

Charles Donahue, Jr., 'Malchus's Ear: Reflections on Classical Canon Law as a Religious Legal System', in Michael Hoeflich, ed., *Lex et Romanitas: Essays for Alan Watson* (Berkeley, CA: The Robbins Collection, 2000), 91–120.

This item is under copyright (copyright © 2000 by the Regents of the University of California, The Robbins Religious and Civil Law Collection, School of Law (Boalt Hall), University of California at Berkeley).

You may download for private, non-commercial use; you may distribute it to your students for a fee no more than copying costs; you may not put it on the web (links are fine). If the item has been published, you may cite or quote it within the limits of "fair use." If it has not been published, you may not cite or quote it without my express permission.

Charles Donahue, Jr.

STUDIES IN COMPARATIVE LEGAL HISTORY

Lex et Romanitas:
Essays for Alan Watson

edited by
Michael Hoefflich

The Robbins Collection

ROBBINS COLLECTION PUBLICATIONS
School of Law (Boalt Hall)
University of California at Berkeley
Berkeley, California 94720-2499
tel: (510) 642-5094 fax: (510) 642-8325
<http://www.law.berkeley.edu/robbins>

Copyright © 2000 by the Regents of the University of California, The
Robbins Religious and Civil Law Collection, School of Law (Boalt Hall),
University of California at Berkeley.

All Rights Reserved.

This book is printed on acid-free paper.

ISBN 1-882239-10-5

Library of Congress Cataloging-in-Publication Data

Lex et Romanitas : essays for Alan Watson / edited by Michael Hoefflich.

p. cm. — (Studies in comparative legal history)

Includes bibliographical references.

ISBN 1-882239-10-5 (hardbound : alk. paper)

1. Comparative law. 2. Roman law. 3. Law—History. 4. Watson, Alan.

I. Watson, Alan. II. Hoefflich, Michael H. III. Series.

K561 .L48 2000

340'.2—dc21

00-020406

Malchus's Ear: Reflections on Classical Canon Law as a Religious Legal System¹

Charles Donahue

In the middle of a complicated argument about the validity and efficacy of the sacraments of simoniacs, Gratian of Bologna (c. 1140) makes the following puzzling observation: "It's not true," he says, "that the fact that Jesus healed the ear of Malchus means that the sacraments of simoniacs impart the grace of the Holy Spirit."² Let us examine the story to which Gratian is referring because the more we know about the story the more puzzling Gratian's remark becomes.

All four Gospels tell us that when Judas came with the soldiers of the high priest to arrest Jesus in the garden of Gethsemane, one of Jesus's disciples drew his sword and cut off the ear of a slave of the high priest. John's Gospel tells us that the disciple was Peter and that the slave's name was Malchus.³ Luke's Gospel tells us that Jesus healed the slave's ear.⁴

1. Earlier versions of this paper were given at conferences and workshops at the University of California (Berkeley), Harvard, McGill, the University of Oregon, Syracuse University, Cornell, and Catholic University. I learned much from the participants on each occasion. I am particularly grateful for a careful read from Calum Carmichael and for advice from the late Gérard Fransen.

2. C.1 q.1 d.p. c.24. This is a paraphrase rather than a translation; for translation see text at n. 48, below. (References to Gratian's *Decreta*, the *Decretales Gregorii noni*, and the *Extravagantes communes* are to the edition of Emil Friedberg, *Corpus iuris canonici*, 2 vols. [Leipzig: Tauchnitz, 1879; rpt. Graz: Akademische Druck, 1959], making use of the standard abbreviations followed by the *Bulletin of Medieval Canon Law*).

3. Jn 18:10-11. (Biblical references and translations throughout are from the New Revised Standard Version, except where the sense of the Vulgate differs. References to the Bible use the [mostly] two-letter abbreviations given in *The Complete Parallel Bible* [New York: Oxford University Press, 1993], xlii.)

4. Lk 22:51.

The fact that the story is in all four Gospels suggests that it is a very old part of the Passion narrative. Each of the Gospel writers uses the story for a somewhat different purpose, but the purpose is quite clear in the case of John, Matthew and Luke, and at least discernible in the case of Mark.⁵

For John the point is the sharp rebuke that Jesus immediately gives to Peter: "Put your sword back in its sheath; am I not to drink the cup the Father has given me?"⁶ Peter has missed the point.⁷ Because Peter cannot see why Jesus must suffer and die, Peter tries to prevent Jesus's arrest. John may even be asking us to connect Peter's lack of understanding with his subsequent denial of Jesus.⁸ For Matthew the point is a bit different but of the same nature: "Put your sword back into its place," Jesus says to the unnamed disciple, "for all who take the sword will perish by the sword. Do you think that I cannot appeal to my Father, and he will at once send me more than twelve legions of angels? But how then would the scriptures be fulfilled, which say that it must happen in this the way?"⁹ For Luke, the only one who reports the healing of the ear, the rebuke to the disciple is as much in deed as in words. By healing the slave's ear, Jesus undoes what the disciple did.¹⁰ This healing is surely to be connected with one of the main

5. What follows does not attempt to read these texts in the light of modern scholarship. Rather, it seeks to sketch what would have been apparent to any medieval cleric who read the texts *ad litteram*. See sources cited below in n. 50. For this reason, I make nothing of the possible significance of the fact that the incident with the sword takes place after Jesus's arrest in Mk and Mt but before the arrest in Lk and Jn or the fact that in Mk, Mt and Lk (but not Jn) the word used in both the Greek and the Vulgate to describe what the disciple did to Malchus's ear may mean "mutilate" rather than "cut off." For a modern interpretation, see D. Daube, *Civil Disobedience in Antiquity* (Edinburgh: University Press, 1972), 110–12. For more traditional modern interpretations, see R. Brown et al., ed., *The New Jerome Biblical Commentary*, 2d ed. (Englewood Cliffs, N.J.: Prentice Hall, 1990), 626, 671, 717, 979–80. 6. Jn 18:11.

7. Just as he dramatically misses the point after his confession in Mt 16:21–23.

8. Certainly the two incidents are linked in the narrative, for the person to whom Peter denies Jesus for the third time is said to be a relative of Malchus. Jn 18:26.

9. Mt 26:52–54.

10. Lk 22:51. Jesus also seems to rebuke the disciple, saying "No more of this!" Ibid. (This translation of *ἐὔτε ἕως τούτου* (possibly *τούτων*) is confirmed by the Revised English Bible [REB], the New Jerusalem Bible, and the New American Bible. For the translation, "Let it be thus far," see Daube, at 111. This possibility is also suggested by the REB in a footnote. The Vulgate "Sinite usque huc" seems to support Daube).

points in Luke's passion narrative—how Jesus behaves in the face of evil. He heals the ear of the slave of the high priest; he tells the repentant thief "Truly, I tell you, today you will be with me in Paradise," and at the moment of his crucifixion he says, "Father, forgive them for they do not know what they are doing."¹¹

The point of the story in Mark's Gospel is the most elusive, but it would seem to be similar to those in the other Gospels. Evil must seem to prevail in order that the scriptures be fulfilled; resistance would be contrary to God's will; the disciples are faithless, perhaps because they have missed the point.¹² In characteristically Marcan fashion, the evangelist makes these points by embedding the story in a chiasmic form. Judas betrays Jesus, and one of the bystanders cuts off the ear of the high priest's slave. That is the A part of the chiasmus. Jesus says: "Have you come out with swords and clubs to arrest me as though I were a bandit? Day after day I was with you in the temple teaching, and you did not arrest me. But let the scriptures be fulfilled."¹³ That is the B part of the chiasmus. The disciples flee, and a young man, traditionally the evangelist, gets grabbed by his night shirt and has to run away naked. That is the return of the A part.

There is, thus, nothing about the way this story is told in any of the Gospels that even vaguely hints that it might have something to do with simony. As a result, there is nothing puzzling about Gratian's statement that the healing of Malchus's ear does not tell us that the sacraments of simoniacs impart grace. What is puzzling is that Gratian should have thought it necessary to say so. Why would anyone in the mid-twelfth century have thought that the story of the healing of Malchus's ear had anything to do with simony, so that it became necessary for Gratian to say that it did not?

We can exclude one possible answer to our question why the story of Malchus's ear might have been thought relevant to the problem of simony. People were not looking to the story of Malchus's ear because there are no passages in the Bible that deal directly with the problem of simony. There are many passages in the Bible that deal with, or can easily be made to deal with, the problem of simony, and they were all well known in the twelfth century.¹⁴ The most obvious passage is the one from which simony takes

11. Lk 23:43, 34.

12. Mk 14:46-52.

13. Mk 14:48-9. This saying is also in Mt 26:55-6 and Lk 22:52-3.

14. In addition to what follows, see text and nn. 68-77, below.

its name. In the eighth chapter of Acts we learn that a Samaritan magician named Simon sought to buy the Holy Spirit from Peter so that he could perform miracles in the way that the apostle did. "May your silver perish with you," Peter tells him, "because you thought you could obtain God's gift with money."¹⁵

A more complicated story is found in the second book of Kings.¹⁶ After Elisha has cured Naaman the Aramean of leprosy, Naaman offers him gifts, which Elisha refuses. But Gehazi, a servant of the prophet, follows after Naaman and extracts from him a large donation on the pretense that it is needed to support two young men of the prophetic brotherhood. When Elisha finds out what Gehazi has done, he is angry, and he prophesies that Naaman's leprosy will cling to Gehazi—which it does. While it is not completely clear whether Gehazi is condemned simply for taking money or for taking it under false pretenses, it is, nonetheless, far easier to see how this story could be used as a proof-text about simony—as it was—than it is to see how the story of the healing of Malchus's ear could be so used.¹⁷ The association of the Gehazi story with the condemnation of the sale of holy things is at least as old as St. Ambrose.¹⁸

In order to see how the story of Malchus's ear might be thought relevant to the problem of simony, we must understand more precisely what

15. Ac 8:20.

16. 2 K 5:15–27.

17. For the narrowing of the interpretation of this text from a general condemnation of avarice to a specific condemnation of selling holy things (in contradistinction to Simon's attempt to buy them), see H.-J. Horn, "Giezie und Simonie," *Jahrbuch für Antike und Christentum* 8/9 (1965/6), 189–202.

