1 d.p.c.9); Aa 43, fol. 330v-331r.

²⁶² *Digest: De pen.* D.1 c.19.

Codex: D.50 c.46; C.3 q.11 c.2, d.p.c.3; C.25 q.2 c.14, c.15, d.p.c.16, c.20; C.32 q.1 d.p.c.10, *De pen.* D.1 d.p.c.9.

authenticae: C.10 q.2 c.2, c.3; C.16 q.3 d.p.c.16.

Novella (*Authenticum*): --

argued that the texts taken from the *Digest* and *Codex* entered into the *Decretum* only in its final stages and that the redactor who introduced these texts was well versed in Roman law. Coupling this with the conclusion that the initial stage of the *Decretum* borrowed romanistic texts largely from earlier canonical collections, one could surmise, Vetulani and Winroth argued, that the principle redactor, Gratian, did not take the added texts from the *Codex* or the *Digest*. They maintained that the second redaction, that is the *Decretum* as we now have it, was not the work of one individual, but rather a collaboration with a co-redactor drawing texts from the *Corpus iuris civilis*.²⁶³ Kuttner concurred with Vetulani's conclusions likewise noting that the Roman law fragments were placed typically at the end of a question, that they lacked rubrics, that uncertainty existed as to the texts' placement, that they disrupted the argument, and that Faventinus' comment on "praescriptione" in C.16 q.3 d.p.c.15-d.p.c.16 referred to "ab alio."²⁶⁴

My analysis of the inclusion of Roman law between the first and second recensions shows, however, that the canons did not circulate originally in a finished compendium and that the additions to the *Decretum* were progressive. Roman law was not a late addition to the *Decretum*, but rather an on-going addition to the *Decretum*. As I have shown in Chapter Two, Gratian created his own rubrics and thus one cannot presume that Gratian did not add a particular text simply because the rubric did not correspond to the Roman code. Of the seventy-five canons or dicta containing passages of Roman legislation analyzed, at least one relevant manuscript omitted eleven complete

²⁶³ Vetulani, "Gratien et le droit romain," 47-48; Winroth, *The Making of Gratian's Decretum*, 146-149, 171-174.

²⁶⁴ Kuttner, "New Studies on the Roman Law in Gratian," 21-22.

passages and four partial passages.²⁶⁵ While Gratian did not add all of the Roman texts, he did add the majority of them incorporating more texts from the *Codex* as he went along. The discontinuity observed by Vetulani, Kuttner, and Winroth was not the fault of Gratian, but rather resulted from the incorporation of second recension texts into the *Concordia* thereby causing the distortion to the arguments Gratian presented. Two Roman law texts support this conclusion. Gratian 2 added the dictum C.3 q.9 d.p.c.15. While both Barcelona and the Additiones of Florence contained the entire dictum, Admont incorporated the text “De his etiam que – ratione valere censemus (ln. 1-12)” and included “III Pars §2 Simul autem necesse – non admittit (ln. 13-15)” in the Additiones.²⁶⁶ Gratian 2 likewise added *De penitentia* D.3 c.29. While the Additiones of Florence included the entire text, Admont incorporated the second part of the canon: “In quibus Domini verbis – qui displicebat (ln. 6-11).” The first part of the canon, “Sicut Achab rex – in diebus eius (ln. 1-11),” appeared in the Additiones of Admont.²⁶⁷ As the interpolation of canons in the Admont manuscript suggests, and an analysis of the canons from the Second Lateran Council will confirm, Gratian may not have intended to incorporate the second recension texts into his work, thus offering an alternative explanation for the distortion to the Gratian 1 arguments caused by the addition of Gratian 2 texts.

²⁶⁵ Complete passages omitted: D.50 c.46; C.3 q.11 c.2, d.p.c.3; C.10 q.2 c.2, c.3; C.25 q.2 c.14, c.15, d.p.c.16, c.20; C.32 q.1 d.p.c.10; *De penitentia* D.1 d.p.c.9.

Partial passages omitted: C.3 q.7 c.2; C.16 q.1 d.p.c.40; C.16 q.3 d.p.c.16; *De penitentia* D.1 c.19.

²⁶⁶ Bc, fol. 141r; Fd, fol. 128r, fol. 33v; Aa 23, fol. 148v; Aa 23, fol. 265r. Hand G^τ would repeat “III Pars” by adding including it in the left margin of the main text.

²⁶⁷ Fd, fol. 161v; Aa 43, fol. 168v; Aa 43, fol. 336v.

As suggested by the incorporation of Roman law into the *Decretum*, Gratian compiled over a period of time the vast majority of the texts added to the second recension. One then cannot rely on the two ‘Gratian’ theory to explain the ‘untidy seams’ that tend to breakup and confuse the arguments laid out in Gratian 1. Fransen has noted that the placement of the canons from the Second Lateran Council appear at awkward places and disrupt the line of argumentation. These canons, furthermore, either come at the end of a series or come just before a dictum and either have instable rubrics or simply rely on “De eodem.” Akin to Vetulani, Kuttner, and Winroth’s conclusions regarding the incorporation of Roman law, Fransen concluded that the canons from the Second Lateran Council entered very late into the *Decretum*.²⁶⁸ The blame for these ‘untidy seams’ neither rests on the shoulders of a second ‘Gratian’ nor on those of our magister. The margins of Barcelona (when relevant), the Additiones of Florence, and the Additiones of Admont included: D.28 c.3,²⁶⁹ C.8 q.1 c.7,²⁷⁰ C.17 q.4 c.29,²⁷¹ C.21 q.4 c.5,²⁷² and C.35 q.6 c.8 Pars IV.²⁷³ An inserted leaf in Barcelona and the Additiones of Admont included D.63 c.35.²⁷⁴ An inserted leaf, the Additiones of Florence, and the main text of Admont included D.60 c.3.²⁷⁵ The margins of Barcelona (when relevant), the Additiones of

²⁶⁸ Gérard Fransen, “La date du *Decret* de Gratien,” *Revue d’Histoire Écclésiastique* 51(1956): 529-530; Winroth, *The Making of Gratian’s Decretum*, 137, fn. 37. I used both Fransen and Winroth’s list of canons from the Second Lateran Council. C.2 q.5 c.17 is the only palea.

²⁶⁹ Bc, fol. 43r (tm); Fd, fol. 108r; Aa 23, fol. 209r.

²⁷⁰ Bc, fol. 154v (lm), Fd, fol. 131v-132r; Aa 23, fol. 275v.

²⁷¹ Fd, fol. 143r; Aa 43, fol. 288v, combined with c.27.

²⁷² Fd, fol. 145r; Aa 43, fol. 294v.

²⁷³ Fd, fol. 163v; Aa 43, fol. 339v.

²⁷⁴ Bc, fol. 70r (inserted leaf); Aa 23, fol. 238v. Florence omitted this canon.

²⁷⁵ Bc, fol. 70r (inserted leaf); Fd, fol. 112v; Aa 23, fol. 66v, combined with c.2. Hand Gα of Florence recopied the canon in the left margin of fol. 10v.

Florence, and the main text of Admont included: C.1 q.3 c.15,²⁷⁶ C.21 q.2 c.5,²⁷⁷ C.23 q.8 c.32,²⁷⁸ and *De penitentia* D.5 c.8.²⁷⁹ While Barcelona included D.63 c.35 in the right margin and Admont incorporated it into the main text, a later hand added the canon to the Florence manuscript.²⁸⁰ While Admont incorporated C.27 q.1 c.40 into the main text, a marginal hand added the text to the right margin of the Florence Additiones.²⁸¹ Though the Admont Additiones included C.18 q.2 c.25 in its entirety, the Florence Additiones included “Perniciosam et detestabilem – vivam sanctimoniales (ln. 1-3) + receptacula et privata – ad psallendum (ln.7-17)” with a hand not recognized as one of the usual hands having copied “tamen uulgo censi – sibi edificant (ln. 4-7)” in the bottom margin.²⁸² Clearly, there was no pattern for the addition of the canons from the Second Lateran Council. Some appeared on an inserted leaf in Barcelona others did not. Some appeared in the Additiones of Florence and a later hand added others. Some appeared in the Additiones of Admont and the scribe incorporated others. The Gratian 2 addition of canons from the Second Lateran Council into the second recension followed the same pattern as other Gratian 2 canons and Roman law. The manuscripts omitted only one canon; Florence did not include D.90 c.11. The ‘untidy seams’ produced by these canons was neither result of their late inclusion into the *Decretum* nor the result of the additions made by a second ‘Gratian’, but rather the result of others, and not Gratian, incorporating the second recension texts into the first recension.

²⁷⁶ Bc, fol. 114r (t-urm); Fd, fol. 121v; Aa 23, fol. 110v, combined with c.14. Hand Gα of Florence recopied the canon in the lower left margin of fol. 24v.

²⁷⁷ Fd, fol. 144v; Aa 43, fol. 47v-48r, appears between q.3 c.2 and c.3.

²⁷⁸ Fd, fol. 150r; Aa 43, fol. 86r, combined with c.31.

²⁷⁹ Fd, fol. 162r; Aa 43, fol. 181r.

²⁸⁰ Bc, fol. 76r; Aa 23, fol. 71v, combined with d.p.c.34; Fd, fol. 12v (lm). Added to Fd by Hand Gα.

