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Discordia in Concordia: The Two-Step Development of the Post-Gratian Gloss and the Emergence of a New Era in Canon Law

Zachary A. Woodward
College of William and Mary

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Discordia in Concordia: The Two-Step Development of the Post-Gratian Gloss and the
Emergence of a New Era in Canon Law

A thesis submitted in partial fulfillment of the requirement
for the degree of Bachelor of Arts in Religious Studies from
The College of William and Mary

by

Zachary Ambrose Woodward

Accepted for Highest Honors
(Honors, High Honors, Highest Honors)

John S. Morreall
John S. Morreall, Director

Philip H. Daileader
Philip H. Daileader

Nicholas S. Popper
Nicholas S. Popper

Williamsburg, VA
April 29, 2014

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Introduction

Around 1140, a canon lawyer named Gratian published a legal collection titled *Concordia Discordantium Canonum* (“A Harmony of Discordant Canons”), which attempted to compile and reconcile the Church’s often contradictory laws. Because of its cohesiveness, comprehensiveness, and directness, canonists began using the *Decretum* (as it became called) as a textbook and legal reference; some canonists composed glosses to aid readers of this masterpiece. I argue that the glosses on Gratian’s *Decretum* developed over the course of two distinct subgenres—early glosses and late glosses. While early glosses were written to provide understanding of Gratian’s original legal arguments, late glosses were written to promote their authors’ own legal opinions. After surveying textual evidence for this two-step development, I consider why such a development occurred and make the case that temporal factors better explain the two-step development than geographic ones. By offering new explanations for the dramatic legal shifts of the twelfth century Church, this thesis offers new insight into one of the most dramatic legal revolutions of Roman Catholicism.

I present my argument over the course of five chapters. Chapter One provides an introduction into the legal culture of the medieval Church. Chapter Two introduces and presents evidence for the two-step development of the gloss genre. Chapter Three explains why temporal factors were much more likely than geographic factors to have driven the development. Chapter Four provides an illustration of how the two-step development affected the legal community’s theory of natural law. Chapter Five compares the legal behaviors of the twelfth century canonists to behaviors in other legal traditions and concludes the thesis by synthesizing the arguments and

observations of the first four chapters into a new model for the legal revolution that the *Decretum* initiated.

Chapter 1

The Legal Culture of the Western Church in the Tenth through Twelfth Centuries

From the early years of the Church, law was viewed as merely a restatement of the divine commandments that were present in scripture. As Christianity expanded as the official religion of the Roman Empire, church law (or canon law) became more methodical and comprehensive, encompassing both the natural law of scripture's divine commandments and the human law that applied to matters with which the Old Testament and the New Testament seemed unconcerned. Around the eleventh century, interest in canon law became renewed, and the emerging legal culture of the *ius commune* inspired expanded study of the law without departing from the theological views that had defined understanding of the law in the earlier centuries of Christianity. This culture of renewed interest and expanded study ultimately resulted in the legal compilation known as Gratian's *Decretum* around 1140 and its multiple subsequent glosses in the form of *summae*.¹ Current research identifies some basic characteristics of these glosses, but scholars have, until now, not fully outlined and explained the process by which glosses evolved as a genre.

¹ Note that the terms "gloss" and "summa" can bear multiple meanings. "Gloss" usually refers to a commentary on a work. A gloss can take many formats; some glosses appear in the margins of the text on which they commentate, while others stand alone as their own texts that make short references to and descriptions of the original work upon which they commentate. "Summa" usually refers to a work that sums up knowledge in a field; *summae* usually stand alone as their own texts. A gloss in the form of a *summa*, then, is a stand-alone commentary on a work, not written in the margins of that work. In this thesis, the terms "gloss" and "summa" will refer to a gloss in the form of a *summa*, unless otherwise specified. (One should only anticipate references to different, non-*summa* types of glosses in Chapter 3.)

Notions of Law in Western Christianity

Emergence and Development of Law

Canon law—the body of laws and traditions governing the Catholic Church—has played an important role in the development of Christianity since the first century. Within one hundred years after the death of Jesus, his followers had realized that, despite great reservations toward some contemporary interpretations and practices of Mosaic Law in Jesus’ teachings, the survival and growth of their community depended on basic rules and guidelines.² Early laws of the Church focused on basic moral precepts, guidelines for church governance, and instructions for the conduct of liturgical services.³ As bishops, community leaders, and the consensus of the whole expanded these guidelines in number and scope, the law focused mostly on maintaining discipline, the order of worship, and relationships among members; overall, the focus of this legal system was predictably insular and small-scale as Christians were a largely marginalized and private group within the Roman Empire.⁴

When the relationship between Christianity and the rest of the empire evolved, so too did Christian law. As Christianity expanded, separated from Judaism, and re-centered itself in the West to enjoy a privileged status as the official state religion of the Roman Empire, the Church became another instrument of the empire, and, as such, the Church’s laws began to reflect the needs of the empire.⁵ The governing needs of the Roman Empire and the purely bureaucratic demands of an imperially-sized church led to canon law’s coverage of many topics ranging from the administration of sacraments, codes of conduct for the clergy and lay people, and

² James A. Brundage, *Medieval Canon Law* (New York: Longman Group 1995), 5.

³ *Ibid.*, 5-6.

⁴ *Ibid.*, 7.

⁵ *Ibid.*, 8.

descriptions of the intricate hierarchical structure that would form the basis of authority of the Roman Catholic Church into modernity.

The Divine Authority of the Law

Throughout this early development of law in the Church, the question of the exact nature of the law arose and would persist through the Middle Ages; of particular importance is the question of where exactly law acquires its authority. In the early centuries of Christian law, before Christianity becoming officially established as the religion of the Roman Empire, it appears quite obvious that divine revelation serves as the direct source of laws. Despite Jesus' condemnation of many Jews' interpretations of Mosaic Law, the canonical gospels reveal that in many Christian communities, law in general is seen as both compatible with the faith and as a direct representation of the will of God on earth. The author of Matthew demonstrates the positive reception of law in his community when he reports that Jesus declared in his Sermon on the Mount, "Do not think that I have come to abolish the law of the prophets; I have come not to abolish but to fulfill. For truly I tell you, until heaven and earth pass away, not one letter, not one stroke of a letter will pass from the law until all is accomplished."⁶ Jesus, declaring the importance of adherence to law, continues, "Therefore, whoever breaks one of the least of these commandments, and teaches others to do the same, will be called least in the kingdom of heaven; but whoever does them and teaches them will be called great in the kingdom of heaven."⁷ The synoptic gospels share this vision of the law and all offer specific commandments as examples of divine instruction on earth.⁸

The early Johannine community does not present as open an embrace for law as Matthew presents in the Sermon on the Mount; however, the community does seem to identify law and

⁶ Matt. 5:17-18 (NRSV).

⁷ Matt. 5:19.

⁸ Matt. 22:34-40; Mark 12:28-33; Luke 10:25-28.

legalism as going hand-in-hand with the more informal “grace and truth” of Christ.⁹ In addition, the Gospel of John, like the synoptics, recognizes particular commandments as having legal authority based on their directly coming from the word of God.¹⁰

In Pauline literature, the importance of law for maintaining God’s will is especially present in the letter to the Romans, where it reads, “sin was indeed in the world before the law, but sin is not reckoned when there is no law.”¹¹ The sentiments of this letter, combined with the representations of Jesus’ sentiments in the four canonical gospels, demonstrate that at least some early Christian communities viewed law as an important institution that received its authority directly from God and served a vital function on earth.

In addition to justifying law as a concept, scripture also describes for Christians how early believers put law into practices. The epistles of the New Testament repeatedly mention formations of legal systems in the early Christian community, and they detail the advice of the apostles (especially Paul) on how to erect these legal systems.¹² Paul instructs believers, “Bear one another’s burdens, and in this way you will fulfill the law of Christ.”¹³ This statement echoes the divine legal instructions from both the synoptic gospels and the Gospel of John. On a whole host of subjects that the law would eventually cover (e.g. prayer, right practice, morality), early Christians could look directly at revelation in scripture to answer legal questions.¹⁴ Maintaining the central idea of revelation as a source for authority, Christianity could have progressed on a track that rejected all laws not found within scripture itself; conceivably, some could argue that

⁹ John 1:17.

¹⁰ John 13:34-35, 15:12.

¹¹ Rom. 5:13.

¹² John A. McGuckin, *The Ascent of Christian Law: Patristic and Byzantine Formulations of a New Civilization* (Yonkers, NY: St. Vladimir’s Seminary Press, 2012), 20-22.

¹³ Gal. 6:2.

¹⁴ Matt. 6:2-4, 6:9-13, 6:16-18. Certainly, one could identify dozens of further passages (both canonical and apocryphal) that could serve as scriptural answers to legal questions of practice and belief. These quotes serve to just illustrate three example in one gospel that answer the questions of how to give alms, how to pray, and how to fast.

the books that became the Christian New Testament contained enough instruction for scripture to constitute the only legal genre for the Western Church.

However, law did not progress in such a fashion to make the Old Testament and the New Testament the only legal collections of the Middle Ages. In the early centuries, the first Christian communities made rules for themselves, and these rules did not always exist in scripture.¹⁵ As the scope, size, and understanding of law evolved in the Church, the genres of various legal works grew to adapt to the new formations of law. The earliest surviving Christian legal genres tended to be small and merely stated the law, reflecting the law's underdeveloped state in the first few centuries of Christianity. The *Doctrine of the Twelve Apostles*, emerging around the turn of the second century, was "scarcely more than a pamphlet-size" and merely listed rules for its audience.¹⁶ The second century's *Pastor* of Hermas introduces more literary aspects to the legal genre by incorporating "visions" and parables to deliver its legal message.¹⁷ In the third century, the *Traditio apostolica* eschews many of the more creative aspects of the *Pastor* tradition, but the author expands the scope of the legal genre to address issues such as Church governance and the liturgy.¹⁸ The *Didascalia apostolorum* of the mid-third century expands upon this scope even further to address questions such as Jewish-Christian relations and communal responsibilities toward widows and orphans.¹⁹ After Constantine elevated the status of the Church, entirely new genres of Christian law entered the community. Starting with the Council of Nicaea in 325, the Roman Emperor would occasionally call a council to settle complex questions and to define orthodox belief and practice. The conciliar canons that these councils issued became their own

¹⁵ James A. Brundage, *Medieval Canon Law*, 5-6.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, 6.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

genre that persisted through the Middle Ages (and into the present day).²⁰ In addition, more local and frequent synods began convening around the fourth century, adding the canons and decrees of synods to this new legal genre.²¹ As the Bishops of Rome attempted to assert power within the Church through the first millennium, papal decretals became yet another non-biblical genre of legal authority in the Church.²² From the third century onward into the Middle Ages, these various legal genres—early writings, conciliar canons, synodal decrees, and papal decretals—began appearing in canonical collections, which sought to compile these many extra-biblical sources for easy reference.²³

With so many extra-biblical sources of law in the medieval Church, the question arises as to how medieval canonists could theologically justify their way of practicing law. Some Christian communities, particularly ones eventually deemed non-orthodox, held that a law could not have authority if it originated outside of revelation. For example, the Gospel of Mary (a Gnostic work from the second century) proscribes, “Do not lay down any rules beyond what I [Jesus] appointed you, and do not give a law like the lawgiver lest you be constrained by it.”²⁴ These objections from fellow Christians put the ultimately orthodox Christians on the defensive, forcing an explanation for laws that came from outside the direct word of God. The early legal systems constantly referred back to scripture in order to receive their authority.²⁵ However, having scripture as a source of authority does not necessarily equate to having a legal system as rigid, immovable, and narrowly-focused as scripture itself. Christians who largely expanded their legal system both abandoned the various ceremonial practices in the Torah and assumed the

²⁰ Ibid.

²¹ Ibid., 8-9.

²² Ibid., 10.

²³ Ibid., 10-11.

²⁴ The Gospel According to Mary Magdalene 4:38, The Gnostic Society Library, accessed December 7, 2013, <http://www.gnosis.org/library/marygosp.htm>.

²⁵ John A. McGuckin, *The Ascent of Christian Law: Patristic and Byzantine Formulations of a New Civilization*, 15.

priority of the Gospels; by changing these views of scripture, they instituted changes in the understanding of scripture that allowed for a “New Constitution” in terms of how their community perceived the relationship among the Law of the Old Testament, revelation by Christ in the New Testament, and legal practice from the time of the apostles onward.²⁶ The “New Constitution” indicated that orthodox Christians perceived legal practice as encompassing more than just adherence to the scripture.

This “New Constitution” represents a certain degree of legal fluidity that would continue past Christianity’s re-centralization in the West and persist well into the Middle Ages after the fall of Rome. During the Middle Ages, the work of canon lawyers continued to hinge upon authority by revelation, even with their many extra-biblical sources. Justification for extra-biblical sources comes from the fact that “the great bulk of medieval canon law was not, and did not purport to be, divinely revealed truth.”²⁷ Medieval canonists believed scripture was indeed the sole source of revelation; however, not all laws necessarily had to be divinely revealed. While revelation serves as the basis of eternal law that applies to all peoples and nations, tradition serves as an important source of information on more transitory matters.²⁸ In fact, revelation by scripture continued to hold primacy throughout canonist writing, and the bifurcation of law into law that is by revelation (e.g. *ius naturale*) and law that is by humanity (e.g. *ius moribus*) allowed legal tradition that stretched far beyond the mere commandments of scripture.²⁹ According to the medieval canonist, the law frequently mentioned throughout

²⁶ Ibid., 19-20.

²⁷ Brian Tierney, “‘Sola Scriptura’ and the Canonists,” *Collectanea Stephan Kuttner* 1, (1967): 345-366; repr., *Church Law and Constitutional Thought in the Middle Ages*, ed. Brian Tierney, (London: Variorum Reprints, 1979), 351.

²⁸ Ibid., 352.

²⁹ Brian Tierney, “*Natura Id Deus: A Case for Juristic Pantheism?*”, *Journal of the History of Ideas* 34 (1963): 307-322; repr. *Church Law and Constitutional Thought in the Middle Ages*, ed. Brian Tierney, (London: Variorum Reprints, 1979), 310-311.

scripture exclusively refers to *ius naturale*; the canonist fulfills the vital function of describing what is revealed within *ius naturale* and determining how that form of law relates to *ius moribus*.

When one discusses medieval canon law, he/she must keep these notions of Christian law in mind. Medieval canonists did not see themselves as ushering in new revelation that was previously hidden from the Church. On the contrary, Christian legalists of the Middle Ages viewed the study of the law as the practice of outlining how to bring Christians in closer accordance with revelation and how to relate the divine commandments of revelation with the secular commandments of humanity. This objective for canonists saw immense activity once a revolution in the legal community emerged.

The Emergence of the *Ius Commune*

One of the most dramatic legal changes of medieval Europe was the birth of the *ius commune*. This legal culture that developed before the twelfth century allowed the most significant legal innovations of the Middle Ages to occur. The term *ius commune* can assume many different meanings depending on the term's user and its context; some used the term to refer to natural law, others to canon law, and others to the *ius gentium*.³⁰ The versatility of the term *ius commune* (i.e. its application in many areas of the law in medieval Europe) demonstrates, in part, the vibrancy and diversity of thought that this new legal culture produced.

The culture of the *ius commune* emerged alongside scholars' increased awareness and understanding of Roman Law. In the early Middle Ages, the unified body of Roman Law and legal jurisprudence known as the *corpus iuris civilis* had been almost entirely out of use; its partial recompilation and rejuvenated interest by the eleventh century was what sparked the

³⁰ James A. Brundage, "Universities and the Ius Commune," *Rivista Internazionale di Diritto Comune* 11 (2000): 237-253; repr., *The Profession and Practice of Medieval Canon Law*, ed. James A. Brundage (Burlington, VT: Variorum, 2004), 238.

initial renaissance in medieval legalistic thought.³¹ The circulation of the Roman Law ideas in the *corpus iuris civilis* led to new ways of thinking about law, and the new ways of thinking ultimately made their way into the existing legal communities and upcoming universities of Europe.³² The discussions on Roman Law that took place in these communities contributed to a “climate of desire for learning” that existed around law in general during the early days of European universities; this inquisitive spirit served as an ultimate spur for more legal research and as defining aspect of the legal culture in the Middle Ages.³³

The entry of Roman Law into the university classrooms of canon and civil law (particularly, the classrooms at Bologna) also led to the two types of law becoming “intimately intertwined” following the re-emergence of the *corpus iuris civilis*.³⁴ Building on the genres of law that emerged in the first few centuries of Christianity (i.e. early writings, conciliar canons, synodal decrees, and papal decretals), the *ius commune* began searching for a means to adapt these genres in response to renewed dedication and curiosity toward the law.

The *Ius Commune* and the Genre of Canonical Collections

Because the new legal culture of the *ius commune* provided opportunity to ask questions about the law, the eleventh and twelfth centuries saw many attempts to perfect the Western Church’s understanding and teaching of canon law. Before 1140, there existed no universally accepted body of canon law (a *corpus iuris canonici*); furthermore, the growth of the genres of letters, decrees, and writings resulted in the law consisting of an amorphous mass of sources that

³¹ Stephan Kuttner, “The Revival of Jurisprudence,” in *Renaissance and Renewal in the Twelfth Century*, ed. R.L. Benson and G. Constable (Cambridge, MA: Harvard University Press, 1982), 299-323; repr., *Studies in the History of Medieval Canon Law*, ed. Stephan Kuttner (Brookfield, VT: Variorum, 1990), 300-308.

³² *Ibid.*, 305.

³³ *Ibid.*, 310.

³⁴ James A. Brundage, “Universities and the *Ius Commune*,” 242.

often disagreed with one another.³⁵ The unification and simplification of the confusing wealth of sources in pre-1140 canon law served as a primary need amongst the canonists, leading popes and many canonists to attempt to accomplish this feat.³⁶ To do so, many legal scholars wrote works that both gathered and synthesized the various sources of canon law and prescribed guidelines for determining what legal sources held authority, according to Christian legal thought.³⁷

In French-speaking circles, there was a particularly large amount of effort to compile the law. In the French-speaking region of what is now Belgium, Alger of Liège wrote multiple early twelfth-century works (e.g. *De Misericordia et iustitia*, *De Sacramentis corporis et sanguinis Dominici*) dealing with issues of mercy, justice, and the sacraments; based on their content, his works sought primarily to address various important canonical issues of the time at Liège and were not intended to serve as a sort of tract for canon lawyers.³⁸ In sharp contrast to the specific nature of Alger's compilations, Ivo of Chartres in Southern France wrote three main collections (i.e. *Decretum*, *Panormia*, *Tripartita*) that offered a very extensive review of the potential sources of canon law. Because Ivo offered a clearer, more comprehensive approach to canon law, his works were much more useful for answering broader legal questions and became widely circulated throughout Europe.³⁹ On a much smaller scale than Ivo's three writings was the

³⁵ Michael Brett, "Finding the Law: The Sources of Canonical Authority before Gratian," in *Law before Gratian: Law in Western Europe c. 500-1100*, ed. Per Andersen, Mia Münster-Swendsen, and Helle Vogt (Copenhagen : DJØF Publishing, 2007), 51-58.

³⁶ Stephan Kuttner, "Harmony from Dissonance: An Interpretation of Medieval Canon Law," (lecture, Wimmer Lecture X, St. Vincent College, 1956; pub., (Latrobe, PA: Archabbey Press, 1960), 1-16; repr., *Studies in the History of Medieval Canon Law*, ed. Stephan Kuttner (Brookfield, VT: Variorum, 1990), 2.

³⁷ Michael Brett, "Finding the Law: The Sources of Canonical Authority before Gratian," 53-58.

³⁸ *Ibid.*, 64-68.

³⁹ *Ibid.*, 69-70.

anonymous *La Summa Institutionum "Iustiniani est in hoc opere"* in 1127.⁴⁰ That work focused similarly on broad issues (e.g. justice and the sources of authority); however, the smaller size of this work reduced the number of issues the work contains and the depth to which the author of *La Summa* could go into each issue.

Outside of France (particularly, in Germanic communities), there were additional attempts to compile the law. In the eleventh century, Bernold of Constance devoted his canonical collection to outlining the criteria that make a source authoritative, as well as to extensively discussing the theological backgrounds that led to several of the enactments considered authoritative in the Middle Ages.⁴¹ Even more extensive than Bernold was Burchard of Worms, who wrote his *Decretum* (not to be confused with Ivo's *Decretum*) over the course of twenty books in the early eleventh century to address a wide range of topics, mostly dealing with issues related to *ius naturale*. Burchard, like Ivo, also saw huge circulation of his *Decretum*. However, none of the works of Bernold, Alger, Ivo, or Burchard would ever become as lasting as the work that became the definitive collection of canon law in the Middle Ages.

The *Decretum Gratiani*

Composition of the Decretum

By 1140, a compilation of canon law attributed to an individual named Gratian emerged from Bologna and quickly became accepted as a standard legal text for canon lawyers. Little is known about the life of Gratian (including whether he actually existed or was just a pseudonym for a group of authors); however, the canonical collection that he produced in the mid-twelfth century is widely regarded as the turning point in the legal history of the Western Church.

⁴⁰ Rudolf Weigand, "The Transmontane Decretists," in *The History of Medieval Canon Law in the Classical Period, 1140-1234: from Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pilkington (Washington, DC: Catholic University of America Press, 2008), 175.

⁴¹ Michael Brett, "Finding the Law: The Sources of Canonical Authority before Gratian," 59-64.

Gratian entitled his collection *Concordantia Discordantium Canonum*, reflecting the still-present goal of harmonizing and synthesizing huge number of (conflicting) sources that made up the body of canon law in the first millennium. Gratian went about compiling the sources of canon law by relying extensively on the canonists that precede him, especially Ivo.⁴² By relying on his predecessors and his own reasoning and legal skill to harmonize the *discordantes canones*, Gratian produced in the 1140s a treatise divided into two parts. The first part contained a tract outlining Gratian's legal theory for determining the authority of sources, and the second part contained a series of hypothetical legal cases that illuminate the reader on how to apply the correct law under specific circumstances; the final part of the *Decretum* briefly addresses issues surrounding the sacraments.⁴³ The *Decretum* is divided into multiple subsections. In parts one and three, the respective labels for sections and subsections are called *distinctions (distinctiones)* and *canons (canones)*; in part two, the respective labels are *cases (causae)* and *questions (quaestiones)*.

Recently, scholarship has come to accept the theory that the *Decretum* was composed over the course of two recensions. The most recent version of the theory demonstrates that the first recension was a much shorter work and that the second recensions was a much longer work that built upon the first recension.⁴⁴ Because the *Decretum* underwent an editing process after its first recension, scholars believe that early commentators (and not Gratian himself) were responsible for huge sections of text in the *Decretum*; these sections are called the *paleae* and appear in the final recension of the *Decretum* with little to distinguish them from the first

⁴² Peter Landau, "Gratian and the *Decretum Gratiani*," in *The History of Medieval Canon Law in the Classical Period, 1140-1234: from Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pilkington (Washington, DC: Catholic University of America Press, 2008), 22-54.

⁴³ Peter Landau, "Gratian and the *Decretum Gratiani*," 35-36.

⁴⁴ Anders Winroth, *The Making of Gratian's Decretum*, (New York: Cambridge University Press, 2000), 122, accessed April 15, 2013, EBSCOhost. Consult Winroth for more information on the details of which parts of the *Decretum* were contained within the first recension and which parts were added in the second recension.

recension.⁴⁵ After the second recension emerged, that edition began circulating as the standard form of the *Decretum*.⁴⁶

Following the composition of the *Decretum*, the work quickly became the standard for teaching canon law in medieval universities. In addition, canonists quickly began using the *Decretum* as the primary reference point in matters related to Church law. In this respect, the *Decretum* itself (not just the sources it quoted) became an authoritative source, and canon law, like Roman Law, could now operate with an identifiable *corpus* (i.e. the *corpus iuris canonici* that had previously been absent). One can therefore view Gratian's *Decretum* as the pivotal product of the *ius commune*'s influence on canon law.