18. *Expositio Evangelii secundum Lucam*, 4:52–4 (on Lk 4:27), ed. M. Adriaen, *Corpus Christianorum, Series Latina* [CCL], 14 (Turnholt: Brepols, 1967), 124–5 (partially extracted in C.1 q.i c.16). The earliest association of Gehazi with Simon the magician would seem be in Jerome's *Vita sancti Hilarionis*, 18, ed. J.-P. Migne, *Patrologia latina* [PL] 23, 37B. Hilarion the hermit rebukes a man who offers him gifts for a cure: "Non legisti, inquit, quid Giezi, quid Simon passi sint: quorum alter accepit pretium, alter obtulit; ut ille venderet gratiam Spiritus sancti, hic mercaretur?" The *Sermo de dignitate sacerdotum*, ed. PL 17, 577A–B, cf. PL 139, 175B–C, extracts from which appear under the name of Ambrose in C.1 q.i c.14–15, must be rejected as a certain early example because of the uncertainty of the authorship of work. See Horn, at 199 and n. 72 (opinions of authorship ranging from Ambrose to Ambrosiaster to Gregory the Great to Gerbert of Aurillac [† 1003 as Pope Sylvester II]). The same may be said of a passage from the commentary on the books of Kings attributed to Eucherius of Lyon († c. 449), but which may, in the form in which we have it, date from the Carolingian period. *Ibid.* at 199–200 and n. 79.

was controversial about simony in the early twelfth century. No one in the early twelfth century maintained that simony was morally acceptable.¹⁹ As Gratian says at the very beginning of his treatment of the question, "That it is a sin to buy spiritual things is proven by many authorities."²⁰ In addition to the scriptural passages mentioned above, simony had been condemned by a number of early church councils, most notably the council of Chalcedon (451), by a number of popes, most notably Gregory the Great (c. 540–604, pope 590–604), and by a distinguished group of the Latin church fathers, most notably Ambrose (339–97) and Jerome (342–420).²¹

The issue was not whether simony was wrong. The issues were in what did it consist, and what were its consequences. In particular, was it simony for a bishop to pay a king for the livery of the lands that went along with the bishopric? Was it simony for a bishop to do homage to a king? Was it simony for a child's parents to give land or chattels to a monastery on the occasion of the child's being received into the monastery? Answers to these questions could and did vary, if only because the institutions that gave rise to these questions did not exist at the time that the basic condemnations of simony had been written.²²

Whatever the answers to these questions might be, there was general agreement within the reform party that developed in the church in the

19. The existence of heretics who approved of the practice is occasionally suggested in the polemical literature, but no text has been found defending the practice as such. See below n. 25.

20. C.1 q.1 d.a. c.1.

21. See Appendix I.

22. See the general treatments by P. Mikat, in A. Ertler and E. Kaufmann, ed., *Handwörterbuch zur deutschen Rechtsgeschichte* (Berlin: Schmidt, 1964–), s.v. Simonie (=fasc. 31 [1989], cols. 1664–8); F. Kempf, in H. Jedin, ed., *Handbuch der Kirchengeschichte*, vol. 3/1 (Freiburg: Herder, 1966); A. Briggs, trans., *History of the Church* (New York: Crossroads, 1982), 41–4, 353–5, 363. The most recent book-length treatment is J. Weitzel, *Begriff und Erscheinungsformen der Simonie bei Gratian und den Dekretisten*, Münchener Theologische Studien. 3; Kanonistische Abteilung, 25 (München: Hueber, 1967). Gratian, somewhat curiously, treats the problem of royal and imperial investiture of bishops only indirectly. His treatment of lay election of prelates is found in D.63 and his condemnation of lay investiture of parish priests in C.16 q.7. The problem of the child entering the monastery is one of the questions in C.1. For the suggestion that the omission of a direct treatment of this and other aspects of the problem of the relationship between *regnum* and *sacerdotium* is deliberate, see S. Chodorow, *Christian Political Theory and Church Politics in the Mid-Twelfth Century* (Berkeley: University of California Press, 1972), 54–6.

eleventh century that simony was very common. With the advantage of hindsight we can see how the institutions of the church at the time made simony almost inevitable—even if one takes a relatively narrow view of the nature of the offense, and the reformers tended to take a broad view of the nature of the offense. Not only did the reformers believe that simony was common, but many who were not closely associated with the reformers believed it as well. Hence the importance of the second question: Granted that simony has happened, what are the results? In particular, if a bishop has obtained his office by simony, is he a bishop? Are his sacraments, particularly his ordinations, valid? If a priest is ordained in a simoniacal transaction, are his sacraments valid? If he repents, is he to be reordained?²³ Is the repentant simoniacal bishop to be reconsecrated? Do all those who were ordained by the simoniacal bishop have to be reordained, whether or not their ordinations were obtained by simony?²⁴

Precise answers to these questions were not likely to be found in the earlier texts that condemned simony. After all, Peter had condemned Simon the Magician on the spot. Acts does not speculate as to what would have happened if Peter had accepted the payment and had given Simon the gift of the Holy Spirit, but that was precisely what had happened in many instances in the eleventh and twelfth centuries. What was to be done?

The first thing to be done was to search the tradition for texts that indicated or could be made to indicate what the appropriate principles were. One group of texts, in particular, did much to shape the nature of the debate. Gregory the Great, perhaps without fully realizing the consequences of what he was saying, had declared simony to be a heresy.²⁵ That

23. See n. 31 below.

24. See J. Gilchrist, "Simoniaca haeresis' and the Problem of Orders from Leo IX to Gratian," in *Proceedings of the Second International Congress of Medieval Canon Law, Boston, Monumenta iuris canonici [MIC], C: Subsidia, 1* (Città del Vaticano: Congregatio de Seminariis, 1965), 209–35, in J. Gilchrist, *Canon Law in the Age of Reform* (Aldershot: Variorum, 1993), IV, with ample references to sources and previous literature. Gratian treats these issues fully in C.1.0.

25. Gregory was anticipated in this holding by the synod of Tours (567), c. 27, ed. F. Maassen, *Concilia aevi merovingici*, Monumenta Germaniae Historica [MGH], Legum sectio III, 1 (Hannover: Hahn, 1893), 135. See Weitzel, p. 33 and n. 43. Whether Gregory knew of this canon or not, it was he who brought the concept of "simoniacal heresy" into the mainstream of canonic thought. E.g., *Registrum epistolarum*, 9.219 (599), ed. cit. below, Appendix I, 785 (ll. 58–9 = C.1 q.1 c.4); *ibid.*, 784–5 (ll. 55–9 = C.1 q.1 c.13); *ibid.* 786 (ll. 92–4, = C.1 q.1 c.27); *ibid.*, 9.216 (599), ed. cit., 776–9 (ll. 14–17 = C.1 q.1 c.28); *ibid.*, 5.58

meant that texts dealing with the nature of simony were not the only ones that were relevant to the decision. Any text that dealt with the sacraments of those outside the church was relevant. That considerably expanded the range of texts, but it did not provide a ready answer because there was considerable variation in the way in which the church had treated the sacraments of heretics in the past.²⁶

The search for authorities produced one more text of relevance to our particular inquiry. In 787, Tarasios, patriarch of Constantinople, writing to Pope Hadrian I, had made an analogy about simony that seems to have been new. Simoniacs, he says, are like Judas. Like Judas, they sell what is holy.²⁷ This analogy, probably used more for its rhetorical effect than for any doctrinal or legal point that might be derived from it,²⁸ sets the stage for the next development in our story.

(595), ed. cit., vol. 140, 354-7 (ll. 44-7 = C.1 q.1 c.117). (Parallel passages to the last in *ibid.*, 5.62, ed. cit., 365 [ll. 42-4]; 5.63, ed. cit., 368 [ll. 50-3]; 6.7, ed. cit., 376 [ll. 44-7]). See generally Weitzel, 12-14, 34-35. On Gregory's puzzling use of the concept of heresy here, see J. Leclercq, "Simoniaca haeresis," *Studi gregoriani* 1 (1947) 523-30; H. Meier-Welcker, "Die Simonie im frühen Mittelalter," *Zeitschrift für Kirchengeschichte* 64 (1952/3), 61-93, particularly 64-67. For the complicated, and largely legendary, history of Simon Magus as an heresiarch, see Leclercq, at 523-4; H. Cowdrey, "Simon Magus in South Italy," *Anglo-Norman Studies* 15 (1993), 77-80. St. Augustine, in his *De haeresibus*, c.1, ed. CCL 46 (1969), 290, ll. 1-4, is one of the few fathers to suggest that Simon *believed* that the gifts of the Holy Spirit could be bought. (Leclercq, at 524 n.5, may exaggerate the extent to which Augustine attributes Simon's sin to false belief.) There are also suggestions that Simon's defect was one of faith in Ambrose's *De paenitentia*, loc. cit. below, Appendix I. For the most part, however, the fathers do not deal with the question of belief, and, as Leclercq points out, when the question is raised in the reform period, the reformers argue that by engaging in simony a simoniac *ipso facto* demonstrates his belief that the gift of the Holy Spirit can be bought.

26. The debate cannot be fully traced in the texts that Gratian quotes, but the views among the orthodox ranged from those of Cyprian († 258), who maintained that schismatic Novatianists should be rebaptized, to those of Augustine (354-430) who maintained against the Donatists the validity (though not the efficacy) at least of baptism and probably of other sacraments of those outside the church. In C.1 q.1, Cyprian appears only once (c.70), and his views about baptism are rejected *sub silentio*. See C.1 q.1 d.p. c.58. Augustine's views are reported many times, though not always in accurate texts. E.g., C.1 q.1 cc.30-8, 46-8, 54-6, 58, 74, 77-8, 81-2, 87-8, 94-8. 27.

27. C.1 q.1 c.21. There are considerable textual problems with the translation that Gratian used, but the Greek version, given by the *Correctores romani* in the margin, loc. cit., shows that for this point Gratian's version is substantially the same as Tarasios's.