²⁸¹ Aa 43, fol. 113v; Fd, fol. 154r. Added to Fd by Hand Gτ¹.

²⁸² Aa 43, fol. 292v; Fd, fol. 144r. This may be a correction of an eye-skip.

I have presented four pieces of evidence, which I applied using two case studies involving the addition of Roman law texts and of canons from the Second Lateran Council, to argue that the Gratian 2 texts in the margins and in the supplements did not enter the textual tradition in a uniform fashion, and thus could not have been copied after the circulation of the vulgate edition. First, the canons entered into the textual tradition of each manuscript at different points as indicated by the layers of additions and the evolutionary timeline for these additions. The layers of additions resulted in placement dislocation of canons. Second, different versions of Gratian 2 texts circulated at different times. Third, the margins and supplements do contain unique texts not found in Gratian 2. Fourth, the margins and supplements do not contain all of the texts found in the vulgate edition. Different versions of some texts circulated and the manuscripts copied the version contained in their exemplar at that time, only to correct them later when they came across another version. The evidence also suggests that those canons which do not appear in all relevant manuscripts may not have originated with Gratian, but like the glosses, with later jurists. The additional texts not in the vulgate tradition, which in many cases cannot be found using the Fowler-Magerl's *Clavis canonum* program, reveals that some canons had a limited circulation and thus were not recopied enough to be considered either part of the second recension or as paleae.

I think it is clear by the manner in which the canons were added that scribes copied the additional texts in the margins and in the Additiones prior to, and not after, the circulation of a completed Gratian 2 (vulgate edition). Had scribes copied the Gratian 2 texts found in the Gratian 1 manuscripts after the circulation of the vulgate edition, one

would expect to find that material copied at the same time, in the same place, and incorporated in a much more uniform fashion than what we find in Florence, Barcelona, and Admont. One would not expect texts added at different times and scattered in Additiones and the margins. I also think it is clear that Gratian originally did not compile a set of additions postdating Gratian 1 and, when he had completed those additions, did not circulate the additional material as a finished compendium. He continued rather to polish his work and make further revisions, thereby resulting in different versions of canons, sometimes with different placements, in different manuscripts.²⁸³ I will concede that some sort of compendium did circulate as it is highly unlikely that two different places, as represented in the Florence and Admont manuscripts, each came up with the idea to use a supplement independently. However, such a compendium probably developed rather than emanating as a finished product. Gratian 2 evolved into the vulgate recension over time.

Conclusions: A Case for the *Decretum's* Progressive Development Post-Gratian 1

In their examination of the Florence manuscript both Larrainzar and Winroth missed the opportunity to explore the transition from Gratian 1 to Gratian 2. The dating of the text and proving that it was Gratian's original text consumed Larrainzar. He could have argued that the work experienced multiple augmentations and that Gratian 2 was not completed in one fell swoop. Disproving Larrainzar's dating and taking issue with his interpretation of Hand G consumed Winroth. He could have provided further credence for his two 'Gratian' theory, though not to the extent he would have liked, by arguing that

²⁸³ This is not to discount the possibility that an original version of Gratian 2 did not exist.

someone other than Gratian added a percentage of the canons. Since neither of them did, I will. Internal textual evidence from the surviving manuscripts of Gratian 1 coupled with a comparison of the manuscripts indicate that the second recension developed over a period of time and that Gratian originally did not publish the additional material as a finished compendium. Finally, a fraction of the canons originated from someone other than him.

The different hands studied by Larrainzar point to a manuscript that experienced multiple augmentations. As an early version of Gratian 1, the Florence manuscript contains more in-text corrections than the other copies. While there is no evidence that the deviations in Hand G can be attributed to Gratian, or even to the same person, there is evidence of a manuscript to which copyists frequently returned to add more canons. Hand B copied the Additiones. Hand E made further additions. Hand $G\tau^1$ followed after both the Additiones and Hand E as it added canons to the former and correctly relocated a canon added by the latter. Hand $G\alpha$ fell late in the sequence of hands as it completed canons found in the Additiones and corrected a canon added by Hand $G\tau^1$. It is difficult to determine where Hand $G\tau^2$ fits into the progression though it may postdate both Hand $G\tau^1$, by adding more new canons, and Hand $G\alpha$, as the former made no corrections to a canon added by the latter. A number of instances arise where the hands replicate a canon previously included in the Additiones by Hand B. Such instances may suggest that copyists did not cross-reference their additions with those previously added, thereby producing duplicates, and that the additional canons did not circulate as an addendum.

The placement of certain canons suggests that Barcelona, while produced at a professional scriptorium, contains different layers of additions. Some canons, such as D.12 c.4, seem added during the first round of augmentation. The additional leaves preserve another layer of addition containing canons that postdate the completion of the manuscript. Finally, the two glossators, both of which postdate the inserted leaves, contributed additional texts. If canons were added at different points, it stands to reason that different hands were also at work. Examples do exist where a canon is added by a hand that, while very close, does not match the others on the folio.

Admont is peculiar in that it preserves manuscript evidence for the transition from Gratian 1 to Gratian 2. The presence of some Gratian 2 canons in a Gratian 1 text demonstrates the realization that extensive use of the margins for additional material in addition to text in a supplement cripples the *Decretum's* usability. To counter the problem, copyists began to incorporate those canons they felt important into the main body of the text. Eventually, all of the canons would become incorporated thus distorting Gratian's original work and creating a work of necessity and not of design.

Just as an examination of the internal features of each manuscript reveals a development in that individual manuscript, a comparison of the Gratian 1 manuscripts reveals that the text was the result of evolution. The number of corrections to the Florence manuscript suggests that it was an early version of the completed Gratian 1 text. Alterations to D.50 c.25, C.1 q.6 d.a.c.1, and C.15 q.1 c.13 seem to amend text found in St. Gall. A unique example, D.101 d.p.c.1 has similar corrections in both the Florence and Barcelona manuscripts. In addition to in-text corrections, there are examples of

different versions of a Gratian 1 text in circulation, as in D.54 c.23, or the text being omitted from at least one of the manuscripts, as in C.2 q.6 d.p.c.39 and c.40. While largely stable, these variations show that Gratian 1 may have developed over time. The number of canons repeated in the margins or in supplements though they are included in the main text with correct placement contributes to this theory. Had all the Gratian 1 texts included these canons originally there would be no need to add them again, thereby causing duplicates in the manuscripts that did contain them.

Like the evidence for a development of Gratian 1, there is evidence for the progressive development from Gratian 1 to Gratian 2. The second recension was not compiled from start to finish and then published. Rather canons were added at different points over a period of time. Such a phase led to some canons circulating in different versions, as in the case of D.10 c.1 which is found in its final form only in Admont. Other times, Barcelona contains the vulgate version of the addition, as with C.2 q.1 c.7 with Admont and Florence including a variant version of the text. Variant forms added at different times could lead to placement confusion. Such confusion could arise because a different form of the canon was inserted elsewhere, as is the case with Admont. Or it could arise from disagreement as to where the text best fit with the argument, as with the case of C.22 q.5 c.1 though d.p.c.7. That each of the manuscripts did not add texts in the same order reveals that the additional material did not circulate as an addendum, rather, as the Additiones testify, one developed. Scribes corrected their text and added canons as they came across exemplars. Such could explain extra canons neither found in the vulgate nor in the other manuscripts, but, as Barcelona and Admont serve as witnesses,

one manuscript could incorporate a text included in another manuscript. If canons were not recopied they did not have a wide circulation and thus did not find themselves in vulgate tradition. So long as one is willing to allow for exceptions, the timeline of additions seems to be Barcelona, Florence Additiones, Admont, the marginal hands of Florence, and the marginal hands in Admont. By incorporating some Gratian 2 texts but omitting more overall, Admont bears witness to the shift from Gratian 1 to Gratian 2.

I believe that the additional text found in the margins of Barcelona and Florence and in the supplements of Florence and Admont play a greater role in the continued development of the *Decretum* than scholars have recognized previously. With a progressive evolution from Gratian 1 into Gratian 2, one thus could speak of a transition from *Concordia* to *Decretum*, a transition for which Gratian was largely responsible. While he added the vast majority of the second recension texts, he did not add all of them. Jurists glossing his work added material to supplement the argument or to take to the argument in a new direction. The lack of a published compendium coupled with Admont only incorporating some of the canons makes me wonder whether Gratian intended to have the additional material integrated into his *Concordia*. Had this been his vision, one would think he would have circulated an addendum or a fully integrated work. Scribes rather resorted to different measures adding text to the margins and in the Additiones. They realized, however, that such methods posed significant problems. The text in the margins left little room to add glosses. The text in the Additiones was difficult to use because one had to alternate between the text and the back of the work. With the number of glosses ever increasing and with both methods of augmenting the *Decretum*

limiting its use, the lack of alternatives may have driven scribes to incorporate the additional canons into the main text. The vulgate recension may have been a product of necessity and not a product of design. It had developed from a text used by priests studying law in Bologna into a work used by professional lawyers.

