

2001

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## Recommended Citation

Richard. H. Helmholz, "Money and Judges in the Law of the Medieval Church," 8 University of Chicago Law School Roundtable 309 (2001).

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# MONEY AND JUDGES IN THE LAW OF THE MEDIEVAL CHURCH

R.H. HELMHOLTZ†

## I. INTRODUCTION

Students of the Middle Ages will readily identify the subject related to legal ethics that figures most prominently and repeatedly in the annals of the time: the effect of money on the outcome of litigation. Dante himself gave voice to serious concern about judges receiving payments from litigants,<sup>1</sup> and that same complaint was commonly extended to both spiritual and temporal courts. It was said that more often than not the primary object of the legal system of the medieval church seemed to be to raise money for its officers. Doing justice came second. Observers thought that judges, even men in holy orders, routinely took “gifts” from the litigants who came before them. The “gifts” were the inescapable price for judicial services, and paying this price perverted the course of justice.

Criticism of venality among court officials was consistent and mordant. In the twelfth century, John of Salisbury (d. 1180) wrote that it was the habit of those who held judicial authority in the church to “love gifts . . . and follow after rewards.”<sup>2</sup> According to him, ecclesiastical officials commonly “turn[ed] the sins of the people into food and drink” for themselves.<sup>3</sup> John was no enthusiast for the role of law in the church, but his distrust did not distinguish his views about venality from those of some of the men who were more kindly disposed towards legal science. If one looks for testimony from a man who made his living

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1. See *Divine Comedy: Paradiso*, Canto IX, ll 127-35.

2. W.J. Millor and C.N.L. Brooke, eds, 2 *The Letters of John of Salisbury: The Later Letters (1163-1180)* Letter 140 (Oxford 1979).

3. *Id.*

from the law and had no axe to grind, a good candidate is the English civilian William Doune (d. 1361). Doune was archdeacon of Leicester and had served as the principal judge in the court of the bishop of Worcester during the middle years of the fourteenth century.<sup>4</sup> At the close of his life, he reflected with bitterness and self-reproach in his last will and testament that “many men in high office go about with thievish designs against those who are subject to them, and of this number I was, and am, one.”<sup>5</sup> To Doune, John of Salisbury’s criticism hit very close to home. It was all too true.

Critical remarks like these about contemporary litigants and judges could easily be multiplied. Indeed they have been multiplied by scholars. To many thoughtful observers, then and now, it has seemed that the rise to prominence of law and the legal profession in the wake of the revival of the scientific study of law at Bologna and the growth of court systems throughout Europe brought judicial rapacity to the fore. It was an unfortunate by-product of an otherwise happy development.<sup>6</sup> Lawyers and judges have been targets for public opprobrium in many eras—so much so that the subject has a history of its own.<sup>7</sup> Much of this historical work has been very well done, and it is not my purpose to add to the chronicle of faultfinding, deserved or not. The purpose of this article is rather to examine the relation of the criticism to the formal canon law.<sup>8</sup>

At first sight, the disparity between these accounts of common practice and the formal law appears quite profound. The canons of the church did not ap-

4. See A.B. Emden, 1 *A Biographical Register of the University of Oxford to A.D. 1500*, 587-88 (Oxford 1957); Michael Haren, *Sin and Society in Fourteenth-Century England: A Study of the Memoriale Presbiterorum* 190-216 (Oxford 2000).

5. The text of the will and the words quoted are found in A. Hamilton Thompson, *The Will of Master William Doune, Archdeacon of Leicester*, 72 *Archaeological J* 233, 280-01 (1915).

6. See, for example, John A. Yuncck, *The Lineage of Lady Meed: The Development of Mediaeval Venality Satire* (Notre Dame 1963). On the riches to be acquired by a career as a judge in the courts of the English church, see C.T. Allmand, *The Civil Lawyers*, in C.H. Clough, ed, *Profession, Vocation, and Culture in Later Medieval England* 155, 171-72 (Liverpool 1982). On attempts to deal with ethical problems in the English common law, see Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 *Syracuse L Rev* 1 (1998).