28. Indeed, both Gratian's text and the patriarch's make it clear that Tarasios is not saying that Judas's act was simony but that simony is as bad as Judas's act: "Ita et qui hanc

In the middle of the eleventh century, two reforming cardinals of the Roman church, Peter Damian and Humbert of Silva Candida, sharply disagreed about what was to be done about simoniacal consecrations and ordinations.²⁹ Humbert took an extreme position.³⁰ A simoniacal ordination or consecration was totally void. It was not a sacrament; it did not impart what a later age would call "priestly character," and, of course, it gave no grace. A simoniacal bishop or priest was simply not a bishop or priest. Hence, none of the ordinations of a simoniacal bishop was valid, none of the masses of a simoniacal priest was valid. If a simoniacal bishop or priest repented, he would have to be reconsecrated or reordained if he were to function as a bishop or priest.³¹ Any priest ordained by a simoniacal bishop would have to be reordained if he were to function as a priest. Humbert's position had the advantages of simplicity. Granted the frequency of simony, however, the consequences of Humbert's rule were serious. Hundreds of men who thought themselves priests were not priests, even though they might have no way of knowing that they were not priests. Thousands of men and women were not receiving valid sacraments, even though they might have no way of knowing it.

iniquam actionem operantur, detrahant Spiritu sancto equaliter peccantes his qui blasphemauerunt, dicentes, Christum in Beelzebub eicere demonia atque, ut verius dicamus, Iudae comparantur proditori, qui Iudeis Dei occisoribus Christum uendidit." In Greek: οὕτως οἱ ταύτην τὴν ἄθεσμον πράξιν ἐργαζόμενοι καταβιβάζουσι τὸ πνεῦμα τὸ ἅγιον, ἴσα ἁμαρτάνοντες τοῖς βλασφημοῦσιν ἐν βεελζεβοῦλ ἐκβάλλειν τὰ δαιμόνια τὸν Χριστόν, ἢ, τότε ἀληθέστερον εἰπεῖν, παρεοίκασι Ἰουδα τῷ προδότῃ, ὅς τοῖς θεοκτόνοις Ἰουδαίοις τιμῆς ἀργυρίου τὸν κύριον ἀπημωλήσατο. A link between Judas and Gehazi was seen in the patristic period, but here the emphasis is more on the avarice of both. See Horn, above, n. 17, at 192 and n. 23, 197 and n. 62, 200 n. 79.

29. The story is best told in Gilchrist, above n. 24, where the point is argued that Humbert was virtually alone in his position. See also G. Miccoli, "Il problema delle ordinazioni simoniache e le sinodi lateranensi del 1060 e 1061," *Studi gregoriani* 5 (1956), 3-81, and literature cited in both.

30. Humbert of Silva Candida, *Adversus simoniacos*, ed. F. Thaner, MGH, *Libelli de lite imperatorum et pontificum saeculis XI et XII. conscripti* [*Libelli de lite*] (Hannover: Hahn, 1891; rpt. 1956), 195-260, a work written after Peter Damian's, cited below, n. 31.

31. Technically, of course, in Humbert's view this would not be a reconsecration or reordination, since no consecration or ordination had taken place in the simoniacal transaction. The problem has come to be known in the literature, however, as the problem of reordination, at least since the fundamental work of L. Saltet, *Les réordinations: Etude sur le sacrement de l'ordre* (Paris: Gabalda, 1907). Peter Damian uses the term *reconsecratio* of a bishop. E.g., Peter Damian, *Liber gratissimus*, ed. L. De Heinemann, MGH, *Libelli de lite*, 1.63-5.

Peter Damian, in the first full-scale treatment of simony written in the west, sought to avoid these consequences.³² Without in any way denying the evil of simony, he sought to limit the consequences of Humbert's position. In the course of marshaling a massive collection of authorities to support the position that the sacraments of simoniacs were valid, perhaps even efficacious under some circumstances, he makes an argument that does not seem to have been made before. "The Spirit has the same power," he says, "when the grace owned by the Spirit has been sold as when it is freely given. Nor does divine potency lose the effect of its power because of the commerce of human perversity. Clearly, our Savior, even when he was sold, and the purse of the betrayer was bulging with the most noxious coins, while he was in the hands of persecutors, restored the ear that had been cut off of the slave Malchus."³³ Peter Damian then goes on to analogize the situation to that of the eucharist, which is received by both good people and bad with remarkably different effect, but which is still the eucharist.³⁴

The statement about the eucharist is sound theology, and the view that Peter Damian expressed ultimately came to prevail. The reformers, however, though they were reluctant to accept Humbert's rigorist view of the situation, were equally uncomfortable with Peter's resolution. To acknowledge the validity of simoniacal ordinations raised difficult questions not only about the position of simoniacs but also about the position of those outside the church generally, for the tradition had led them to the notion that simoniacs were heretics, who cut themselves off from the church by their very act of simony.³⁵ The debate continued throughout the eleventh and

32. *Liber gratissimus* c. 37, ed. cit., 1.15–75. The work was probably written in 1052, five years before Peter became cardinal bishop of Ostia. Ibid. at 16.

33. "Eiusdem namque virtutis est Spiritus sanctus, cum eius gratia venditur, cuius est, et cum gratis datur. Nec propter perversitatis humanae commercium divina potentia propriae potestatis perdit effectum. Plane et Salvator noster, cum venditus esset et pestilentissimi talenti summa proditoris iam crumena turgeret, inter ipsas persecutorum manus precisam servo Malcho auriculum reddidit." Peter Damian, *Liber gratissimus* c. 6, ed. MGH, *Libelli de lite*, 1.23. For discussion of Peter Damian's argument, see below, text following n. 50.

34. Ibid. 1.24.

35. C.1 q.7 d.p. c.4 suggests that Gratian may have had some doubts about the heretical nature of acts of simony. At least, he sees a distinction between this kind of heresy and preaching against the truths of the faith. A later age would see simony as an offense that entailed automatic excommunication, rather than as heresy. Hints of this view may already be found among the twelfth-century decretists. See Weitzel, at 149–50, and sources cited.

into the twelfth century without, so far as I can tell, anyone's explicitly addressing Peter Damian's argument about Malchus's ear.³⁶

By the time of Gratian the tradition had become considerably more complex than it had been in the time of Peter and Humbert. Indeed, Gratian's own resolution of the problem of the sacraments of simoniacs is so complex that it is not completely clear what it was. Nonetheless, the main outlines of his position seem reasonably clear. Gratian's position is based on five distinctions:³⁷ He distinguishes, in the first place, sacraments of necessity (e.g., baptism) from sacraments of dignity (e.g., orders).³⁸ Secondly, he distinguishes between the validity of a sacrament and its efficacy.³⁹ Thirdly, he distinguishes between the power to confer a sacrament and the licitness of its conferral.⁴⁰ Fourthly, he distinguishes between the validity of the sacrament of orders and the lawfulness of exercising the power that it confers.⁴¹ Fifthly, he distinguishes between sacramental

36. Works devoted in whole or in part to problem of simony include Deusdedit, *Contra invasores et symoniacos et reliquos schismaticos* (1097), ed. MGH, *Libelli de lite*, 2.292-365; Bruno of Segni, *Libellus de symoniaciis* (before 1109), ed. cit., 2.543-62; Gerhoh of Reichersberg, *Liber de simoniaciis* (c. 1135), ed. cit., 3.239-272. For Alger of Liège, see below text and n. 46. For spread of the movement of against simony and its political consequences see, most recently, G. Motta, "Echi della polemica antisimoniaca nei secoli XI-XII: I tre codici di sant'Appiano in Valdesa," *Aevum* 62 (1988), 98-214; H. Vollrath, "L'accusa di simonia tra le fazioni contrapposte nella lotta per le investiture," in C. Violante and J. Fried, ed., *Il secolo XI: una svolta?*, Annali dell'Istituto storico italo-germanico, 35 (Bologna: Mulino, 1993), 131-56.

37. See Chodorow, *Christian Political Theory*, above n. 22, at 91-5, whose analysis is not quite so elaborate as mine, but who gave me the clues for understanding this complicated text.

38. C.1 q.1 d.p. c.39.

39. He does not quite use those terms, but he comes close. E.g., C.1 q.1 d.p. c.97: "Quamuis possit generaliter dici, sacramenta, que apud hereticos non aliter quam in ecclesia Dei celebrantur, uera et rata esse quantum ad se, falsa uero et inania quantum ad effectum, et in his, a quibus male tractantur, et in illis, a quibus male suspiciuntur."

40. Ibid.: "Sciendum uero est, quod sacramenta hereticorum dicuntur irrita, uel etiam dampnanda, falsa et inania, non quantum ad se, cum sint sancta et uera etiam ab heretico celebrata, sed quia, cum illicite dantibus perfidiis sint ad iudicium, illicite ab eis accipientibus non conferunt Spritum sanctum." Cf. C.1 q.1 d.p. c.98.

41. E.g. C.1 q.1 d.p. c.97: "intelligamus aliud esse potestatem distribuendi sacros ordines, aliud esse executionem illius potestatis. Qui intra unitatem catholicae ecclesiae constituti sacerdotalem uel episcopalem unctionem accipiunt, offitium et executionem sui offitii ex consecratione adipiscuntur. Recedentes uero ab integritate fidei, potestatem acceptam sacramento tenus retinent, effectu suae potestatis penitus priuantur. . . ." Cf. C.1 q.5.

power, on the one hand, and the holiness of the persons giving and receiving the sacrament, on the other.⁴² Application of these distinctions leads to the following resolutions (among others):

(1) Baptism can be given by anyone (good, bad, Christian, heretic, pagan or simoniac), so long as the proper form is followed. It is valid and efficacious if the recipient is baptized into the true church. If given by a heretic into an heretical church, the baptism is valid but not efficacious. It becomes efficacious with repentance, though the recipient is still to be received into the church by laying on of hands.⁴³

(2) The eucharist can be consecrated only by a validly ordained priest. It may not be efficaciously received from an excommunicated priest (and this probably includes a simoniacal priest, at least one who has formally been condemned), but it may be efficaciously received from a bad priest.⁴⁴

(3) Orders can be validly received only from a validly consecrated bishop. If they are received simoniacally they may be valid, but they do not give the simoniac the right to act as priest. Normally, orders are efficacious only if received from a worthy (that is, a non-simoniacal) bishop, even if they are received without simony, but they are valid and efficacious if received from a simoniacal bishop unknowingly.⁴⁵

42. In addition, to the passages cited in the previous four notes, see D.23 d.p. c.6; C.1 q.1 d.p. c.95.

43. C.1 q.1 d.p. c.97 (§2): "Sacramentum... baptismi non solum a sacerdote deposito uel laico catholico, uerum etiam ab heretico uel pagano si ministratum fuerit, nulla reiteratione uiolabitur..."