Conclusion

LAW AND ORDER

Gratian's *Decretum* was not published in two fixed or predetermined redactions, but rather was a work that evolved over time. It began with Gratian's teaching career as preserved by chance in Sankt Gallen, Stiftsbibliothek 673. An understanding of the rubrication reveals the first cases Gratian used for teaching. The original eight cases covered the most important issues facing a future canon lawyer: judicial procedure, the validity of monastic vows, and the validity of marriage oaths. Intertwined were answers to other legal questions, such as whether women could testify in court, whether a child oblate remained bound to his monastic vow against his will, whether monks could leave wills, and what constituted incestuous relationships. An understanding of how Gratian both developed his rubrication techniques and his incorporation of rubrics as reading aids sheds light on the progression from the core *causae* to the expansion of his teaching repertoire by adding cases in clusters. Each cluster explores more closely questions addressed either directly or tangentially in a previous cluster or takes a previous argument in a new direction. Only when Gratian completed all his cases did he arrange them in the order preserved by Sankt Gallen. The manuscript, in effect, bears evidence to an earlier stage that preceded its production.

Textual evidence in the Gratian 1 manuscripts testify to the work's continued evolution from a simple teaching text to one that is more involved. Scribes made erasures and corrections to the Gratian 1 text with instances of multiple texts making similar corrections to a canon. A handful of Gratian 1 texts were duplicated in the margins or *Additiones* suggesting that not all first recension manuscripts contained the

material. Other examples highlight different versions of a canon or an alternative placement for a canon. Gratian 1 was the product of development, a product that continued to evolve through corrections even after it circulated.

The margins of the Gratian 1 manuscripts and the Additiones found at the end of the manuscripts likewise attest to the continued evolution from Gratian 1 to Gratian 2. Gratian did not circulate the additional material all at once in a published compendium. Rather, some canons entered into the textual tradition at different points, in different versions, and sometimes with different placement. The evolution continued without Gratian as jurists continued to add texts, some of which are recognized as *paleae* and a handful of others having made their way unnoticed into the vulgate tradition.

The evolution of the *Decretum* reflects the evolution of Gratian's thoughts. St. Gall gave an overview of the issues. He did not explore the questions in great detail, but in a manner sufficient enough to outline the problem and the resolution. In Gratian 1 he combined legal and pastoral duties as his students were priests and soon-to-be lawyers. The Gratian 2 canons added to Gratian 1 texts introduce the possibility that Gratian may not have intended to incorporate the supplementary material into his work. Admont bears witness to copyists interpolating canons and dicta. The vulgate recension at times loses a clear progression from one point to another demonstrating that the work was not edited for coherence.

Looking beyond the evolution of Gratian's text, his primary purpose was to teach law and, as Causae 22-26 exemplify, he accomplished this goal by arranging his arguments into two layers: theory and practice. Together these layers provide this

Tractatus de fidelitate et obsequio a structure. In each causa, Gratian devoted at least one question in each case to the theoretical approach. He set forth the justification for: oaths, perjury, just wars, physical reprisal, coercion, papal primacy and legislative power, and divination. These questions introduced the reader to the issues under discussion as well as justified and explained why the matter was within the boundaries of the law. With the legal justification put forth, Gratian devoted questions to demonstrate how to apply the law. Gratian addressed: the workings of the oath and when it could be voided, how to wage a just war, when and how to carry out physical punishment, the forms of coercion and the role of the cleric, the excommunication of those who did not fall in line with Rome, when a pope could negate or change previously granted privileges and decrees, and the punishment for divination and the possibility of reconciliation. This methodology allowed Gratian first to explain the rationale for the law and then how one was to make use of it. This methodology also allowed Gratian to argue a point and bring concord to discordant canons rather than simply giving a list of canons on a particular issue in a manner similar to prior collections.

Gratian used the feudal ideas of fidelity and obedience to structure the medieval world. Focusing on the legal implications, Gratian co-opted society's use of the co-operative bond and adapted it to fit the needs of the Church. Using a principle that governed such relationships, Gratian sought to organize society in a way that oaths created a web of obligations linking everyone to the Church. As in society, these links varied according to the circumstances. Each causa of this tract focused on a different relationship, all of which worked together concomitantly.

Devoted to theory, Causa 22 set forth the legal justification for this tract. An oath created a bond by emphasizing the importance of obedience and by reinforcing relationships. Gratian combined these ideas with the Christian principles of morality, honesty, and integrity. Together they governed the oath. Swearing by God was the only acceptable venue for entering into an oath and as such God served as a witness to the oath. Intentionally lying or taking someone in deceit amounted to holding God in contempt. The offender was guilty of perjury, a crime which Gratian placed under the jurisdiction of the Church. Because the perjurer had violated God's law, he was subject to His benevolent correction. The Church then was the guarantor of the oath and the prelate was charged with the duty of safeguarding that each party entering into the oath did so with the best of intentions. If the oath did not measure up it must be voided as it was more laudable to perjure oneself than to fulfill what was illicit. Aside from ensuring that the oath was pleasing to God, the Church also regulated the times of the year for swearing and the age at which someone may enter into an oath. The burden of responsibility lay squarely on the shoulders of the taker. He must ensure that his words and actions represented in actuality his oath. Gratian used it to link one to another with the Church being the guardian and thus the keeper of equity and justice. He adapted the oath by binding others to the Church in friendship alliances, bonds entailing blatant subjugation, or those of conditional subjugation.

With the theoretical foundation established – the way in which the oath bound people together – Gratian could apply the oath to the Church's myriad relationships. In the guise of a just war, Causa 23 examined the friendship alliance between the state and

the Church. Gratian argued for the state's obligation to come to the aid of the Church whenever called upon. He made God and His earthly representative the pope the authors of just wars for the purpose of repelling the injuries of others or to recover lost goods. Conversely, those wars where the pope has not given his consent were illicit. The secular authority, as the *socius* or *comitatus* should defend the weak, the Church, in accordance with the alliance. Should he not provide aid then he was as guilty as the perpetrator causing the fracas. The secular ruler had perjured himself by his lie and was subject to the Church's corrective measures – excommunication followed by penance – to return to the fold. This excommunication also affected whether his followers needed to uphold their oaths to him. Should one secular ruler not come to the aid of the Church when called upon and not respond to spiritual punishment, another should coerce him by whatever means necessary with the Church's approval.

Because the bond of friendship subjected the state to the Church, the punishment of those who inflicted harm on the Church was a cooperative effort since the only punishments available to the Church were excommunication and anathema. It could not be responsible for the shedding of blood. If excommunication proved not to sway the recalcitrant, the state, with permission from the Church, may step in and continue where the Church could not. All manners of coercion were available – war, torture, destruction of one's home, and confiscation of property – to bring a cessation to hostilities against the Church, so long as the clergy were not the ones inflicting the punishment. Their duty was to serve a spiritual role only. Gratian thus limited the coercive abilities of the Church by emphasizing its responsibility to reform and to save the transgressor from eternal

damnation. While a cleric may have dipped his toes into the secular realm as a feudal lord, first and foremost his duty was to the Church. A cleric may not fulfill his feudal role without the pope's permission. If feudal obligations dictated the cleric's presence at court, it would happen only with permission of the pope.

A co-operative bond blatantly subjugated the ecclesiastical hierarchy in Causa 24. Because Christ built his church upon Peter by giving him the power to bind and loose, this power was passed from Peter to Clement and Clement to his successors. Gratian placed Rome, as the successor of Peter, squarely in control of ecclesiastical cohesion and doctrinal unity. He emphasized Roman supremacy at the expense of the other patriarchs and made salvation hinge upon adherence to the papal see. It was Rome that determined the designation of 'heretic'. Rome was the head of the universal Church. Bishops took their oath of obedience to Rome and patriarchs should pay their respects by bowing to the pope's leadership. Rome was the center of ecclesiastical cohesion as it possessed the ability to excommunicate after death those heretics who had fallen away from the pope. Because the pope granted a bishop, regardless of patriarchal jurisdiction, his powers, it was the pope who could strip these powers for what amounted to perjury. The oath of obedience, taken as a co-operative bond, meant that the taker swore allegiance to Rome and should he perjure himself by not upholding his oath and turning to heresy, which was defined as a stance contrary to Rome's, his powers lost their efficacy. What the pope granted he could strip away.

Causa 25 balanced the pope's obligation to the decrees of the Church with his obligation to uphold them. More pointedly, the preservation of the institutional Church

was the co-operative bond that subjugated him. The decrees of the Church bound the pope, but only conditionally. Gratian maintained that the pope should subject himself to the canons of councils, not out of obligation, but because he desired to emulate Christ. Because the pope's duty was to safeguard the wellbeing of the Church as a whole, however, there would be times when he had to negate or to change private law, which were privileges granted to a particular baptismal church or monastery, or public law, which was applicable to the Church as a whole. So long as a decree did not pertain to the peace of the Church, the pope could change or revoke any privilege to ensure equity within the faith. The pope's legislative powers protected against potential internal or external usurpers, such as bishops or secular rulers unlawfully seizing power. He also may be required to enact a decree that counters what was established previously. Justified with Roman law, the pope's position allowed him to reevaluate and to judge the veracity of petitions. The pope, as a figurehead rather than as a man, did not perjure himself by going against the previously established decree, but rather circumstances have changed thus requiring a new ruling in light of the changes.