7. See John T. Noonan, Jr., *Bribes* (Macmillan 1984); Joseph Borkin, *The Corrupt Judge: An Inquiry into Bribery and Other High Crimes and Misdemeanors in the Federal Courts* (Clarkson N. Potter 1962); M.H. Hoeflich, *Lawyers, Fees & Anti-Lawyer Sentiment in Popular Art, 1800-1925*, 4 *Green Bag* 2d 147 (Winter 2001); E.J.H. Schrage, *The Judge’s Liability for Professional Mistakes*, 17 *J Legal Hist* 101 (1996).

8. In what follows, I have used the standard system of citing the canonical sources in the *Corpus iuris canonici*:

Dist. 1 c. 1	<i>Decretum Gratiani</i> , Distinctio 1, can. 1
C. 1 q. 1 c. 1	-----, Causa 1, quaestio 1, can. 1
De pen.	-----, De penitencia
De cons.	-----, De consecratione
X 1.1.1	<i>Decretales Gregorii IX</i> , Lib. 1, tit. 1, cap. 1
Sext 1.1.1	<i>Liber sextus</i> (of Boniface VIII), Lib. 1, tit. 1, cap. 1
gl. ord.	<i>glossa ordinaria</i> (standard commentary on texts of <i>Corpus iuris canonici</i> and <i>Corpus iuris civilis</i> )
d.p.	dictum post (in <i>Decretum Gratiani</i> )
s.v.	<i>sub verbo</i> (reference to <i>glossa ordinaria</i> or other commentary on a legal text)

prove of bribing judges, to put it mildly. The Bible itself was cited as prohibiting judges from receiving anything at the hands of those who appeared before them, this on the grounds that “a gift doth blind the eyes of the wise.”<sup>9</sup> The *ius commune*, and in particular the law of the church, contained some sweeping and very elevated sentiments stating that prohibition. The law condemned the very vice against which the critics of the time railed and which, they claimed, was endemic to ordinary practice within the system of ecclesiastical justice. The assumption of the canon law—one that ran through the texts of the *Corpus iuris canonici*—was that justice should not be sold.

Gratian, the great canonist of the twelfth century and compiler of the *Decretum* (c. 1140), the first of the church’s basic legal sources, condemned bribery several times. He raised the question of whether judges who accepted a reward for doing justice could be defended under the law, and his answer seems unequivocal. They could not. “He who takes a reward in recompense perpetrates a fraud upon God.”<sup>10</sup> It did not matter if his sentence was just. It was the “sale” of justice that constituted the wrong.<sup>11</sup> The love of justice, not a desire for earthly reward, must be the source of every decision made by an upright judge.<sup>12</sup> As another text in the *Decretum* proclaimed,<sup>13</sup> justice was a gift of God, and “He who sells or purchases a gift of God is condemned by God.”<sup>14</sup> Bribery would be very close to the sin of simony, the sale of a holy thing.<sup>15</sup>

The same sentiment and legal precept is found stated in the second of the basic lawbooks of the medieval church, the *Decretales Gregorii IX* (1234) and the *Liber sextus* (1298). Judges were to administer justice without taking any reward in return.<sup>16</sup> In order that justice should be rendered “freely and with all purity,” it was unlawful for judges to take “a charge or anything else” from the parties who appeared before them.<sup>17</sup> To “sell justice” was thus a practice the canon law specifically, repeatedly, and roundly condemned.<sup>18</sup>

In light of the apparent strength of the prohibition, how is the apparent dis-

9. *Deuteronomy* 16:19.

10. C. 11 q. 3 c. 66.

11. C. 11 q. 3 c. 71.

12. See *gl. ord.* ad C. 11 q. 3 c. 66 s.v. *qui recte*. “non quia non amor iustitiae, sed pecunia illud ad veritatem provocavit.”