44. Compare *ibid.*: "Suspensio enim uel deposito sacerdote, nulla ei relinquitur potestas sacrificandi," with C.15 q.8 c.5 (rubric): "De manu sacerdotis, qui ab ecclesia tollatur, licite sacramenta sumuntur."

45. C.1 q.1 d.p. c.106: "Sicut ergo hec sacramenta, licet symoniace ministrentur, tamen effectum benedictionis conferunt accipienti, sic et sacerdotalis unctio, licet symoniace ministretur, suo tamen non debet carere effectu. Sed, sicut supra dictum est, illa sacramenta sunt necessitatis, haec dignitatis, et ideo priuilegia eorum non possunt generare communem legem istorum. Habent ergo symoniaci uulneratum caput per symoniacae manus prauam inpositionem. Hoc autem de illis intelligitur, quos nec excusat ignorantia, nec attractionis uiolentia, qui ab illis ordinantur, quos indubitanter sciunt esse symoniacos siue symoniace siue non symoniace ordinentur ab eis." Cf. C.1 q.6; C.1 q.7 d.a. c.24. The last should be compared with C.1 q.1 d.p. c.97 for a full appreciation of Gratian's positions (and its possible ambiguities), but we need not pursue that issue for our purposes.

Gratian's resolutions were not new. They had largely been anticipated about a generation earlier by Alger of Liège,⁴⁶ a theologian (to the extent that one can distinguish lawyers from theologians in this period) of the late eleventh and early twelfth centuries, on whom Gratian draws not only for many of his proof-texts⁴⁷ but also for much of the text of his own resolutions. Alger is the first author that I know of to return to Peter Damian's argument about Malchus's ear: "Peter Damian demonstrates," Alger says,

that those sacraments are valid in which... the fire of the Holy Spirit does not shine. For he says that just as Christ sold restored the ear of Malchus and worked miracles, so too the Holy Spirit can be sold and work its grace in the very sale. But this comparison is not valid—that the Holy Spirit does spiritually in the perfidious traffic of avarice what Christ did corporally by reason of a certain mystery as an example of patience. For if the comparison were on all fours, since we would believe that the Holy Spirit could be sold as Christ was sold, we would have to believe that the Spirit could be crucified as Christ was crucified—which is impossible.⁴⁸

Alger's Latin is as murky as the translation, but what he has in mind seems reasonably clear. He takes Peter Damian's argument to have been that the Holy Spirit can still work in the context of the greatest of all simonies.⁴⁹ Malchus, a participant in the simony, can still receive the grace of healing. Simony does not prevent the Holy Spirit from operating. To this Alger offers three answers. (1) The sale of Jesus was certainly the sale

46. R. Kretzmer, ed., *Alger von Lüttichs Traktat "De misericordia et iustitia"*, Quellen und Forschungen zum Recht im Mittelalter, 2 (Sigmaringen: Thorbecke, 1985).

47. There are 130 canons in C.1 q.1 alone. Hence, Malchus's ear is but a small part of what is necessary for Gratian to get to his conclusions.

48. "Approbat ergo Petrus Damianus illa sacramenta valere, in quibus Augustinus testatur ignem spiritus sancti non lucere. Dicit enim, quod, sicut Christus venditus restituit auriculam Malcho et fecit miracula, sic et spiritus sanctus possit vendi et in ipsa venditione gratiam suam operari. Sed non valet similitudo, ut hoc operetur spiritus sanctus spiritaliter in perfidis mercimoniis avaritiae, quod Christus corporaliter gessit certi causa mysterii ad exemplum patientie. Si enim omnifaria est similitudo, cum credatur posse vendi, ut Christus credatur etiam posse crucifigi spiritus sanctus, quod impossibile est." Alger of Liège, *De misericordia* 3.42, ed. cit., 347 (= C.1 q.1 d.p. c.24).

49. Gratian's posing of the argument is a bit clearer than Alger's and provides some evidence for how Peter Damian's argument was understood: "Item Christus a Iuda uenditus auriculam serui sanauit. . . . Exemplo Christi liquet, quod Spiritus sanctus, etsi iniuste a symoniacis uenalis putetur, uirtutis tamen suae non obliuiscitur, nec desinit effectum suae gratiae etiam uenditus praestare." C.1 q.1 d.p. c.22.

of the holy, but it was not the sale of the Holy Spirit. Jesus was sold bodily, but the Spirit was not sold, any more than it was crucified; therefore it could continue to work. (2) What Jesus did is an example of patience. (3) What Jesus did is a mystery; we cannot use it to solve our problem.⁵⁰

That Peter's analogy is not on all fours with the problem at hand is certainly true. Totally apart from whether Judas or Malchus can be regarded as simoniacs, except by analogy, it was not Judas or Malchus, the supposed simoniacs, who performed the miracle, but Jesus. Further, even if we can regard Judas's betrayal of Jesus as a sale⁵¹ and that sale as being, in some sense, a sale of the Holy Spirit,⁵² the purpose of the sale was not, as it is in all genuine cases of simony, to obtain the grace of the Holy Spirit. But there is something about Alger's refutation that misses the point. The Spirit moves where it wills. It is not disabled because of the wickedness of men. Peter Damian's analogy does not provide a complete argument, but I am not sure that it was ever meant to. If we take the analogy together with the other argument that Peter makes in the same section—that the eucharist is still the eucharist even if those who receive it are evil and receive no grace from it—we can see that Peter saw, much more clearly than did his opponents, that the validity of the sacraments is not dependent on the merits of those who dispense them. By the time of Alger and Gratian, however, this does not need to be argued. They both concede that point. Perhaps one might say, then, that the story of Malchus's ear by this time was no longer needed.

50. It is possible that Alger's use of the words "mystery" and "example" are to be connected to the mystical and moral senses of interpreting scripture. Of a large literature, B. Smalley, *The Study of the Bible in the Middle Ages* (Oxford: Blackwell, 1952) still gives a wonderfully readable account of large movements in scriptural interpretation that were just beginning to take place in this period. Henri de Lubac, *Exégèse médiévale: Les quatre sens de l'Écriture*, 2 vols. in 4 (Paris: Aubier, 1959–64), contains the standard account of the various "senses" of scripture. For more recent views, see P. Riché and G. Lobrichon, ed., *Le moyen âge et la Bible* (Paris: Beauchesne, 1984); M. Jordan and K. Emery, ed., *Ad litteram: Authoritative Texts and Their Medieval Readers* (Notre Dame, Ind.: University Press, 1992).

51. The sale of human beings was well known in the ancient world, but slavery does not seem to be what is at stake here.

52. To make this argument one has to emphasize the divinity of Jesus at the expense of his humanity, i.e., the sale of Jesus is the sale of the Holy Spirit. I have not been able to explore whether Alger's rejection of this analogy corresponds to a change of emphasis about the hypostatic union. The fact, however, that this is possible shows how closely law and theology were related in this period.

One might say the story was no longer needed, but I am not sure that the statement would be true. Gratian repeats Alger's arguments refuting Peter Damian's analogy, but then Gratian adds a remark of his own. "[The story]," he says, "can however be understood (so that we might not walk away from the analogy) in this way: Just as Christ sold did not confer the gifts of his grace on the seller or the buyer but on those who were present unknowing, for whom he prayed on the cross,⁵³ so too the Holy Spirit may be shown to bestow the effect of his grace not on the seller or the buyer but on those who led by ignorance receive the Lord's sacraments from their hands."⁵⁴ Gratian thus anticipates what is ultimately going to be his resolution of the troublesome problem of those who have been ordained without simony by simoniacal bishops. If they do not know that the bishop was so ordained, they are both validly and efficaciously ordained. They may exercise their office. They do not need to be reordained; they may exercise their ministry in the church, without any special reconciliation.⁵⁵ Thus, in Gratian's hands Peter Damian's far-out analogy is made to serve the ultimate resolution of the problem and is made to serve it, as we shall see, in a way that is more faithful to Luke's text than is Peter Damian.⁵⁶

Gratian's solution, in my view, was the correct one. There are a number of assumptions that lie behind that statement. We are dealing with what we have learned to call an interpretive community, a particularly complicated one, because what the authors within this community say is itself interpretation of another text. In the early twelfth century the rules of interpretation were getting tighter, influenced by the early developments in scholastic logic, notably those of Peter Abelard.⁵⁷ If the story of Malchus's ear had first been raised in the context of simony in the early twelfth cen-

53. A clear reference to "Father, forgive them for do not know what they are doing." Lk 23:43.

54. "Potest etiam intelligi (ut a similitudine non recedamus), quod sicut Christus uenditus non uenditori uel ementi, sed eis, qui nescientes aderant, dona suae gratiae contulit, pro quibus etiam in cruce supplicavit, sic et Spiritus sanctus non uendenti uel ementi, sed, his, qui de manibus eorum ignorantia ducti sacramenta dominica accipiunt, suae gratiae effectum largiri probatur." C.1 q.1 d.p. c.24.

55. See text and n. 45 above.

56. See text and n. 11 above.

57. See, e.g., the references gathered in R. Benson and G. Constable, ed., *Renaissance and Renewal in the Twelfth Century*, index s.v. Abelard, Peter. For a collection of key texts, see A. Minnis and A. Scott, ed., *Medieval Literary Criticism, c. 1100-c. 1375*, rev. ed. (Oxford: Clarendon, 1988), especially 87-112 (Abelard).

tury, it probably would have been rejected out of hand either on the ground that Judas's betrayal of Jesus, however reprehensible, was not simony, or on the ground that it was Jesus, not Judas or Malchus, the supposed simoniacs, who performed the miracle. The story, therefore, tells us nothing about the sacraments of simoniacs. This point is probably what Alger of Liège is driving at when he says that it was Jesus who was sold bodily, not the Holy Spirit, therefore, the Holy Spirit could still work. But Gratian, though he repeats Alger's argument, ultimately does not reject Peter Damian's analogy out of hand. The use of the Malchus story to deal with the sacraments of simoniacs was in the tradition, and it deserved respect because it was in the tradition. Further, the tradition had analogized Judas's act to simony and that made Malchus a participant in what could be said to be the greatest of all simonies. Yet, Malchus received the grace of healing. To be fully satisfactory, a position on the issue of the sacraments of simoniacs must take into account this undeniable fact.