Using divination as the subject matter, Causa 26 examined the interplay between two bonds existing simultaneously. On the one hand was the bond between a priest and his bishop. On the other hand was the bond between the priest and his congregation. The priest had to balance his oath to his bishop with his obligations to his parishioners. Driven by circumstances he was bound conditionally to each. Under normal conditions, the priest's oath of obedience subjugated him to his bishop. In the event that a bishop had excommunicated a layman, this excommunication stood until the bishop has

determined that sufficient penance has been paid and loosened him from his sentence. A priest could not, without the bishop's permission, perform such reconciliation. He could only loosen private sins, not public sins. In other words, he could hear an auricular confession, but not a public confession that fell under the purview of the bishop alone. Should extenuating circumstances present themselves, a priest may forego his obligations to the bishop in favor of those to his parish. In the event that the bishop could not be reached and death, or some other imminent danger, threatened the salvation of the excommunicated, the priest may hear his confession and reconcile him with the Church. It was better that a priest go beyond his duty – perjure himself – than to have the greater crime of someone dying without the saving grace of reconciliation and jeopardizing the salvation of his soul. Just as a bishop had to balance his obligations to his feudal lord with those to the pope, a priest must balance his obligations to his bishop with those to his congregation.

Gratian used the canons found in various canonical collections to teach both the theory that underpinned the law and the application of the law rather than simply to make yet another compilation. Historians often refer to Causa 23-26 as the *Causae hereticorum*. And while heresy and divination are the most obvious themes, this myopic view misses the more subtle meaning that becomes apparent when these cases are understood in light of Causa 22. Together, as a *Tractatus de fidelitate et obsequio*, they not only made a statement about the subject addressed in the hypothetical, but also to make an argument about the way in which bonds organized society with each fulfilling

his role. This system allowed for the Church to be guardian of morality and the keeper of order; both of which were necessary for peace; both of which became legal maxims.

Gratian did not compile his *Decretum* in one, or even two, sittings. The work changed over time as his views on law evolved. Beginning as a teaching tool for his personal use, it developed into a teaching text, then into one for priests/lawyers, and finally into a comprehensive code of canon law. The *causae*, which he organized into loose tracts after he finished compiling them in clusters, were his commentary on various subjects. The *Tractatus de fidelitate et obsequio* is one such tract that illustrates his teaching techniques of theory and practice, in this case, to organize society around feudal principles with the Church as the overseer of these principles. Gratian's *Decretum* is more than a legal code; it is a work that sought order in the Church and order in society through a clear understanding of the law and how it should be applied.

Appendix 1

RUBRIC PERCENTAGE IN SANKT GALLEN 673 BY CAUSA

The following table lists the percentage of rubrics present in St. Gall 673. Each causa is represented by the number of canons, the number of rubrics, and the overall percent. The total number of canons in each causa reflects only those *auctoritates* that appear as canons in the body of the manuscript. If a particular *auctoritas* is a canon in Vgl. *edF* but appears either as a dictum or as a part of the previous canon or dictum in Sg, it is not counted among the total number of canons. Conversely, if a dictum in Vgl. *edF* appears as a canon in Sg, it is counted among the total number of canons.

Causa	Number of Canons	Number of Rubrics	%
Distinctiones	Omitted	n/a	n/a
Causa prima	149	83	55.70%
1	64	32	50%
2	103	83	80.58%
3	53	20	37.74%
4	7	6	85.71%
5	16	2	12.50%
6	15	1	6.67%
7	16	8	50%
8	12	7	58.33%
9	12	9	75%
10	13	9	69.23%
11	54	19	35.19%
12	47	3	6.38%
13	11	0	0%
14	21	0	0%
15	20	0	0%
16	81	10	12.35%
17	8	0	0%
18	11	2	18.18%
19	9	0	0%
20	12	0	0%
21	13	1	7.69%
22	41	1	2.44%
23	34	29	85.29%
24	Omitted	n/a	n/a
25	Omitted	n/a	n/a
26	Omitted	n/a	n/a
27	32	21	65.63%

Causa	Number of Canons	Number of Rubrics	%
28	Omitted	n/a	n/a
29	3	2	66.67%
30	20	16	80%
31	7	3	42.86%
32	24	9	37.50%
33	24	9	37.50% (qq.1, 2, 4, 5)
34	8	0	0%
35	51	38	74.51%
36	13	8	61.54%

Appendix 2

RUBRIC PERCENTAGE IN SG 673 BY CLUSTER

Cluster A: 0-3%

Causa	Number of Canons	Number of Rubrics	%
13	11	0	0
14	21	0	0
15	20	0	0
17	8	0	0
19	9	0	0
20	12	0	0
22	41	1	2.44
34	8	0	0

Cluster B: 6-19%

Causa	Number of Canons	Number of Rubrics	%
5	16	2	12.50
6	15	1	6.67
12	47	3	6.38
16	81	10	12.35
18	11	2	18.18
21	13	1	7.69

Cluster C: 35-43%

Causa	Number of Canons	Number of Rubrics	%
3	53	20	37.74
11	54	19	35.19
31	7	3	42.86
32	24	9	37.50
33	24	9	37.50 (qq.1, 2, 4, 5)

Cluster D: 50-75%

Causa	Number of Canons	Number of Rubrics	%
Causa prima	149	83	55.70
1	64	32	50
7	16	8	50
8	12	7	58.33
9	12	9	75
10	13	9	69.23
27	32	21	65.63
29	3	2	66.67
35	51	38	74.51
36	13	8	61.54

Cluster E: 80-86%

Causa	Number of Canons	Number of Rubrics	%
2	103	83	80.58
4	7	6	85.71
23	34	29	85.29
30	20	16	80

Appendix 3

RUBRIC PERCENTAGE IN SG 673 AND IN FD 402 BY CAUSA

The following table charts the percentage of rubrics present in Sg and Fd as compared to those present in Vgl. *edF*. The total number of canons in each causa reflects only those *auctoritates* that appear as canons in the body of the manuscript. If a particular *auctoritas* is a canon in Vgl. *edF* but appears either as a dictum or as a part of the previous canon or dictum in Sg or in Fd, it is not counted among the total number of canons. Conversely, if a dictum in Vgl. *edF* appears as a canon in Sg or in Fd, it is counted among the total number of canons. For each causa, the percentage of rubrics is repeated as a ratio – the number of rubrics to the number of canons in that causa.

Causa	Sg 673	Fd 402
Distinctiones	Omitted	99.68% (309r:310c) A missing quire contains D.1-D.28 c.13
Prima Causa	55.70% (83r:149c)	Omitted
1	50% (32r:64c)	99.08% (108r:109c)
2	80.58% (83r:103c)	99.08% (108r:109c)
3	37.74% (20r:53c)	100% (62c)
4	85.71% (6r:7c)	100% (7c)
5	12.50% (2r:16c)	100% (19c)
6	6.67% (1r:15c)	94.12% (16r:17c)
7	50% (8r:16c)	100% (20c)
8	58.33% (7r:12c)	100% (20c)
9	75% (9r:12c)	100% (13c)
10	69.23% (9r:13c)	100% (17c)
11	35.19% (19r:54c)	100% (87c)
12	6.38% (3r:47c)	100% (60c)
13	0% (11c)	100% (11c)
14	0% (21c)	100% (20c)
15	0% (20c)	100% (25c)
16	12.35% (10r:81c)	98.92% (92r:93c)
17	0% (8c)	100% (9c)
18	18.18% (2r:11c)	100% (13c)
19	0% (9c)	100% (10c)
20	0% (12c)	100% (15c)
21	7.69% (1r:13c)	100% (16c)
22	2.44% (1r:41c)	96.23% (51r:53c)
23	85.29% (29r:34c)	100% (105c)
24	Omitted	97.44% (38r:39c)
25	Omitted	100% (24c)

Causa	Sg 673	Fd 402
26	Omitted	100% (30c)
27	65.63% (21r:32c)	96.30% (52r:54c)
28	Omitted	100% (11c)
29	66.67% (2r:3c)	100% (3c)
30	80% (16r:20c)	95.45% (21r:22c)
31	42.86% (3r:7c)	100% (8c)
32	37.50% (9r:24c)	100% (42c)
33	37.50% (9r:24c) (qq.1, 2, 4, 5)	100% (28c) (qq.1, 2, 4, 5)
34	0% (8c)	100% (2c)
35	74.51% (38r:51c)	100% (31c)
36	61.54% (8r:13c)	100% (9c)

Appendix 4

CANONS OMITTED FROM GRATIAN 2

The following texts or partial texts were added to Gratian 2; however, at least one relevant manuscript continued to omit it. An 'X' indicates that that particular manuscript omits the text.