Almost immediately after Gratian wrote his *Decretum*, canon lawyers began developing their own profession in the sense that their work involved fulltime occupation, esoteric knowledge, and high social esteem.⁴⁷ The process of professionalization began around 1150 when individuals began composing glosses (commentaries) on Gratian's *Decretum*; despite only existing in a proto-professional stage of canon law, the thinkers who composed, read, and taught these glosses were given title such as *iurisperiti*, *magistri*, and *legum professores*, indicating both esteem, seriousness, and intellectual commitment within the schools of canon law.⁴⁸ A careful reader of these glosses notices a peculiarity in their composition. Among the glosses that emerged in the decades immediately following the circulation of the *Decretum*, the works tend to

⁴⁵ Peter Landau, "Gratian and the *Decretum Gratiani*," 47-48. Consult Landau for more information on the two recensions of the *Decretum Gratiani* and the role of early glossators' in compiling the *paleae* of the *Decretum*. While the works of Winroth and Landau have firmly established that authors other than Gratian composed large sections of the *Decretum*, the earliest commentators treat the entire second recension (including the *paleae*) as if it was one complete work composed at one particular point in time. For that reason, this study does not treat commentaries on the *paleae* and other second recension sections in any way different than how it treats commentaries on first recension segments.

⁴⁶ Anders Winroth, *The Making of Gratian's Decretum*, 122-123.

⁴⁷ James A. Brundage, "The Rise of Professional Canonists and Development of the *Ius Commune*," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Kanonistische Abteilung* 8 (1995): 26-63; repr., *The Profession and Practice of Medieval Canon Law*, ed. James A. Brundage (Burlington, VT: Variorum, 2004), 27-30.

⁴⁸ James A. Brundage, "The Rise of Professional Canonists and Development of the *Ius Commune*," 35.

appear short and strictly grammatical and explanatory in their content. However, the glosses that emerged toward the end of the twelfth century tend to be longer and more argumentative. A few scholars have noticed aspects of this trend and written some observations on the discrepancy between the early glossators and the later glossators.⁴⁹ However, the current literature fails to fully and succinctly articulate how the genre of the post-Gratian gloss progressively developed in the late twelfth century; furthermore, little to no scholarship has devoted itself to explaining why the glossators wrote in such different tones.

⁴⁹ Rudolph Weigand, "The Development of the *Glossa Ordinaria* to Gratian's *Decretum*," in *The History of Medieval Canon Law in the Classical Period, 1140-1234: from Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pilkington (Washington, DC: Catholic University of America Press, 2008), 55-57; M.V. Dougherty, *Moral Dilemmas in Medieval Thought: From Gratian to Aquinas* (New York: Cambridge University Press, 2011), 18-19. Weigand explains that the earliest glosses on the *Decretum* were simply explanatory, clarifying, and grammatical. This article also documents the most prominent of the later glosses and explains how they are structured. However, Weigand concerns himself primarily with the multi-century process leading to the development of the *Glossa Ordinaria* (the set of glosses that the Roman Catholic Church officially recognized as authoritative after the Council of Trent in 1563) and does little to explain why the later glosses are more argumentative than the earlier ones. Dougherty picks up on many of the argumentative attitudes underpinning the works of the later glossators, but his research focuses more on documenting the specific arguments over the *ius naturale* in the glosses. Dougherty does not address wider legal issues present in Gratian's *Decretum*, nor does he attempt to explain the discrepancies in style between the later and earlier glossators.

Chapter 2

The Two-Step Development of the Post-Gratian Gloss

After the circulation of the *Decretum*, many canonists developed glosses on the work. These can be divided into two major subgenres of early glosses and late glosses. The early glossators of Bologna seem to have enthusiastically welcomed Gratian's collection and offered little of their own insight while commenting on the work. On the other hand, late glossators appear to have been less admiring toward Gratian, and their commentaries offered much more critical and original legal insight.

The Effect of the *Decretum*'s Dissemination

Soon after its finalization around the year 1140, Gratian's *Decretum* spread rapidly throughout Europe. Bologna became the first university to adopt the *Decretum* as a reference work for canon lawyers; its comprehensiveness of scope and thoroughness of method distinguishes it from all previous attempts to compile canon law. After Bologna (the most prestigious center of canon law at the time) accepted the work as a teaching tool, other localities and emerging universities followed.¹

The spread of the *Decretum* produced many tangible effects for the legal community. By the mid-twelfth century, clerics and monks alike acted in canon courts as judges (exclusively a clerical position), advocates (a role that became increasingly available to both groups as the twelfth century progressed), and litigating parties. A central role of the legal process at that time were the fees that advocates would charge to provide legal advice and represent litigating parties

¹ Dario C. Ferreira and Sandra A. Sawicki, "Decretum Gratiani: Cornerstone of Canon Law," *The Quarterly Journal of the Library of Congress* 34, no. 4 (October 1977): 333, accessed August 15, 2013, <http://www.jstor.org/stable/29781750>.

in canon courtrooms. Often, these legal fees would make advancing the interests of an individual (e.g. a monk) or an institution (e.g. an abbey) so debilitatingly expensive that it became economically advantageous for an abbey to send one of its own monks to a university to receive legal training.² When universities began employing the *Decretum* in classrooms for the purposes of instructing students of canon law, mastery of legal understanding became fundamentally dependent upon mastery of the *Decretum*.³ The culture of the time, then, presented many economic and political incentives for an individual or group to master the understanding of the law; by extension, after 1140, the *Decretum* created many economic and political incentives for students to read, digest, and respond appropriately to the content of this new legal work.

Two-Step Development Hypothesis

The current research shows that glosses were the main form in which legal actors in the academy responded to the *Decretum*. Scholars have noted and characterized the glossators of both the Italian and French schools.⁴ However, the current research has not yet sought to comparatively understand the glosses of all of western Europe with respect to how the gloss genre developed in the decades after the *Decretum*. This chapter argues that, after the

² James A. Brundage, "The Monk as Lawyer," in *The Profession and Practice of Medieval Canon Law*, ed. James A. Brundage, VI, (Burlington, VT: Ashgate, Variorum, 2004), 426-429.

³ James A. Brundage, "Universities and the Ius Commune," *Rivista Internazionale di Diritto Comune* 11 (2000): 237-25; repr., *The Profession and Practice of Medieval Canon Law*, ed. James A. Brundage (Burlington, VT: Variorum, 2004), 238-239.

⁴ Kenneth Pennington and Wolfgang P. Müller, "The Decretists: The Italian School," in *The History of Medieval Canon Law in the Classical Period, 1140-1234: from Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pilkington (Washington, DC: Catholic University of America Press, 2008), 121-173; Rudolf Weigand, "The Transmontane Decretists," in *The History of Medieval Canon Law in the Classical Period, 1140-1234: from Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pilkington (Washington, DC: Catholic University of America Press, 2008), 174-210. Pennington and Müller describe the glossators that arise in Italy from Paucapalea onward. The authors discuss at length the biographical details of the individual glossators, as well as the characteristics of their individual works. On a comparative scale, Pennington and Müller interpret the glosses as products of the canonist communities in Italy, as opposed to products of the canonist communities of their time. Weigand describes the glossators that arise in Paris and Southern France. He focusses less on the biographies of each glossator and more on the individual content of each work. Given the paucity of complete gloss manuscripts that survive, Weigand documents and describes many gloss fragments that survive. Like Pennington and Müller do with the Italian glossators, Weigand interprets the French glosses as products of their legal communities, and not as products of their specific times.

Decretum's circulation, gloss-writing on the entire continent underwent a clearly identifiable two-step development: (1) early glossators wrote to merely explain the content of the *Decretum*, and (2) later glossators wrote to intellectually engage themselves with the theoretical content of the *Decretum* and to formulate legal arguments of their own.

Two of the earliest glosses on the *Decretum* were *Summa Paucapaleae* and *Stroma Rolandi*. *Summa Paucapaleae* arose as the first gloss on the *Decretum*, written in Bologna between 1144 and 1150; while many claim that Paucapalea was Gratian's student and that he was responsible for many of the *paleae* in the *Decretum*, Pennington and Müller emphasize that these traditions are unfounded.⁵ Paucapalea served an important role as the preeminent instructor of Gratian's *Decretum* in the 1140s; by the mid-1150s, a successor to Paucapalea, Rolandus, emerged as an instructor of legal studies in Bologna.⁶ Once the *Decretum* became composed in its final form,⁷ these two glossators mostly organized Gratian's work into chapters and made notations (primarily abbreviations) that served to make the work accessible to a wider audience.⁸

Rufinus emerges as the earliest of the later glossators. Teaching in Bologna either at the same time or shortly after Rolandus in the 1150s, Rufinus was even more prominent than his

⁵ Kenneth Pennington and Wolfgang P. Müller, "The Decretists: The Italian School," 128-129. Pennington and Müller's emphasis that Paucapalea was not responsible for the *paleae* (large portions of the *Decretum* inserted within the text by the early 1140s) is particularly significant for this study, for it establishes Paucapalea as a glossator on the text and not a collaborator on the text. Note that the dates in this chapter are presented as the authors report them; see Chapter 3 for a more critical inspection of these dates.

⁶ *Ibid.*, 131-135. Pennington and Müller devote much of their notes on Rolandus to the work of Wiegand discrediting the tradition that equates Magister Rolandus with Pope Alexander III. The discrediting of this legend is of great importance to this study, by revealing that one cannot rely on the decretals of Alexander III for insight into the legal thought of Rolandus.

⁷ Peter Landau, "Gratian and the *Decretum Gratiani*," in *The History of Medieval Canon Law in the Classical Period, 1140-1234: from Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pilkington (Washington, DC: Catholic University of America Press, 2008), 47-48. Consult Landau for information on the two recensions of the *Decretum Gratiani* and the role of early glossators' in compiling the *paleae* of the *Decretum*. While the work of Anders Winroth has firmly established that authors other than Gratian composed these large sections of the *Decretum*, Paucapalea and Rolandus (and certainly later glossators) both commented on the *paleae* as if they were no different than the parts of the *Decretum* that composed the first recension.

⁸ Kenneth Pennington and Wolfgang P. Müller, "The Decretists: The Italian School," 122.

contemporary and became “the major figure at Bologna in the 1150s.”⁹ Rufinus completed his *Summa* on the *Decretum* by 1164 and his student Stephanus of Tournai (also of the later subgenre of glosses) completed his *Summa* in Bologna by 1167.¹⁰

In later decades, as more universities began accepting the *Decretum* as a tool for instruction, glosses started showing up in European cities outside of Italy. French schools, in particular, produced a fair number of glosses, with the *Summa Parisiensis* (written anonymously in Paris in the 1160s) standing out as one of the most notable.¹¹ In addition, there were many other glosses on the *Decretum* from both Paris and southern France; many of them appear familiar with the works of Bolognese Paecapalea, Rolandus, and Rufinus (as does the *Summa Parisiensis*).¹² Back in Bologna, Simon of Bisignano and Huguccio both composed summae very late in the twelfth century (after late glosses had already emerged in France), and both appear familiar with all of the previously mentioned glosses of both the Italian and the French schools.¹³

Characteristics of the Early Glosses

The previous foundational observations on the origins of the early glosses provide the first two characteristics of the early glosses: (1) they were composed very soon after the *Decretum*'s completion, and (2) they were almost exclusively from Bologna.

A review of the prologues to these early glosses reveals more about the attitudes that these early glossators had toward Gratian and his work. After explaining the complex problem of so many different and contradictory sources of law before 1140, Paucapalea writes, “Intentio

⁹ Ibid., 135.

¹⁰ Ibid., 135-137.

¹¹ Rudolf Weigand, “The Transmontane Decretists,” in *The History of Medieval Canon Law in the Classical Period, 1140-1234: from Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pilkington (Washington, DC: Catholic University of America Press, 2008), 198-199.

¹² Ibid., 174-210. Unfortunately, many of these other French glosses only partially survive today as manuscript fragments. Almost no French glosses, other than *Summa Parisiensis*, have been reliably produced in the form of a recent, reliable edition.

¹³ Kenneth Pennington and Wolfgang P. Müller, “The Decretists: The Italian School,” 135-137.

vero eius [Gratian's] fuit, ipsa decreta ordinare et in superficie dissonantia ad concordiam revocare. Modus autem tractandi talis est.”¹⁴ By contrasting his highly negative portrayal of the pre-1140 era in canon law with Gratian's work which (through great means that he sees as *talis*) finally brings about an era of concord and stability, Paucapalea portrays Gratian as somewhat of a savior, who rescued the practice of canon law from its dismal state pre-1140. Rolandus also sees Gratian as having a particular role within the history of canon law, saying, “Horum igitur dubitationes magister Gratianus intuens praesentibus atque futuris consulere cupiens hoc opus composuit.”¹⁵ To Rolandus, Gratian is not so much a savior as a caretaker; Gratian is the one that has preserved the law that arose in the first thousand years of Christian history, and he has taken upon himself a burdensome task to make the legal tradition viable for centuries to come. Therefore, one can identify a third quality of the early sub-genre of glosses: (3) the tone of early glossators tended to be highly laudatory of Gratian and the value of his work.

When one gets into the main text of these early glosses, it appears that they have little in conflict with Gratian's original work. The very first line of Paucapalea's commentary on Distinction 1 of the *Decretum* (in which Gratian outlines the two main types of law that govern humanity) reveals the major goal of his commentary. Paucapalea opens the gloss, “Ordinaturus decreta ipsa altius ingreditur a divisione videlicet iuris, quod in duo dividit, primo loco in ius naturae videlicet et consuetudinis. Inde multipliciter supponit divisiones, quarum singulas assequitur.”¹⁶ Paucapalea introduces here a gloss whose primary purpose is to merely guide the audience in reading the *Decretum*; the guidance starts with this explanation of how Gratian

¹⁴ Paucapalea, *Summa Paucapaleae*, ed. Johann Friedrich von Schulte (Giessen: Emil Roth, 1890), 3, accessed April 25, 2013, hosted by Bibliothèque Cujas, Université de Paris, <http://web.colby.edu/canonlaw/tag/rufinus/>.
Introductio.

¹⁵ Rolandus, *Summa Magistri Rolandi*, ed. Friedrich Thaner (Innsbruck: Wagner, 1872), 4, accessed April 25, 2013, http://works.bepress.com/david_freidenreich/6/.

¹⁶ Paucapalea, *Summa Paucapaleae*, 4. D. 1.

structures his work and continues with mild textual explanations and restatements that can simply help someone who might find difficulty digesting the content of the *Decretum*.

Paucapalea's textual explanations occur mostly in the form of cross references with Gratian's sources, and his restatements occur mostly in "id est" equivalencies and alternatives to Gratian's grammatical constructions.¹⁷ Rolandus, however, formats his commentary in a different manner as does Paucapalea; in fact, he completely omits commentary on 101 distinctions of the *Decretum*, offering only a brief, one-sentence summary of each distinction's contents.¹⁸

Rolandus offers a few more notes on Gratian's *causae* (part 2 of the *Decretum*), but these notes are of the same explanatory nature as Paucapalea's.¹⁹ Thus, one can see the final four unifying characteristics of the earlier gloss subgenre: (4) they frequently agree with Gratian's legal reasoning and conclusions; (5) there exists little diversity in opinion among themselves; (6) they provide mostly grammatical and explanatory notes on the *Decretum*; and (7) they sometimes abstain from even commenting on large portions of the *Decretum*.

Characteristics of the Later Glosses

From previous scholarship, we can begin with two basic observations on the origins of the later glosses: (1) these glosses were composed at least a decade after the *Decretum*'s completion, and (2) these glosses emerged from all around western Europe.

Further contrasts become visible when one examines the prologues of the late glossators. Rufinus, in sharp contrast to his immediate predecessor Rolandus, does not ascribe any special role to Gratian. At the end of his preface, he simply outlines the structure of the *Decretum*, as his

¹⁷ Ibid., 4-50. D. 1 – D. 101.

¹⁸ Rolandus, *Summa Magistri Rolandi*, 5-12. D. 1 – D. 101. To compare with the opening sentence of *Summa Paucapaleae*, Rolandus offers the following summary of Distinctions 1 and 2: "Prima et secunda distinctione ostendit, quid sit ius, quid lex et de speciebus eorum." Rolandus offers absolutely no other commentary on these two distinctions.

¹⁹ Ibid., 13-303. C. 1 – C. 36.

two Bolognese predecessors had done, and ends with the note, “Quanta huius libri [the books of the *Decretum*] sit utilitas, studiose et perseverantur legentibus apparebit.”²⁰ One can interpret this closing remark in two ways: more positively toward Gratian, Rufinus hints that the *Decretum* contains some imbedded benefit that the reader can access only through fervent study; or, more neutrally toward Gratian, careful study of the *Decretum* will reveal whether the work has any benefit to the reader at all. Whatever Rufinus’ intention and the reader’s impression, this remark departs from the tones of the glossators’ predecessors and in no way identifies Gratian as having a special role in the history of canon law; instead, Gratian is simply another legal thinker whose work is now used as a tool for instruction.

Stephanus writes an introduction even longer than the ones of the other glossators in Bologna. However, Stephanus fills the extra length of his introduction with more meticulous outlining of foundational legal terms and references to both Biblical and theological sources of canon law.²¹ Toward the very end of his introduction, Stephanus begins to talk about Gratian but does so in more mechanical tones, writing, “Compisitorum huius operis recte dixerim Gratianum, non auctorem.”²² Much like his treatment of legal terms throughout the beginning and middle of his introduction, Stephanus’ treatment of Gratian at the end of his introduction is much more technical than it is laudatory. In the brief comments that he devotes to Gratian in the prologue, Stephanus appears more focused on determining the exact nature of Gratian’s work than on proclaiming the great role that Gratian has played in the history of canon law’s development. Even less focused on proclaiming the greatness of Gratian’s work is the author of *Summa Parisiensis*, who writes only a one-paragraph preface, geared mainly at stating what the

²⁰ Rufinus, *Summa Decretorum*, ed. Heinrich Singer, (Paderborn: Ferdinand Schoningh, 1902); repr., (Aalen: Scientia, 1963), 5, accessed April 25, 2013. http://works.bepress.com/david_freidenreich/11/.

²¹ Stephen of Tournai, *Summa Stephani*, ed. Johann Friedrich von Schulte, (Giessen, Germany: 1891); repr., (Aalen: Scientia, 1965), 1-6. Introductio.

²² *Ibid.*, 5. Introductio.

Decretum is and why Gratian wrote it.²³ In the preface to his *Summa Decretorum*, Huguccio mentions Gratian only once within a very long discussion on the history and legal foundations of law; Huguccio does not describe Gratian as a savior or a preserver, but as merely one compiler in law's long history.²⁴ Therefore, from the introductions of Rufinus, Stephanus, Huguccio, and *Summa Parisiensis* (and from the lack of any praise for Gratian from Simon, who omits a prologue), one can develop the third characteristic of later glosses: (3) the later glosses express much less appreciation for the work of Gratian.

From their commentaries at the beginning of their works, these later glossators sought to distinguish themselves from Gratian. Gratian's very first few sentences of the *Decretum* read, "Humanum genus duobus regitur, naturali videlicet iure et moribus. Ius naturae est, quod in lege et evangelio continetur, quo quisque iubetur alii facere, quod sibi vult fieri, et prohibetur alii inferre, quod sibi nolit fieri."²⁵

Rufinus comments on this passage, "Gratianus tracturus de iure canonico quasi altius rete ducto expandit iter operi, incipiens a iure naturali, quod quidem et antiquius est tempore et excellentius dignitate." Rufinus' commentary is so far in line with his predecessors, veering little from the plain text of Gratian. However, he continues by responding:

Hoc autem ius legistica traditio generalissime diffinit dicens: Ius naturale est quod natura omnia animalia docuit. Nos vero istam generalitatem, que omnia concludit animalia, non curantes, de eo, iuxta quod humano generi solummodo ascribitur, breviter videamus: inspicientes, quid ipsum sit et in quibus consistat et quomodo processerit et in quo ei detractum aliquid aut audauctum fuerit.²⁶

²³ *The Summa Parisiensis on the Decretum Gratiani*, ed. Terence P. McLaughlin (Toronto: Pontifical Institute of Mediaeval Studies, 1952), 1. [Præfatio].

²⁴ Huguccio Pisanus, *Summa Decretorum*, ed. Oldřich Přerovský, in *Monumenta Iuris Canonici*, ser. A: Corpus Glossatorum, vol. 6 (Vatican City: Biblioteca Apostolica Vaticana, 2006), 3-12. Praefatio. On page 6, Huguccio writes, "Ne igitur tanta varietate canonum aut diversa viderentur adversa aut varia crederentur contraria magister Gratianus communi consulens utilitati dispersos canones in unum colligere et, si que videbatur inesse contrarietas, proposuit soluere."

²⁵ Gratian, *Decretum Magistri Gratiani*, ed. Emil Friedberg, in *Corpus Iuris Canonici*, vol. 1 (1879; repr., Graz: Akademische Druck- u. Verlagsanstalt, 1959), 1. D. 1.

²⁶ Rufinus, *Summa Decretorum*, 6. D. 1.

Rufinus, here, does more than just restate or explain Gratian. Rufinus incorporates his own reasoning and includes his own understanding of natural law to provide a gloss that, from its very beginning, allows readers to compare Gratian's views with Rufinus' views. Rufinus appears to see his time commenting on Gratian as an opportunity to introduce the reader to his own legal theories and reasoning.

Summa Parisiensis acts in a similar way later on in the discussion of natural law. When Gratian moves briefly through the topic of whether or not one may participate in the Eucharist (in either administering the sacrament or receiving it) after a nocturnal emission, even some of the earlier glossators rearrange Gratian's wording in their notes in order to simplify what many may find a difficult argument progression. However, *Summa Parisiensis* goes even further, as the author pays particular attention to the issue of *crapula* (over consumption, drunkenness) to place even more culpability on those who experience an emission as a result of *crapula*. In addition, the author does not hesitate to employ the first person *dico* when glossing many of Gratian's phrases.²⁷ From this issue of the nocturnal emission, *Summa Parisiensis* appears geared toward refocusing the reader toward certain legal matters (e.g. culpability) so that the reader considers the issue in a different way than he would consider it had he just read the *Decretum* by itself. In addition, the author of *Summa Parisiensis* appears to see his own role as one of instructor, not just reporter; he presents the reader with his own legal reasoning instead of merely acquainting the reader with Gratian's text. Stephanus appears to form his gloss in the same way as *Summa Parisiensis*, with a desire to present his own ideas, as well as the ideas of his predecessor Rufinus.²⁸ The later glosses of the *Summa Simonis Basinianensis* and the *Summa Decretorum*

²⁷ *The Summa Parisiensis on the Decretum Gratiani*, 6. D. 6.

²⁸ Stephen of Tournai, *Summa Stephani*, 7-280. Specific areas in Stephanus include D.1 – D.101, C. 1- C. 36, and de Cons. D. 1 – de Cons. D. 2.