How is it that Malchus could receive the grace of healing? Today, we might say that Malchus was a slave.⁵⁸ He had no choice but to participate in capture of Jesus in the garden; therefore, he cannot be held morally responsible for it. Therefore, he may receive grace. That thought may not be far from Gratian's mind, but it is not quite what he says. He says that Malchus participated in the simony unknowingly, a clear echo of Luke's "Father, forgive them for they do not know what they are doing."⁵⁹ Because he participated unknowingly he may receive grace, just as those who are ordained by a simoniacal bishop, but who do not know that the bishop is a simoniac, may receive both the character of the sacrament of ordination and the grace. In them the sacrament is both valid and efficacious.

What makes Gratian's resolution so good is not only that he uses a piece of the tradition rather than just throwing it away, not only that he uses it in a way that supports his ultimate practical resolution of the problem of the sacraments of simoniacs, but also, in doing so, he is truer to Luke's text than any of the previous users of the story had been. As we have seen, one of the main points of Luke's passion narrative is how Jesus reacted in the face of evil, how he healed Malchus's ear, forgave those who crucified him, and forgave the repentant thief.⁶⁰

58. But see *The New Jerome Biblical Commentary*, 671 (arguing that Malchus was an important Temple administrator).

59. Lk 23:43.

60. See text at n. 11 above.

Now, what does this elaborate argument tell us about medieval canon law as a religious legal system? We use it here to develop three related but distinct points:

The first point is a chronological one. The story of Malchus's ear is first used in the context of simony in the middle of the eleventh century, and it ceases to be so used in the middle of the twelfth century. In all religious periods of reform tend to lead people back to the sources, and the Bible was the ultimate source for medieval Christians just as much as it was for those of the patristic period and those of the period of the reformation.⁶¹ This is not to say that the medieval reformers would not have used material from the tradition, canons of councils, decisions of popes, writings of the fathers, if that material had given a clear answer to the problem of the sacraments of simoniacs. But a clear answer could not be found in these sources, though much material could be found that could be used on both sides of the debate. The absence of a clear answer in the tradition drove the reformers back to the Bible, drove them back to arguing from foundational document of the religion.

But this move back to the sources was not inevitable. One need only think of the ninth century, when the response to the absence of material in the sources that clearly answered contemporary questions was to make up new sources, the so-called "false decretals," that did provide an answer.⁶²

61. See generally the works cited in n. 50. Unlike his predecessors, particularly those from the reform period, Gratian does not use the Bible directly in his canons. On the other hand, his dicta and the canons that he quotes, particularly those derived from the fathers, are full of biblical quotations, examples and imagery. See G. Le Bras, "Les Ecritures dans le Décret de Gratien," *Zeitschrift für Rechtsgeschichte (kan. Abt.)*, 58 (27) (1938), 52-4. The biblical citations in Gratian's dicta would seem to be heavily dependent on the *glossa ordinaria* to the Bible. See G. Fransen, "Ecriture sainte et droit canonique," *Revista española de derecho canonico* 43 (1986), 10. We must leave to one side the possible significance of this fact, other than to say that it is not the case for most of the scriptural citations about simony, and certainly not the case in the use of the story of Malchus's ear. Bernard of Pavia returned to the practice of using canons derived directly from the Bible in his *Compilatio prima*, but these biblical canons were virtually ignored by the decretalists of the following century. See P. Landau, "Alttestamentisches Recht in der 'Compilatio Prima' und sein Einfluss auf das kanonische Recht," *Studia Gratiana* 20 (1976), 111-33.

62. The *Collectio hibernensis*, which probably dates from the eighth century, does make considerable use both of the Bible and of texts from the fathers. See, most recently, Fransen, at 9. This collection, however, did not have much impact on the Continent considerably until later. *Ibid.* For the "false decretals," see H. Fuhrmann, *Einfluss und Verbreitung der pseudoisidorischen Fälschungen*, *Schriften der MGH*, 24.1-3 (Stuttgart: Hiersemann, 1972-4).

Much that is hard to understand about the great forgeries that are so characteristic of canonic learning of this period may be more understandable if we think of them as a studied, and not unsophisticated, response to the problem of legal ambiguity. Nor is recourse to the Bible a characteristic response to the problem of ambiguity in the sources a century after Gratian. By the thirteenth century it has become clear that questions that cannot be clearly answered with the sources at hand are to be referred to the pope. The pope, in turn, will answer them either by a decretal letter or in a council that he calls and the terms of the resolutions of which he will dictate.⁶³

But the mind-set of the period from the middle of the eleventh to the middle of the twelfth century was different. What might be called the canon of old canons was, in some sense, closed. While there is little evidence of doubt about the forged material that was already in the collections, one gets the impression that centuries of searching and an increasing consciousness of the problem of forgery had led to an awareness that major new discoveries of old material were unlikely. While there was a healthy respect for the authority of the pope among the reformers of the eleventh and twelfth centuries, the problem of simony in the form in which it appeared in this period was new, and the sense of the range of what we would today call the legislative power of the papacy was not nearly so great as it was to be a century later. Hence the sources must be searched both to advise the pope as to what he should do and to support the positions that he had taken.

But, as we have said, the sources did not provide a clear answer. Hence an answer was sought by interpretation. And interpretation is a process in which the men of the eleventh and twelfth centuries had an increasing confidence. Of all the sources available in the eleventh and twelfth centuries the Bible had the longest history of interpretation; it was the source that they believed had been written by the Holy Spirit with a view not only to problems that existed at the time it was written but with a view to all times and to all problems. In a world that knew at least some forms of historical interpretation but tended, in general, not to use them, the Bible was the easiest source to take out of its historical context.⁶⁴

63. See G. Fransen, *La décrétale et les collections des décrétales*, Typologie des sources du Moyen Age occidental, 2 (A-III.1) (Turnhout: Brepols, 1972, mise à jour 1985).

64. See generally sources cited in n. 50, above, especially M. Colish, "Peter Lombard as an Exegete of St. Paul," in *Ad litteram*, 71-92 (Peter Lombard using historical arguments to blunt the force of theological arguments of St. Paul with which he disagreed).

One more element is necessary to complete the picture: The first six centuries of Christianity had made relatively—I emphasize “relatively”—little effort to create a distinctively Christian legal system. This was for a complicated set of reasons that include the opposition of Jesus to the legalism of the Pharisees reported in all four Gospels, the decision not to subject Gentile converts to all the requirements of the Jewish law, the separation of Jews from Christians following the first destruction of Jerusalem, the influence of Greek as opposed to Roman or Jewish thought in the development of early Christianity, and the necessity for Christianity to deal with law in Roman legal terms once it became the official religion of the empire. Law is there but it is relegated to a subordinate position. The council of Nicea adopted twenty canons, but they pale in significance when compared to the creed that the council also adopted.⁶⁵

By the eleventh century all this had changed. Gentile converts were rare, and no one was suggesting that they must be circumcised and obey the rules of kashruth. The differences between Christianity and Judaism were all too firmly established. The influence of Greek thought was not strong, and Roman law had almost been forgotten. The questions that the church was facing were legal ones, or could be seen to be legal ones. The questions were certainly more legal than those that had occupied most of the time of the great councils of the early church. In this atmosphere the time was ripe for the development of a distinctively Christian legal system. Men could seriously argue that the story of Malchus's ear provided guidance about what was to be done about the sacraments of simoniacs, and the most sophisticated answer to that assertion was not that it has nothing at all to say about the problem but that the guidance to be derived from the story is not that simoniacal orders are effective but that those who are ordained without simony by simoniacal bishops are validly and effectively ordained.

65. J. Alberigo, et al., ed., *Conciliorum oecumenicorum decreta* [COD], 3d ed. (Bologna: Istituto per le scienze religiose, 1973), 5–16. Every statement in this paragraph is controversial. The early Christians, except possibly for some heretics, were not antinomians, as that term was later understood. Early Christianity did, however, subordinate legal to other concerns. Despite the development of ecclesiastical institutions in the three later of the first six centuries, this characteristic subordination was maintained, perhaps even intensified. See generally E. Sanders, *Jewish Law from Jesus to the Mishnah* (London: SCM Press, 1990); F. Thielman, *Paul and the Law: A Contextual Approach* (Downer's Grove, Ill.: InterVarsity Press, 1994); C. Dodd, *Gospel and Law* (New York: Columbia University Press, 1951); E. Blackman, *Marcion and his Influence* (London: S.P.C.K., 1948); J. Gaudemet, *L'Eglise dans l'empire romain, Histoire du droit et des Institutions de l'Eglise en Occident*, 3 (Paris: Sirey, 1958).

Indeed, the whole discourse about simony is replete with biblical arguments.⁶⁶ The prohibition of simony is said to be a command of the Lord, citing Matthew's version of the commissioning of the Twelve: "You received without payment; give without payment."⁶⁷ Simon the Magician and Gehazi are referred to many times.⁶⁸ Jesus, we are told, left many sinners in the Temple, but he cast out the buyers and sellers.⁶⁹ The authority of St. Jerome is marshaled to show that Samuel was not a simoniac when Saul offered him a quarter of a shekel, and that the wife of Jeroboam did not engage in a simoniacal transaction with the prophet Ahijah.⁷⁰ Fundamental sacramental theology is derived from Paul's remark in First Corinthians, "I planted, Apollo watered, but God gave the growth."⁷¹

That the efficacy of a sacrament depends on the faith of the recipient is supported by numerous biblical examples: Jesus could not work miracles in his own country because of the lack of faith of the people.⁷² He was transfigured twice (once in the transfiguration, so called, and once in the road to Emmaus), but in the later instance the disciples did not recognize him for lack of faith.⁷³ There was nothing wrong with the crust of bread that Jesus gave Judas at the last supper but because of Judas's wickedness, he immediately thought of betraying Jesus.⁷⁴ He who receives the body and blood of the Lord unworthily brings judgment on himself.⁷⁵

66. Even in the eleventh and twelfth centuries, particular texts are used more in one period than in another. Jn 10:1-14 (beginning "Very truly, I tell you, anyone who does not enter the sheepfold by the gate but climbs in by another way is a thief and a bandit...") was critical in Gregory VII's thought in condemning simony and lay investiture. K. Benz, "Joh. 10,1-14 in der theologischen Argumentation Gregors VII. gegen Simonie und Laieninvestitur," in H. Mordek, ed., *Aus Archiven und Bibliotheken*, Freiburger Beiträge zur mittelalterlichen Geschichte, 2 (Frankfurt: Lang, 1992), 239-69; idem, "Noch einmal: Joh. 10,1-14 in der theologischen Argumentation Gregors VII. gegen Simonie und Laieninvestitur," *Deutsches Archiv* 49 (1993), 201-6. Gratian uses the text only once in dealing with simony, and that use is in a canon derived from one of Gregory VII's letters. C.1. q.1 c.113.