Reference	Florence	Barcelona	Admont
D.4 c.5	X		
D.9 c.6	X		
D.9 c.11	X		
D.18 d.a.c.1			X (only a summary provided)
D.23 d.p.c.20	X		
D.23 c.21	X		
D.23 c.22	X		
D.23 c.23	X	X	X
D.25 d.p.c.1 (Est enim alia – sua ita dicens)	X		
D.25 c.2	X		
D.25 d.p.c.2	X		
D.25 c.3	X		
D.26 d.p.c.4 (§1 Bigamus uero in – est sacerdotis)	X		
D.26 c.5	X		
D.28 c.11	X		
D.28 c.12	X		
D.30 d.a.c.1 (sicut etiam quorundam – Gangrensi Concilio statutum legitur)		X	X
D.50 c.46	X		
D.52 d.a.c.1			X
D.52 c.1			X
D.56 c.1 (nisi aut in cenobiis – fuerint conuersari)	X		X

Reference	Florence	Barcelona	Admont
D.61 c.3 (Emendatiorem esse conuenit – sacerdotii dignitatem)			X
D.62 d.a.c.1		X (elegendi. Nunc uidendum est a quibus sunt)	
D.63 d.a.c.1	X	X	
D.71 c.2	X		
D.72 c.2	X		X
D.72 c.3	X		X
D.73	X	X	
D.74 c.1	X		
D.74 c.2 (Gesta que nobis – [remouetur] Et)	X		
D.88 d.a.c.1			X (non pietatis curam uiduis et orphanis inpendere)
D.88 c.10	X		
D.90 c.11	X		
D.91 c.1	X		
D.91 c.3		X	
D.93 c.12	X		
D.93 c.13 (§1 Sacri corporis – habeant exercendi)	X		
D.93 c.14 (Peruenit ad sanctum – Hec ergo omnia amputentur)		X	X (Hec ergo omnia amputentur)
CAUSA 1			
C.1 q.1			
c.28 (Fertur symoniaca – potius iudicantur)	X (Vulneratio namque – fructum de se pro[ducturus])		

Reference	Florence	Barcelona	Admont
c.51 (Hii qui baptismum – sacerdotibus consequatur)			X (cum antea baptizanti – confirmandi sunt)
d.p.c.51 (ut etiam rebaptizentur – statutum est)			X
c.91		X	
c.92		X	
c.93		X	
c.94		X	
c.95		X	
d.p.c.122			X (Non itaque quorumlibet – supplicans extorquet)
d.p.c.123 (Sicut autem pretio – nec redimendi)			X (Ut enim ait – nec redimendi)
C.1 q.4			
d.p.c.12 (Iuris ciuuilis ignorantia – Si quis in tantam)	X (§3 non ita si delictum)		
c.21		X	
c.25		X	
CAUSA 2			
C.2 q.1			
c.7 (Imprimis requirendum est – suaserit iudicandum; Hii uero qui contra – habere mereatur)			X (Qui igitur Stephanus episcopus in odio suo quaedam ficta et)
C.2 q.3			
c.8		X	

Reference	Florence	Barcelona	Admont
C.2 q.8			
c.2	X		
CAUSA 3			
C.3 q.1			
d.p.c.2	X (correction not made)	X (correction not made)	X (correction not made)
d.p.c.6 (Unde supra in tractatu ordinandorum – uiolenter eicti fuerint)			X
C.3 q.4			
c.4 (§2 Similiter de raptoribus – penitentiam recipimus)			X
C.3 q.5			
c.3		X	X
c.4 (et eos qui non – docent fidem)	X	X	
d.p.c.15	X	X	
C.3 q.6			
c.10		X (inuicem et in omnes)	
C.3 q.7			
c.2	X (et generi appellatione – uxorem duxit)		
d.p.c.2			X (Idem testatur Felix Papa et eisdem uerbis)

Reference	Florence	Barcelona	Admont
C.3 q.9			
d.p.c.13	X		
c.18		X	
C.3 q.11			
c.2		X	
d.p.c.3 (Hoc autem intelligendum est – §1 Aliquando enim criminalis)			X
CAUSA 4			
C.4 qq.2-3			
d.p.c.3	X	X	X
C.4 q.4			
c.1 (Iudices autem debent – minuendam causam)		X	
CAUSA 6			
C.6 q.1			
c.17 (nec isti nec liberti – possunt accusare)		X	
d.p.c.19		X	X
C.6 q.3			
d.p.c.3			X
c.4			X
C.6 q.5			
d.p.c.1	X		X
CAUSA 8			
C.8 q.1			
d.p.c.19	X (beginning of the dictum is left incomplete)		

Reference	Florence	Barcelona	Admont
CAUSA 9			
C.9 q.2			
c.3 (Nam qui ordinare non – iudicare poterit)	X		
CAUSA 10			
C.10 q.2			
d.p.c.1			X
c.2			X
c.3			X
CAUSA 11			
C.11 q.1			
c.5 (§1 Constantinus presidens – solius reseruamini)	X		
[d.p.c.9]	X		
c.33			X (correction is missing)
C.11 q.3			
c.2		X	
c.3		X	
c.7		X	
d.p.c.40 (Hoc siquidem solos – ferire licet)	X		
c.77			X
CAUSA 12			
C.12 q.1			
d.p.c.3			X
c.9 (Et infra §1 Quicumque uestrum communem – egerunt opera)		X	

Reference	Florence	Barcelona	Admont
c.10 (uixerit quisquis inuentus – permitto ut inde)	X	X	
c.17			X
C.12 q.2			
c.33			X (et communione priuetur – sententia teneantur)
c.49	X		
d.p.c.67	X		
		Bc ends at the end of the quire on 178v though the catch phrase indicates the work was to continue	
CAUSA 13			
C.13 q.2			
c.15 (aliquid sponte dare – presbiteris illis aliquid)	X		
CAUSA 14			
C.14 q.1			
c.3	X		X
CAUSA 15			
C.15 q.4			
c.3			X
C.15 q.7			
c.7			X
CAUSA 16			
C.16 q.1			
c.33 (§1 Si enim necesse – presumat episcopus)			X

Reference	Florence	Barcelona	Admont
d.p.c.40 (§3 Nouarum etiam collationum – supra in tractatu ordinandorum; Hinc idem Ieronimus alibi – Gloria episcopi; §3 Ceterum absque episcoporum – executio interdicitur)	only a reference [Iuxta sanctionem quam] to the decree of Constantius in §3; dictum incomplete Nouarum etiam collationum – perpetuae deporationis uratur		
C.16 q.2			
c.8 [1] (uel si ordinati iam – [sur]rexerit pertinebit)			X
C.16 q.3			
d.p.c.16 (Licet predia siue sint – suum locum habentibus)			X (IX pars De prescriptionibus – locum habentibus)
C.16 q.5			
c.1 (Et responderunt omnes: Anathema sit [ln.12-13]; Et responderunt omnes: Anathema sit [ln.17])	X (anathema sit. Et responderunt omnes: Anathema sit [ln.12-13])		
CAUSA 17			
C.17 q.2			
d.p.c.2 (Auctoritas illa Alexandri – triennium conceditur)	X		X
c.3			X

Reference	Florence	Barcelona	Admont
C.17 q.4			
c.5 (et non solum eos – consentientes comprehendit)			X
CAUSA 18			
C.18 q.2			
c.12	X		
CAUSA 19			
C.19 d.init.	X (corrections not made)		
C.19 q.2			
c.2 (que quidem propter transgressiones – scriptis detestatum est; sicut de quibusdam dicit – estis sub lege)			X
C.19 q.3			
c.4 (Qui uero permiserint – constitutae sunt)			X
CAUSA 21			
C.21 q.1			
c.1 (et his qui mecum sunt; Et hec quidem – hominum indulgeatur)	X (et his qui mecum sunt)		X (Et hec quidem – hominum indulgeatur)
C.21 q.2			
c.4			X (sicut Papa Calixtus testatur)

Reference	Florence	Barcelona	Admont
C.21 q.3			
d.a.c.1 (Cartaginensis Concilio I probatur in quo Nicasius Episcopus Culusitanus dixisse legitur cap. 6)			X
C.21 q.4			
c.1 (Omnes iactantia et – ordine. Eos ergo; §1 Quoniam uero radice – epithimium corrigantur)			X
CAUSA 23			
C.23 q.3			
c.7 (Unde S. Moyses hinc prius – ducitur ad mortem)			X
C.23 q.4			
c.7 (Si quis a catholica – manet super eum)			X
C.23 q.7			
c.4 (Quemadmodum membrum si – multitudinem peccatorum; quantum ualemus inquirimus)	X (quantum ualemus inquirimus)		X (quantum ualemus inquirimus)
C.23 q.8			
c.26			X
d.p.c.27 (In quo casu auctoritas – dixisse legitur)			X

Reference	Florence	Barcelona	Admont
c.28			X
CAUSA 24			
C.24 q.1			
c.21			X
c.24			X
CAUSA 25			
C.25 q.2			
c.2			X
c.14			X
c.15			X
c.16			X
d.p.c.16	X		
c.20			X
CAUSA 26			
C.26 q.5			
c.4 (Hos autem qui talibus – ecclesia iussimus)	X		
C.26 q.6			
c.13 (quasi non possit ad se – et liberari; Vera ergo ad Deum – nouerit reuelari)			X (quasi non possit ad se – et liberari)
C.26 q.7			
d.p.c.1			X
CAUSA 27			
C.27 q.1			
c.19			X
c.42			X

Reference	Florence	Barcelona	Admont
C.27 q.2			
c.19 (Cum certum est qui omnipotens – ecclesiae regimina migrasse)			X
c.46 (etiam si eis – uis illata constiterit)	X		X
CAUSA 29			
C.29 q.1			
d.a.c.1 (et aliam ducere)	X		X
CAUSA 30			
C.30 q.1			
c.2 (et aliam numquam – Similiter et mulier)			X
C.30 q.5			
c.3 (Item §1 Hec sunt preter – non dicimus)	X		X
CAUSA 31			
C.31 q.1			
d.p.c.7 (Sic et Bersabee permissa – in Neocesariensi Concilio legitur)			X
CAUSA 32			
C.32 q.1			
d.p.c.4			X
c.5			X
c.8			X