13. C. 1 q. 3 c. 10.

14. “Qui dona Dei vendunt vel emunt pariter a Deo damnantur.” For the context, see Gaines Post, Kimon Giocarinis and Richard Kay, *The Medieval Heritage of a Humanistic Ideal: ‘Scientia Donum Dei Est, Unde Vendi Non Potest,’* 11 *Traditio* 195 (1955).

15. See, for example, Rufinus of Bologna, *Summa Decretorum* ad C. 11 q. 3 c. 57 319 (Scientia 1963) (Heinrich Singer, ed). For modern commentary, see Noonan, *Bribes* at 119-24 (cited in note 7); John W. Baldwin, *1 Masters, Princes, and Merchants: The Social Views of Peter the Chanter & His Circle* 191-202 (Princeton 1974).

16. See X 3.1.10.

17. Sext 1.3.11.4.

18. See also C. 14 q. 5 c. 15: “Sed non ideo debet iudex vendere iustum iudicium.” See also d.p. C. 2 q. 6 c. 41 § *venales*; X 5.34.16 and *gl. ord.* ad id s.v. *venditionem*; *gl. ord.* ad Sext 1.3.11.4 s.v. *gratis*.

crepancy between law and contemporary criticism of practice in the courts of the church to be explained? To that question more than one answer has been given. One explanation, the most benign, is to say that the criticism was exaggerated, probably the fruit of defeat in litigation. Men easily think their cause is in the right, and as Sir William Holdsworth saw the matter, most medieval accusations of bribery were very likely to have been the result of “the fury of disappointed litigants.”<sup>19</sup> The likelihood, therefore, is that there was actually much less corruption than contemporary criticism suggested. A second explanation is to point to the practical difficulties of putting the canonical rules into effect. As James Brundage stated in his fundamental work on the medieval legal profession in the ecclesiastical courts, “The problem was not a want of standards, but a lack of effective means” by which offenders could be detected and punished.<sup>20</sup> In other words, the canonical norms simply could not be fully implemented in practice because of weaknesses in the enforcement mechanisms available. In fact, if not in theory, the officials who took bribes had no realistic reason to fear detection and punishment, and venal human nature thereby triumphed over the law.

There must be a good deal of truth to both these explanations of the disparity between ideal and reality. Certainly some exaggeration of the venality of court officials occurred. Undoubtedly failures to enforce the canon law’s rules against bribery took place. But is that all? This paper contends that it is not. In fact there is more to the story. To show the complexity of the question, the paper looks more closely at the formal law related to money and judging—in other words, judicial bribes. In particular, the paper examines the treatment of the subject found in the medieval commentaries written by the jurists of the time. Such an examination sheds a little new light on the subject. It leads to the conclusion that many of the complaints were exactly what should have been expected given the state of the law at this time. A closer look at the canon law, as it was interpreted at the time, shows that it left more room for making payments to judges than was compatible with the texts condemning the selling of justice set out above. To critics and to losing litigants, what some canonists were prepared to tolerate might have looked very much like bribery.

## II. GRATIAN’S *DECRETUM*

To understand how the canon law left room for some payments to judges, it is necessary to begin with the treatment of the question in Gratian’s *Decretum*. Gratian’s habit was to put forth a hypothetical case, then to discuss and solve the separate issues raised by the case on the basis of the sources at his disposal,

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19. William S. Holdsworth, 2 *A History of English Law* 564 (Little, Brown 3d ed 1923).

20. James A. Brundage, *The Ethics of the Legal Profession: Medieval Canonists and Their Clients*, 33 *The Jurist* 237, 248 (1973).

including canons of church councils, decretal letters of popes, writings of church fathers, and extracts from Roman law. The primary treatment of the question in the *Decretum* occurs in a *Causa* about the cleric who had sued another cleric before a lay tribunal. For the cleric to have done this was not only contrary to the jurisdictional rules of the canons, but also in direct violation of a sentence of excommunication and suspension from office that had been issued by the offender's bishop. In *Quaestio* 3, Gratian supposed that the sentence of excommunication might have been tainted for various reasons, one of which being that it was given in return for a bribe. That is, he used the factual situation to discuss the hypothetical question of the effect of prejudice, including prejudice caused by the payment of money to the bishop who had acted as the judge in rendering a sentence of excommunication.