Magistri Huguccionis have commentaries similar to the previous three; however, they critique and reinterpret the theories of not just the *Decretum*, but also the late glossators that precede them.²⁹ Thus, the final three characteristics of the later glosses are: (4) the glossators often identify unresolved issues in Gratian's reasoning and seek to bring up issues the *Decretum* ignores; (5) the latter glossators tend to have more diverse opinions amongst themselves than their earlier counterparts; (6) they still provide many grammatical and explanatory notes, but the focus for the glossators is more to insert their own legal reasoning and ideas into the text, rather than to help the reader understand the original text for himself; and (7) they consistently comment on each distinction and *causa* of the *Decretum*, very limited exceptions.

Further Areas to Observe the Two-Step Development

While the previous passages demonstrate the major aspects of the two-step development, they are, by no means, the only excerpts that demonstrate the differing approaches and styles that the two sub-genres of glosses had. The following examples further illustrate the contrasts between early glosses and late glosses in the context of specific areas within the law. Each example tracks the canonist's coverage of a very specific legal topic, starting with Gratian's original text and moving through the commentaries of the earlier and then the later glossators.

For the purposes of comprehensive illustration, this section intentionally showcases excerpts that come from different sections of the *Decretum*. The first example covers what sources possess legal authority and comes from the first section of the *Decretum*, which is largely theoretical and stylizes itself like a legal treatise. The second example concerns marriage and adultery and comes from the second section of the *Decretum*, which is composed of

²⁹ Simon of Bisignano, *Summa in Decretum Simonis Bisinianensis*, ed. P. V. Aimone (Fribourg, Switzerland: 2007), accessed February 15, 2014, http://www.unifr.ch/cdc/assets/files/summa_simonis_BAND_II%2013%2001%202008%20normal.pdf; Huguccio Pisanus, *Summa Decretorum*.

hypothetical legal cases and structures itself as a series of hypothetical legal exercises. After these two examples comes a note on the third section of the *Decretum*, whose brief comments are not of great use to this study. The author has selected each case to provide the reader with the fullest understanding of gloss development but also in anticipation of potential criticism of the two-step hypothesis.

Authoritative Sources

Given the lack of a universally accepted legal canon before Gratian, one huge source of the *discordantes canones* to which Gratian alludes in his title was great disagreement over what sources the legal community should consider authoritative and with what order of precedence, if any, lawyers should treat such sources when determining the law.

After establishing that authentic bishop's decretal letters should be considered as authoritative as conciliar canons (a somewhat contentious issue in the twelfth century), Gratian devotes Distinction 20 to addressing the question of whether theological analyses of Scripture (e.g Augustine's *De Doctrina Christiana*) should be considered just as legally authoritative as papal decretals and conciliar canons. After considering the merits in favor of holding scriptural expositions on the same or an even higher level of precedence as decretals and conciliar canons,³⁰ Gratian decides against giving these works much authority, arguing:

Sed aliud est causis terminum imponere aliud scripturas sacras diligenter exponere. Negotiis diffiniendis non solum est necessaria scientia, sed etiam potestas...Cum ergo quelibet negotia finem accipiant vel in absolute innocentium, vel in condemnatione delinquentium, absolutio vero vel condemnatio non scientiam tantum, sed etiam potestatem presidentium desiderant: aparet, quod divinarum scripturarum tractatores, etsi scientia Pontificibus premineant, tamen, quia dignitatis eorum apicem non sun adepti, in

³⁰ Gratian, *Decretum Magistri Gratiani*, 65. D. 20, I Pars: "Quo enim quisque magis ratione nititur, eo maioris actoritatis eius verba esse videntur. Plurimi autem tractatorum, sicut pleniori gratia Spiritus sancti, ita ampliori scientia aliis precellentes, rationi magis adhesisse probantur. Unde nonnullorum Pontificum constitutis Augustini, Ieronumi atque tractatorum dicta eis videntur esse pefedenda."

sacrarum scripturarum expositionibus eis preponuntur, in causis vero diffiniendis secundum post eos locum merentur.³¹

The crux of Gratian's arguments then falls upon how to weigh the relative merits of *potestas* and *scientia* in determining *auctoritas*. The conclusion promotes the ideas that while *scientia* is both admirable and useful in all matters of the church, the law does not concern itself with such talents in reading the Scripture. Because law concerns itself with the question of who has the ability to make a decision in a given case, even the smallest degree of *potestas* outweighs the largest degree of *scientia* when determining the *auctoritas* of a source.

Paucapalea's gloss on Gratian's handling of the *espositores* offers no new theoretical approach to the issue and nothing that differs from or adds to Gratian's own conclusions. The glossing begins with, "Decretales epistolae, ut ostensum est, conciliorum canonibus pari iure exaequantur."³² This opening does not even fully embody the style of glossing, as it simply copies the opening premise of the *Decretum*, making only minor alterations for more logical syntax under the new author.³³ Paucapalea continues and incorporates his own verbiage, "Nunc de sacrae scripturae expositoribus, ut August., Ambr., Hier., quaeritur, an exaequantur decretalibus epistolis et conciliis, an eis subiiciantur."³⁴ Even though Paucapalea is no longer simply reporting Gratian's words verbatim, his gloss is merely a summation of the issue at hand. Paucapalea concludes, "Et sciendum est, quia in sacrarum scripturarum expositionibus eis praeponantur, in causis autem terminandis secundum post eos locum tenent, sicut Leo papa ait: De lib. et com. etc."³⁵ Here the conclusion again is merely a restatement of Gratian's own conclusions and begins the very quotation from Pope Leo IV that Gratian quotes. At the end of

³¹ Gratian, *Decretum Magistri Gratiani*, 65. D. 20, II Pars.

³² Paucapalea, *Summa Paucapaleae*, 20. D. 20.

³³ Gratian, *Decretum Magistri Gratiani*, 65. D. 20, I Pars: "Decretales itaque epistolae conciliorum canonibus pari iure exaequantur."

³⁴ Paucapalea, *Summa Paucapaleae*, 20-21. D. 20.

³⁵ *Ibid.*, 21. D. 20.

this early gloss passage, then, readers are left with no further insight into the underlying concepts of *potestas*, *scientia*, and *auctoritas* and no expansion upon Gratian's conclusions. By the representation of Paucapalea, the early gloss genre comments on issues of authority for the sole purposes of offering some summation and little, if any, explanation.

Departing from Paucapalea's resistance to detracting from Gratian's content, Rufinus focuses his gloss on a matter that Gratian barely even addresses: what role remains for scriptural expositions in the Church. Rufinus writes:

Ubi dicitur quod [expositores sacrae scripturae] canonibus et decretalibus epistolis in decidendis causis penitus postponuntur, in expositione vero scripturarum preferuntur. Et de ecclesiasticis negotiis non secundum eos, sed secundum canones vel decretales epistolas iudicandum, nisi cum tale emergerit vel contigerit inusitatum negotium, quod per illos canones vel epistolas terminari non valeat.³⁶

Gratian defined *expositores* in terms of how lawyers could not use them; Rufinus defined *expositores* in terms of how the Church as a whole could use them. Two important changes have occurred since Gratian: (1) Rufinus has identified, pondered, and settled an unaddressed issue in Gratian's discussion of the *expositores*, and (2) Rufinus has assumed a broader audience of not just lawyers, but anyone who might take interest or find utility in the genres that sometime enter the legal realm.

While Rufinus' gloss discusses other possible conclusions from Gratian's reasoning, Stephanus' gloss focuses on the underlying theology of Gratian's legal arguments. The latter glossator writes, "Soli enim apostolici ius habent condendi canones, vel ea, quae loco canonum habenda sunt."³⁷ Here, Stephanus does not limit himself to summarizing the legal reasoning as Paucapalea does; instead, he connects the legal concept of authority to the theological concept of

³⁶ Rufinus, *Summa Decretorum*, 44. D. 20.

³⁷ Stephen of Tournai. *Summa Stephani*, 30. D. 20. Stephanus appears to use the word *ius* with a slightly more specific meaning than the one used most often in medieval legal writings. In this case, it appears that *ius* employs notions of authority, similar to the terms *potestas* and *auctoritas*.

apostolic succession. The glossator clarifies for the reader the reason why highly esteemed theologians like Augustine are devoid of *potestas*—they cannot trace their own decision-making authority back to the apostles. Such a connection seems so obvious upon reading Gratian’s distinction in the context of this line from Stephanus’ gloss; however, when one looks closely at Gratian’s words and his sources, an unambiguous link between the principle of apostolic succession and the reasons for rejecting *expositores* is absent. As Stephanus continues, he insists, “Sanctorum autem patrum libros sacros exponentium scripta praeponuntur etiam ipsis apostolicis in sententiarum pondere vel obscuritatis interpretatione.”³⁸ Identifying the same unaddressed issue as Rufinus does, Stephanus comes to the same conclusion as his predecessor: that one should not discount the merits of *expositores* in areas of study where their use is warranted. While it is entirely possible that Stephanus directly borrowed this idea from the gloss of Rufinus, his different wording and more specific articulation of the uses of *expositores* demonstrate that Stephanus did not simply copy Rufinus’ words and that this section of the gloss indeed presents some of Stephanus’ own ideas.

After providing some basic editorial clarifications on Distinction XX,³⁹ the *Summa Parisiensis* summarizes Gratian’s basic thesis in the distinction:

Determinat sic: in causis duo sunt necessaria, scientia dividendi iustum ab iniusto, et potestas cogendi ad illud, prohibendi ab isto. Quae duo quia habet papa, sed non Augustinus, praecellit in sententiis dando auctoritas papae. Sed in expositionibus praecellit Augustinus quis sapientior sit. Ita determinat Gratianus.⁴⁰

³⁸ Ibid., 30. D. 20.

³⁹ *The Summa Parisiensis on the Decretum Gratiani*, 20. D. 20: “*Decretales, de expositoribus, ut Hieronymo, Augustino. exaequantur, sint pari auctoritate. quo enim, probatio quod sint maioris auctoritatis quam videtur, quia sanctiores quibusdam apostolicis et sapientiores fuerunt. plurimi, assumpto. aliis, i.e. apostolicis. nonnullorum pontificum, Romanorum. sed aliud.*”

⁴⁰ *The Summa Parisiensis on the Decretum Gratiani*, 20. D. 20. Compare to the less detailed summary by Rolandus, *Summa Magistri Rolandi, Mit Anhang Incerti auctoris quaestiones*, ed. Friedrich Thaner, 6, D. 19 – 20: “D. XIX...et quod auctores ut Augustinus et ceteri in expositione sacrarum scripturarum praeponuntur, in terminatione vero cansarum canonibus postponuntur. D. XX. Quod decretis pontificum Romanorum et sacris

Although the author provides an original summary of Gratian with some independent work in articulating the underpinnings of the latter's argument, the contents of the gloss thus far do not seem to fit into the subgenre of later glosses. However, the tone of the commentary quickly changes into one more characteristic of the later subgenre with the author writing, "Potest dici tamen quod in obscuris et maxime circa articulos fidei quod in definitione dominus papa interpretaretur, maioris esset auctoritatis expositione Augustini."⁴¹ Not only is there a significant grammatical change with the voice changing from the specific third-person subject Gratian to the impersonal third-person subject of "potest dici," but there is also a substantive shift in which the author introduces a new claim of papal powers to interpret in certain circumstances. Given the conservatism of Gratian in the amount of interpretative power he grants to the Pope, this introduction by the author of *Summa Parisiensis* could be seen as a partial nullification of or specific exception to the rules put forth in Distinction 20 of the *Decretum*. The Parisian glossator continues, "Sed si alias in camera librum expositionis suae componat dominus papa, componat et Augustinus, praecellit et Augustini."⁴² Here, the glossator not only again provides exceptions and nullifications to Gratian's rules, but introduces entirely new circumstances not even approached in the original text of Distinction 20. The *Summa Parisiensis*, then, provides the greatest example of a late glossator who seems unwilling to allow the confines of the gloss genre to limit his assertion of legal theories that both exist outside the scope of Gratian's writings and occasionally flatly contradict Gratian's legal reasoning.

Toward the beginning of Huguccio's gloss, the author begins a summary commentary on the apparent crux of Gratian's argument, writing, "Videtur quod sint due claves, scilicet scientia

canonibus ecclesiastica negotia terminentur." (The contents of D. 20 in Friedberg's edition of the *Decretum* appear to span both D. 19 and D. 20 in Thaner's edition of *Summa Rolandi*.)

⁴¹ Ibid., 20. D. 20.

⁴² Ibid. D. 20.

vel discretio et potestas; scientia scilicet discernendi inter lepram et lepram, potestas ligandi et solvendi.”⁴³ He continues with implications that Gratian himself identifies, “Et sic non omnes sacerdotes habebant ambas nec omnibus presbiteris in sua ordinatione dantur. Imperitis non datur nisi potestas ligandi et solvendi, secretis et peritis dantur ambe tunc, scilicet potestas ligandi et solvendi et scientia.”⁴⁴ Suddenly, though, Huguccio poses a question not covered in the *Decretum*, “Set nonne habebant scientiam ante?”⁴⁵ In this instance, “ante” refers to the more literal sense of time, that is when *scientia* is bestowed upon an individual. Huguccio answers his own question with a lengthy explanation that has no basis in the text of Gratian:

Habebant, utique, set non erat clavis in eis. Et ideo tunc dicitur eis dari, quia tunc confertur eis ut scientia sit clavis in eis, quia ex tunc ea possunt aperire et claudere quod ante non poterant. Set veteris dicitur quod tantum sit una clavis sacerdotalis, scilicet potestas ligandi et solvendi. Et hec est ordo sacerdotalis. Set dicuntur due propter duos effectus, scilicet ligandi et solvendi.

This short discussion in Huguccio’s long commentary on the distinction exemplifies the basic trend of all of his predecessors in this distinction: that reinterpretation of the concepts of *scientia* and *potestas* is acceptable, for it allows the glossator to exercise greater freedom in expressing ideas on legal authority.

Marriage

Even before Gratian, canonists devoted a great deal of attention to laws governing sacraments. The earliest legal compilations set guidelines for the administration of the sacraments, and many legal compilers, such as Alger and Burchard, had devoted entire books to certain sacraments. Because of their persistent presence in Church legal writing, the sacraments deserve some attention in this discussion on the twelfth-century changes in canon law. Here, we will review the entirety of a marital case that Gratian puts forth, and, for the purposes of depth

⁴³ Huguccio Pisanus, *Summa Decretorum*, 330. D. 20

⁴⁴ *Ibid.* D. 20.

⁴⁵ *Ibid.* D. 20.

and simplicity, zoom into just one line of argument that Gratian puts forth and track the glossators' commentary on that line.

Gratian devotes many of his *causae* to the topic of marriage. Of these many cases, Case 31 seems worthy of heavy scrutiny in this study, for it touches upon multiple issues surrounding matrimony, namely adultery, betrothal, and consent. Case 31 presents a man who commits adultery with a married woman. After her husband dies, the man marries her, has a daughter, and promises that daughter to a certain man. After his daughter objects to the betrothal, the father marries her to another man. The first man to whom the daughter was betrothed requests that father return his daughter to him.⁴⁶ With the case laid out, Gratian then asks whether one can marry another with whom he has committed adultery, whether a man can betroth his daughter to a man without her consent, and whether a daughter can marry one man after her father has betrothed her to another.⁴⁷

Because the rest of the issues in this case depend on Gratian's response to the first question, that question will be the focus here. In answering the first question, Gratian ultimately affirms the permissibility of a man to marry a woman with whom he had previously committed adultery, but, to do so, he must first address the many canons that so obviously appear to argue against the legality of this specific type of remarriage after adultery. The first of such canons, a decretal by Pope Leo, reads simply, "Nullus ducat in matrimonium quam prius polluit adulterio."⁴⁸ To this prohibition, which on the surface appears to apply to any situations involving a woman "previously polluted by adultery," Gratian responds that "quam prius polluit

⁴⁶ Gratian, *Decretum Magistri Gratiani*, 1108. C. 31: "Uxorem cuiusdam alius constupravit; eo mortuo adulter adulteram sibi in uxorem accepit; filiam ex ea susceptam cuidam in coniugem se daturum iuravit; illa assensum non prebuit; deinde pater alii eam tradiit; a primo reposcitur."

⁴⁷ Ibid. C. 31: "(Qu. I.) Queritur: an possit duci in coniugium que prius est polluta per adulterim? (Qu. II.) Secundo, an filia sit tradenda invita alicui? (Qu. III.) Tertio, an post patris sponsionem illa possit nubere allii?"

⁴⁸ Ibid. C. 31, q. 1, c.1.

adulterio” only refers to a woman whose husband has not repudiated her, whose husband is still alive, and to whose husband she still owes a conjugal debt.⁴⁹ The second canon which Gratian must creatively explain to defend his argument comes from a supposed Council at Altheim, which appears to refer to a local synod, rather than an ecumenical council. Gratian reports that the council decreed, “Si quis cum uxore alterius vivente eo fornicatus fuerit, moriente marito sinodali iudicio aditus ei claudatur illicitus, nec ulterius ei coniungatur matrimonio, quam prius polluit adulterio. Nolumus enim, nec Christianae religioni convenit, ut ullus ducat in coniugium quam prius polluit per adulterium.”⁵⁰ Gratian responds here that this canon actually means that a man can marry a woman “quam prius polluit adulterio” under the conditions that: the adulterous man did not bring about the original husband’s death, the adulterous man did not promise to marry the woman before her husband’s death, and penance is executed.⁵¹ (Here, Gratian remains ambiguous as to whether the man, the woman, or both must pay penance; however, subsequent canons make it seem as if he implies that both are required to pay penance.) To support this modification of the plain-sense reading of the Council of Altheim’s reading, Gratian cites multiple canons from the Council of Tribur, the Council of Vermerias, and the Council of Elvira.⁵² (Again the *concilia* that Gratian records as producing these canons seem to refer to local

⁴⁹ Ibid. C. 31, q. 1, c.2: “Illud vero Leonis Papae de ea intelligendum est, que a viro suo non erat repudiata, cuius vivebat vir, reddens ei coniugale debitum.”

⁵⁰ Ibid., 1109. C. 31, q. 1, c.3.

⁵¹ Ibid. C. 31, q. 1, c.3: “Hic subaudiendum est, nisi peracta post penitentiam et si nichil in morte viri machinatus fuerit, vel si vivente viro fidem adulterae non dedit, sumpturum eam sibi in coniugem, si viro eius superviveret.”

⁵² Ibid., 1109-1110. C. 31, q. 1, c. 4 – c. 7. Canon 4 comes from the Council of Tribur, concerns promising to marry an adulterous woman before the death of her first husband, and reads, “Relatum est auribus sanctorum sacerdotum, quendam alterius uxorem stupro violasse, et insuper mechae vivente viro suo iuramentum dedisse, ut post legitimi mariti mortem, si supervixisset, duceret eam uxorem, quod et factum est. Tale igitur conubium prohibemus et anathematizamus.” Canon 5 comes from the same council, concerns penance and accelerating the death of the husband, and reads, “Si quis vivente marito coniugem illius adulterasse accusatur, et, eo in proximo defuncto, eandem sumpsisse dinoscitur, omnimodis penitentiae publicae subiciatur. De quo etiam post penitentiam prefata, si expedierit, servabitur regula; nisi forte idem, aut mulier virum, qui mortuus fuerat, occidisse notentur, aut propinquitas, vel alia quelibet actio criminalis impediatur. Quod si probatum fuerit, sine ulla spe coniugii cum penitentia perpetuo maneat.” Canon 6, added as one of the *paleae*, comes from the Council of Vermerias, concerns an adulterous woman plotting the death of her husband with others, and reads, “Si qua mulier in mortem mariti sui

synods, rather than ecumenical councils.) In addressing a large body of legal literature that argues against allowing the adulterous man and woman of Case 31 to marry, the *Decretum* successfully (but not necessarily convincingly) dissects each canon in the negative for the purposes of upholding the affirmative. What results is a cohesive argument that all canons on the matter are actually in harmony with the assertion of Augustine that, “Denique mortuo eo, cum quo fuit verum conubium fieri potest coniugium, cum qua precessit adulterium...Posse sane fieri licitas nuptias ex personis licite coniunctis, honesto placito subsequente, manifestum est.”⁵³ Gratian also addresses objections to the woman remarrying based on the grounds that it constitutes a dual marriage, but his initial skill here in harmonizing so many seemingly contradictory canons with Augustine sufficiently demonstrates for our purposes the arguments that faced the glossators.

Paucapalea begins his gloss on the first question of Case 31 by recognizing the contradictory conclusions of the canons that Pope Leo and Augustine put forward. He writes, “Quod hoc [duci in matrimonium quae prius polluta est per adulterium] fieri non possit, auctoritate Leonis papae declaratur. Augustinus vero e contra testatur.”⁵⁴ From this introduction, it appears as if Paucapalea plans to devote his commentary toward tackling possible inconsistencies and potential overzealousness in harmonizing within Gratian’s original text. However, as the gloss proceeds, Paucapalea shows no interest in that sort of approach. Instead, he nearly verbatim reports the *Decretum*’s solution to the question without any original

cum aliis consiliata sit, et ipse vir aliquem illorum se defendendo occiderit, si probare potest ille vir, eam ream esse consilii, potest (ut nobis videtur) ipsam uxorem dimittere, et si voluerit, aliam ducere. Ipsa autem insidiatrix penitentiae subiecta absque spe coniugii maneat.” Canon 7 comes from the Council of Elvira, concerns an adulterous widow giving penance after remarrying, and reads, “Si qua fuerit vidua mechata, et potesta eundem habuerit maritum, post quinquennii tempus acta legitima penitentia placuit eam ad communionem.”

⁵³ Ibid., 1109. C. 31, q. 1, c.2.

⁵⁴ Paucapalea, *Summa Paucapaleae*, 124. C. 31, q. 1.

explanation, contribution, or detraction.⁵⁵ The gloss on this first part of this question contains two instances in which Paucapalea appears to offer a substantive addition to the text. First, within Gratian's original text saying that the adultery in this case is excusable should the woman have believed it was licit, Paucapalea writes, "*Cuius aliquam habet veniam adulterium, i.e. non est ita reus ille, qui ducit eam, dum eius copula creditur esse licita.*"⁵⁶ Here, the clarification seems to do little more than to reinforce what a plain-sense reading of Gratian already implies—that there is no guilt under the described circumstances. In the second possible circumstance of a substantive contribution, Paucapalea appears to only provide an alternate transition to Gratian's *dictum* of Canon 3, saying, "*Vel etiam, cum inhietur ducere in matrimonium, quam prius polluit per adulterium, subintelligendum est, nisi post peractam poenitentiam et si nihil in mortem...*"⁵⁷ By the end of the issue, the reader comes away from Paucapalea's gloss with just a reinforced and differently stylized version of Gratian's arguments.

If Paucapalea fulfills the role of supplying argumentative reinforcement and stylized reorganization, then Rolandus seems to fulfill the role of simply summarizing Gratian's conclusions. Rolandus opens with, "*Hic primum quaeritur, an possit duci in coniugium, quae prius polluta est per adulterium. Hanc quaestionem recipere contrarietatem, dubium non est.*"⁵⁸ While acknowledgment of the amount of contrariety that exists in answering this question may seem to promise a good amount of criticism and original insight in the gloss, such a promise in the earlier gloss of Paucapalea has previously been shown unreliable. Likewise, as one begins to

⁵⁵ Ibid. C. 31, q. 1. "*Sed illa auctoritas Augustini de repudiata lquitur, quam dum vivente viro suo aliquis ducit in coniugium, committit adulterium.*"

⁵⁶ Ibid. C. 31, q. 1. As per usual in these editions, italicized text signals quoting from the *Decretum*, while normal text indicates writing by the glossator.