Reference	Florence	Barcelona	Admont
d.p.c.10 (Quod si in adulterio – priuilegium detulit)			X
CAUSA 33			
C.33 q.2			
c.7			X
De penitentia (C.33 q.3)			
D.1			
d.a.c.1 (Ambrosii super Lucam)	X		
c.1 (Petrus doluit et – scio quod fleurit)	X		
d.p.c.9	X		
c.19	X (et ideo apud Grecos – scriptum est)		X (et ideo apud Grecos – scriptum est)
c.30 (Si cui etiam non contingat –facto deprehenderetur)	X (Si cui etiam non contingat – est quam si)		
c.41	X		
c.51 (Verbum Dei dimittit – potestatis iura exercet)	X		
D.2			
d.a.c.1 (Quia uero de penitencia – in medium proponentes)	X		

Reference	Florence	Barcelona	Admont
D.3			
c.6 (Item §1 Si autem dicunt pauci – plangenda declinare)	X		
c.7	X		
c.36	X		
c.37	X		
c.39	X		
d.p.c.39			X
d.p.c.43			X
d.p.c.44			X
c.49			X
D.4			
c.24	X		X
C.33 q.4			
c.8			X
c.13			X
CAUSA 34			
C.34 qq.1-2			
c.1 (et tamquam alieni iuris – ducti sunt pertinebant)	X		
CAUSA 35			
C.35 qq.2-3			
d.p.c.4			X
c.6			X
c.10 (Incestuosos uero nullo – statutum esse legimus)			X
d.p.c.10			X
d.p.c.21 (Pascalii II scribens Regino Episcopo – Ait enim)			X
c.22			X

Reference	Florence	Barcelona	Admont
C.35 q.5			
c.4			X
c.5			X
c.6			X

BIBLIOGRAPHY

Manuscripts

- Aa Admont, Stiftsbibliothek 23 et 43. Austria, s. XII^{3/4}.
Bc Barcelona, Arxiu de la Corona d'Aragó, Santa Maria de Ripoll 78. Italy, s. XII.
Fd Florence, Biblioteca Nazionale Centrale, Conventi Soppressi A 1.402. Southern Italy, s. XII^{3/4}.
P Paris, Bibliothèque Nationale de France, nouv. acq. lat. 1761. France s. XII.
Sg Sankt Gallen, Stiftsbibliothek MS 673.

Althoff, Gerd. *Family, Friends, and Followers: Political and Social Bonds in Early Medieval Europe*. Translated by Christopher Carroll. Cambridge: Cambridge University Press, 2004.

Berger, Adolf. *Encyclopedic Dictionary of Roman Law*. Philadelphia: The American Philosophical Society, 1991.

Beyer, Alfred. *Lokale Abbreviationen des "Decretum Gratiani": Analyse und Vergleich der Dekretabbreviationen "Omnes leges aut divine" (Bamberg), "Humanum genus duobus regitur" (Pommersfelden) und "De his qui intra claustra monasterii consistent" (Lichtenthal, Baden-Baden)*. Bamberg Theologischer Studien 6. Frankfurt am Main: Peter Lang, 1998.

Brasington, Bruce and Kathleen Cushing. *Bishops, Texts and the Use of Canon Law around 1100: Essays in Honour of Martin Brett*. Burlington: Ashgate, 2007.

Brentano, Robert. *Two Churches: England and Italy in the Thirteenth Century*. Berkeley: University of California Press, 1988.

Brett, Martin. "Rough Text of the Second Version of the *Collectio Tripartita*." Computer files.

Brett, Martin, and Bruce C. Brasington. "Provisional Edition of Ivo of Chartres' *Panormia*." West Texas A&M University.
<http://wtfaculty.wtamu.edu/~bbrasington/panormia.html> (accessed October 18, 2009).

Brundage, James. *Medieval Canon Law and the Crusader*. Madison: University of Wisconsin Press, 1969.

Chodorow, Stanley. *Christian Political Theory and Church Politics in the Mid-Twelfth Century: The Ecclesiology of Gratian's Decretum*. Berkeley: University of California Press, 1972.

- . “Ecclesiastical Politics and the Ending of the Investiture Contest: The Papal Election of 1119 and the Negotiations of Mouzon.” *Speculum* 46 (1971): 613-640.
- Cortese, Ennio. *Il basso medioevo*. Vol. 2, *Il diritto nella storia medievale*. Rome: Il cigno Galileo Galilei, 1999.
- Cushing, Kathleen. *Reform and the Papacy in the Eleventh Century: Spirituality and Social Change*. Manchester: Manchester University Press, 2005.
- De León, Enrique. “La biografia di Graziano.” In *La cultura giuridico-canonica medioevale: Premesse per un dialogo ecumenico*, 89-107. Edited by Enrique De León and Nicolás Álvarez de las Asturias. Milan: Giuffrè, 2003. Reprinted, *Ius Ecclesiae* 14 (2002): 415-423.
- Di Domenico, Adriana. “Codici miniati romanici nel fondo Conventi soppressi della Biblioteca Nazionale Centrale di Firenze: Camaldoli-Vallombrosa-Santa Maria Novella.” Ph.D. diss., Università degli Studi di Firenze, 1990.
- Dillon, John Noel. “Case Statements (themata) and the Composition of Gratian's Cases.” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 92 (2006): 306-339.
- Dolezalek, Gero. “*Libri magistrorum* and the Transmission of Glosses in Legal Textbooks (12th and Early 13th Century).” In *Juristische Buchproduktion im Mittelalter*, 315-350. Edited by Vincenzo Colli. Frankfurt am Main: Vittorio Klostermann, 2002.
- Donahue, Charles, Jr. “The Monastic Judge: Social Practice, Formal Rule and the Medieval Canon Law of Incest.” In *De Iure Canonico Medii Aevi: Festschrift für Rudolf Weigand*, 49-69. Edited by Peter Landau and Martin Petzolt. Rome: LAS, 1996.
- Ekelund, Robert, Jr., Robert F. Herbet, and Robert D. Tollison. “An Economic Model of the Medieval Church: Usury as a Form of Rent Seeking.” *Journal of Law, Economics, & Organization* 5 (1989): 307-331.
- Eichbauer, Melodie Harris. “St. Gall Stiftsbibliothek 673 and the Early Redactions of Gratian's *Decretum*.” *Bulletin of Medieval Canon Law* 27 (2008): 105-139.
- Fichtenau, Heinrich. *Heretics and Scholars in the High Middle Ages: 1000-1200*. Translated by Denise A. Kaiser. University Park: Pennsylvania State University Press, 1998.
- Fransen, Gérard. “La date du Decret de Gratien.” *Revue d'Histoire Écclésiastique* 51(1956): 521-531.

- Fowler-Magerl, Linda. *Clavis canonum: Selected Canon Law Collections Before 1140*. Monumenta Germaniae Historica. Hilfsmittel 21. Hannover: Hansche Buchhandlung, 2005.
- . *Ordines iudicarii and Libelli de ordine iudiciorum*. Turnhout: Brepols, 1994.
- Fuhrmann, Horst. *Papst Urban II. und der Stand der Regularkanoniker*. Bayerische Akademie der Wissenschaften, Philosophisch-Historische Klasse, Sitzungsberichte: Munich, 1984.
- Gaudemet, Jean. "Les sources du Décret de Gratien." *Revue de droit canonique* 48:2 (1998): 247-261.
- . "Das römische Recht im Dekret Gratians," *Österreichisches Archiv für Kirchenrecht* 12 (1961): 177-191.
- Genka, Tatsushi. "Some Critical Comments on the Rubric of C.15 q.1 c.8 of Gratian's *Decretum*." *Forum historiae iuris*. <http://s6.rewi.hu-berlin.de/online/fhi/articles/0701genka.htm> (accessed October 18, 2009).
- . "Gratians Umgang mit seinen Quellen in C.15 q.1." In *"Panta rei": Studi dedicati a Manlio Bellomo*, 2:421-443. Edited by Orazio Condorelli. Rome: Il Cigno, 2004.
- Goldberg, Jessica. "The Legal Persona of the Child in Gratian's *Decretum*." *Bulletin of Medieval Canon Law* 24 (2000): 10-53.
- Gratian. *Decretum*. Vol. 1, *Corpus Iuris Canonici*. Edited by Aemilius Friedberg. Graz: Akademische Druck – U. Verlagsanstalt, 1959.
- . *The Treatise on Laws (Decretum DD. 1-20)*. Translated by Augustine Thompson. Washington D.C.: The Catholic University of America, 1993.
- Gujer, Regula. *Concordia Discordantium Codicum Manuscriptorum? Die Textentwicklung von 18 Handschriften anhand der D.16 des "Decretum Gratiani"*. Forschungen zur kirchlichen Rechtsgeschichte und zum Kirchenrecht 23. Cologne: Böhlau, 2004.
- . "Zur Überlieferung des Decretum Gratiani." In *Proceedings of the Ninth International Congress of Medieval Canon Law*, 87-104. Monumenta iuris canonici. Series C, Subsidia 10. Vatican City: Biblioteca Apostolica Vaticana, 1997.
- Grundman, Herbert. *Religious Movements in the Middle Ages*. Notre Dame: University of Notre Dame, 1995.