The question for Gratian was whether the fact of bribery or other source of prejudice would have rendered the bishop's sentence invalid. His answer turns out not to be entirely straightforward. In dealing with the question, Gratian took pains to compile authorities to show that there might actually be quite a few reasons that would render the sentence of a judge suspect. The sentence might have been given out of anger.<sup>21</sup> It might have been the product of fear of personal consequences to the judge.<sup>22</sup> It might have been issued because of the judge's personal favor for one side over the other.<sup>23</sup> All these, as well as bribery itself, could pervert justice and cause a judge to issue an unjust sentence.

What followed from this litany of possible sources of bias and error? For Gratian, it followed that unjust sentences should be corrected by the judge involved, or else by his superior if he was unwilling to do so. The litigant harmed by the bribe should have recourse to justice through appeal to a higher court as a matter of right. He was entitled to have the sentence overturned in due course. However, Gratian added, the sentence of the bribed judge was not a nullity. It was to be obeyed until recourse to a higher judge had taken place and the sentence of excommunication was lifted. If no such recourse was available, as might well happen, then a higher judge still—God himself—would reverse the unjust sentence and punish the judge who had issued it. Put into modern terminology, a sentence given because of bribery, hatred, fear, or favor was valid until it could be shown to have been unjust on appeal. Sentences given for a bribe were thereby put into a larger class of cases where one of the many things that can come between the truth and right judicial decision had occurred. Litigants and others were required to respect such sentences until overturned. As Gratian put it, "A sentence which is given against any person, not out of love of justice, but for any other cause, is to be obeyed out of humility."<sup>24</sup> Bribery was one of those

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21. See C. 11 q. 3 c. 68.

22. See C. 11 q. 3 c. 80.

23. See C. 11 q. 3 c. 78.

24. D.p. C. 11 q. 3 c. 72: "Huic itaque sententiae, quae non amore iustitiae, sed ex alia qualibet causa fertur in quemquam, humiliter obediendum est."

causes. In other words, bribery was not put into a special category. It was just one of many ways in which justice might be perverted.

It is worth pointing out that the modern law is to the contrary. The problem has of course not disappeared. It is quite possible for a judicial decision to be tainted by many kinds of self-interest: sympathy for a cause, interest in an economic theory, or even a desire to be seen as doing justice despite one's personal interests. Bribery, however, is today treated as a case apart. The *Restatement of Judgments* draws a distinction between causes of bias, including those just listed, and those that "are clear cut, as where a judge or juryman accepts a bribe."<sup>25</sup> In the latter situation, "no worthwhile interest is served in protecting the judgment" and the judgment may be set aside upon a showing that money has changed hands.<sup>26</sup> No more need be shown. The appellate decisions, of which there are happily not many, reach the same result. Bribery is the "most egregious" example of fraud upon the court. If proved, the fact that a bribe was given is in itself sufficient to have the judgment set aside.<sup>27</sup> It is not necessary to show that the sentence was itself in error. With all the other causes of biases to which Gratian had drawn attention, however, the modern rule is that substantive error in the judgment must be shown on appeal.