⁵⁷ Ibid. C. 31, q. 1. Compare to the original introduction of Gratian's *dictum* in *Decretum Magistri Gratiani*, ed. Emil Friedberg, 1109, C. 31, q. 1, c. 3: "*Hic subaudiendum est, nisi peracta post penitentiam et si nichil in morte viri machinatus fuerit, vel si vivente viro fidem adulterae non dedit, sumpturum eam sibi in coniugem, si viro eius superviveret.*"

⁵⁸ Rolandus, *Summa Magistri Rolandi, Mit Anhang Incerti auctoris quaestiones*, ed. Friedrich Thaner (Innsbruck: Wagner, 1872), 154, accessed April 25, 2013. http://works.bepress.com/david_freidenreich/6/. C. 31.

read further into Rolandus' gloss on this case, its rather unstimulating function as a canon-by-canon summary of the issues in this question becomes apparent. The next line reads, "Ait enim Leo pap: Nullus ducat in matrimonium, quam prius polluit per adulterium. Econtra Augustinus talium copulam licitam fore testatur dicens: Denique mortuo etc."⁵⁹ Here, Rolandus simply provides an account of the contents and controversy of Canons 1 and 2 in Gratian. The gloss follows, "Notandum vero quoniam adulterorum quidam viventibus viris earum fidem praestant adulteris se post mortem virorum legitimorum eas in coniugium accepturos."⁶⁰ This note seems to only report a summary the Gratian's *dicta* of following Canons 1 and 2. The rest of the commentary on the first part of the question reads:

Item sunt aliqui machinates in mortem vivorum earum, cum quibus fornicantur. Generaliter ergo horum copula inhibetur, aliorum vero minime interdicitur. Sunt etiam quidam asserentes cuique fore illicitum eam accipere in uxorem, quam tempore, quo a viro suo debitum ei reddebatur, fornicaria pollutione foedavit. Si vero a proprio viro fuerit derelicta atque interim ab aliquo carnaliter cognita, mortuo viro poterit copulari adultero, adulterii tamen secundum quosdam poenitentia peracta; iuxta illud Tiburiensis concilii: ["Sui quis vivente marito"] etc. cais. ead. qu. ead. cap. V. — ["Nullus"] etc., Illud vero etc. His auctoritatibus eorum copula, ut dictum, est, interdicitur, quorum unis vivente viro vel uxore legitimo fidem dedit alteri, ut eo defuncto vel defuncta eum vel eam acciperet in coniugium; vel eorum, qui machinati sunt in mortem viri vel uxoris, vel secundum quosdam eorum, qui nullo proprii viri vel uxoris intercedente repudio foeditate commiscuntur. Praemissa distinctio praestentibus comprobatur decretis scil.: ["Relatum"] etc., ["Si quis vivente"] etc. — ["Si qua vidua"] etc.

The account ends, and the initial hints of lively inquiry into how to improve Gratian's original conclusions have proven misleading. The entirety of the discussion summarizes the topics of responsibility for a husband's death, proposal before a husband's death, and public penance found within the texts of and *dicta* on Canons 3 through 7 of the *Decretum*. After this straightforward account, Rolandus concludes the first part of this question with the only commentary that seems to show critical speculation, "Potest hic agi de vidua voto astricta, vel

⁵⁹ Ibid. C. 31.

⁶⁰ Ibid. C. 31.

dicamus ad terrorem dictum, ut videlicet ab adulterio deterreat mulieres.” Despite its originality, this conclusion appears to be little more than a proposed aim of the canons’ authors, rather than a critical analysis of the canons’ meanings and applications. By the end of this section, the summary nature of Rolandus’ work makes his gloss appear more like a medieval study guide or cheat sheet to the larger compilation by Gratian.

Like his predecessors, Rufinus opens by openly acknowledging the controversy that exists in attempts to answer the question of whether the woman can marry again:

Controversia est super hoc auctoritatum, cui duplex subiungi potest solutio. Et prima quidem est hec, ut dicatur quod potest peracta penitentia aliquis ducere in matrimonium quam prius polluit per adulterium, nisi in mortem viri fuerit machinatus vel nisi fidem adultere dederit, quod post mortem viri eam duceret in uxorem: in quibus exceptionibus intelligendum est primum et quartum capitulum. Secunda est, ut dicamus referre, utrum adultera prius fuerit a viro repudiata, vel non. Si enim repudiata non fuerat et eam vivente viro aliquis constupraverit, nullo umquam tempore ipsam in uxorem habere poterit; si vero eam vir iam repudiaverat, mortuo viro poterit illam ducere in coniugem.⁶¹

After establishing the greater complexity of the issue, Rufinus moves on to settle some conclusions that a reader might incorrectly draw from the text. In response to Gratian’s assertion that a woman’s adultery is excusable when she is under the impression that it is licit, Rufinus replies, “non quod non puniatur, sed quia minus propter ignorantiam puniendus est.”⁶² The quote here seems intensely reactionary to a perceived sympathy for an adulterous woman in the *Decretum*; when Gratian calls for clemency on behalf of a sinner, Rufinus rushes to urge the reader that, despite the legality of the woman’s second marriage, her sin must certainly receive full punishment. When one compares this note to Paucapalea’s note at the same point,⁶³ the extent of Rufinus’ detraction from Gratian and the earlier glossators becomes even more apparent. Rufinus then points out a flaw in Gratian’s argument, arguing that the *Decretum*’s

⁶¹ Rufinus, *Summa Decretorum*, 470. C. 31.

⁶² *Ibid.* C. 31.

⁶³ Cf. Discussion of *Summa Paucapalea* on pages 35-37

claim regarding public penance goes against what Gratian is about to argue in Case 32.⁶⁴ Rufinus then ponders why such a contradiction would occur, writing, “sed illud ex rigore, istud ex misericordie contrahendi. Vel ibi de contrahendo, hic de contracto matrimonio. Vel ibi de deprehensa in adulterio a viro; hic de ea, cuius adulterium post mortem viri depalatur. Vel hoc de simplici adulterio, illud de incestuoso.”⁶⁵ This back-and-forth pondering, in which the glossator presents a litany of apparently freeform proposals without any sort of definite argument of agenda, still demonstrates a departure from the approach of the early glosses. Unlike the earlier glossators who simply explained the meaning of the text, Rufinus identifies areas of the text that he admits he cannot explain himself and encourages the reader to engage in his own critical reading of the text, warning that simply reading and accepting the *Decretum*’s arguments may not provide the most comprehensive legal education and could even lead to inconsistencies in thought and reasoning. Rufinus follows with a modification of one of Gratian’s conclusions; when Gratian states that the man in the case may marry a widowed woman provided that no crime by the two impedes it, Rufinus comments, “i.e. factum criminale, horrendum scil. crimen, propter quod oportet eum perpetuo a coniungo abstinere.”⁶⁶ In this instance, Rufinus behaves in his gloss much in the same way that Gratian behaves in his *Decretum*; he takes a previously existent legal text with a specific judgment on a particular topic and inserts a modification of a term that substantively and significantly departs from the plain-sense reading of the original text. In this case, Gratian’s original quote from the Council of Tribur at first seems to clearly refer to criminal actions that impede the specific action of marrying a woman with whom one has committed adultery; however, Rufinus alters the plain-sense interpretation by claiming that

⁶⁴ Rufinus, *Summa Decretorum*, 470, C. 31. “*Si quis vivente [etc.] regula matrimonii contrahendi. Signavimus contrarium in decretis infra Cs. prox. q. ult. cap. Hii qui (22.)*”

⁶⁵ *Ibid.* C. 31.

⁶⁶ *Ibid.* C. 31.

Tribur's judgment refers to crimes with a wider-reaching punishment of demanding lifelong abstinence. In Case 31, then, Rufinus embodies two aspects of the later glossators' role as an editor: he both identifies areas where the *Decretum* needs improvement and, in many areas, improves the definitions of the *Decretum* himself.

Like Rufinus, Simon appears to have some difficulty in explaining Gratian's case for the legality of a second marriage that appears to result from one of the gravest of sins. In response to the text, he answers, "Quia non est summum bonum, illud inquam facit excusabile hoc quod inter coniuges agitur, idest excusat coitum illum ab adulterio vel fornicatione."⁶⁷ Simon here offers explanations for the permissibility of the second marriage based on the distinction of legality and morality and on the basis of practicality. Later in the question, he continues doing so:

Sic ergo cum nullum esset ibi sacramentum, non posset talium coitus ab adulterio uel fornicatione excusari. Ad hoc dici potest quod licet difficile hoc posset accidere, excusaretur coitus talium propter sacramentum fidelis anime ad Deum vel propter ecclesie auctoritatem, ut infra C.xxxiiii. q.i. c.i. Vel quod melius est, excusarentur tales propter Christi et ecclesie sacramentum, quod in secundis nuptiis figuratur, quamuis non ita plene ut in primis.

Simon says that, though the situation is not "the greatest good," the legal solution sanctifying the second marriage exists because it prevents further sins (such as additional instances of adultery and fornication) from emerging out of the union. For Simon, the same uneasiness that appears in Rufinus leads him to concerns about the consequences of not sanctifying the marriage; ruminations on these consequences lead to the solution that he proposes in his gloss. The *Decretum* does not seem to concern itself with such matters of quasi-pragmatism in the law; thus, Simon's commentary inserts into this case his own legal style and tone where it previously did not exist.

⁶⁷ Simon of Bisignano, *Summa in Decretum Simonis Bisinianensis*, 451-452. C. 31, q. 1.

One may be surprised to look at Case 31 in the *Summa Stephani*, *Summa Parisiensis*, and *Summa Decretorum Magistri Huguccionis*, for, despite this author's contention that these three glosses belong to a later subgenre of glosses marked by a willingness to critique and add to the work of Gratian, Stephanus and the Parisian glossator do not offer any original gloss on the first line of reasoning of Question 1 in Case 31. In the *Summa Stephani*, this omission is most pronounced, as Stephanus declines to offer any original commentary on Case 31 at all; instead, he borrows his commentary of the case almost entirely from his predecessors Paucapalea and Rolandus.⁶⁸ In the *Summa Parisiensis*, the glossator offers a line of commentary for the first half of Question 1 that appears very similar to the styles of Paucapalea and Rolandus, in that it merely summarizes the argument of Gratian, rather than providing any criticism or editing of Gratian's answer.⁶⁹ Do these behaviors invalidate the previous assertions as to the inquisitive attributes of the later glossators? Not necessarily. One must keep in mind the context in which Stephanus and the Parisian author composed their glosses; before them, three glossators had already commented on every *causae* of the *Decretum*. Surely, if one were writing in such an environment, he would occasionally come across segments of the text to which he has nothing original to add. This lack of original thought is characteristic of the early subgenre of glosses only if it is consistent throughout a text. However, when one looks at *Summa Stephani*'s commentary on the *causae*, there are many questions and full cases that contain extensive original thoughts and critical contributions by Stephanus.⁷⁰ In the *Summa Parisiensis*, one only needs to read onto the second

⁶⁸ Stephen of Tournai. *Summa Stephani*, 243. C. 31.

⁶⁹ *The Summa Parisiensis on the Decretum Gratiani*, 238. C. 31, q. 1. "Quaeritur an possit duci in coniugem prius polluta est per adulterium. Quaedam decreta dicunt posse licitas aliquem contrahere nuptias cum ea quae vivente vivo cognovit. Alia etiam contradicunt, et auctoritates quae permittunt intelligendae sunt si prius peregit poenitentiam et si nihil in mortem viri machinatus fuerit et si vivente viro eius superviveret. Alioquin nuptiae prohibentur. Si forte aliquis neque in mortem viri machinatus est aliquid, neque fidem dedit adulterae, sed si sorte ante peractam poenitentiam coniuncti fuerint, non debent separari sed poenitentiam agant et vacent coniugio."

⁷⁰ Stephen of Tournai. *Summa Stephani*, 121-258. C. 1 - C. 36. One merely has to start with the contents of Case 1 to see just how original Stephanus' contributions can be.

half of the commentary on question one to notice the substantive contributions this gloss makes that affect the interpretation of Gratian's text.⁷¹ These huge expanses of originality do not exist in the earlier glosses of Paucapalea and Rolandus, for it is precisely that total absence of long segments of pondering over the original text of the *Decretum* that distinguishes the subgenre of the first two glossators. Despite Stephanus and Paris's failure to fully represent an inquisitive attitude in Case 31, that this seems to be an exceptional occurrence and not a norm in the *Summa Stephani* and the *Summa Parisiensis* clarifies why Stephanus and the Parisian glossator still deserve characterization as later glosses.

A note on Gratian's last five distinctions

The final part of the *Decretum* contains five distinctions all dealing with issues surrounding the nature of sacraments, particularly the Eucharist and Baptism. This final section distinguishes itself from the earlier ones in two important ways—Gratian abandons his previous argumentative and scholastic style of answering legal questions, and he abandons the use of his previously frequent *dicta*. In these last five distinctions Gratian simply assembles the canons of earlier authorities without offering any arguments as to how they should be interpreted or applied. The first two canons stick out, however, for they do not present rigid regulations or judgments over a specific area of sacraments. Instead, Canons 1 and 2 of Distinction 1 offer much more general ideas of what is holiness and what Scripture teaches the Church on how to understand the holiness of the sacraments. Indeed, the entirety of Canon 1 summarizes the relationship between Scripture and the sacraments, “De ecclesiarum consecratione, et missarum celebrationibus non alibi quam in sacritis Domino locis absque magna necessitate fieri debere, liquet omnibus, quibus sunt nota novi et veteris testamenti precepta.”⁷² The ideas and verbiage

⁷¹ *The Summa Parisiensis on the Decretum Gratiani*, 238-239. C. 31, q. 1.

⁷² Gratian, *Decretum Magistri Gratiani*, 1293. de Cons. D. 1, c. 1.

written over the course of these two canons was nothing new in the 1140s; almost every line can be found in multiple pre-Gratian sources, such as Burchard, Isidore, and various decretals.

Just as Gratian's treatment of this subject stands out from the rest of his texts, the glossators treatment of this ending of the *Decretum* stands out from their treatments of the cases and the earlier distinctions. Despite each distinction's lengthiness, Paucapalea offers only a few sentences of glossing per each one.⁷³ Showing even more indifference, the *Summa Rolandi* and *Summa Parisiensis* decline glossing the last five distinctions entirely.⁷⁴ Rufinus and Stephanus comment on the third part of the *Decretum*, but they do so as if they are composing their own introductions to the section, rather than critiquing or editing the canons that Gratian chose to include.⁷⁵ With such anomalies and vastly different approaches in commentary, the glossators seemed to view the last five distinctions as fundamentally different from the earlier sections, leaving the development glossing approaches different for this section than the earlier two. As a result, any hypothesis that explains the development of glosses in the twelfth century must treat the activity in the last five distinctions as exceptions distinct from the trends in the rest of the *Decretum*. For that reason, development in the manner of the two-step hypothesis would not affect the glossators' style of commentary in the third part of the *Decretum*.

Conclusion and Remaining Questions from the Two-Step Hypothesis

The in-depth examinations of the preceding section reaffirm the previously described characteristics of early and later glosses. In his commentary on the role of scriptural interpretation, Rufinus demonstrates the later glossators' tendency to identify issues that the *Decretum* ignores. With their different focuses in Distinction 20 and their vastly different

⁷³ Paucapalea, *Summa Paucapaleae*, 144-147. de Cons. D. 1 – de Cons. D. 5.

⁷⁴ Rolandus, *Summa Magistri Rolandi; The Summa Parisiensis on the Decretum Gratiani*.

⁷⁵ Rufinus, *Summa Decretorum*, 537-570; Stephen of Tournai. *Summa Stephani*, 249-280. For both glosses, examine de Cons. D. 1 – de Cons. D. 5.

approaches to Case 31, the latter glossators have demonstrated the many diverse opinions among themselves. In areas where the later glossators define terms, as Rufinus does in Case 31, they seem to do so in a way that brings Gratian's text closer to a meaning more in line with their own arguments and agenda. In contrast to all of these examples, the early glossators' behavior in these examples reaffirms their tendency to just be short, explanatory, and uncritical, leaving little room for diversity of opinion within their own subgenre.

To make an analogy of the glossators' behavior, consider the differing approaches justices of a United States Appeals Court might take in interpreting a statute. Some justices are inclined to accept the text of a statute at face value and not subject it to heightened levels of scrutiny. These justices behave in a similar manner as the early glossators who did not subject the text of the *Decretum* to any form of heightened inquiry or criticism. Other justices readily employ stricter tests to the statutes before them, often imposing new limits on how a law may be applied and sometimes even nullifying entire sections of a law. These justices behave in a similar manner as the later glossators who subjected nearly every argument to careful inquiry, resulting in their molding and reshaping of Gratian's original text lest it detract from their understanding of correct law. Do instances like Stephanus' borrowed commentary in Case 31 or *Summa Parisiensis*' lack of insightful glossing within that same case make these later glossators any less like these more inquisitive justices? Of course not, for even the most skeptical and opinionated of justices frequently signs onto entire opinions by his/her colleagues on the bench. It is the dominant tendency to ask questions of the text that make all of the later glossators like the more opinionated justices.

Just as differences between active and passive justices are numerable, differences from the early gloss genre exist in all six of the described characteristics but are most evident,

noticeable, and substantial in characteristics three through six, as these characteristics are what mark the later glosses as works that sought to alter the interpretation of the original text of the *Decretum* and mark the earlier glosses as works that sought to increase reliance on the original text of the *Decretum*. The question remains as to why the later glosses developed these characteristics so markedly different from the works of their predecessors.

Chapter 3

Explaining the Two-Step Development

Two Hypotheses

After concluding that the post-Gratian gloss developed in a two-step process, it's natural to ask why. To answer this question, I put forth two hypotheses: one that explains the development by geographic factors and another that explains the development by temporal factors.

The geographic hypothesis stresses that the earliest readers and commentators on the *Decretum* were overwhelmingly Gratian's contemporaries and colleagues in Bologna. Because these glossators came out of the same school as Gratian, they generally had the same legal opinions as his and were unlikely to find much with which they disagreed in his argument. As time progressed, the *Decretum* reached a wider geographic area, thus giving rise to greater geographic diversity among the later glossators. Because these later glossators were more representative of non-Bolognese schools than the early glossators were, they were less likely to agree with Gratian's legal reasoning and more likely to commentate in a way that expressed their own views. Furthermore, if more critical non-Italian glosses had gained circulation in Italian circles in later decades, Italian glossators might have begun mimicking the styles of foreign works, accounting for the active role Bologna played in the production of the later subgenre of glosses. Thus, the spread of the *Decretum* (and the genre of the gloss) to universities other than Bologna over time led to the later glosses appearing more argumentative in tone than the earlier glosses.

The temporal hypothesis focuses on the notion that, as the *Decretum* disseminated across Europe, the needs of its readers evolved. Initially, readers of the *Decretum* required aids to understand its content; thus, early glosses adopted more grammatical methods and explanatory tones in dealing with Gratian's legal theories. However, once these initial glosses became available and readers became confident in their understanding of Gratian's arguments, glossators turned their attention to tweaking and refining the contents of the *Decretum*. Thus, the changing context of the *Decretum* in the culture of the *ius commune* over time led to the changing nature and characteristics of the gloss genre in the late twelfth century.

Rejection of the Geographic Hypothesis

Expectations of What to Observe under the Geographic Hypothesis

Were geographic factors to play a prominent role in the more argumentative tone of the later glosses, one would expect to observe some specific trends within and among the glosses. The first trend concerns the chronology of the glosses' composition. Under the geographic hypothesis, the earliest late glossators drove themselves to write in a more opinionated style because their school or community held theories that sharply contradicted the Bolognese theories that Gratian put forth in his *Decretum*; a difference in legal communities initially sparked the trend of later glossing, and glossators of the Bolognese school simply mimicked the subgenre that originated elsewhere. Under the geographic hypothesis, one should expect to see the subgenre of late glosses emerge first outside of Bologna and only later catch on in Gratian's original school.

Within the content of the late glosses, the geographic hypothesis predicts certain trends in the arguments that the later glossators put forth. These trends would be found in two forms: consistency and cohesiveness of sources within each school of glosses and a clear bias of the

Summa Parisiensis and other French manuscripts toward sources popular in French legal communities in the twelfth century. With regard to the first of the geographic trends, we should not expect to see total uniformity within each school of law, for the mere existence of multiple late glossators from Gratian's own university of Bologna demonstrates that intra-community disagreements still existed among commentators who had access to the same pool of sources. Instead, we should expect to see that schools like Bologna and Paris, on the whole, make their arguments based on a common canon of pre-Gratian legal texts; diversity of specific source preferences among glossators within a given school would be due to either factions within the community or the particular partialities of each glossator. With regard to the second of the geographic trends, we should expect to find that the argumentative sections of glosses like the *Summa Parisiensis* tend to either directly cite or indirectly concur with the pre-Gratian collections that were uniquely popular in their own communities. Under the geographic hypothesis, French glossators would still draw on arguments from sources common to both their own community and Bologna, but the frequency and strength of arguments from sources of their own community would be particularly strong, since it is these types of differences that are driving the late glossators to write in such an original and opinionated manner.

Therefore, to determine whether or not the geographic hypothesis holds much merit, one must examine whether the chronology and sources of the late glossators offer any evidence for a geography-based explanation.

Chronology of the Later Glossators

Due to historians' great efforts to reexamine the original twelfth-century legal manuscripts of the Church, the literature of the past few decades offers extensive new insight into the precise dates and chronology of the glossators. Because of the extensiveness and

thoroughness of this body of literature, this section determines the approximate dates of each work by reviewing, considering, and critiquing the findings of authors who have examined the many original manuscripts themselves. While the recent expansion of this historical research is quite useful for our purposes, we should be mindful that debate still persists in the literature as to the dates of many of this study's sources, and recent shifts in the consensus around some dates hints that further shifts are bound to occur. Thus, we should proceed with the understanding that the dates judged as the most acceptable here may not remain the most acceptable in the future.

To start determining the chronology of the glossators, one must first understand when the final recension of the *Decretum* emerged. Undoubtedly, any current research on the development of the *Decretum* must be judged against Winroth's hypothesis that Gratian (or other individuals) composed the collection over the course of two editions. Winroth initiates his argument by focusing on a question that first gained significant study in the twentieth century—Did Gratian write his *Decretum* all at once?¹ Toward the close of the twentieth century, this question had received some modest investigating but had seen only slight progress in producing an academic consensus around the timeline of the *Decretum*'s composition.² Under Winroth's two-recension hypothesis, the composition of the *Decretum* occurred over the course of two recensions, termed Gratian 1 and Gratian 2; Gratian 1 is a shorter text containing 1,860 canons (47% of what is now considered the *Decretum*), and Gratian 2 is a much larger work consisting of 3,945 canons (the entirety of what the literature typically considers the *Decretum*).³ The manuscripts that, under this hypothesis, make up Gratian 1 have previously been viewed as later abbreviations of

¹ Anders Winroth, *The Making of Gratian's Decretum* (New York: Cambridge University Press, 2000), 122, accessed April 15, 2013, EBSCOhost.

² Stephan Kuttner, "Research on Gratian: Acta and Agenda," proceedings of the Seventh International Congress of Medieval Canon Law; publ., *Monumenta iuris canonici*, Subsidia 8 (Vatican City: 1988); repr., *Studies in the History of Medieval Canon Law*, ed. Stephan Kuttner (Brookfield, VT: Variorum, 1990), 10-21.

³ Anders Winroth, *The Making of Gratian's Decretum*, 122.