- Ivo of Chartres. *Decretum*. Patrologia Latina Database. Edited by Jacques-Paul Migne. http://pld.chadwyck.com/all/fulltext?ALL=Y&ACTION=byoffset&warn=N&div=4&OFFSET=122798570&FILE=./session/1064240783_28850 (accessed October 18, 2009).
- Krueger, Paul, Theodor Mommsen, and Rudolf Schoell, eds. *Corpus iuris civilis*. 3 Vols. Berolini: Apud Weidmannos, 1954.
- Kuttner, Stephan. *Gratian and the Schools of Law, 1140-1234*. London: Variorum Reprints, 1983.
- . “Research on Gratian: Acta and Agenda.” In *Proceedings of the Seventh International Congress of Medieval Canon Law*, 3-26. Monumenta iuris canonici. Series C, Subsidia 8. Vatican City: Biblioteca Apostolica Vaticana, 1988. Reprinted, Kuttner, *Studies in the History of Medieval Canon Law*, no. v. Aldershot: Ashgate, 1990.
- . “New Studies on the Roman Law in Gratian,” *Seminar* 11 (1953): 12-50. Reprinted, *Gratian and the Schools of Law, 1140-1234*, no. iv. London: Variorum Reprints, 1983.
- . “Additional Notes on the Roman Law in Gratian’s *Decretum*.” *Seminar* 12 (1954): 68-74. Reprinted, *Gratian and the Schools of Law, 1140-1234*, no. v. London: Variorum Reprints, 1983.
- Lambert, M.D. *Medieval Heresy: Popular Movements from the Gregorian Reform to the Reformation*, 3d ed. Oxford; Malden, MA: Blackwell Publishing, 2002.
- Landau, Peter. “Neue Forschungen zu vorgratianischen Kanonessammlungen und den Quellen des gratianischen Dekrets.” *Ius commune* 11 (1984): 1-29.
- . “Quellen und Bedeutung des gratianischen Dekrets.” *Studia et documenta historiae et iuris* 52 (1986): 218-235.
- . “Gratians Arbeitsplan.” In *Iuri canonico promovendo: Festschrift für Heribert Schmitz zum 65 Geburtstag*, 691-707. Regensburg: F. Pustet, 1994.
- . “Gratian und Dionysius Exiguus: Ein Beitrag zur Kanonistischen Interpolationenkritik.” In *De iure canonico Medii Aevi: Festschrift für Rudolf Weigand*, 271-283. *Studia Gratiana* 27. Rome: LAS, 1996.
- . “Das Register Papst Gregors I. im *Decretum Gratiani*.” In *Mittelalterliche Texte: Überlieferung – Befunde – Deutungen*, 124-140. Schriften der Monumenta Germaniae Historica Bd. 42. Edited by Rudolf Schieffer. Hannover: Hansche Buchhandlung, 1996.

- , “Burchard de Worms et Gratien: Pour l’étude des sources directes du *Décret* de Gratien.” *Revue de droit canonique* 48:2 (1998): 233-245.
- , “Patristische Texte in den beiden Rezensionen des *Decretum Gratiani*.” *Bulletin of Medieval Canon Law* 23 (1999): 77-84.
- , “Gratian and the *Decetum Gratiani*.” In *The History of Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*, eds. Wilfried Hartmann and Kenneth Pennington, 22-54. Washington D.C.: The Catholic University of America Press, 2008.
- Lange, Hermann. *Die Glossatoren*. Vol. 1, *Römisches Recht im Mittelalter*. Munich: C.H. Beck, 1997.
- Lansing, Carol. *Power and Purity: Cathar Heresy in Medieval Italy*. Oxford: Oxford University Press, 1998.
- Larrainzar, Carlos. “El *Decreto* de Graciano del Codice Fd (= Firenze, Biblioteca Nazionale Centrale, Conventi Soppressi A.I.402): In memoriam Rudolf Weigand.” *Ius Ecclesiae* 10 (1998): 421-489.
- , “El borrador de la *Concordia* de Graciano: Sankt Gallen, Stiftsbibliothek MS 673 (=Sg).” *Ius Ecclesiae* 11 (1999): 593-666.
- , “La formacion del *Decreto* de Graciano por etapas.” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 87 (2001): 67-83.
- , “La ricerca attuale sul *Decretum Gratiani*.” In *La cultura giuridico-canonica medioevale: Premesse per un dialogo ecumenico*, 109-122. Edited by Enrique De León and Nicolás Álvarez de las Asturias. Milan: Giuffrè, 2003.
- , “El manuscrito Cd del *Decreto* de Graciano (=Cambridge Mass., Harvard Law School Library Ms 64).” In *Proceedings of the Tenth International Congress on Medieval Canon Law*, 81-109. Monumenta iuris canonici. Series C, Subsidia 11. Vatican City: Biblioteca Apostolica Vaticana, 2001.
- , “La edición crítica del *Decreto* de Graciano.” *Bulletin of Medieval Canon Law* 26 (2004-2006): 71-103.
- Larson, Atria. “The Evolution of Gratian’s *Tractatus de penitentia*.” *Bulletin of Medieval Canon Law* 26 (2004-2006): 59-123.
- , “Early Stages of Gratian’s *Decretum* and the Second Lateran Council: A Reconsideration.” *Bulletin of Medieval Canon Law* 27 (2008): 1-36.

- Lenherr, Titus. *Die Exkommunikations- und Depositionsgewalt der Häretiker bei Gratian und den Dekretisten bis zur "Glossa Ordinaria" des Johannes Teutonicus*. Münchener theologische Studien, III: Kanonistische Abteilung 42. St. Ottilien: EOS Verlag, 1987.
- . "Die Summarien zu den Texten des 2. Laterankonzils von 1139 in Gratians *Dekret*." *Archiv für katholisches Kirchenrecht* 150 (1981): 528-551.
 - . "Fehlende 'Paleae' als Zeichen eines überlieferungsgeschichtlich jüngeren Datums von *Dekret*-Handschriften." *Archiv für katholisches Kirchenrecht* 151 (1982): 495-507.
 - . "Zur Überlieferung des Kapitels *Duae sunt, inquit, leges* (*Decretum Gratiani* C.19 q.2 c.2)." *Archiv für katholisches Kirchenrecht* 168 (1999): 359-384.
 - . "Die Vier Fassungen von C.3 q.1 d.p.c.6 im *Decretum Gratiani*. Zugleich ein Einblick in die neueste Diskussion um das Werden von Gratians *Dekret*." *Archiv für katholisches Kirchenrecht* 169 (2000): 353-381.
 - . "Die Freiheit zur *vita communis* der Jerusalemer Urgemeinde. Ein anderer Blick auf *Duae sunt, inquit, leges* (*Dekret Gratians* C.19 q.2 c.2)." In *Communio in Ecclesia mysterio: Festschrift für Winfried Aymans zum 65. Geburtstag*, 305-333. Edited by Karl-Theodor Geringer and Heribert Schmitz. St. Ottilien: EOS Verlag, 2001.
 - . "Die *Glossa Ordinaria* zur Bibel als Quelle von Gratians *Dekret*: Ein (neuer) Anfang." *Bulletin of Medieval Canon Law* 24 (2000): 97-129.
 - . "Ist die Handschrift 673 der St. Galler Stiftsbibliothek (Sg) der Entwurf zu Gratians *Dekret*? Versuch einer Antwort aus Beobachtungen an D.31 und D.32." <http://www.t-j-l.de/Sg-Entw.PDF> (accessed October 18, 2009).
 - . "Reos sanguinis [non] defendat ecclesia: Gratian, mit einem kurzen Blick erhascht?" In *Medieval Church Law and the Origins of the Western Legal Tradition*, 110-121. Edited by Wolfgang Müller and Mary Sommar. Washington D.C.: Catholic University of America Press, 2006.
 - . "Zur Redaktionsgeschichte von C.23 q.5 in der '1.Rezension' von Gratians *Dekret*: The Making of a Quaestio." *Bulletin of Medieval Canon Law* 26 (2004-2007): 31-58.
- Madden, Sister James Eugene. "Business Monks, Banker Monks, Bankrupt Monks: The English Cistercians in the Thirteenth Century." *The Catholic Historical Review* 49 (October 1963): 341-364.
- McLaughlin, Terence, ed. *The Summa Parisiensis on the Decretum Gratiani*. Toronto: The Pontifical Institute of Mediaeval Studies, 1952.