Why did Gratian take the opposite position about bribery? The answer to that question is not a matter of speculation. Gratian and some other early canonists provide a clear answer. It was the result of their wish to ensure that men and women would respect the church's sanction of excommunication. "The sentence of the pastor, whether it is just or unjust, is to be feared."<sup>28</sup> Gratian invoked this sentiment several times,<sup>29</sup> and it was repeated both in the *glossa ordinaria*, the standard commentary on texts in the *Decretum*, and also in the commentaries of the canonists who commented upon it.<sup>30</sup> The avowed aim of Gratian and the other canon lawyers of the twelfth century was to secure the distinctiveness and the strength of the church's legal position. The *Decretum* grew out of the great movement for reform of church and society, one of the aims of which was the increase of respect for sacerdotal power in society.<sup>31</sup>

25. *Restatement (First) of Judgments* § 124 (1942). Under one view, the later medieval canon law reached the same result. See Panormitanus, *Commentaria super quinque libros Decretalium* ad X 3.1.10 (1517) ("sententia lata intercedente pecunia est ipso iure nulla"). This may have been the result of Sext 1.3.11, which at least raises the possibility of that result.

26. *Restatement (Second) of Judgments* § 70 cmt b (1982).

27. See, for example, *Root Refining Co v Universal Oil Prods Co*, 169 F2d 514, 534-35 (3d Cir 1948); *Johnson v Johnson*, 424 P2d 414, 420-21 (Okla 1967). Happily, most statements of this rule found in judicial opinions are by way of dicta. See, for example, *Wilkin v Sunbeam Corp*, 466 F2d 714, 717 (10th Cir 1972); *United States v International Tel and Telegram Corp*, 349 F Supp 22, 29 (D Conn 1972); *Moya v Catholic Archdiocese*, 755 P2d 583, 587 (NM 1988).

28. C. 11 q. 3 c. 1.

29. See C. 11 q. 3 c. 31; d.p. C. 11 q. 3 c. 72; C. 24 q. 3 c. 6.

30. See, for example, *gl. ord.* ad C. 24 q. 3 c. 4 s.v. *qui intus*; Rufinus, *Summa decretorum* ad C. 11 q. 3 c. 57 312-14 (cited in note 15).

31. See Otto Gierke, *Political Theories of the Middle Ages* 10-15 (Cambridge 1900) (F.W. Maitland,

It should be no surprise, therefore, that Gratian and some of the other twelfth-century canonists took the position they did. It was not that they thought bribes and unjust sentences were admirable or even lawful. It was rather that their sights were set elsewhere—on establishing the respect they believed was due to the church's sanctions. Humility before the power of God's representatives on earth was what they sought. To that goal, other goals took second place. When we remember also that they believed that God would reverse all unjust sentences, and that for this reason such sentences did not really count in the long run, their attitude may come into clearer perspective. Bribing judges perverted justice, and that mattered, but it mattered somewhat less than did some other things.

### III. THE *DECRETALES* OF POPE GREGORY IX

Gratian was half a theologian, and his *Decretum* did not deal with procedural law in a sustained or sophisticated fashion. This cannot be said, however, about the second half of the *Corpus iuris canonici*, the *Decretales Gregorii IX* and the *Liber sextus*, or about the many men who commented upon the texts in them. They were compiled by professional jurists for a functioning legal system. We therefore expect, and indeed we get, much more detailed and lawyerly treatment of the problem of money and judging in the later lawbooks.

Like the *Causae* in the *Decretum*, most of the decretals in the later collections arose out of concrete factual situations, although normally they were real cases that had been appealed to the papal court in Rome. One involved a financial transaction between the judges and a litigant; it was to provide the *locus classicus* for juristic commentary on the subject. The decretal arose out of a situation in which the papal judges' delegate had agreed in advance with the parties that the judges would take a tenth of the amount at stake in return for judging the case.<sup>32</sup> It was something like a contingent fee, except that it was the judge, not the lawyer, who took the money. This arrangement came to the attention of Pope Innocent III (1199-1216), however, and he condemned it. Judges must abstain from every kind of evil, he announced, including this particular form of evil. The judges involved, the decretal went on, were clerics who enjoyed the revenue of an ecclesiastical benefice. They had sufficient resources from which to live honestly without resorting to sordid deals like this one. Moreover, in the Pope's eyes, neither a secular custom, which was said to be the source of this form of payment, nor a proffered subterfuge, which pretended that the money was to be used to pay for judicial assessors, could justify the arrangement. Justice should be rendered without demanding any payment for it.