67. Mt 10:8. E.g., C.1 q.1 c.1; c.22; c.99; c.101; c.117.

68. E.g., C.1 q.1 c.11; d.p. c.16; c.24.

69. Jn 2:13-22, and parallels; see C.1 q.1 c.11.

70. 1 S 9; 1 K 14; see C.1 q.1 d.p. c.22; c.24.

71. 1 Co 3:6; see C.1 q.1 d.p. c.24.

72. C.1 q.1 d.p. c.97 (§6).

73. Mt 25, and parallels; Lk 24; see C.1 q.1 d.p. c.97 (§7).

74. Jn 13:21-30; C.1 q.1 d.p. c.97 (§5).

75. 1 Co 13:27-32; see C.1 q.1 d.p. c.97 (§7).

The inefficacy of the sacraments of heretics is supported by a number of Old Testament texts condemning the sacrifices of wicked.⁷⁶ A strange interpretation of the sale of Joseph to Potiphar, and an apocryphal story about the consequences of Jason's purchase of the high priesthood from Antiochus are both used to support the proposition that simoniacs' sacraments lack grace.⁷⁷

By the end of the twelfth century, however, Malchus's ear and most of the rest of the biblical arguments are gone. Most of the canonists who deal with the problem of simony, even when they are commenting on Gratian, pay no attention to the argument about Malchus's ear.⁷⁸

More dangerously—if only because I cannot offer a full panoply of evidence to support it⁷⁹—I would like to suggest not only that this particular argument is gone but that arguments like it are gone.⁸⁰ Of course, the canonists still know the Bible; they still quote from it both consciously and unconsciously; biblical images and rhetoric come easily to them, but

76. E.g., Pr 21:27; Pr 3:9; Qo 34:24; see C.1 q.1 c.27.

77. Gn 39:1 (taking the description of Potiphar as *eunuchus* literally; Rufinus [H. Singer, ed., *Die Summa Decretorum des Magister Rufinus* (Paderborn: Schöningh, 1902), 209] knows that this is wrong); cf. 2 Mc 1, 4; for both see C.1 q.1 c.29.

78. See Appendix II.

79. Support can be found in Landau, above n. 61; G. Le Bras, "Les Ecritures dans la codification des Décrétales," in *Mélanges Eugène Tisserant*, Studi e testi, 231 (Città del Vaticano: Biblioteca Apostolica Vaticana, 1964) 1:245–54; R. Foréville, "Le recours aux sources scripturaires: A quel moment d'histoire l'écriture a-t-elle cessé d'être source directe du droit de l'Eglise," *L'Année canonique* 21 (1977), 49–55.

80. I recognize that here I am disagreeing—though how much it is still not clear to either of us—with R. Helmholz, "The Bible in the Service of the Canon Law," *Chicago-Kent Law Review* 70 (1995) 557–81. Certainly, Helmholz sees less of a change around 1200 than do I. When, however, all the qualifications that follow in this article are taken into account—and all the caution that is in Helmholz's—the difference between us may be that between a half-full and a half-empty glass. I would emphasize one point more than does Helmholz: Innovation was not the canonists' long suit. If a biblical example was in Gratian, or firmly embedded in the tradition independently of Gratian, the canonists would continue to cite it into the sixteenth century. Hence, there is nothing surprising about the use of Nebuchadnezzar's decree (Dn 3:29) in the context of discussions of blasphemy. It was, as Helmholz points out, mentioned by Gratian in this context in five places. Helmholz, at 568 and n. 46. The question that I would like to raise here (it can hardly be answered) is whether if one removes the repetitions of biblical authority derived from the past and purely rhetorical use of the Bible, there remain many examples of the use of the Bible to advance the arguments in which the canonists were engaged.

by and large they are not using the Bible to resolve the burning issues of the day.

Licet Heli, the famous decretal on the topic of simony issued around the year 1200 by Pope Innocent III, illustrates this difference in approach.⁸¹ The decretal is famous because it says that simony should be dealt with by a new form of procedure, an inquisitorial process in which the judge of his own motion questions those who know about the incident and proceeds to make a ruling. The judge does not have to wait until someone makes a formal accusation, nor is he bound by the elaborate set of procedural rules that limit those who can make such an accusation and those who can testify about it.⁸² The decretal contains two biblical references, the only authorities cited in it. "Although Eli, the high priest, was himself a good man," the decretal begins, "nonetheless because he did not effectively punish the wickedness of his sons, he brought down the rod of divine judgment both on them and on himself."⁸³ That a pastor has the obligation to discipline his flock is a fundamental principle of canon law, and one does not need to cite Old Testament examples to show it.⁸⁴ "I will go down," the decretal later says, quoting words that Genesis ascribes to God in the context of Sodom, "and see whether they have done in fact what is reported to me."⁸⁵ This is a little closer to the real issue, because it suggests that reports of crimes must be investigated. But the quotation raises more issues than it settles: Is the pope really arrogating to himself the power of divine judgment? How is the pope to know what God knows? In particular, is there anything about the story of Sodom that suggests that it is appropri-

81. X 5.3.31.

82. For the background, see, most recently, R. Fraher, "IV Lateran's Revolution in Criminal Procedure," in R. Castillo Lara, ed., *Studia in honorem eminentissimi cardinalis Alphonsi M. Stickler* (Roma: LAS, 1992), 97-111; idem, "The Theoretical Justification for the New Criminal Law of the High Middle Ages," *Illinois Law Review* (1984), 557-95.

83. "Licet Heli summus sacerdos in se ipso bonus existeret, quia tamen filiorum excessus efficaciter non corripuit, et in se pariter, et in ipsis animadversionis divinae vindictam excepit. . . ." X 5.3.31. The reference is to 1 S 2:12-4:18.

84. The *locus classicus* for this requirement is 1 Tm 3:4-5: "He [the bishop] must manage his household well, keeping his children submissive and respectful in every way—for if someone does not know how to manage his own household, how can he take care of God's church?" See, e.g., D.47 d.p. c.8 (with a long string of biblical examples, including Eli).

85. "'Descendam,' inquit Dominus, 'et videbo utrum clamorem, qui venit ad me, opere compleverint.'" X 5.3.31, quoting Gn 18:21.

ate for the pope to set aside the ancient canonical requirements about accusers and witnesses? It would seem, then, that the Bible is being used here more for the purpose of rhetorical effect (no one who heard these words would miss the implicit equation of simony and sodomy)⁸⁶ than it is for the guidance that it provides for the resolution of the issue at hand.

We have already seen one reason why the nature of canonical argumentation seems to change by the end of the twelfth century: the increasing recognition of the power of the pope makes recourse to a closed system of sources unnecessary. There is another reason buried in the history of canon law as a profession. Increasingly over the course of the twelfth century canon lawyers separated themselves from moral and dogmatic theologians. The theologians, to exaggerate slightly, took the Bible with them and left the lawyers with their canons, the ever-increasing body of decretals, and the *leges*, the Roman law, which the canonists and civilians were in the process of developing into the *ius commune*.⁸⁷ The separation was never complete. Gratian's great collection of canons and decretals intermingled with extracts from the fathers with their strongly biblical orientation and the arguments that Gratian himself makes, a striking number of which have a biblical base, continued to be a basic source-book for the canon lawyers. The canonists of the thirteenth and later centuries continued to use the Bible in teaching and argument, but they ceased to be creative in biblical argument in the manner of Gratian when he is dealing with Malchus's ear. They no longer used biblical passages to create new arguments. New arguments came out of the decretals and the *leges*, and that was a full-time job.

This last point requires some qualification. There are at least two areas in which considerable new biblical material and argumentation is brought to bear: arguments with heretics and arguments about the relationship between ecclesiastical and secular power. It is perhaps not by chance that

86. The equation, of course, is not legal but rhetorical. It consists in the similarity of the sound of the words.

87. The still-standard account in English of the development of the various faculties may be found in H. Rashdall, *The Universities of Europe in the Middle Ages*, ed. F. Powicke and A. Emden, 3 vols. (Oxford: Clarendon, 1936), many times reprinted. The separation of theologians from lawyers, which antedated, though not by much, the formation of the faculties needs to be explored in widely scattered works. See, e.g., the essays by J. Leclercq, R. Southern, J. Baldwin, and S. Kuttner, in *Renaissance and Renewal*, at 68-87, 113-172, 299-323.

both of these areas are areas in which simple appeal to a papal decretal letter will not suffice to end an argument.⁸⁸

With all these qualifications, however, the point is more than a statistical one. Recourse to the Bible is not only less frequent in the thirteenth century than it was in the twelfth, but the Bible was less fundamental to the system of canon law in the thirteenth century than it was in the twelfth. Canon law has never been a completely closed system, developing solely by reference to a closed canon of sources, but it came closest to being such a system in the eleventh and twelfth centuries. It is the presence of a closed canon, or a partially closed canon, that leads to the development of strained analogies like that of Malchus's ear.

The second point has to do with the historical significance of this shift in emphasis in canon law. Periods of reform in religion frequently, perhaps always, give rise to a tension between reformist zeal and pastoral concern. Peter Damian was no less convinced than Humbert of Silva Candida that simony was wrong, but unlike Humbert he sought texts that would allow him to say that grace could come from the most questionable of transactions. Gratian, perhaps more firmly committed than Peter Damian to the notion that simoniacs were outside the church,⁸⁹ nonetheless managed to find a way where those who receive sacraments from simoniacs unknowingly can obtain grace.

But what for Peter Damian and Gratian was a profoundly difficult point of what today we would call sacramental and moral theology has become by the time of Innocent III a matter of criminal law. Do we not have here a striking illustration of what one recent author has called "the formation of a persecuting society?"⁹⁰ Maybe. Certainly, as the canonists move away from dealing with a broad variety of sources, some of which are only marginally legal, they also move from being a group that is on the margins of power to a group that is at the heart of, and is dealing the pronouncements of, one of the most powerful governmental entities in Europe. Certainly too, *Licet Heli* marks the beginning of the inquisitorial procedure, a form of procedure virtually synonymous with a persecuting society.⁹¹

88. See Appendix III.

89. But see n. 35, above.

90. R. I. Moore, *The Formation of a Persecuting Society: Power and Deviance in Western Europe, 950-1250* (Oxford: Blackwell, 1987).