- Minnucci, Giovanni. *La capacità processuale della donna nel pensiero canonistico classico*. Milan: Dott. A. Giuffrè Editore, 1989.
- Mordek, Hubert. "Systematische Kanonensammlungen vor Gratian: Forschungsstand und neue Aufgaben." In *Proceedings of the Sixth International Congress of Medieval Canon Law*, 185-201. Monumenta iuris canonici. Series C, Subsidia 7. Vatican City: Biblioteca Apostolica Vaticana, 1985.
- Nardi, Paolo. "Fonti canoniche in una sentenza senese del 1150." In *Life, Law and Letters: Historical Studies in Honour of Antonio García y García*, 661-670. Studia Gratiana 29. Edited by Peter Linehan. Rome: Libr. Ateneo Salesiano, 1998.
- Nobel, Pierre. "La Traduction Médiévale du Décret de Gratien." *Revue de droit canonique* 48:2 (1998): 317-347.
- Noonan, John T. "Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law." *Traditio* 35 (1979): 145-172.
- . "The Catholic Law School - A.D.1150." *The Catholic University Law Review* 47 (1998): 1189-1205.
- Paxton, Frederick C. "Le cause 13 de Gratien et la composition du Décret." *Revue de droit canonique* 51:2 (2001): 233-249.
- Pennington, Kenneth. "Gratian, Causa 19, and the Birth of Canonical Jurisprudence." In *La cultura giuridico-canonica medioevale: Premesse per un dialogo ecumenico*, 209-232. Edited by Enrique De León and Nicolás Álvarez de las Asturias. Milan: Giuffrè, 2003. Expanded and reprinted, "*Panta rei*": *Studi dedicati a Manlio Bellomo*, 4:339-355. Edited by Orazio Condorelli. Rome: Il Cigno, 2004.
- . "The 'Big Bang': Roman Law in the Early Twelfth-Century." *Rivista internazionale di diritto comune* 18 (2007): 43-70.
- . "*Lex Naturalis* and *Ius Naturale*." *The Jurist* 28.2 (2008): 569-591.
- . "The Formation of the Jurisprudence of the Feudal Oath of Fealty." *Rivista internazionale del diritto comune* 15 (2004): 57-76.
- Racine, Pierre. "Bologne au temps de Gratien." *Revue de droit canonique* 48:2 (1998), 263-284.
- Rambaud, Jacqueline. "Le legs de l'ancien droit: Gratien." In *L'âge classique 1140-1378: sources et théorie du droit*, 47-129. Edited by Gabriel Le Bras, Charles Lefebvre, and Jacqueline Rambaud. Histoire du droit et des institutions de l'Eglise en Occident 7. Paris: Sirey, 1965.

- Rambaud-Buhot, Jacqueline. "L'étude des manuscrits du *Décret* de Gratien conservés en France." *Studia Gratiana* 1 (1953): 119-145.
- Reuter, Timothy and Gabriel Silagi, eds. *Wortkonkordanz zum Decretum Gratiani*. Monumenta Germaniae historica. Hilfsmittel 10. Munich: Monumenta Germaniae Historica, 1990.
- Russell, Frederick Russell. *Just War in the Middle Ages*. Cambridge: Cambridge University Press, 1975.
- Scheichl, Andrea. "Studien zu Handschriften des 12. Jahrhunderts aus der Stiftsbibliothek Admont." Vienna, Staatsprüfungsarbeit, Institut für Österreichische Geschichtsforschung, 1989.
- Schulte, Johann Friedrich von. *Die Summa des Stephanus Tornacensis über das Decretum Gratiani*. Giessen: Emil Roth, 1891.
- Sommar, Mary E. "Gratian's Causa VII and the Multiple Recension Theories." *Bulletin of Medieval Canon Law* 24 (2000): 78-96.
- Somerville, Robert. "Pope Innocent II and the Study of Roman Law." In *Papacy, Councils and Canon Law in the 11th-12th Centuries*, XIV: 105-114. Aldershot: Variorum Reprints, 1990.
- . *Pope Urban II, The Collectio Britannica, and the Council of Melfi (1089)*. Oxford: Clarendon Press, 1996.
- Stickler, Alfons. "Iter Helveticum." *Traditio* 14 (1958): 462-483.
- Tarín, Luis Pablo. "An secularibus litteris oporteat eos esse eruditos? El texto de D.37 en las etapas antiguas del *Decreto* de Graciano." In *La cultura giuridico-canonica medioevale*, 469-511. Edited by Enrique De León and Nicolás Álvarez de las Asturias. Milan: Giuffrè, 2003.
- Van Engen, John. "Observations on *De consecratione*." In *Proceedings of the Sixth International Congress of Medieval Canon Law*, 309-320. Monumenta iuris canonici. Series C, Subsidia 7. Vatican City: Biblioteca Apostolica Vaticana, 1985.
- Vetulani, Adam. *Sur Gratien et les décrétales: recueil d'études*. Edited by Waclaw Uruszczak. Burlington: Ashgate, 1990.
- . "Gratien et le droit romain." *Revue historique de droit français et étranger* 24/25 (1946/1947): 11-48.

- Viejo-Ximénez, José M. "Variantes Textuales y Variantes Doctrinales en C.2 q.8." *Bulletin of Medieval Canon Law* 26 (2004-2007): 1-23.
- . "La redacción original de C.29 del *Decreto* de Graciano." *Ius ecclesiae* 10 (1998): 149-185.
- . "*Concordia y Decretum* del maestro Graciano: In memoriam Rudolf Weigand." *Ius canonicum* 39 (1999): 333-357.
- . "La recepción del derecho romano en el derecho canonico." *Ius Ecclesiae* 14 (2002): 375-414.
- . "El derecho romano 'nuevo' en el Decreto de Graciano." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 88 (2002): 1-19.
- . "Les Étapes de l'incorporation des textes romains au Décret de Gratien." *Revue de droit canonique* 51:1 (2001): 251-260.
- Wei, John. "A Reconsideration of St. Gall, Stiftsbibliothek 673 (Sg) in Light of the Sources of Distinctions 5-7 of the *De penitentia*." *Bulletin of Medieval Canon Law* 26 (2004-2006): 141-180.
- Weigand, Rudolf. *Die Glossen zum "Dekret" Gratians: Studien zu den frühen Glossen und Glossenkompositionen*. Studia Gratiana 26-27. Rome: Ateneo Salesiano, 1991.
- . "Die Dekretabbreviatio 'Quoniam egestas' und ihre Glossen." In *Fides et ius: Festschrift für Georg May zum 65. Geburtstag*, 249-265. Regensburg: F. Pustet, 1991.
- . "Zur künftigen Edition des *Decretum Gratians*." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 83 (1997): 32-51.
- . "Das kirchliche Wahlrecht im *Dekret Gratians*." In *Wirkungen europäischer Rechtskultur: Festschrift für Karl Kroeschell zum 70*, 1331-1346. Edited by Gerhard Köbler and Hermann Niehlsen. Munich: Beck, 1997.
- . "Chancen und Probleme einer baldigen kritischen Edition der ersten Redaktion des Dekrets Gratians." *Bulletin of Medieval Canon Law* 23 (1998), 53-75.
- . "Mittelalterliche Texte: Gregor I., Burchard und Gratian." *ZRG Kan. Abt.* 84 (1998): 330-344.

- . “Versuch einer neuen, differenzierten Liste der Paleae und Dubletten im *Dekret Gratians*.” In *Life, Law and Letters: Historical Studies in Honour of Antonio García y García*, 883-899. *Studia Gratiana* 29. Edited by Peter Linehan. Rome: LAS, 1998. Reprinted, *Bulletin of Medieval Canon Law* 23 (1999): 114-128.
 - . “Causa 25 des *Dekrets* und die Arbeitsweise Gratians.” In *Grundlagen des Rechts: Festschrift für Peter Landau zum 65. Geburtstag*, 277-290. Edited by Richard H. Helmholz, Paul Mikat, Jörg Müller und Michael Stolleis. Paderborn: F. Schöningh, 2000.
 - . “Frühe Glossenkompositionen zum Dekret Gratians und der Apparat ‘*Ordinaturus magister*’.” In *Proceedings of the Sixth International Congress on Medieval Canon Law*, 29-39. *Monumenta iuris canonici. Series C, Subsidia* 7. Vatican City: Biblioteca Apostolica Vaticana, 1985.
- Werckmeister, Jean, “Les études sur le *Décret* de Gratien: Essai de bilan et perspectives.” *Revue de droit canonique* 48:2 (1998): 363-379.
- . “Les deux versions du ‘de matrimonio’ de Gratien.” *Revue de droit canonique* 48:2 (1998): 301-316.
- Winroth, Anders. “Les deux Gratien et le droit romain.” *Revue de droit canonique* 48:2 (1998): 285-299.
- . *The Making of Gratian's Decretum*. Cambridge: Cambridge University Press, 2000.
 - . “Le manuscrit florentin du *Décret* de Gratien: Une critique des travaux de Carlos Larrainzar sur Gratien, I.” *Revue de droit canonique* 51:2 (2001): 211-231.
 - . “The Teaching of Law in the Twelfth Century.” In *Law and Learning in the Middle Ages*, 41-62. Edited by Helle Vogt and Mia Münster-Swendsen. Copenhagen: DJØF Publishing, 2006.
 - . “Neither free nor slave: Theology and Law in Gratian’s Thoughts on the Definition of Marriage and Unfree Persons.” In *Medieval Foundations of the Western Legal Tradition: A Tribute to Kenneth Pennington*, 97-109. Edited by Wolfgang Müller and Mary Sommar. Washington, D.C.: Catholic University of America Press, 2006.
 - . “Recent Work on the Making of Gratian’s *Decretum*.” *Bulletin of Medieval Canon Law* 26 (2006): 1-29.
 - . “The Two Recensions of Gratian’s *Decretum*.” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 83 (1997) 22-31.

Wojtyła, Karol. "Le traité de 'penitentia' de Gratien dans l'abrégé de Gdańsk Mar. F. 75." *Studia Gratiana* 7 (1959): 355-390.