Gratian's text, but that way of viewing them seems misguided for several reasons. First, the references to earlier sources in Gratian 1 manuscripts offer quotations that largely demonstrate an earlier reading of those sources, rather than a later reading of them.⁴ Secondly, the manuscripts of Gratian 1 appear to use a certain set of initial sources, while Gratian 2 manuscripts appear to demonstrate a decision to add on additional sources alongside the ones of Gratian 1.⁵ Thirdly, the arguments of Gratian 1 flow more smoothly and coherently than the arguments of Gratian 2 manuscripts, indicating that later editions may have muddled the cohesiveness of the original text.⁶

With a basic understanding of the framework of the two-recension hypothesis, we can proceed to Winroth's arguments on how to date these editions, starting with the date of the first recension. While most Gratian research (including this thesis) often uses the terms pre-1140 and post-1140 to refer to the time before the *Decretum* and the time after the *Decretum*, these terms should not be taken to mean that the *Decretum* actually emerged in the year 1140. Under the two-recension hypothesis, dating becomes more difficult as there are multiple *Decreta*, each having its own date of composition. The first important aspect of dating the *Decretum* that Winroth points out is that students still used the earlier recension of Gratian 1 even after Gratian 2 emerged; this seems almost indisputable since some Gratian 1 manuscripts date to the 1160s and 1170s, well after it is believed that the full, later version of the *Decretum* existed.⁷ When Gratian 2 emerged, it may have been in the form of mere supplementary additions to Gratian 1, rather than a new text that is a complete and unified statement of the *Decretum*.⁸ Such a development, while not necessary for the two-recension hypothesis, seems credible given the

⁴ Anders Winroth, *The Making of Gratian's Decretum*, 123-125.

⁵ *Ibid.*, 125-126.

⁶ *Ibid.*, 126-128.

⁷ *Ibid.*, 134.

⁸ *Ibid.*, 134-135.

great monetary, labor, and time costs related to the physical writing of these legal texts. Citing a reference to the Second Lateran Council in the body of manuscripts identified as Gratian 1 and the lack of any evidence that this reference is a post-circulation edition to the work, Winroth concludes that Gratian composed the first recension of the *Decretum* no earlier than 1139, when the Council occurred.⁹ Given the consistency of this citation in the Gratian 1 manuscripts, this dating seems appropriate; however, when Winroth goes on to discuss why no other source dated between 1119 and 1139 appears in Gratian 1, he too readily dismisses hypotheses to explain this phenomenon. Winroth entertains the possibility that an early version of the first recension may have been composed before 1139 and edited after the Second Later Council, but he asserts that further questions that this hypothesis would raise render its suggestions “pointless.”¹⁰ Perhaps for Winroth’s purposes of simply dating the text, such an endeavor is “pointless;” however, in the broader sphere of studies on Gratian, the idea of a long-developing first recension has many uses, one of which will re-appear in this section’s discussion of the temporal hypothesis. In answering the question of why Gratian omitted all other canons from the Second Lateran Council, Winroth readily attributes this phenomenon to the medieval tendency to prefer older law to newer law, and claims that the patterns in similar omissions of newer sources among Gratian’s predecessors indicate that he likely composed Gratian 1 in 1139 or very soon after.¹¹ While this preference likely played an important role in the omission of much legislation from 1139 and its preceding decades, another factor could also explain this gap in sources—whether recent sources would be useful in Gratian’s aim. As the title *Concordia Dicordantium Canonum* illustrates, Gratian selected legal sources that made his *Decretum* cohesive and concordant. Throughout the sections of the *Decretum* classified as Gratian 1, the author excludes multiple sources that would be

⁹ Ibid., 136-139.

¹⁰ Ibid., 139.

¹¹ Ibid.

deemed old; one cannot explain their absence with the same reasoning that Winroth provides to explain the absence of so many Second Lateran canons. Instead, these omissions may be due to the possibility that so many recent canons, like a large number of earlier canons, were deemed non-germane to the main object of the text. Therefore, Winroth's assertion that the medieval precedent of omitting the legal texts of recent decades in the genre canonical collection does not justify his conclusion of an "1139 or slightly after" dating of Gratian 1. Instead, one must proceed with the understanding that the first recension of the *Decretum* could likely have been composed at least a few years after 1139, as well as a few years before 1139.

The exact limits of this dating on the second recension depend on the dating of the second recension. With the acceptance of the two-recension hypothesis as explanation of the *Decretum's* composition, many of the previous dates that scholars assigned the publication of the *Decretum* are no longer useful since their approaches to dating depended on the *Decretum* originating from a solitary effort.¹² Because Peter Lombard quotes the *Decretum* in his *Sentences* by the year 1158, one can say with reasonable certainty that the second recension of the *Decretum* was not only written by 1158, but had likely been circulating for some time and had reached Paris by that date.¹³ Beyond this date, Winroth offers no more certain dating and states that the second recension, and thereby the *Decretum* as a whole, was composed before the first glossators began glossing the work.¹⁴ For now then, our investigation will have to work on the understanding that the first recension, after possibly undergoing a long development process, emerged in 1139 or the years afterward and that the *Decretum* as a whole emerged ready for glossing by 1158 before the date of the first glossator.

¹² Ibid., 140-141.

¹³ Ibid., 141.

¹⁴ Ibid., 140.

With this approximate dating of the *Decretum*, our attention can now turn to dating the glosses. Due to several misconceptions about the glossators that historians have, until recently, preserved (e.g. that Paucapalea wrote the paleae of the *Decretum*, that Rolandus became Pope Alexander III), literature has renewed its interest in producing corrected dates of the glosses in recent years. On Paucapalea, while it is clear that many of the traditions that have arisen about him are false, it appears indisputable that his *Summa* emerged as the first coherent work glossing the *Decretum*; we can be quite certain of this placement given the observation that Rolandus, Rufinus, and the author of *Summa Parisiensis* all quote extensively from *Summa Paucapaleae*.¹⁵ The date of the *Summa Paucapaleae* is a bit more difficult to determine. Given that Paucapalea glosses distinctions and cases from both the first recension and the second recension of the *Decretum*, one can be sure that Paucapalea's *Summa* emerged after Gratian 2 emerged either in 1139 or in the years afterward. While Pennington and Müller offer the date range of 1144-1150 as the date of the *Summa Paucapaleae*, this date contains a lot of speculation and should be interpreted liberally.

With regard to Rolandus, the earliest mention of him in Bologna comes from 1154.¹⁶ In his review of the historical figure of Rolandus, Weigand argues that the *Summa Magistri Rolandi* was composed over the course of five recensions, starting around the year 1150 and culminating by 1160.¹⁷ Weigand also concludes that Rolandus likely taught at Bologna in 1160 and that canonists cited his *Summa* until the 1180s.¹⁸ The exact dating of the *Summa Magistri Rolandi* need not concern this study for now; the important take-away findings of the works of Weigand

¹⁵ Kenneth Pennington and Wolfgang P. Müller, "The Decretists: The Italian School," in *The History of Medieval Canon Law in the Classical Period, 1140-1234: from Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pilkington (Washington, DC: Catholic University of America Press, 2008), 129.

¹⁶ *Ibid.*, 132.

¹⁷ *Ibid.*, 132-133.

¹⁸ *Ibid.*, 135.

and Pennington and Müller are that Rolandus composed his *Summa* sometime after Paucapalea composed his and that the glosses of Rolandus' *Summa* emerged gradually over the course of the 1150s.

This general timeline provides framing for the central question behind this examination into the dating of the glossators—where did the later glossators first emerge? The most likely candidate for the earliest late glossator in Bologna is Rufinus, as there exists no surviving Bolognese *summa* that demonstrates the qualities of the post-Gratian *summa*, seems unaware of the work of Rufinus, and cannot be proven via textual clues to have emerged much later in the twelfth century. Because the *Summa Decretorum* of Rufinus demonstrates extensive knowledge of the *summae* of Paucapalea and Rolandus, there exists little doubt that his *Summa* emerged after the works of these two glossators.¹⁹ However, the multi-recension process by which Rolandus unveiled his *Summa* makes it difficult to provide an earliest end for dating Rufinus; his range could fall anywhere from the mid-1150s after a first few recensions of Rolandus had been circulated until years later. Quotations of Rufinus in the *Summa Stephani*, *Summa Simonis Basinianensis*, and the *Summa Decretorum* of Huguccio demonstrate that his work circulated around Bologna earlier than these three glossators, making the emergence of the *Summa Stephani* (the earliest of the three) the latest end for dating the *Summa* of Rufinus. Dates for Stephanus' work vary, but generally fall within the range of 1165-1167.²⁰ Thus, we can say with certainty that Rufinus emerged as the first late glossator in Bologna, but we cannot offer a date more specific than ca. 1155-1165 for this work.

For the success of the geography hypothesis, then, a French work that has the characteristics of the late-glossators must have emerged before the *Summa Decretorum* of

¹⁹ Ibid., 135.

²⁰ Ibid., 136. Kalb dates to ca. 1166; Weigand dates ca. 1165-1167 and suggests a possible two-recension editing process of the *Summa*.

Rufinus ca. 1155-1165. (Recall that, under the hypothesis, Rufinus would have composed his later subgenre style of *summa* as a mimic of what arose organically in the French legal community.) Weigand, along with many others, asserts that Stephen of Tournai (author of *Summa Stephani*) founded that French school after completion of his time at Bologna.²¹ While this assertion would certainly discount any pre-Rufinus late glosses from France, it appears problematic for many reasons. Firstly, Weigand, like others who make this assertion, seems to rely more on traditions and documentary evidence that fail to explain the exact nature of Stephanus' "founding" of the French school. (Was it a re-founding of a previous French tradition that had been lost? Was it the transporting of Bolognese ideas to France? Was it simply a reforming or modification of pre-Stephanus legal practices?) Secondly, the assertion does not take into account the full breadth of legal activity that existed in France before Gratian. The works of Ivo of Chartres (southern France, late 11th century – early 12th century) and the anonymously authored *La Summa Institutionum "Iustiniani est in hoc opere"* (southern France, early 12th century) both demonstrate the vibrant legal discourse that occurred in southern France long before any late glossator arrived from Bologna. In addition, the popularity within Paris and southern France of other non-Bolognese canonical works, such as those by Burchard of Worms (Holy Roman Empire, early 11th century), Bernold of Constance (Holy Roman Empire, late 11th century), and Alger of Liège (autonomous, French-speaking Liège in the Holy Roman Empire, early 12th century), show the influence of non-Bolognese thought (specifically, German and Franco-German legal thought) that would have had an effect on the French school before the arrival of Stephen of Tournai in the late twelfth century. For these reasons, we cannot simply rule

²¹ Rudolf Weigand, "The Transmontane Decretists," in *The History of Medieval Canon Law in the Classical Period, 1140-1234: from Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pilkington (Washington, DC: Catholic University of America Press, 2008), 175.

out French initiation of the late gloss subgenre on the basis of Stephanus' "founding" of the French School.

To determine whether there exists a pre-Rufinus French summa of the later subgenre, one must look directly at the research on the manuscript evidence from France. The first definite sign of French study of the *Decretum Gratiani* emerges in Parisian and southern manuscripts of "*Quoniam egestas*", which both abbreviated and glossed the *Decretum* in the year 1150.²² The presence of these manuscripts demonstrates that both southern communities and Paris were familiar with, read, and taught the *Decretum* by 1150. However, that "*Quoniam egestas*" abbreviates the *Decretum* and only offers explanatory and summary glosses demonstrates that, at this time, French decretists were not yet glossing in the manner of the late glossators. This style of glossing continues in the French school until at least the 1160s, but the manuscripts of these early French glosses are unfortunately difficult to date.²³ There exist many dateable and non-dateable French sources that behave like the late glossators in some ways, in that they use the *Decretum* in a critical way to build up their own arguments.²⁴ However, these works cannot be considered late gloss summae or even glosses of non-summa form because they do not confine themselves to the commentary nature of the gloss genre. One example of these types of works is the *Rhetorica ecclesiastica*, which was composed in Hildesheim in 1160.²⁵ While the *Rhetorica ecclesiastica* builds arguments based on the *Decretum*, it also draws upon multiple French authors to make its legal cases; for that reason, the *Rhetorica ecclesiastica* belongs within the genre of treatise, rather than in the various genres and subgenres of gloss. The earliest existing French text that demonstrates the qualities of summa and the attributes of later glosses is the

²² Ibid., 175-176.

²³ Ibid., 176-178.

²⁴ Ibid., 178-180.

²⁵ Ibid., 180.

Summa Parisiensis, with which we have dealt extensively. Unfortunately for the geography hypothesis, the *Summa Parisiensis* demonstrates strong familiarity with Rufinus, making it impossible for it to have pre-dated the Bolognese glossator.²⁶ No other French work exists that both pre-dates the *Summa Parisiensis* and fits the subgenre of later glossators. This absence does not definitively prove that no such work ever existed; a lost pre-Rufinus French gloss could have existed, reached Bologna, and sparked late glossing in the Italian school. However, the notion that such a work would be popular enough to have had such an effect on Bologna but would not have survived seems quite dubious.

Sources of the Later Glossators

Often, late glossators will cite pre-Gratian sources in their more argumentative notes on the *Decretum*. Occasionally, these citations are very direct and name the source upon which the glossator draws his reasoning. For example, on the discussion of Case 31, Gratian judges that a woman who commits adultery may marry her lover provided that she performs five years of penance.²⁷ Rufinus responds to this prescription by cross-referencing it with Burchard, writing, “Hic dicitur quod vidua mechans quinquenem agat penitentiam. Quod quidem ex severiori regula intelligendum est; alias enim pro simplici fornicatione nisi trium annorum est penitentia indicenda, ut Burc. 1. IX. ex conc. Melensi cap. ‘Si laicus.’”²⁸ Rufinus later adds:

[Si qua vidua] fuerit mechata cum aliquo et eundem postea habuer. in virum etc.
Intelligatur: *mechatur*, antequam ab illo desponsaretur; postquam enim fuerit desponsata, si cum eo concumbat ante quam tradatur, non dicitur mechari. Quia tamen iniuriam

²⁶ Ibid., 181.

²⁷ Gratian, *Decretum Magistri Gratiani*, ed. Emil Friedberg, in *Corpus Iuris Canonici*, vol. 1 (1879; repr., Graz: Akademische Druck- u. Verlagsanstalt, 1959), 1110, C. 31, q. 1, c. 7. Quoting the Council of Elvira, Gratian writes, “Si qua fuerit vidua mechata, et potesta eundem habuerit maritum, post quinquennii tempus acta legitima penitentia placuit eam ad communionem.”

²⁸ Rufinus, *Summa Decretorum*, ed. Heinrich Singer, (Paderborn: Ferdinand Schoningh, 1902); repr., (Aalen: Scientia, 1963), 471, accessed April 25, 2013. http://works.bepress.com/david_freidenreich/11/. C. 31.

nuptiis intulerunt, imponetur utrique penitentia inius anni, ut notatur similiter in eodem libro Burchardi ex concilio Elibertano cap. Virgenes.²⁹

In this example, Rufinus provides the reader with a specific citation in the works of Burchard, and a modern observer can determine the role that the pre-Gratian compiler had on Rufinus' legal reasoning in this case. To the extent to which a glossator cites previous sources, then, one can determine the role that individual pre-Gratian legal works or specific types of pre-Gratian legal works have had on that particular glossator.

To determine the role that geography had in driving the French late glossators to compose, we can apply this principle to the *Summa Parisiensis*. Unfortunately, the author of *Summa Parisiensis* does not frequently cite by name the sources he quotes or paraphrases in the way Rufinus does. For this reason, we will have to discern the role of pre-Gratian sources on the Parisian glossator by reviewing the relevant literature and examining only a few select differences between the *Summa Parisiensis* and the *Decretum*. An unusually high number of French pre-Gratian sources would indicate a pro-French agenda in composing the gloss; a level of French sources that appears less than significant would indicate a lack of a pro-French agenda in the gloss's composition.³⁰

Father McLaughlin reviews the sources of the *Summa Parisiensis* in the introduction of his pivotal 1952 edition of the gloss. Regarding the early canonists that the Parisian glossator mentions by name or with whom he seems obviously familiar, McLaughlin identifies only the

²⁹ Ibid. C. 31.

³⁰ Because of the high level of uncertainty in identifying sources and the small number of citations in the *Summa Parisiensis*, a quantitative study of the sources in the Parisian gloss could not feasibly yield a statistically significant result. When reviewing the pre-Gratian sources that McLaughlin identifies, we will ignore arguments for the inclusion of *Summa Decretorum Magistri Rufini* and *Summa Stephani*. We ignore such arguments for the purposes of temporarily interpreting within the confines of the geography hypothesis. Under the geography hypothesis, Rufinus and Stephanus could not possibly have influenced the Parisian glossator since the latter's gloss precedes the former two. Under the geography hypothesis, Rufinus and Stephanus would have cited the *Summa Parisiensis*; not vice versa.

Penitential of Theodore, the decretals of Pseudo-Isidore, and some works of Ivo.³¹ First, we will examine the non-French authors Theodore and Pseudo-Isidore. The Penitential of Theodore proves a bit problematic as it is quite difficult to determine whether the glossator has direct familiarity with the work or whether he draws his knowledge of it from a separate source. McLaughlin judges that, despite similarities between the Parisian glossator's use of Theodore and Burchard's use of Theodore, the former's apparent disinterest in employing the latter throughout the *Summa Parisiensis* makes Burchard an unlikely source for this knowledge of Theodore.³² Father McLaughlin's dismissal, though, seems too swift. Though McLaughlin is careful not to say that the Parisian glossator was unaware of Burchard, whose works were immensely influential throughout the Western Church, he does not give the importance of Burchard's penance work due consideration. Burchard's *De Paenitentia* (Book XIX of the *Decretum Burchardi*, also known as *Doctor and Corrector*) was perhaps the leading penitential work of late-medieval western Europe; that this work would not have circulated in Paris in the twelfth century seems unfathomable, and the notion that the *Summa Parisiensis* would not take the opportunity to incorporate Burchard's penance commentary seems unlikely. McLaughlin posits that the *Summa Paucapaleae* may be the source of the Theodore quote.³³ This idea, however, seems a less likely scenario than one including Burchard when one compares the textual evidence. The original quote of the *Summa Parisiensis* reads, "Videtur hoc [*in lege nunc autem*] contra illud Theodori in poenitentiali: 'Mulier si ante tempus purgationis praesumpserit ecclesiam intrare, tanto tempore ieiunet in pane et aqua, quanto ab ingressu ecclesiae abstinere

³¹ *The Summa Parisiensis on the Decretum Gratiani*, ed. Terence P. McLaughlin (Toronto: Pontifical Institute of Mediaeval Studies, 1952), xx-xxi.

³² *Ibid.*

³³ *Ibid.*, xxi.

debuerat.”³⁴ The wording of this text differs quite noticeably from the wording that Paucapalea offers, “Sed in poenitentiali Theodori contra legitur, ut si mulier ante praefinitum tempus praesumpserit ecclesiam intrare, tot dies in pane et aqua poeniteat, quot ecclesia carere debuerat.”³⁵ Compare this to the wording of Burchard, “Mulier quae intrat Ecclesiam ante mundum sanguinem post partum, si masculum generat, XXXIII dies, si foeminam LVI. Si qua autem praesumpserit ante tempus praefinitum Ecclesiam intrare, tot dies in pane et aqua poeniteat, quot Ecclesia carere debuerat. Qui autem concubuerit cum ea his diebus, decem dies poeniteat in pane & aqua.”³⁶ The quotation of the *Summa Parisiensis* seems much more in line with the wording of Burchard than of Paucapalea, so McLaughlin’s preference for Paucapalea or some other unknown author for this quote seems unwarranted. What one can take from this analysis is that the possible quoting of a non-French, ubiquitous author like Burchard, along with another non-French, semi-ubiquitous author like Pseudo-Isidore initially hints at the lack of a pro-French agenda in the *Summa Parisiensis*.

The use of Ivo of Chartres superficially hints at a pro-French agenda; however, the context in which the *Summa Parisiensis* employs Ivo mitigates this impression. In the first direct citation, the glossator writes, “Hoc dicunt quidam esse paragraphum Gratiani, et multi subdit exempla filiorum sacerdotum qui fuerunt summi pontifices, sed in canonibus Ivonis multa plura sunt exempla.”³⁷ Here, the citation seems more to provide a cross-reference, rather than to insert French legal theory over Bolognese legal theory. The second direct citation provides a similar example; when Gratian assembles a series of canons for the reader, the glossator speculates,

³⁴ Ibid., 5. D. 5.

³⁵ Paucapalea, *Summa Paucapaleae*, ed. Johann Friedrich von Schulte (Giessen, Germany: Emil Roth, 1890), 11, accessed April 25, 2013, hosted by Bibliothèque Cujas, Université de Paris, <http://web.colby.edu/canonlaw/tag/rufinus/>. D. 5.

³⁶ Burchard of Worms, *Decretorum Libri XX*, ed. Gérard Fransen (Aalen, Germany: Scientia-Verl, 1992), 217. Cap. 141.

³⁷ *The Summa Parisiensis on the Decretum Gratiani*, 51. D. 56.

“Videtur quod Gratianus has leges sumpsisset de canonibus Ivonis.”³⁸ Again, in its employ of Ivo, the *Summa Parisiensis* acts more as a source for the audience to find further reading (almost in a manner typical of the early glosses). On the final instance of a direct instance, the glossator simply writes about a text of the *Decretum*, “Quidam libri habent rubricam praemissam huic decreto talem ‘De rapacitate monachorum,’ et quidem in Panormia Ivonis, ubi hoc decretum ponitur, haec rubrica praemittitur.”³⁹ Not only is this statement simply cross-referential, but it appears almost unnecessary and forced. Perhaps, then, there was some motivation on the part of the early French late glossators to insert some French legalists; but these inserts appear more to remind the reader that the French school can offer insight in the same way that the Italian school can. Not only does such a notion fail to justify the claim that these glossators held a pro-French agenda, but it almost seems as if they sought to build bridge between the two schools in the ongoing legal discourse.

However, given that McLaughlin published his edition of *Summa Parisiensis* in 1952, his commentary on the gloss’s contents do not consider the possible influence of works discovered in more recent decades. In particular, scholars only began significantly recognizing the value of the early twelfth-century French *Summa Institutionum Iustiniani* (Manuscript 903 in the Pierpont Morgan Library) in the 1970s when it was printed as a published edition and in the 1980s when André Gouron published an extensive study on the work.⁴⁰ The *Summa Institutionum Iustiniani* reflects a vibrant legal community in southern France shortly before the 1140, indicating that it likely could have been a source material for the Parisian glossator and other glossators who might have had protectionist motivations in their writing. If the work had held a strong enough

³⁸ Ibid., 109. C. 2, q. 6.

³⁹ Ibid., 167. C. 13, q. 2.

⁴⁰ *La Summa Institutionum “Iustiniani est in hoc opere,”* ed. Pierre Legendre (Frankfurt: Klostermann, 1973); Rudolf Weigand, “The Transmontane Decretists,” 175.

influence on the French school of canonists, it could have helped form a French legal culture that was united in church legal theory. This unity in thought might have led to the Parisian glossator's strong disagreements with Gratian and to the argumentative nature that inspired him and other French glossators to develop the late subgenre of glosses. However, a review of the contents of the *Summa Institutionum Iustiniani* reveals why this scenario is unlikely. The *Summa Institutionum Iustiniani* primarily concerns itself with Roman law, not canon law. When one considers the issues which inspire the most commentary by the Parisian glossator (e.g. natural law), he/she finds no arguments with regard to these issues in the *Summa Institutionum Iustiniani*.⁴¹ The absence of these topics in the *Summa Institutionum Iustiniani* makes it improbable that this work would have instilled strong enough regional opinions to provoke the composition late glosses like the *Summa Parisiensis* under the geography hypothesis. This absence, combined with the bridge-building sentiments of some cross-references and with the relatively meager showing of French pre-Gratian canonists in the earliest known French late gloss, hints against an initiation of the late sub-genre by French-protectionist glossators.