91. See the works of R. Fraher, above n. 82.

Yet I must confess that there is something about the connection between the shift in canonic argumentation and the idea of a persecuting society that makes me uneasy. Part of my unease has to do with my unease about the notion of a persecuting society. Pursuit of that unease would take us far afield. Part of my unease, however, can be stated very simply: The major difference between the canonic legal system in the time of Gratian and that in the time of Innocent III was that in Innocent's time, but not in Gratian's, there was a working system of public canonic courts. The shift in emphasis, and perhaps even in argumentation, in the two periods may largely be the product of that fact. Law that is not limited to public courts can mix what to us are the diverse disciplines of law and theology. Law increasingly focused on public courts must be increasingly like what the west has come to know as law: narrow, practical, and just a bit dull.

The third point has to do with comparative law, and it must necessarily be the most sketchy and suggestive: If we ask what are the major religious legal systems of the world, we would certainly answer the Jewish and the Islamic, perhaps the Hindu. We would probably not, however, so classify western canon law. Western canon law certainly is a legal system, perhaps it is a major one, but it is not a religious legal system, at least not in the sense that the Jewish and the Islamic are (and I suspect the Hindu, though I know so little about it that I probably should not be writing about it). What we have suggested is that there was a moment, roughly in the eleventh and twelfth centuries, when it looks as if it might have been otherwise. Christianity might have developed a legal system that would take into account all the sources on which the religion was based and would proceed with an elite group interpreting a closed canon of sources that were believed to contain all that was needed to solve every problem. That was not what happened, and I have suggested some reasons both in the circumstances of the religion before the eleventh century and in those which arose in the late twelfth and thirteenth centuries that may help to explain why it did not happen.

This point is worth some explanation. We began with a classificatory point: Western canon law is not one of the major religious legal systems of the world. There may not be much to the *grosso modo* classifications in which comparative lawyers are fond of engaging.⁹² The fact is, however, that none

92. For an attempt to argue that another of the major divisions of comparative law, that between the civil law and common law is less than helpful in analyzing what is dis-

of the standard books on the topic classifies western canon law among the world's major religious legal systems.⁹³

The question is why do they say this? How does canon law differ from what we normally call the major religious legal systems, the Jewish, the Islamic, and the Hindu?

One difference is the comprehensiveness of canon law. Neither the 1983 Code of Canon Law of the Roman Catholic Church nor that of 1917 could serve as the basis of an entire legal system for a society. The *Corpus Juris Canonici*, the fundamental source-book of Roman Catholic canon law prior to 1917, might have served as such a basis, but considerable reference to Roman law would have been required. In fact, however, so far as I know, no society's legal system was ever based exclusively on the *Corpus Juris Canonici*, not even that of the Papal States of the late medieval and early modern periods.

Lack of legal comprehensiveness may, however, not be the most important difference between western canon law and what are called the major religious systems. By the later middle ages Roman law had been fully incorporated into, and changed by, canon law in such a way that the *ius commune* could be properly regarded as as much canonic as Roman, and the *ius commune* of late medieval Europe was certainly a system that could have served as the basis of the entire legal system of a society. Indeed, a number of societies came close to so using it.⁹⁴

If the comprehensiveness of canon law does not fully explain why canon law is not regarded as a major religious legal system, perhaps the dif-

tinctive about the legal development of England, on the one hand, and the European Continent, on the other, see C. Donahue, "Ius commune, Canon Law, and Common Law in England," *Tulane Law Review* 66 (1992), 1746-80.

93. E.g., R. David and J. Brierley, *Major Legal Systems of the World*, 2d ed. (New York: Free Press, 1978), 27-8 and n. 22 (explaining the exclusion of canon law); J. Derrett, ed., *An Introduction to Legal Systems* (New York: Praeger, 1968) (simply excluding canon law from a book that includes introductions to Roman, Jewish, Islamic, Hindu, Chinese, African, and English law). The volume of the *International Encyclopedia of Comparative Law* devoted to *The Legal Systems of the World: Their Comparison and Unification* (vol. 2.1, 2.2, R. David, ed., [Tübingen: Mohr, 1974, 1971]) deals only with Islamic law and Hindu law, excluding Jewish law, apparently because not enough people live under it.

94. Of a large literature, see particularly M. Bellomo, *Europa del diritto comune* (Roma: Il Gigno Galileo Galilei, 1989), trans. L. Cochrane, *The Common Legal Past of Europe* (Washington, D.C.: Catholic University of America, 1995); H. Coing, *Europäisches Privatrecht. 1: Älteres gemeines Recht* (München: Beck, 1985).

ference lies in the way in which canon law deals with religion. Canon law, we said, is a legal system (particularly if we add the Roman law elements of the *ius commune*), it may even be a major legal system, but it is not a religious legal system in the way that Jewish law and Islamic law (and I think Hindu law) are religious legal systems. The differences seem to be these:

(1) Canon law never pretends to be comprehensive about behavior. It is a characteristic of religious legal systems that they deal both with what we call law and what we call morals. While the western Christian church certainly has a comprehensive moral code, that is not canon law. Historically, this separation of law from morality may not have been as much the product of the separation of law from theology faculties (though that played some role) as it was the product of the development of the so-called internal forum, the forum of the confessional, as opposed to the external forum, the forum of the courts.⁹⁵

(2) Canon law, except in the eleventh and twelfth centuries, did not base itself on the fundamental sources of the religion. They lay elsewhere, in the Bible, the creeds, the liturgy, and the writings of the fathers. When the relationship between secular and ecclesiastical power became a fundamental issue for the religion, canon law played an important role. Curiously, the fact that it did so limited its range.⁹⁶

(3) Canon law, except in the eleventh and twelfth centuries, never used to any great extent the interpretive method that I have outlined in the story of Malchus's ear.⁹⁷ Canon law, except in those periods, has always sought

95. See generally, J. Mahoney, *The Making of Moral Theology* (Oxford: Clarendon, 1987).

96. H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983), argues that the Gregorian reform was a critical period for the formation of the western legal tradition. That may be true. Certainly, law served to mediate the fundamental conflict between *regnum* and *sacerdotium* in this period, and it continued to do so throughout the medieval period. But a law that must draw the line between the sacred and secular must speak in a way that is understandable to the secular and so must leave behind some of its sacred sources. The move to Roman law sources in the same period is also a move to a body of law that is notably secular, particularly in private law. Finally, the mediative function of law in this period may have caused the canonists to leave behind sources the interpretation of which assumed the personal commitment of the reader. If law is to reconcile warring parties, it must be a "bad man" type of law.

97. There are, of course, many different methods at work in both Jewish and Islamic law. The terse statements of the Mishnah, for example, are quite different from the discursive discussions of the Gemara. See D. Halivni, *Midrash, Mishnah and Gemara* (Cambridge,

to bypass the interpretive process by getting a ruling from an existing authority. Canon law has also endowed those authorities with legislative power, making interpretation of the basic sources unnecessary in many instances.⁹⁸

Now whether this means that canon law is not a religious legal system or whether it simply means that it is a religious legal system that is different from Jewish or Islamic law is probably not worth an argument. The important point is that canon law did not develop into a religious legal system like that of Judaism or Islam, and the reasons why it did not do so are contingent ones, found in the history of Christianity in the west. They are not, it would seem, fundamental to Christianity itself. If that is true, then it might still be possible for Christianity—or at least those branches of Christianity that still have a legal system—to develop a legal system more like that of Judaism or Islam than it now is. Christians today are conscious of a need to restructure their institutions and yet, by and large, are profoundly mistrustful of law and lawyers. Perhaps if the lawyers went back to the sources they could assist in this restructuring of institutions in ways that would make other Christians less mistrustful of them. Perhaps canon lawyers need to think less about the canons and more about Malchus's ear.⁹⁹

Mass.: Harvard University Press, 1986). Nonetheless, it is characteristic of both systems that they rely much more on interpretation than they do on legislation.

98. See, most recently, K. Pennington, *The Prince and the Law, 200–1600* (Berkeley: University of California Press, 1993), 38–75.

99. One might note in this regard a number of recent works dealing with the relationship between canon law and theology. E.g., L. Örsy, *Theology and Canon Law* (Collegeville, Minn.: Liturgical Press, 1992); M. Wijlens, *Theology and Canon Law: The Theories of Klaus Mörsdorf and Eugenio Corecco* (Lanham, Md.: University Press of America, 1992); E. Corecco, *Theologie des Kirchenrechts: methodologische Ansätze* (Trier: Paulinus Verlag, 1980), trans. F. Turvasi, *The Theology of Canon Law: A Methodological Question* (Pittsburgh: Duquesne University Press, 1992).

Appendix I: Condemnations of Simony:
Chalcedon, Gregory I, Ambrose, Jerome

Chalcedon: (451) c.2, ed. COD, 87-8 (= C.1 q.1 c.8).

Gregory I, *Registrum epistolarum* 3.47 (593), ed. D. Norberg, CCL, 40 (Turnholt: Brepols, 1982), 191-2 (ll. 21-6 = C.1 q.1 c.119); 3.48 (593), ed. cit., 193-4 (ll. 19-30 = C.1 q.1 c.120); 5.58 (595), ed. cit., 354-7 (ll. 29-47 = C.1 q.1 c.117); 5.62 (595), ed. cit., 364-6 (ll. 52-60 = C.1 q.1 c.116); 5.63 (595), ed. cit., 366-8 (ll. 52-7 = C.1 q.1 c.117); 6.7 (595), ed. cit., 375-6 (ll. 30-55 parallel to C.1 q.1 c.117); 9.216 (599), ed. CCL, 140A (Turnholt: Brepols, 1982), 776-9 (ll. 14-43 = C.1 q.1 c.28); 9.219 (599), ed. cit., 782-90 (ll. 27-9 = C.1 q.1 c.2; ll. 58-9 = C.1 q.1 c.4; ll. 55-9 = C.1 q.1 c.13; ll. 70-95, 125-8 = C.1 q.1 c.27); Gregory I, *Homiliae in Evangelia* 1.4, ed. PL 76, 1091D-1092A, trans. D. Hurst, Cistercian Publications, 123 (Kalamazoo, Mich.: Cistercian Publications, 1990), 123-4 (Homily 17, based on an "interim critical edition") (=C.1 q.1 c.114). (For C.1 q.1 c.5, a pastiche of Gregorian and non-Gregorian material, see the notes of the *Correctores romani*). Gratian also makes use of the following genuinely Gregorian passages that do not contain a condemnation of simony: Gregory I, *Registrum epistolarum* 1.24 (591), ed. CCL 140, at 22-32 (ll. 5-41 = C.1 q.1 c.93); 5.35 (595), ed. cit., 302-3 (ll. 11-17 = C.1 q.1 c.122); 8.1 (597), ed. CCL 140A, at 513-14 (ll. 29-31 = C.1 q.1 c.121); 9.136 (599), ed. cit., 685-7 (ll. 5-12 = C.1 q.1 c.26 [shortened and altered]); *Dialogi* 3.31, ed. U. Moricca, *Fonti per la storia d'Italia* (Roma: Istituto storico italiano, 1924), 205 (ll. 2-18 = C.1 q.1 c.72).