Use of Late Glosses Across Both the French and Italian Schools

Also casting doubt on the idea that geography was the driving force behind the development of the late glosses are the trends observed in gloss compilations of both the French and Italian schools. Gloss compilations, unlike the *summae* of the glossators discussed in this thesis, draw upon multiple sources to provide commentary of the *Decretum*; some of the glosses in compilations come from the actual *summae* of the glossators, while other glosses come from sources by the same authors of the *summae* but are not actually included in their *summae*. Under the geography hypothesis, the canonists' preference for the theories of colleagues within their

⁴¹ *La Summa Institutionum "Iustiniani est in hoc opere."* A review of the contents of each section within each book reveals no extended focus on the topics of natural law, church authority, the sacraments, etc.

own school should lead them to also develop gloss compilations that are homogeneous in terms of school. That is, among the later sources, the French gloss compilations should almost exclusively include the works of the *Summa Parisiensis* and other late French glosses, and the Italian gloss compilations should almost exclusively include the works of the late Italian glosses. Since early glosses are mostly explanatory and grammatical, a compiler's decision to include an early gloss from another school would be uncontroversial since this inclusion would not imply the appropriation of substantive legal theory from another school. A large blow to the expectation of exclusivity in compilations exists in a compilation that Weigand describes simply as "The Fifth Gloss Compilation." Despite many signs that this compilation was composed in France, the compiler included dozens of glosses directly from Rufinus, including some which may have come directly from his *Summa Decretorum* (as opposed to another source that included commentary by Rufinus).⁴² Since Rufinus is identified so strongly with the Bolognese school, it appears that, in the case of "The Fifth Gloss Compilation," geography played little role for some French canonists in deciding which commentaries to follow. Such activity in the school's composition of one genre makes it difficult to believe that more protectionist activity would occur in the composition of another genre.

Ultimate Rejection of the Geography Hypothesis

Alone, none of the above findings can definitively discount the geography hypothesis wholesale. Though we know of no late summa that came out of the French school before the *Summa Decretorum Magistri Rufini* came out of Bologna, and the documentary evidence makes such a work extremely unlikely to have ever existed, uncertainties in dating and the number of works that have been lost over time keeps viable the possibility of such a work. Though the

⁴² Rudolf Weigand, "The Development of the *Glossa Ordinaria* to Gratian's *Decretum*," in *The History of Medieval Canon Law in the Classical Period, 1140-1234: from Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pilkington (Washington, DC: Catholic University of America Press, 2008), 62-63.

direct citations and speculated indirect references of the *Summa Parisiensis* show no adamant preference for French legal theory over outside legal theory, the number of sources that would have been available to the Parisian glossator but are now lost to contemporary scholars makes it plausible that many French-protectionist inserts of the gloss are unrecognized in the twenty-first century. French glossators of non-summa genres often incorporate the work of Italian late glossators, indicating little drive to defend their own community against Bolognese legal thought; however, such trends in these glosses do not prove a universal trend, meaning that the late glossators like the author of the *Summa Parisiensis* may have been more protectionist in aim. Overall, though, when one takes into account the lack of evidence for a French initiation of the late glosses and indications that French glossators actually embraced legal discourse between the French and Italian schools, the geography hypothesis seems to lack any serious plausibility and a rejection of it as an explanation for the development of the late gloss subgenre seems appropriate.

Acceptance of the Temporal Hypothesis

The Early Glossators

To understand how time may have affected the development of the gloss genre, one must first understand the historical context of the glossators coming out of the pre-Gratian era of canon law. For centuries before Gratian, canon lawyers lamented the state of law in the Church. Canons had been emerging for over five hundred years throughout the Western Church. For a canonist to settle a legal question, he would need to sift through the laws of ecumenical councils, local synods, bishop's decretals, legal treatises, Scripture, and multiple other legal sources. Adding to the confusion of this complex terrain of canonical authority, canonists had to develop norms about how to compare the relative authority of such sources, raising numerous questions.

Can a later source supersede an earlier source? To what extent are the Bishop of Rome's decretals superior in authority to decretals of lesser bishops? Under what circumstance can a local synod's canons become universally applicable throughout the Church? These questions and others became exacerbated when, through separation by geography and time, many of the canons that arose contradicted one another. These questions, disparities, and complexities gave rise to a rough series of norms and practices in answering legal questions, but the canonists remained anxious about legal ambiguity and the drive to solve the problem of so many conflicting sources persisted.⁴³ Gratian offered a solution to this anxiety. By virtue of its title, method, and style, the *Concordia Discordantium Canonum* turned a complex system of contradictions into a simplified one of relative cohesion, thereby ending the "ordeal" that so many canonists perceived.⁴⁴ Furthermore, the emerging university system in the mid-twelfth century allowed for easy circulation of this beneficial text. For these reasons, it not only makes sense that the *Decretum* would have gained popularity circa 1140 (as opposed to earlier collections from the pre-university era), but it seems natural that the legal community would have gladly accepted the *Decretum* and done whatever possible to make sure this work became a standard legal text throughout the Church; these considerations would adequately explain why the early glossators focused their attention on praising Gratian's work.

Offering further insight as to how time might have affected the early glossators is the historical context in the years immediately after Gratian published his work. Although the work was quickly employed as a teaching tool for students, its ubiquity did not alter the reality that the

⁴³ Michael Brett, "Finding the Law: The Sources of Canonical Authority before Gratian," in *Law before Gratian: Law in Western Europe c. 500-1100*, ed. Per Andersen, Mia Münster-Swendsen, and Helle Vogt (Copenhagen : DJØF Publishing, 2007), 51-72.

⁴⁴ Finbarr McAuley, "Canon Law and the End of the Ordeal," *Oxford Journal of Legal Studies* 26, no. 3 (2006): 473-513, accessed September 16, 2013, <http://ojls.oxfordjournals.org.proxy.wm.edu/content/26/3/473.full.pdf+html>.

Decretum was both highly disorganized and difficult to read.⁴⁵ For a community coming out of a legal era whose chaos was seen as highly distasteful, this disorganization proves highly problematic, as it stands in the way of the understanding and information sharing necessary for setting up a more structured system. The *Decretum* could only succeed in drawing concord from discord if its audience could understand and apply it. Thus, the need to make the work more ordered and readable explains the many explanatory, cross-referential, and abbreviating aspects of the early glosses; the demand in the decades after 1140 simply demanded such work for the *Decretum* to accomplish the mission the community had assigned to it.

The Late Glossators

An understanding of the greater context of the *ius commune* legal culture out of which the *Decretum* came can explain the techniques and approaches of the later glossators. As discussed in Chapter 1, this time period was one in which ideas flourished and the legal community encouraged discourse and an exchange of ideas. Furthermore, during this time period, universities became important in both legal and theological education. The combination of the pre-existent culture of the *ius commune*, the institutional opportunities the universities provided, and the introduction of the *Decretum* would have all invited the type of ideas and styles present in the late glossators. However, there arises the question of why the late glossators delayed in appearing if all these factors seemed to welcome them. The answer to this first question lies in the discussion of the previous section. The environment of the 1140s Church was one that desperately desired legal consistency, had an opportunity to create legal consistency, but needed to solidify that opportunity before it could fully enjoy such a structured law system's benefits. Thus, the argumentative glosses that canonists would seem so inclined to compose would have had to have been put on hold until the *Decretum* became readable.

⁴⁵ Kenneth Pennington and Wolfgang P. Müller, "The Decretists: The Italian School," 122.

Weighing the Two Theories

As discussed in this chapter, there exists no “smoking gun” that allows us to definitively prove the falseness of the geography hypothesis. Likewise, there exists no stand-alone piece of evidence that allows us to say with certainty that time and changing cultural circumstances were the driving forces behind the two-step development of the glosses on the *Decretum*. However, the preponderance of the evidence demonstrates not only a lack of plausibility on the part of the geography hypothesis, but an extreme likelihood on the part of the temporal hypothesis. Time so dramatically divides the early and late gloss subgenres (with the *Summa Decretorum Magistri Rufini* both initiating the latter group and ending all currently known compositions of the former group), and the evolution of the most salient aspects of legal culture (e.g. universities, legal compositions, the *Decretum*) theoretically should have produced the very same traits of gloss composition that we see in the two-step development. Upon weighing all of these pieces of evidence, one can say with great confidence that the temporal hypothesis functions best in interpreting the phenomena seen in post-Gratian glosses.

Chapter 4

Gratian, the Glossators, and the Struggle to Define Natural Law: An Illustration of Findings

The synthesis of the two-step hypothesis and the temporal hypothesis produces the following statement: Immediately following the circulation of the *Decretum*, the authors of summa-style glosses first wrote works that merely explained the *Decretum*'s contents to a community whose most prominent yearning was to understand the new compilation; after these first glosses satisfied this yearning, authors of that very same style of gloss developed a new subgenre that satisfied their own needs to express legal theories not necessarily present in the *Decretum*. In this chapter, we will examine Gratian and the glossators' handlings of specific topics in natural law to see how the two-step hypothesis and temporal hypothesis help to interpret what we observe.

The Basic Tenets of Natural Law

How to Define Natural Law

On defining natural law, Gratian writes, "Ius naturae est, quod in lege et evangelio continetur, quo quisque iubetur alii facere, quod sibi vult fieri, et prohibetur alii inferre, quod sibi nolit fieri."¹ There then exist two parts to Gratian's definition; natural law, (1) is contained in scripture, (2) is the mechanism by which everyone is commanded to do unto others what he/she wants done unto himself/herself and is prohibited from doing unto others what he/she does not want done unto himself/herself. Gratian elaborates on the definition later in Distinction 1,

¹ Gratian, *Decretum Magistri Gratiani*, ed. Emil Friedberg, in *Corpus Iuris Canonici*, vol. 1 (1879; repr., Graz: Akademische Druck- u. Verlagsanstalt, 1959), 1. D. 1.

explaining, “Ius naturale est commune omnium nationum, eo quod ubique instinctu naturae, non constitutione aliqua habetur, ut viri et feminae coniunctio, liberorum successio et educatio, communis omnium possessio et omnium una libertas, acquisitio eorum, quae celo, terra marique capiuntur; violentiae per vim repulsio.”² This clarification provides more input both on how natural law operates and on what types of topics natural law concerns itself. On how this type of law is perceived and evaluated, Gratian simply writes, “Nam hoc, aut si quid huic simile est, numquam iniustum, sed naturale equumque habetur.”³ Gratian later devotes an entire chapter to what natural law is and opens that chapter with his summary of how natural law relates to other forms of law: “Naturale ius inter omnia primatum obtinet et tempore et dignitate. Cepit enim ab exordio rationalis creaturae, nec variatur tempore, sed immutabile permanet.”⁴ Gratian continues to say that, since some things are contained in the Old Testament yet no longer followed, “non videtur ius naturale immutabile permanere.”⁵ Thus Gratian produces a final major aspect of his definition of natural law, which is that natural law is not immutable.

On Gratian’s definition of natural law, Paucapalea writes, “*Ius naturale est q. q. i. a. f. quod sibi rationabiliter, optat fieri et e converso. Hoc ius a beato Gregorio iustitia appellari videtur, cum ait: ‘Iustitia est naturae tacita conventio in adiutorium multorum inventa.’”⁶ The commentary on the quote begins with a cross-reference, pointing the reader to a possible source that Gratian might have used in creating his definition of natural law. Paucapalea proceeds in his discussion of the definition:*

Ab hoc iure, ut in libro etymologiarum Ysidorus dicit, divinae leges natura principium habuerunt, et humanae a moribus. Liber etymologiarum dicitur, quia in eo diversa

² Ibid. D. 1, c. 7.

³ Ibid. D. 1, c. 7.

⁴ Ibid., 7. D. 5, c. 1, §1.

⁵ Ibid. D. 5, c. 1, §2.

⁶ Paucapalea, *Summa Paucapaleae*, ed. Johann Friedrich von Schulte (Giessen: Emil Roth, 1890), 4, accessed April 25, 2013, hosted by Bibliothèque Cujas, Université de Paris, <http://web.colby.edu/canonlaw/tag/rufinus/>. D. 1.

vocabula exponuntur. Est enim etymologia origo vocabulorum, cum vis nominis et verbi per interpretationem colligitur. Cuius cognitio saepe usum necessarium habet interpretatione sua. Dum enim videris, unde ortum est nomen, citius vim eius intelliges. Sunt autem rationes etymologiarum nominum aut ex causa datae, ut reges a recte regendo, aut ex origine, ut homo, quia fit ex humo, aut ex nominum derivatione, ut a prudentia prudens, aut etiam ex vocibus, ut a garrulitate garrulus.⁷

Here, Paucapalea provides an additional cross-reference and provides readers with some background knowledge so that they may better understand the context of Gratian's definition of natural law. The explanation and quotation of Isidore does not supplant what Gratian has already said; it elaborates upon the point, and allows for greater understanding. Such a guide reflects the same trends of the *Summa Paucapaleae* that we have witnessed in previous chapters; the goal for Paucapalea is to help the reader access and understand the *Decretum*.

As is typical of his commentary on the first 101 Distinctions, Rolandus offers only a summary for the sections dealing with the definition of natural law. Rolandus writes, "Prima et secunda distinctio [the former of which contains Gratian's definition of natural law] ostendit, quid sit ius, quid lex et de speciebus eorum."⁸ His goal is therefore similar to Paucapalea's, but he does not go to such compositional lengths to ensure he meets that goal for the reader.

Rufinus reads Distinction 1 and grows concerned that either Gratian relies too much on overly broad legal traditions or that students will read Gratian's text and come to follow overly broad legal traditions. He writes:

Hoc [Gratian's definition of natural law] autem ius legistica traditio generalissime diffinit dicens: Ius naturale est quod natura omnia animalia docuit. Nos vero istam generalitatem, que omnia concludit animalia, non curantes, de eo, iuxta quod humani generi solummodo ascribitur, deviter videamus: inspicientes, quid ipsum sit et in quibus consistat et quomodo processerit et in quo ei detractum aliquid aut adauctum fuerit.⁹

⁷ Ibid. D. 1.

⁸ Rolandus, *Summa Magistri Rolandi*, ed. Friedrich Thaner (Innsbruck: Wagner, 1872), 4, accessed April 25, 2013, http://works.bepress.com/david_freidenreich/6/.

⁹ Rufinus, *Summa Decretorum*, ed. Heinrich Singer (Paderborn: Ferdinand Schoningh, 1902); repr., (Aalen: Scientia, 1963), 6, accessed April 25, 2013. http://works.bepress.com/david_freidenreich/11/. D. 1.

Rufinus identifies this potential misleading as reason for introducing his own definition of natural law, “Est itaque naturale ius vis quedam humane creature a natura insita ad faciendum bonum cavendumque contrarium.”¹⁰ On what makes up natural law, Rufinus writes, “Consistit autem ius naturale in tribus, scilicet: mandatis, prohibitionibus, demonstrationibus. Mandat namque quod prosit, ut: ‘diliges Dominum Deum tuum’; prohibet quod ledit, ut: ‘non occides’” demonstrat quod convenit, ut ‘omnia in commune habeantur’, ut: ‘omnium una sit libertas’, et huiusmodi.”¹¹ This listing of *mandates*, *prohibitiones*, and *demonstrationes* exists nowhere in Gratian’s original notion of natural law, and Rufinus adds it without any prompt in the text. Thus, Rufinus initiates the late glossing trends of his subgenre by altering Gratian’s definition and offering completely original additions to sit alongside the definition.

Stephanus begins the commentary on the definition by offering comments clearly borrowed from Rufinus. He writes, “Et secundum hanc ultimam acceptionem ponit: *nurali iure*, i.e. divino, et illo alio primitivo. Vel si quintam iuris naturalis acceptionem non abhorreas, intellige, hic dici ius naturale, quod hominibus tantum et non aliis animalibus a natura est insitum, scil. ad faciendum bonum vitandumque contrarium. Quae quasi pars divini iuris est.”¹² The differences between Stephanus’ definition and Gratian’s are parallel to the differences between Rufinus’ and Gratian’s. Continuing his reliance on the *Summa Decretorum Magistri Rufini*, Stephanus then describes the forms in which natural law appears by stating, “Quod in tribus constat maxime, mandatis scilicet, prohibitionibus et demonstrationibus. Mandat quod prosit, ut deum diligere; prohibet quod laedit, ut non occidere; demonstrate quod convenit, ut

¹⁰ Ibid. D. 1.

¹¹ Ibid. D. 1.

¹² Stephen of Tournai, *Die summa über das Decretum Gratiani*, ed. Johann Friedrich von Schulte (Aalen: Scientia, 1965), 7, accessed April 25, 2013, http://works.bepress.com/david_freidenreich/12/. D. 1.

omnes homines liberos esse.”¹³ In this instance, the copying from his predecessor is almost verbatim. After a few explanatory notes, the *summa* provides an extensive commentary on Gratian’s use of the “quod sibi vult” commandment from the Sermon on the Mount as a summary of the contents of natural law. The stretch begins:

Haec duo praecepta naturalia non inveniuntur in lege vel in evangelio; sed alterum tantum, scil. illud, quod sequitur: *omnia quaec.* etc. Ex isto tamen non absurde contrarium intelligi datur. Nota voluntatem in bono frequentius accipi, concupiscentiam in malo. Cum ergo dicitur: *quod sibi vult fieri*, intelligitur, quod iustum sit; alioquin non esset proprie velle sed concupiscere. Quod autem dicitur: *quo prohibetur alteri inferre*, subintelligas iniuste propter iudicem, qui poenam infert delinquenti, quam sibi nollet inferri; vel dicamus, iudicem non inferre poenam, sed per eum iustitiam vel legem.¹⁴

Stephanus takes Gratian’s quoting of the Sermon and offers a note on how to correctly interpret it; with this interpretation, Stephanus alters how one approaches the *Decretum*’s definition of natural law so that the reader’s understanding is more nuanced, more complex, and closer to Stephanus’ own legal theory.

The *Summa Parisiensis*’ commentary begins on a somewhat critical note. “*Ius naturale*: Haec descriptio non videtur conveniens quia non omne quod est in evangelio et in lege est naturale ius, ut caeremonialia. Sed huiusmodi verborum captiones non cavet Gratianus in suis descriptionibus seu expositionibus.”¹⁵ After his slight condemnation of Gratian, the author continues, “Hic tamen dicere possumus eum habuisse intellectum ad praecepta legis et evangelii, vel totum ex parte subiecti sumit.”¹⁶ The effect of these two statements is that, though the author expressed admiration for many of Gratian’s abilities, the faults of Gratian compromise many of his legal theories. This doubt toward Gratian primes the reader to receive the definition that the glossator introduces. On the clarifications in Canon 7, the author adds that natural law also

¹³ Ibid. D. 1.

¹⁴ Ibid., 8. D. 1.

¹⁵ *The Summa Parisiensis on the Decretum Gratiani*, ed. Terence P. McLaughlin (Toronto: Pontifical Institute of Mediaeval Studies, 1952), 1. D. 1.

¹⁶ Ibid. D. 1.

applies to all living things and not just all nations.¹⁷ Furthermore, On Gratian's discussion of the immutability of natural law, the *Summa Parisiensis* offers a slightly different way of expressing the mutability: "Ad quod dicimus: ius naturale quod redactum est in praeceptum scriptum non mutatur."¹⁸ This expression admittedly does not represent the full potential for criticism that the Parisian glossator possesses, but it does demonstrate a desire to change some aspects of the *Decretum's* definition.

Simon of Bisignano, in discussing natural law, critiques not just Gratian, but also many of those glossators who have offered definitions of natural law in place of Gratian. He first introduces the main issue of defining natural law, and explains the great discussion that the topic has sparked.¹⁹ He then discusses the type of theory first proposed by Rufinus that natural law makes humans shun what is prohibited and embrace the good virtues of *caritas*. On this definition, Simon writes, "Dicunt enim quidam quod ius naturale nichil aliud est quam caritas per quam facit homo bonum uitatque contrarium. Sed hoc stare non potest quia caritas in solis bonis est; ipsa enim proprius est fons bonorum cui non communicat alienus. Ius uero naturale commune est omnium."²⁰ After critiquing this body of thought, Simon proceeds to reject other theories that equate natural law with free will, writing, "Alii uero dicunt ius naturale esse liberum arbitrium. Sed hoc similiter ex eo tollitur quia libero ad bonum et ad malum homo arbitrio flectitur. Ius uero naturale malum semper prohibet et detestatur."²¹ Finally, Simon introduces his own definition of natural law:

¹⁷ Ibid., 2. D. 1, c. 7. "*nationum, et animalium, ut habetur Institutum.*"

¹⁸ Ibid., 5. D. 5.

¹⁹ Simon of Bisignano, *Summa in Decretum Simonis Bisinianensis*, ed. P. V. Aimone (Fribourg, Switzerland: 2007), 1, accessed February 15, 2014, http://www.unifr.ch/cdc/assets/files/summa_simonis_BAND_II%2013%2001%202008%20normal.pdfPrincipium. "Cum autem ius naturale dicatur vis mentis, queritur quo nomine vis illa valeat exprimi et quid illa esse possit. De hoc uero diuersi uario modo respondent."

²⁰ Ibid., 2. Principium.

²¹ Ibid. Principium.

Nobis itaque uidetur quod ius naturale est superior pars anime, ipsa uidelicet ratio que sinderesis appellatur, que nec in Caim, teste scriptura, potuit extinguere. Cum autem sit natura, idest naturale bonum, delictorum meritis obfucari poterit, numquam extinguere. De illa questione, scilicet ‘quod tibi non uis fieri alii ne feceris,’ solutionem potes habere duobus modis; alias, scilicet iniuste; uel alio modo, quia uidetur iudex non occidere sed lex.²²

Simon continues with the customs of his predecessors by forming his own alternative definition of natural law, but he also begins his own custom by actively critiquing the definitions of Rufinus, Stephanus, and others. On Canon 7, Simon writes, “Hic queritur de qua coniunctione hoc possit intelligi. De fornicaria non, quia ipsa est peccatum et ideo de iure naturali esse non potest. De ea ergo intelligendum est que fit per matrimonium, quod in inuentione est iuris naturalis, confirmatione est iuris ciuilis, transsumptione est iuris canonici.”²³ Such statements slightly yet pointedly alter the examples of natural law that Gratian initially put forth, a symptom of the detraction Simon makes from the definitions of Gratian and his preceding glossators. In the *Summa in Decretum Simonis Basinianensis*, then, we can begin to see the a condensation of the post-Gratian definitions of natural law; the process of condensing these definitions places the legal theories of the glossator in direct response to both Gratian and the earliest late glossators, instead of just Gratian.

Summa Decretorum Huguccionis demonstrates a repetition of the trends observed over the course of the two-step development. Huguccio provides his own definition of natural law in Distinction 1, writing, “id est naturali ratione, id est naturali ductu rationis quo homo impellitur ad ea observanda que in iure diuine precipiuntur et ad ea vitanda que ibi prohibentur. Et est idem sensus.”²⁴ Again one observes here how the glossator, like so many of his predecessors, does not just offer an alternative to Gratian, but does so at the very first mentioning of natural law so that

²² Ibid., 3. D. 1.

²³ Ibid., 3. D. 1.

²⁴ Huguccio Pisanus, *Summa Decretorum*, 14. D. 1.

it influences the reader before Gratian has the opportunity to do so with his expanded definition. Here, though, Huguccio's definition bears much similarity with Rufinus', demonstrating both a rejection of Simon's definition (if Huguccio was aware of it) and a behavior in opposition to Simon's behavior. Where Simon critiques Rufinus' theory, Huguccio adopts it. Such activity reinforces the idea that, as time proceeded, late glossators might have moved beyond simply engaging in an exchange of legal theory between themselves and the *Decretum* into creating a more complex exchange of legal dialogue within their genre; toward the end of the twelfth century, glossators appear to have incorporated the legal theories of their predecessors deemed favorable and discarded the ones deemed less favorable.

The devotion of each late glossator that we include in this study demonstrates the great importance that natural law had to them. Because they were so vibrant in their exchange, their subgenre was able to progress from a simple dialogue with the text to a dialogue among the text and multiple readers of the text. The significance that this developed dialogue had will become apparent at the end of this chapter.

Where to Find Natural Law

Gratian introduces the topic of where to find the sources of Natural Law in his own definition. He states, “[Ius naturale] in lege et evangelio continetur.”²⁵ Despite the simplicity of this statement, the conversation on how to use those sources becomes quickly becomes more complex. After introducing the notion that natural law appears immutable on the surface because of so many scriptural laws that have fallen out of observance in western Christianity, Gratian inspects a series of issues in natural law (described in the following section) to come up with an expanded version of this initial statement: “In lege et evangelio naturale ius continetur; non

²⁵ Gratian, *Decretum Magistri Gratiani*, 1. D. 1.

tamen quecunque in lege et evangelio inveniuntur, naturali iuri cohere probantur.”²⁶ He clarifies what parts of scripture are indeed immutable:

Sunt enim in lege quedam moralia...et alia his similia. Moralia mandata ad naturale ius spectant atque ideo nullam mutabilitatem recepisse monstrantur. Mistica vero, quantum ad superficiem, a naturali iure probantur aliena, quantum ad moralem intelligentiam, inveniuntur sibi annexa; ac per hoc, etsi secundum superficiem videantur esse mutata, tamen secundum moralem intelligentiam mutabilitatem nescire probantur.²⁷

Providing a final reaffirmation of the immutability of natural law and circling back to his earlier definition of natural law, Gratian concludes, “Naturale ergo ius ab exordio rationalis creaturae incipiens, ut supra dictum est, manet immobile.”²⁸ According to the *Decretum*, one can look at moral mandates in the Law and the Gospel to identify immutable natural law, and one can look at more symbolic mandates to find mutable natural law, which no longer requires keeping.

While it is typical and expected for Rolandus to not offer commentary on how to define natural law, Paucapalea too surprises by writing nothing on Gratian’s full articulation of the relationship between Scripture and natural law in Distinction 6.²⁹ On Gratian’s earliest mention that natural law is found in Scripture, the *Summa Paucapaleae* still contains nothing more than a few abbreviations.³⁰ With those two segments, the early glossators leave Gratian’s arguments about the use of sources in finding natural law completely untouched.

Rufinus’s commentary on the first aspects of the *Decretum*’s account of natural law sources stands out among all glossators for his original account of how natural law itself has changed over the years. (Note that Rufinus offers this account in Distinction 1 of his summa, many chapters before Gratian ever examines the seeming mutability and evolving nature of natural law.) Rufinus chronicles:

²⁶ Gratian, *Decretum Magistri Gratiani*, 11. D. 6.

²⁷ Ibid. D. 6.

²⁸ Ibid. D. 6, §1.

²⁹ Paucapalea, *Summa Paucapaleae*, 5-6. D. 1. C. 6- C. 7.

³⁰ Ibid., 4. D. 1.

Hoc igitur ius naturale peccante primo homine eo usque confusum est, ut deinceps homines nichil putarent fore illicitum...Postmodum vero per decem precepta in duabus tabulis designata ius naturale reformatum est, sed non in omnem suam plenitudinem restitutum, quia ibi quidem omnino opera illicita, sed non inimmodo operantis voluntas condemnabatur. Et propterea evangelium substitutum est, ubi ius naturale in omnem suam generalitatem reparatur et reparando perficitur. Quoniam autem ista lex naturalis nudam rerum naturam prosequitur, ostendo solummodo hoc in natura sui equum esse, illud autem iniquum, idea necessarium fuit ad modificationem et ornamentum iuris naturalis bonos mores succedere, quibus in eo ordo congruus et decor servaretur.³¹

Here, as in many other places in the *summa*, Rufinus offers a commentary that the *Decretum* does not prompt, for Gratian never mentions the history of natural law in this chapter. This account of the many shifts in natural law (from its origins in creation, through the delivery of the Decalogue, through the Gospel that Christ brought) appears to serve the purpose of shaping the reader's conception of how the sources of natural law have changed over time; more importantly, it seeks to have this influence before the *Decretum* itself gets to do so in Distinctions 5 and 6. Prime influence on the reader's notions of natural law emerges as paramount for Rufinus. Later, Rufinus builds upon this conception of natural law to point out an apparent contradiction in Gratian's argument. To the *Decretum's* statement that moral mandates are immutable, Rufinus observes, "Sed opponitur de illo recepto decalogi: 'Memento sanctificare diem sabbati'; illud namque immutatum videtur, quia tunc ad litteram, nunc autem spiritualiter impletur."³² As a response, he offers:

Ad hoc ita respondendum est quod, licet quantum ad verborum faciem illius diei observatio videretur precepta, non hoc tamen principaliter precipiebatur vel ibi aliquod futurum presignificabatur, sed potius sanctificatio requiei spiritualis inibi mandabatur, que tunc a Iudeis debebat magis observari, et in Christiano populo et fideli ex hoc nunc et usque in seculum observatur.³³

Rufinus' solution differs considerably from Gratian's original one in that, instead of just judging that moral mandates last forever and symbolic practices fade, he proclaims that the essence or

³¹ Rufinus, *Summa Decretorum*, 6-7. D. 1.

³² *Ibid.*, 19. D. 6.

³³ *Ibid.* D. 6.

spirit of mandates are the components that last forever; the means by which one acts in accordance to the mandate may change.

Huguccio's gloss on the sources of natural law contains a significant contribution toward Gratian's concept of *mistica*. Huguccio writes:

Mistica sive figuralia sunt que aliquid significant preter id quod littera sonat; horum alia sunt sacramentalia, alia cerimonialia. Sacramentalia sunt illa de quibus aliqua ratio reddi potest, quare ad litteram sic fuerint mandata, ut de circumcissione et sabbati observatione. Cerimonialia sunt ille de quibus nulla ratio reddi potest, quare ad litteram fuerint mandata, ut 'non arabis in bove et asino,' [et cetera]."

In this instance, Huguccio's insertion might serve as a response to a potential application of Gratian's theory on ceremonies. If a ceremony is mutable, does that also mean that the sacraments of the church are mutable? Not necessarily (or at least, not so easily as ceremonies) Huguccio responds. Sacraments differ from the vast majority of seemingly trivial Mosaic laws the Church ignores in that one cannot justify them with reason; the Mosaic laws that he identifies as bona fide sacraments have undergone rational review and are deemed either changed or no longer necessary due to extraordinary circumstances that Scripture identifies.³⁴ The effect of this change is that the sacraments of the church become much easier to defend, as reason protects them from the perception of mutability.

In both Rufinus and Huguccio, one sees a shift in how the glosses direct the reader to interpret natural law. Instead of simply viewing natural law as a series of moral mandates that always matter and symbolic mandates that last for as long as they hold meaning and purpose, readers of Rufinus and Huguccio are guided to think critically about each mandate, ask what its essence might be, and determine in what ways the law directs individuals and the Church to act in accordance with the mandate.

³⁴ The letters of Paul handle the question of circumcision, while the gospels handle the question of when to celebrate the Sabbath.

Issues in Natural Law

Besides theory as it applies to natural law, Gratian and the glossators also cover specific topics in natural law. Specifically, Gratian focuses on two issues related to the apparent mutability of natural law: Leviticus' prohibition of a menstruating woman or new mother entering a temple and Leviticus' declaration of a man's impurity after experiencing nocturnal emission.

Entering a Church While Menstruating or After Birth (And Related Topics)

The first example Gratian offers to explain how the Church does not follow all Old Testament laws concerns the supposed cleanliness of women. Gratian states that Leviticus 12:2-5 and Leviticus 15:19 both seem to prohibit a new mother from entering the Church or receiving communion for forty to eighty days and prevent a menstruating woman from doing the same. Gratian comments, though, "nunc autem statim post partum ecclesiam ingredi non prohibetur. Item mulier, que menstrua patitur, ex lege immunda reputabatur; nunc autem nec, ecclesiam intrare nec sacrae communionis misteria percipere, sicut illa, que parit, vel illud, quod gignitur, nec statim post partum baptizari prohibetur."³⁵ Over the course of the distinction Gratian produces a decretal from Gregory to Augustine, Bishop of England, that demonstrates that one should symbolically approach Leviticus 12's declaring a new mother impure and that there is no question that a woman may enter the church even one hour after the child is born; the letter also discusses multiple other issues that touch upon the topics of sexuality as it relates to childbirth and menstruation.³⁶

Paucapalea's most notable contribution is his introduction of a relevant (yet seemingly contradictory) canon. On the issue of entering the church within an hour after birth, he writes,

³⁵ Gratian, *Decretum Magistri Gratiani*, 17. D. 5, I Pars, §2.

³⁶ *Ibid.*, 17-19. D. 5.

“Sed in poenitentiali Theodori contra legitur, ut si mulier ante praefinitum tempus praesumpserit ecclesiam intrare, tot dies in pane et aqua poeniteat, quot ecclesia carere debuerat.”³⁷ He then offers a solution that brings the canon back into harmony with Gratian, “Beatus Greg. illum dicit in hoc non peccare, quae gratias actura humiliter ecclesiam ingreditur. Theodorus vero de ea dicit, quae non causa orationis sed alia qualibet necessitate ducta temere ingreditur. Sic et menstrua orationis causa non prohibetur ecclesiam ingredi.”³⁸ In this instance, Paucapalea does not insert the canon of Theodore to alter the interpretation of the *Decretum*. Quite the opposite, he introduces Theodore’s canon so that it may be subject to the terms of the *Decretum* and become interpreted in a manner more closely aligned with Gratian’s arguments (i.e. Gregory’s arguments) on the matter. In a sense, Paucapalea sees himself as continuing the work of Gratian by finding previously undiscussed discordant canons and bringing them into full harmony with the set of canons in the original *Decretum*.

Rufinus displays much greater anxiety than both his predecessors and his contemporary Stephanus over the general topics of menstruation and sexuality post- childbirth. He describes the impurity of menstrual blood, “Adeo autem execrabilis et immundus est sanguis ille, sicut ait Iulius Solinus in libro de mirabilibus mundi, ut eius contactu fruges non germinent, arescant arbusta, moriantur herbe, amittant arbores fetus, nigrescant era, si canes inde ederint in rabiem efferantur.”³⁹ He proceeds with his fears to talk of the more sex-specific consequences of improper care of menstrual blood and improper sex in relation to birth and the menstrual cycle:

Non autem solum propter ipsam immunditiam sanguinis a menstruata arcenda est voluptas, sed etiam ne vitiosus fetus ex illo coitu nascatur; tunc enim testante Ieronymo concepti fetus vitium seminis contrahunt, ita ut leprosi et elephantici ex hac corruptione

³⁷ Paucapalea, *Summa Paucapalea*, 11. D. 5

³⁸ Ibid. D. 5.

³⁹ Rufinus, *Summa Decretorum*, 16. D. 5.

nascantur et feda corpora in utroque sexu parvitate vel deformitate membrorum appareant; sanies enim corrupta degenerat.⁴⁰

Rufinus ends this line of discussion with a final warning, “Caveat ergo uxor, ut ait Ieronymus, ne illud celet viro desiderio coeundi, et vir caveat, ne vim faciat ei, putans omni tempore subiectam sibi voluntatem coniugis.”⁴¹ That this stretch does little to expand the reader’s understanding of the *Decretum*’s case demonstrates how Rufinus does not primarily seek to give the reader a strong grasp of the arguments in this matter. Instead, he seeks to intercept the delivery of those arguments so that the reader can read warnings of the impurity of menstrual blood before he ever gets a chance to review the discussion of Gratian, who Rufinus feels left the image of menstruation too positive in the *Decretum*. The goal then of this passage is to create caution and warning, rather than to offer clarity.

To a lesser extent, Stephanus demonstrates anxieties similar to Rufinus’ in his attention to the prohibition of sexual intercourse with a woman while she is still nursing her newborn child. He writes, “Tempus ablactionis multis modis accipitur, sive usque quo mulier puero sine periculo carere potest. Dicitur enim, quod prae lactis abundantia mulier in partu infirmetur, nisi per suum vel alterius filium lactis superfluitas minuatur.”⁴² After proposing these possibilities of understanding the time of weaning, Stephanus continues to ponder, “Vel tempus ablactionis tempus intelligitur purificationis. Vel ablactari puer dicitur, quia a laete separatur et solido eibo uti potest. Quod si ita intelligitur, dieemus argumentum ad continentiam consulendo invitare, alioquin fere omnes habentes uxores transgressionis arguerentur.”⁴³ Again, here the impetus for writing seems more of an anxiety over certain aspects of sexuality, rather than a hope to instruct on the original work.

⁴⁰ Ibid., 16-17. D. 5.

⁴¹ Ibid., 15. D. 5.

⁴² Stephen of Tournai, *Summa Stephani*, 17. D. 5.

⁴³ Ibid. D. 5.

Where Gratian states that a woman may enter a church after birth because there is fault in *voluptas* and not in *dolor* or birth, the *Summa Parisiensis* appears concerned that Gratian speaks too broadly on the matter of *voluptas* as it applies to married persons. The glossator begins his commentary on the matter, “*Si mulier, nullo, ex hoc, voluptas, ac si diceret si abstineret videretur quod dolor esset in culpa et non sit consequentia sed ostensio quod inde existimaretur. Nec tamen in legibus semper contrarius sensus est verus. Quod vero dicitur, voluptas est in culpa, non dicitur de qualibet voluptate mariti et uxoris.*”⁴⁴ Discontented with the *Decretum*’s handling of this matter, he then offers the many types of culpability that could actually result from *voluptas*, “*Si fiat ad prolem non est peccatum. Si ad luxuriam explendam, est veniale. Si vero ita tua uxore utaris ut, etsi esset aliena tamen uteresis ea, est criminale. Unde dicitur: Vehemens amator propriae uxoris adulter est.*”⁴⁵ The driving force behind the Parisian glossator’s confrontational attitude, here, appears less of a matter of anxiety over certain aspects of the topic and more of a matter regarding pure scholarly concern over potential misinterpretation of the law cited. However, the fear is not that misinterpretation by a reader would prevent understanding of the *Decretum*; rather, the fear is that misinterpretation might result in a reader coming to conclusions about *voluptas* that stray from the legal opinions of the Parisian Glossator himself.

In the glosses concerning the issues of menstruation and childbirth in natural law, one can see a different progression of attitudes among the late glossators. While the more theoretical concepts of law saw a neat progression in thought among the glossators, this practical issue produces a more speckled image of attitudes over time; the idiosyncratic attitudes of each glossator affect the tone of his gloss, resulting in highly individualized commentaries.

⁴⁴ *The Summa Parisiensis on the Decretum Gratiani*, 5. D. 5.

⁴⁵ *Ibid.* D. 5.

Receiving and Administering the Eucharist Following a Nocturnal Emission

Since Leviticus also considers male ejaculation to bring about impurities, Gratian devotes Distinction 6 to discussing whether a man should receive communion and whether a priest should administer communion that day following a nocturnal emission. Here, Gratian produces another decretal from Gregory to Augustine saying that a man should only abstain from communion if an impure (and thus sinful) mind brought about the emission.⁴⁶ The end of the distinction (a *palea* and an excerpt from the works of Isidore) discusses how if one delights in and consents to an impure suggestion in a dream, then he is in sin, but if the dream brings about the emission without his consent, then he is not in sin.⁴⁷ Thus, sinfulness of thought, not the act of emission itself, is Gratian's ultimate test of whether someone can receive or administer communion.

Paucapalea opens his commentary with a quoting of Deuteronomy 23:10-11, the previously uncited source of the issue at hand in Distinction 6.⁴⁸ The subsequent gloss on the conclusions of Gratian merely summarizes the contents of the *Decretum*. The only two notable additions include a definition of the term *crapula* and an explanation for why an emission brought about by *crapula* does not prohibit one from participating in the sacraments. Paucapalea defines *crapula* as “immoderata voracitas quasi cruda epula, cuius eruditate gravatur cor et stomachus indigestus efficitur.”⁴⁹ Such a definition does not seem to detract from the notion of *crapula* in the *Decretum*.⁵⁰ On explaining Gratian's judgment that an emission due to *crapula*

⁴⁶ Gratian, *Decretum Magistri Gratiani*, 19-20. D. 6, c. 1.

⁴⁷ *Ibid.*, 20-21. D. 6, c. 2 - c. 3.

⁴⁸ Paucapalea, *Summa Paucapaleae*, 12. D. 6: “Sic enim in veteri lege praecipitur: Si fuerit inter vos homo, qui nocturno pollatus sit somnio, egredietur extra castra et non revertetur priusquam ad vesperam; lavetur aquo et post solis occasum regredietur in castra.

⁴⁹ *Ibid.* D. 6.

⁵⁰ Gratian, *Decretum Magistri Gratiani*, 9. D. 6, c. 1. Gratian introduces the term “*crapula*” in §1 of the canon and, in §3, mentions “Cum vero ultra modum appetitus gulae in sumendis alimentis rapitur, atque idcirco humorum

does not prohibit participation, Paucapalea explains, “Immoderata enim voracitas vitium est; sed tantum sumere, quantum sustentationi naturaeque sufficiat, id salutis est...et cum crapula, licet valde peccet, non tamen a perceptione sive celebratione sacri mysterii prohibetur.”⁵¹ Here, Paucapalea makes clearly the distinction between sinful and illegal and that the *Decretum* concerns itself with laws, not morals. Gratian hints at this difference in his discussion of *crapula*, but he does not make it quite as overt as Paucapalea does.⁵² Here then, Paucapalea introduces the matter of sin not to insert a matter important to Paucapalea and absent in the *Decretum*, but to clarify a point already present in the *Decretum*.

Rufinus, Stephanus, and the Parisian glossator are mostly consistent with Gratian in their commentaries on Distinction 6; however, all three differ from him in one minute yet consequential way. Gratian argues that a priest may hold mass or administer a sacrament after an emission that *crapula* brings about, and he only suggests that a priest might want to excuse himself from holding mass out of an optional act of humility.⁵³ These first late glossators, however, turn this suggestion into a prohibition, with Rufinus stating, “cum autem ex crapula pollutio oritur, tunc sacerdos, qui hoc passus est, a percipiendo corpore Domini eadem die non prohibetur, sed a celebratione missarum abstinere debet, nisi [certain constraining conditions exist].” Similarly, Stephanus writes, “Quod si ex crapula accidat, refert, utrum dormiens in ipsa illusionem turpi imaginatione concussus sit an non. Si in illa imaginatione concussus sit, potest humiliter ea die precipere corpus domini, conficere autem, si sit sacerdos, non potest, nisi

receptacula gravantur...” This introduction to an argument seemingly refers to *crapula* and does not differ to greatly from the definition Paucapalea offers.

⁵¹ Paucapalea, *Summa Paucapaleae*, 12. D. 6.

⁵² Gratian, *Decretum Magistri Gratiani*, 9. D. 6, c. 1: “Cum [crapula], habet exinde animus aliquem reatum, non tamen usque ad prohibitionem sacri mysterii percipiendi, vel missarum sollempnia celebrandi...”

⁵³ Ibid., 10. D. 6, c. 1, §3: “Nam si adsunt alii, qui implere ministerium valeant, illusio per crapulam facta a perceptione sacri mysterii prohibere non debet, sed ab immolatione sacri mysterii, ut arbitror, abstinere debet humiliter, si tamen dormientem turpi imaginatione non concusserit.” Note both the phrase “ut arbitror” and the word “humiliter,” indicating that this is an opinion of Gratian regarding etiquette and propriety, rather than law.

[certain constraining conditions exist].” Paris echoes the emphasis of the priest’s prohibition, “quandoque [non] concuitur turpi imagine, et tunc debet a celebratione Missarum abstinere, si sacerdos est.”⁵⁴ Thus, with regard to a priest celebrating mass after *crapula* has brought about a nocturnal emission, the later glossators have altered the original text of the *Decretum* by making their reporting of the original contents stricter than Gratian.

Late glossators from the generation after Rufinus, Stephanus, and Paucapalea adopted this addition to the *Decretum* in their own glosses. Huguccio writes, “[Si] aliter [i.e. non turpi imaginatione et concussione fit] autem, id est si non fit sic, a perceptione Euchariste non prohibet, set a confectione removet, nisi [certain constraining conditions exist].”⁵⁵ This statement, though it does not deal with *crapula* specifically, still reflects the changes that Rufinus, Stephanus, and Paris made; a commandment for a priest to excuse himself after an emission replaces what was originally a mere option for the priest to excuse himself.

Explanation of the Above Phenomena under the Two-Step Hypothesis

In the discussion of natural law’s definition, we have observed how the late subgenre both distinguished itself from the early subgenre and progressed into having a vibrant inner dialogue. To what end did this inner dialogue progress, though? One can find the answer to this question in the *Glossa Ordinaria* that eventually developed to accompany the *Decretum*. This later work, which, along with the *Decretum*, the Council of Trent made a part of the Church’s official *Corpus Iuris Canonici*, represents an amalgamation of the glosses that had developed before the Council. This work provides hints at what supplementary notes to the *Decretum* the Church’s legal community adopted as authoritative law.

⁵⁴ *The Summa Parisiensis on the Decretum Gratiani*, 6. D. 6.

⁵⁵ Huguccio, *Summa Decretorum*, 106. D. 6, c. 1.

Throughout the two-step development, we have observed glossators propose an addition to the *Decretum* and watched subsequent glossators concur with those conclusions. For example, recall that the early glossator Paucapalea introduced a quote from the Penitential of Theodore as relevant to the discussion of a woman entering a Church after giving birth and that subsequent glossators concurred with Paucapalea on the relevance of this quote to the text. A note to the very same effect of the one that Paucapalea initiated appears in *Glossa Ordinaria* to that discussion.⁵⁶ The inclusion of this quote in the *Glossa Ordinaria* represents how the course of discussion on natural law had preserved that commentary by Paucapalea as relevant and accurate.

Recall now an example of a late glossator introducing a comment that subsequent glossators would universally accept—Rufinus’ changing the attitude toward an emission caused by *crapula* from one that merely frowns upon a priest administering a sacrament or celebrating mass after such an event to one that explicitly prohibits him from doing so. Interestingly, the *Glossa Ordinaria* contains a note that identically states that such an emission unequivocally prohibits a priest from celebrating Mass or consecrating the Eucharist.⁵⁷ Even more interestingly, however, the *Glossa Ordinaria* contains an additional note that recognizes that this reading of the text is not originally Gratian’s and that the *Decretum* merely states that whether or not a priest participates is a matter of choice and council.⁵⁸ On this matter, then, we see the community reacting to a popular position of a late glossator. The community appreciates and seemingly agrees with the judgment of those commenters who slightly disagree with Gratian, yet they also note that the change by the late glossators is a detraction from the original *Decretum*. Thus, the

⁵⁶ *Corpus Iuris Canonici*, vol. 1, *Decretum Gratiani* (Rome: In aedibus populi Romani, 1582), 18, accessed January 6, 2014, <http://digital.library.ucla.edu/canonlaw/>. D. 5, c. 1, nota h.

⁵⁷ *Ibid.*, 22. D. 6, c. 1, nota k.