Ambrose (? see above note 18), *De dignitate sacerdotum*, c.5, ed. PL 17, 577A-B (= approximately PL 139, 175B-C) (= C.1 q.1 cc.14, 15); Ambrose, *De misteriis* 4.23, ed. O. Faller, *Corpus scriptorum ecclesiasticorum latinorum* [CSEL], 73 (Vienna: Hoelder-Pichler-Tempsky, 1955), 98 (ll. 37-8 = C.1 q.1 c.50 [beginning only, the rest of this canon comes to Gratian through Alger from an unknown source]); Ambrose, *Expositio Evangelii secundum Lucam*, 4.52-4 (on Lk 4:27), loc. cit. above, note 18 (partially extracted in C.1 q.1 c.16); Ambrose, *De paenitentia*, 2.4.23, ed. CSEL 73, at 172 (ll. 30-8 = C.1 q.1 c.19 [shortened]).

Jerome, *Commentarii in Michaeam* 1.3.9-12, ed. M. Adriaen, CCL, 76 (Turnholt: Brepols, 1969), 461-5 (ll. 157-63 = C.1 q.1 c.23 [pr]; ll. 223-5 = C.1 q.1 c.44; ll. 241-4 = C.1 q.1 c.23 [§1]; ll. 250-72 = id. [§§2-3]; ll. 235-40 = C.1 q.1 c.24 [shortened]). (C.1 q.1 c.23 [§4] [reciting the Gehazi story] is not part of Jerome's *Commentarii in Michaeam*, nor is it found in any of Gratian's known sources; it may be a *dictum* of Gratian's that the manuscripts that Friedberg used failed to mark. See C.1 q.1 c.23, at n.315.) Gratian also makes use of the following genuinely Hieronymian passages that do not contain a condemnation of simony: Jerome, *Commentarii in Aggaeum* 2.11-15, ed. M. Adriaen, CCL, 76A (Turnholt: Brepols, 1970), 732-8 (ll. 451-9 = C.1 q.1 c.61 [slightly shortened]; ll. 399-408 = C.1 q.1 c.80 [somewhat altered]); Jerome, *Commentarii in Amos* 2.5.21-22, ed. CCL 76, at 293-5 (ll. 758-60 = C.1 q.1 c.62 [somewhat altered]); Jerome, *Commentarii in Osse* 2.6.6-7, ed. cit., 66-7 (ll. 161-4 = C.1 q.1 c.63 [slightly altered]); Jerome, *Commentarii in epistolam ad Galatas* 1.1 (Ga 1:11-12); 3.5 (Ga 5:14), ed. PL 26, 322B-C, PL 26, 410A-B (= C.1 q.1, cc.64, 65); Jerome,

Commentarii in Malachiam 1.14–2.2, ed. CCL 76A, 913–15 (ll. 40–3 = C.1 q.1 c.76); Jerome, *Commentarii in Sophoniam* 3.1–7, ed. cit., 694–700 (ll. 119–23 = C.1 q.1 c.90).

Appendix II: Malchus's Ear in the Decretists

Paucapalea (ed. Schulte), Rolandus (ed. Thaner), Rufinus (above note 77), the *Summa Parisiensis* (ed. McLaughlin), Stephanus (ed. Schulte) and the ordinary gloss (ed. Venice, 1572) all pass over the passage without comment. (See below for a possibly relevant passage in the ordinary gloss.) The omission is particularly striking in the case of Rufinus, because he finds it necessary to explain to his students some of the more obscure biblical references in C.1 q.1. See ed. cit., 208–9, and nn. 64, 68, 71.

In the *Summa "Elegantius in iure diuino" seu Coloniensis*, 4.79, ed. G. Fransen and S. Kuttner, MIC. A: Corpus Glossatorum, 1.2 (Città del Vaticano: Biblioteca Apostolica Vaticana: 1978), 39, we find: "Ei quoque quod iam sepe diximus: simoniace scienter ordinatos, licet sacramenti accipiant caracterem, interiores Spiritus non obtinere uirtutem, sic obiciunt. Christus a Iuda uenditus auriculam Malchi sanauit. Ex quo exemplo colligitur quod Spiritus sanctus licet iniuste a simoniacis uenalis putetur sue tamen uirtutis non obliuiscitur nec desinit effectum sue gratie uenditus etiam prestare." Whether there was anyone who was making this objection at the time of the summist (probably around 1170) is hard to tell. He may simply have been taking it as a possible objection, which he found in Gratian, where, we have seen, it is ultimately based on Alger of Liège's probable misinterpretation of Peter Damian. In the event, the summist simply answers it by quoting Gratian's *dictum*, C.1 q.1 d.p. c.24. There is no advance in the argument.

Huguccio, who normally passes over little, contents himself with the remark: "Bene solvit [scilicet, magister], et melius secundo." ("Secundo" presumably refers to Gratian's use of the story to deal with those who receive ordination from simoniacal bishops unknowingly.) Huguccio ad C.1 q.1 d.p. c.24 v° *Item quod dicitur*, in MS Admont 7, fol. 131va (corrected from Guido de Baysio, *Rosarium* ad id. [Lyons, 1549], fol. 111vb). He then goes on to offer five glosses, which show that he understands Gratian's argument but which do not advance it.

The thirteenth century sees a change, but the change supports the argument advanced here. According to Guido de Baysio, Johannes Teutonicus ignored the passage, but both Laurentius Hispanus and Johannes de Fintona used it to teach about the dangers of argument by analogy. Guido de Baysio, loc. cit., v° *similitudo*, v° *in glossa et ita*. In the second of these passages we learn that the gloss on *secundum* in the ordinary gloss, ed. cit., p. 340, is in fact a gloss of Laurentius Hispanus and that its warning ("et ita nos magister docuit resistere argumentis a simili") is directed to the story of Malchus's ear.

Appendix III: Scriptural Arguments Against Heretics and Princes

New biblical arguments, for example, are devised to deal with the Cathars' and the Waldensians' refusal to take oaths. On the refusal, see, most conveniently, W. Wakefield and A. Evans, ed., *Heresies of the High Middle Ages* (New York: Columbia University Press,

1969), 173, 191, 193, 199, 234, 239, 245, 600-1. For the development of arguments against the heretics, see, e.g., *ibid.* at 194, 199. A full development of the argument is found in Innocent III's decretal *Etsi Christus* (1206) (X 2.24.26; Potth. 2722). Interestingly, this decretal is addressed to a group of monks (perhaps the monastery of Conches near Rodez, deep in Cathar territory), who had qualms of conscience about taking an oath even when it was necessary to defend their monastery in litigation.¹⁰⁰ While the bare outlines of the argument may be found in Gratian (C.22 q.1 [relying principally on Augustine]), Innocent develops the biblical arguments much more fully than does Gratian.

On discourse about politics, the relationship of the spiritual to the temporal power, see, e.g., Boniface VIII's *Unam sanctam* (1302); Extrav. comm. 1.8.1. Here, the argument is quite reminiscent of the style of Gratian, though it comes to conclusions far more extreme. The unity of the church is demonstrated by a mystical interpretation of the Song of Songs (Sg 6:8), the ark of Noah (Gn 6:14-8:19), a literal interpretation of Ps 21:21 (20:20), and the undivided cloak of Jesus (Jn 19). The headship of Peter of demonstrated from Jn 21:17, reinforced with Jn 10:6. The imagery of the two swords (Lk 22:38) is reinforced with Mt 26:52 (the Malchus scene).¹⁰¹ The divine source of this power is proven by Rm 13:1 (and confirmed with a reference to Pseudo-Dionysius, the only non-scriptural authority cited). The superiority of the spiritual over the temporal power is then reinforced with Jt 1:10, 1 Co 2:15, and, of course, Mt 16:19. Finally, it is suggested that anyone who denies this is a Manichee, because that would mean that there are two principles, whereas Gn 1:1 shows that there is only one. (This last argument is virtually untranslatable, because it depends on the coincidence of *principium*, meaning "principle" and *principium* meaning "beginning").

100. The Rule of St. Benedict, c.4, contains the injunction "Non jurare, ne forte perjuret;" ed. J. McCann (London, 1952), 28. Hence, the monks' reluctance to swear was based on a tradition that antedated the heresies of the twelfth century. See U.-R. Blumenthal, *The Investiture Controversy* (Philadelphia, 1982), 53, 140-1. Nonetheless, the development of the argument to the contrary would seem to be the product of the contemporary debates.

101. This allegorical interpretation of the Malchus story in a political sense (Peter cutting off the ear of the slave of the secular authority [or of Malchus, interpreted to mean "king"] by the use of the spiritual sword) goes back to a difficult passage in Ambrose, *Expositio Evangelii secundum Lucam*, 10.66-71 (on Lk 2:49-51), above, n. 18 (partially extracted in C.24 q.1 c.17). It became a standard part of political discourse in the eleventh century. E.g., Deusdedit, *Contra invasores et symoniacos et reliquos schismaticos* 1.3.6, ed. cit. above, n. 36, 2.346; Sigebert of Gembloux, *Leodicensium epistola adversus Paschalem papam* (1103), c. 9, ed. MGH, *Libelli de lite*, 2.460-1. Pursuit of this use of the passage would take us too far afield, but it is characteristic of the eleventh and twelfth centuries that the same scriptural passage can be used for more than one purpose.