⁵⁸ *Ibid.* D. 6, c. 1, nota k.

emerging *Glossa Ordinaria* recognizes both the original voice of Gratian and the voices of the late glossators whose opinions the community has well received.

Finally, recall the many examples of late glossators offering commentary that successors did not universally adopt—most notably, Rufinus’ and Stephanus’ anxiety over the matters in Distinction 5, and Rufinus’ definition of natural law, which received some pushback from Huguccio and modification from many others. These notes will not make their way into the *Glossa Ordinaria*, presumably because the opinions they represented did not gain significant traction in the legal community. The *Glossa Ordinaria*, then, acts not just to collect those theories around which consensus has built but to reject theories around which there might exist controversy.

The *Glossa Ordinaria* represents a snapshot of the legal consensus coming after the twelfth century. Throughout the two-step development, ideas on natural law were constantly going up against the new *Decretum*. First, early glossators presented few ideas that were mainly used to bolster the *Decretum*’s arguments. Second, late glossators presented their own ideas that were mainly used to stand in place of, in modification of, or alongside the *Decretum*’s arguments. This first group of natural law ideas easily made their way into the *Glossa Ordinaria*, for they were devoid of nearly all controversy and gained a consensus in the legal community. The second group of natural law ideas, however, encountered more difficulty. Since the ideas were more original and argumentative, their success in persisting long enough to enter the *Glossa Ordinaria* depended largely on their ability to gain popularity among future and contemporary glossators; thus, only the ideas that seem to persist through multiple glosses without much push-back appear to gain inclusion. This progression of natural law ideas under the two-step development illustrates the vibrancy of the legal discourse after the *Decretum*; this

vibrancy will play a major role in the new way of interpreting the legal revolution of the twelfth century, described in the final chapter.

Chapter 5

Conclusions and Interpretations

What is new?

The literature on Gratian has not been blind to the stark differences between the first glosses and glosses emerging later in the twelfth century. Weigand, Brundage, Winroth, Pennington and Müller, and others have all made the obvious observation that the earliest glosses contained short abbreviations and, as time progressed, glosses became longer and more explanatory.¹ What, then, does the two-step hypothesis offer that meaningfully changes this observation?

Most importantly, the premises of the two-step hypothesis challenge some incorrect characterizations of the glossators. In describing the development of the gloss genre as a whole, Weigand writes of the first glosses, “These early glosse[s] are often more of an attempt to get at the correct grammatical meaning than an attempt to explain the legal implications of a text...In those cases where a single word is explained by just another, synonymous term, they display no great learning.”² To a certain extent, Weigand is correct; the early glossators do indeed mostly attempt to give a grammatical understanding and often comment in a way that merely provides synonymous terms to the ones used in the original text. However, we know from our

¹ James A. Brundage, *Medieval Canon Law* (New York: Longman Group Limited, 1995); Kenneth Pennington and Wolfgang P. Müller, “The Decretists: The Italian School,” in *The History of Medieval Canon Law in the Classical Period, 1140-1234: from Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pilkington (Washington, DC: Catholic University of America Press, 2008); Rudolph Weigand, “The Development of the *Glossa Ordinaria* to Gratian’s *Decretum*,” in *The History of Medieval Canon Law in the Classical Period, 1140-1234: from Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pilkington (Washington, DC: Catholic University of America Press, 2008), 55; Anders Winroth, *The Making of Gratian’s Decretum* (New York: Cambridge University Press, 2000), accessed April 15, 2013, EBSCOhost.

² Rudolph Weigand, “The Development of the *Glossa Ordinaria* to Gratian’s *Decretum*,” 55-56.

investigation that this is not all that they do. Recall Paucapalea's cross-reference of Distinction 1 with the Penitential of Theodore.³ This cross-reference offers nothing of grammatical significance; instead, it explains the conclusions of the *Decretum* against a well-known and possibly problematic legal text. Such explanation demonstrates that, unlike Weigand's statement to the contrary, much of the early glossators' work was to provide the reader with a fuller understanding of the legal theory behind the text. When the two-step hypothesis speaks of the main qualities of the early glosses, it states that they provided notes that were mostly grammatical *and* explanatory; the purpose of these glosses is not to be a thesaurus or dictionary for the *Decretum* (as Weigand's characterization suggests), but to allow the reader to more fully grasp the legal theories that the *Decretum* contains. Additionally, the notion that early glossators do not explain and later glossators do explain fails to adequately describe the work of the later glossators. Recall Rufinus' alternative definition of natural law in Distinction 1.⁴ Here, the late glossators' main goal is not to explain the argument of the *Decretum*; it is to *challenge* those arguments and draw the reader closer to the mind of the glossator.

The two-step hypothesis, then, offers greater detail and complexity to a progression that the literature has already identified but oversimplified. By modeling the two-step development in conjunction with the temporal hypothesis, one interprets Gratian's role as smaller and the glossators role as larger in the twelfth century revolution. Gratian initiated the revolution; he did not carry it out entirely on his own. The *Decretum* offered a base framework from which the legal community might someday reach total harmony within the law. Most glossators (particularly the late ones) acted because they wanted to bring about this total harmony, not

³ Paucapalea, *Summa Paucapaleae*, ed. Johann Friedrich von Schulte (Giessen: Emil Roth, 1890), 4, accessed April 25, 2013, hosted by Bibliothèque Cujas, Université de Paris, <http://web.colby.edu/canonlaw/tag/rufinus/>. D. 1. Cf. 83-84.

⁴ Rufinus, *Summa Decretorum*, ed. Heinrich Singer, (Aalen: Scientia, 1963), 6, accessed April 25, 2013, http://works.bepress.com/david_freidenreich/11/. D. 1.

because they believed the *Decretum* had already presented total harmony without ambiguity or dissonance for them. The gloss genre emerged first in a subgenre that helped the community access the *Decretum*; after it secured access with this first subgenre, the community moved on to produce works that critically engaged the text, thereby creating a second subgenre. This second subgenre carried on the work of Gratian, striving in this new legal landscape toward an ideal point of uniformity in Church law.

Not Unique Legal Activities

Other Religious Legal Traditions

One can observe legal activities similar to the two-step development in other legal systems at various times and legal areas different from twelfth century canon law. One can even draw comparisons between the norms and practices of Catholic canon law around the time of Gratian's revolution and the norms and practices of religious law in other traditions, particularly medieval Islam and rabbinic Judaism.

Islamic law began with its own problem of discordance: how does the community reconcile the many different ways one can interpret the Qur'an? The answer to this question came in the emergence of schools of *tafsir* (Qur'anic interpretation) within two centuries after the Prophet's death. Each of these schools produced its own body of *hadith* (reports on the sayings and actions of Muhammad) to guide them in interpretation. Quite regularly, two or more schools of *tafsir* would produce differing *hadith* reports to explain the same verse of the Qur'an; often, these differing uses of *hadith* would result in vastly different interpretations of the same verse. As the Muslim caliphate expanded, these schools of *tafsir* with their different bodies of *hadith* and different interpretations of Qur'anic verse developed into a diverse set of schools of Islamic law (*fiqh*). In the Sunni tradition alone, the medieval era saw a huge number of schools

emerge (e.g., Hanafi, Shafi'i, Hanbali, Maliki). These schools differed not only in their approaches to *hadith* and *tafsir*, but in how one even goes about determining correct *shari'a* (law). To the mindset of the medieval Catholic canonist, such a legal situation would be unacceptable; as we have seen repeatedly in our discussion of Gratian, church lawyers worked for centuries to have total cohesion within their legal community and had little patience for diversity and disunity. The focus on legal cohesion in the Church, in contrast to the embrace of legal diversity in the Islamicate empire, reflects many of the theological concerns of the Church at the time. Only a few decades after the *Decretum* in 1184, Pope Lucius III issued the bull *Ad Abolendam*; this statement identified *katholikon* (total unity) of belief and practice as the ultimate goal in Christian religious life and called for the stamping out of all heresy, which stands outside of *katholikon*. This bull and its contents eventually became official church doctrine at the Fourth Lateran Council in the thirteenth century and laid the groundwork for the episcopal (and eventually, the papal) inquisition of the Church. While the Muslim world sought to make its empire cohesive through embrace of both religious and legal diversity, Western Christianity sought total theological unity in the Middle Ages; the anxiety over theological disunity in the Church mirrored itself in the legal community, leading to a quest for total unity within which we observe the roles of the *Decretum* and the two-step development of the glossators.

In rabbinic Judaism, the notion of a discordance in the law emerges after the destruction of the Second Temple of Jerusalem in 70 CE. Centuries after this event, medieval rabbis noticed that the Torah prescribes particular legal obligations on the Jews, yet the Jewish community no longer regarded those obligations which relate to the temple cult. In Gratian-like terms, the problem was one in which the *ius consuetudinis* did not appear to concord with the *ius legis*. Though the pre-medieval Talmudic texts (in particular, the Mishnah) provided written law that

justified many of the post-Temple nullifications of the cultic laws in the Torah, anxiety persisted in the Jewish community over the apparent discrepancy between written law and practice. In response to this apparent discordance, medieval rabbis such as Maimonides, Nahmanides, and Rashi all composed commentaries to the Torah that reinterpreted many of the law codes. These reinterpretations allowed the codes to take on newer meaning from the plain-sense interpretation and provided more flexibility in determining what practices constituted compliance with the law codes. These behaviors bear much similarity to the behaviors of late glossators; new meaning is infused into old law for the purposes of producing an outcome more in line with the legal perspective of the commentator.

Though neither the Islamic nor the Jewish legal traditions ever perceived a crisis in the law in the same way that the twelfth-century canonists did, comparing the situation of Gratian and the glossators to the challenges and coping mechanisms of early Muslims and medieval rabbis allows for greater understanding of how and why the Christian lawyers behaved as they did. The contrast between the Church's striving for total legal and theological unity in western Christendom and the Islamic world's embrace of legal and religious diversity in the caliphate exposes some of the impetuses for Gratian and the glossators to write. In addition, the similarity between the interpretive behaviors of the late glossators and those behaviors of medieval rabbis reflects how, within religious law, the behaviors present in the two-step development are certainly not unique.

A Secular Legal Tradition

In Chapter 2, we drew a few parallels between the glossators and justices of the United State Courts of Appeals; as we approach the end to our discussion of the two-step development, we can draw even more parallels between the legal genre of the glossators and the legal genres of

United States lawyers and jurists in the aftermath of the Supreme Court's 2013 decision in *United States vs. Windsor*, which, by acknowledging the due process and equal protection rights of non-heterosexual individuals, removed the federal legal code's prohibition of recognizing same-sex marriages and posed numerous questions in the realm of marriage law, civil rights law, and states' rights law.⁵

One can view the package of opinions that the court issued in the case as analogous to the *Decretum*. Like the canonists of the medieval church, lawyers in the United States had recognized an apparent discordance in their legal system. In this case, instead of the discordance resulting from a large, amorphous, and disjointed set of legal opinions that arose due to a lack of communication across time and geography, the discordance resulted from a specific law that emerged out of a particular cultural mindset in 1995 American society. Lawyers argued that Section 3 of the Defense of Marriage Act (DOMA) appeared discordant with Amendments 5 and 10 of the United States Constitution in that the statute's prohibition against the federal recognition of same-sex marriages could be interpreted as contrary to the Fifth Amendment's prohibition against the deprivation of a person's rights without due process of law and contrary to the Tenth Amendment's prohibition against the federal government's deprivation of a state's rights to have sovereignty over issues to which it typically reserves sovereignty, such as marriage law. In the court's harmonization of the discordance (which took the form of an *opinion*, not a *Decretum*), some justices presented opinions that explained to the reader why the amendments in question accommodated the law, but the court rejected these opinions as incorrect interpretations much in the same way that Gratian entertained false interpretations to an issue in his *Decretum*. Ultimately, the court's harmonization included a single majority opinion, which agreed with the observations that the law stood in conflict with the Constitution and, because it did not hold the

⁵ *United States v. Windsor*, 570 U.S. 12 (2013).

same legal weight as the Constitution, was null and void. Such an interpretation reflects many of the harmonization techniques of Gratian, who declared multiple canons invalid in his *Decretum*.

After the harmonization of DOMA and the Constitution (in the form of the abandonment of Section 3 of the former), the United States' legal sphere underwent a two-step development in its approach to the law's treatment of individuals in same-sex partnerships. First emerged legal works similar to the early glosses. These contemporary legal texts included works within the genre of legal memoranda and court orders. In the former group arose multiple memoranda by lawyers of United States governmental agencies explaining how their bureaus should interpret and apply the decision in their daily activities.⁶ In the groups of court orders, one day following the *Windsor* decision, a United States Federal Court in Boston applied the implications of *Windsor* to its own separate case, *McLaughlin v. Hagel* by ordering the respondents in the trial to explain why the term "marriage" should not apply to the union of a lawfully married same-sex couple.⁷ Additionally, in that same case, the court eventually adopted a proposed order that aimed to directly apply the court opinion in *Windsor* to the circumstances of *McLaughlin* without any further extrapolation.⁸ Such actions by actors throughout the United States federal legal system mirror the actions of the early glossators in their strict explanation and application of the new legal concordance that *Windsor* imposed.

⁶ United States Office of Personnel Management, *Coverage of Same-Sex Spouses*, by John O'Brien, Benefit Administration Letter, Number 13-203 (July 17, 2013), accessed March 7, 2014, <http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf>; United States Office of Government Ethics, *Effect of the Supreme Court's Decision in United States v. Windsor on the Executive Branch Ethics Program*, by Walter M. Shaub. LA-13-10 (August 19, 2013), accessed March 7, 2014, <http://www.oge.gov/OGE-Advisories/Legal-Advisories/LA-13-10--Effect-of-the-Supreme-Court-s-Decision-in-United-States-v--Windsor-on-the-Executive-Branch-Ethics-Program/>. The Office of Personnel Management memo interprets terms such as "marriage" and "spouse" in light of the *Windsor* decision. The Office of Government Ethics memo interprets terms such as "marriage," "spouse," and "relative" in light of the *Windsor* decision.

⁷ *Shannon I McLaughlin, et al. v. Chuck Hagel, et al.*, 2013 WL 6622898, (D. Mass. Dec. 17, 2013), 2. The judge describes the nature of the order at the bottom of page 2.

⁸ *McLaughlin*, 3. The judge describes the adoption of the respondents' proposed order.

After these explanatory memos, there came a second wave of legal works that bore much similarity to the works of the late glosses. These works remained mostly within the realm of court opinions and reliably utilized the arguments of the majority opinion (and in some cases, even the minority opinions) in *Windsor* to bolster justices' own legal opinions that *Windsor* did not directly cover. In the federal court system, the first of these opinions was *Kitchen v. Herbert*, which, despite *Windsor*'s complete unwillingness to comment on the marriage and civil rights law of states, argues that *Windsor*'s holding on the due process and equal protection rights of non-heterosexual persons makes Utah's prohibition against same-sex marriage discordant with Amendment 14 of the United States Constitution and thereby null and void.⁹ Here, we can observe the same sort of legal behavior as the late glossators; a legal actor takes an authoritative argument and infuses new meaning into it for the purposes of bolstering his/her own legal argument. An even more obvious case of this exists in the opinion of *Bishop v. United States*, which declares Oklahoma's ban on same-sex marriage invalid because of its violation of the United States Constitution's Fourteenth Amendment. In the opinion of *Bishop*, the justice utilizes a small line of reasoning from one of *Windsor*'s dissenting opinions (which disagreed with extending equal protection and due process rights to non-heterosexual persons) for the purposes of establishing the equal protection and due process rights of non-heterosexual persons when subject to state law.¹⁰ Here, the justice in *Bishop* acts with even greater independence by applying a legal argument in a way that its author never intended for it to be applied. Such actions bear similarity to the occasional complete disregard that late glossators would have

⁹ *Kitchen, et al. v. Herbert, et al.*, 2013 WL 6697874 (D. Utah Dec. 20, 2013), 20.

¹⁰ *Bishop, et al. v. United States*, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014), 36. In this instance, the justice appropriates a line of Justice Scalia's dissent, which claims that the opinion in *Windsor* would logically bolster the arguments of those claiming that state bans on same-sex marriage violate the U.S. Constitution. The *Bishop* opinion agrees with Justice Scalia's reasoning in this line but applies his argument in a manner in which Justice Scalia certainly never intended.

toward Gratian's arguments, who primarily sought to use the *Decretum* in a manner most favorable to their own legal opinions.

Certainly the current post-*Windsor* situation in the United States legal system is not perfectly analogous to the post-*Decretum* situation of the twelfth-century Church. For example, the current two-step development of United State marriage and civil right law does not confine itself to one genre. However, the contemporary series of events does provide an adequate example of how these types of two-step developments are not unique to medieval canon law. Once a discordance of any legal system is settled, the community responds first to understand and explain the new harmonization and afterwards begins to incorporate the new harmonization into lively, opinionated, and subjective legal discourse.

A New Model of Interpretation

Having examined in-depth the details of the development of the twelfth-century gloss, demonstrated the new insights that this examination provides, and compared the two-step development to the trends of other legal systems, we can now construct a complete model of how the glosses fit into the revolution of canon law after 1140. First, let us model how the current literature treats the development. For this model, we must illustrate how scholarship views Gratian as ushering in an era of harmony in the law, with the glossators serving as part of that era of harmony. We must also illustrate how scholarship views that era in contrast to the more discordant era that existed before Gratian. Figure 5-1 illustrates this view of Gratian:

Figure 5-1: Old Model of the Gratian Revolution

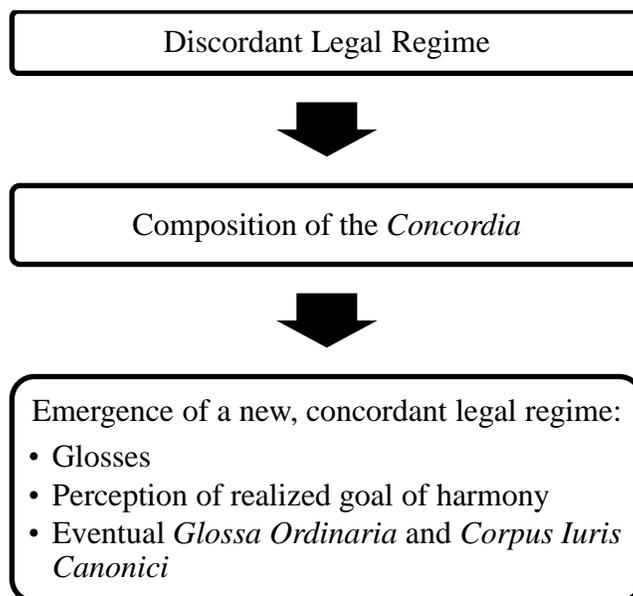


Figure 5-1

The chart demonstrates the role of the *Decretum* in almost instantaneously bringing about a new era that marks itself by the concordance of the law. Glossators, in this model, operate under the perception that their legal culture is now concordant; they write for the purposes of explaining that concordance to others in the community. The eventual *Glossa Ordinaria* is merely a product of the perceived concordance of this new regime of legal norms and practices, and the official establishment of the Church's *Corpus Iuris Canonici* at Trent solidifies the concordance that Gratian initiated. Under some interpretations, one can view the Council of Trent and *Corpus Iuris Canonici* as ushering in an even newer legal regime. This regime marks itself by having officially catalogued standards of Church consensus from which canonists must make their arguments. Regardless of how to interpret those later texts, the key to this model is the simplified image of Gratian bringing about perceived consensus and the glossators operating within that culture of concordant law.

As an alternative to the model described in Figure 5-1, I offer Figure 5-2:

Figure 5-2: New Model of the Gratian Revolution

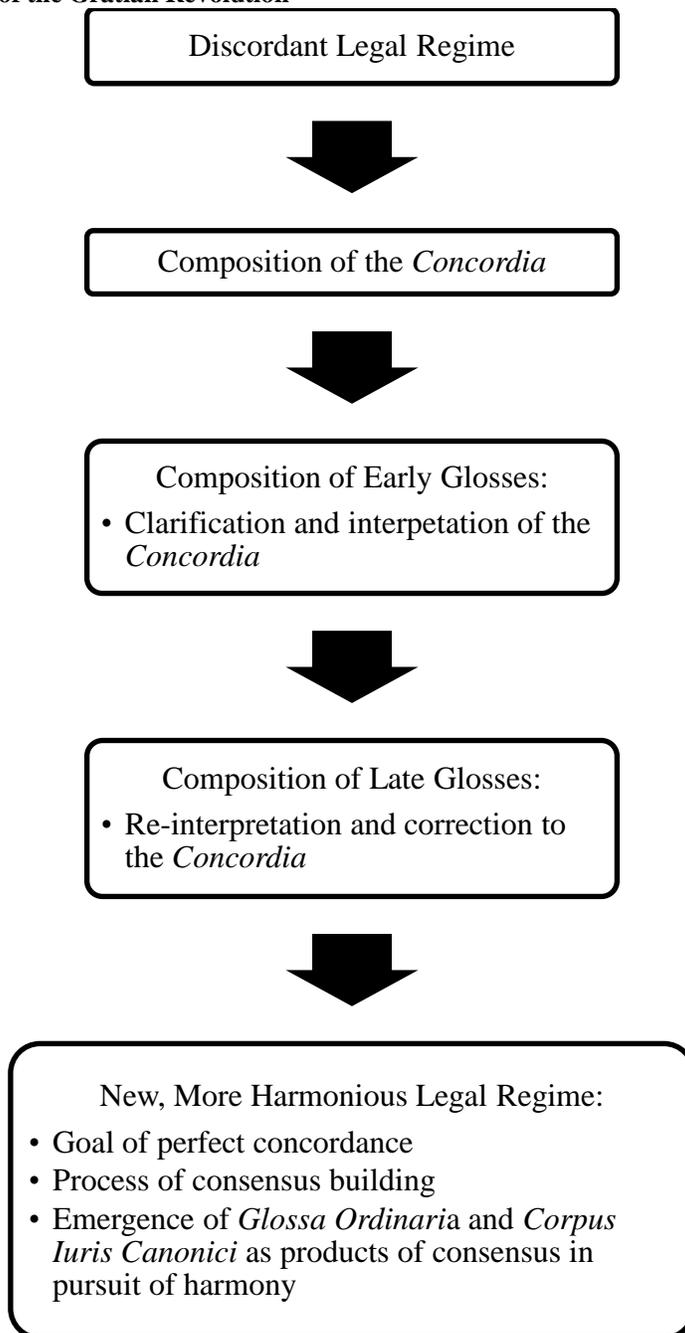


Figure 5-2

This new model takes into account the many findings of this study. First, there existed a discernable two-step development of the gloss genre. Second, these two steps occurred almost entirely sequentially with very little, if any, concurrence. Third, Gratian did not usher in a period of harmony in canon law; instead, he provided a new base standard that served as a starting point on the path to legal harmony. Fourth, the two steps in the development of the gloss genre each possessed its own subgenre that tailored its style and content toward the needs of the community in bringing about harmony in the law. Fifth, the second step in the development of the gloss genre persisted throughout the twelfth century and relied on long-term consensus building among canonists to bring about harmony. Sixth and finally, in many respects, partial harmony did emerge around specific issues in canon law; however, harmonization is most accurately conceived as a perpetual process that continued even past the Council of Trent, not a goal that was ultimately achieved. Going forward, scholarship should approach twelfth-century law using this newer model and interpreting the goal of concordance in this more abstract way. As tremendous as the *Concordia* is and as romantic as it might be to imagine Gratian as having accomplished his goal in 1140, we will better understand how the *Decretum* and the *ius commune* transformed the Church between the fall of Rome and the Council of Trent when we appreciate the more significant, varied, and nuanced roles that the glossators played in their ushering in of a new legal age.

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