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trans). See generally Stanley Chodorow, *Christian Political Theory and Church Politics in the Mid-Twelfth Century* (California 1972).

32. See X 3.1.10.



If this sounds like a ringing condemnation of bribes, it was. However, it is never sufficient to stop with the text itself. The lawyers of the time did not. It is always essential to examine how persons involved at the time read the decretal. The canonists regarded it as their duty to subject any decretal to analysis, to search out its true meaning, and to develop different ways of understanding its intent. As so often happened in the *ius commune*, this process led to the development of the kind of subtle refinements later critics would describe as characteristic of scholasticism.

The first of these refinements was to note that the decretal specifically condemned the presumably evil purpose of these judges in agreeing to the contingent fee. The decretal's stated purpose was to root out evil of all kinds from the judicial process. That this would be accomplished by condemning the contingent fee thus rested on a presumption—a reasonable enough presumption—that receipt of money would warp the judgment of the judges involved.<sup>33</sup> That was the substantive evil. Its eradication was the reason that lay behind the decretal's condemnation of the contingent fee arrangement.

But what if the presumption of corruption could be rebutted? That might happen. Overcoming a legal presumption happened elsewhere in the canon law. Simony was the great example.<sup>34</sup> Whether a transaction was illegal simony or a lawful gift sometimes depended upon the donor's intent, and a presumption that a transaction involving money was simoniacal might be overcome by a showing of innocent intent. Thus it might be in the case of judges; the money might not have been given (or received) with an evil motive, but rather "out of the donor's liberality" or for some other legitimate reason.<sup>35</sup> If so, in the eyes of the canonists, the condemnation of evil and the presumption built upon it in Innocent III's decretal might not apply to a different case. Some payments might be tolerated, "because it is unlikely that they would influence the judge's mind."<sup>36</sup>

The argument was buttressed by the fact that in some situations already recognized both in the Roman and canon law, experts could lawfully take money for their services; a physician or a jurisconsult could receive a reward for his labors without being guilty of the evil, or even the appearance of evil, that was being condemned by Innocent III's decretal.<sup>37</sup> Judges were a case apart, of course. Canonical texts distinguished them for many purposes.<sup>38</sup> However, the existing categories showed that the presumption of evil might be rebutted in

33. See *gl. ord. ad X 3.1.10 s.v. abstinere*.

34. See, for example, X 5.3.18.

35. Panormitanus, *Commentaria ad X 3.1.10 no 10* (cited in note 25).

36. See *gl. ord. ad Sext 1.3.11 s.v. consumi*: "Talia enim exennia non sunt lucra . . . et tolerantur ista quia non est verisimile quod propter ista moveretur animus iudicantis."

37. See C. 14. q. 5 c. 15 and *gl. ord. ad id*; X 2.26.16. See also William Durantis, *Speculum iudiciale*, Lib IV, Pt 4, tit *De magistris* (Scientia 1975) (1574) (where the implications of the parallel between the office of the judge and that of other professional men was drawn upon for legal conclusions).

38. See, for example, C. 14 q. 5 c. 15.

some circumstances, and it stood to reason that this might be true in the judicial forum. The canonists had of course to reconcile *all* the texts, not just the particular one upon which they happened to be commenting. Doing so led them to the conclusion that it might be that the wrong against which this specific decretal had been directed could not have been meant to create a blanket prohibition against monetary payment for services rendered. If it had, its words would contradict too many other texts. Thus the papal prohibition could not have been intended to invalidate every kind of payment made to court officials. At least so argued some of the commentators.

The second refinement was based upon the fact that the decretal itself drew a distinction between the contingent fee arrangement and “the expenses of food and drink.” The latter could lawfully be provided for the judges by the terms of the decretal itself. This distinction was amplified by a later text placed in the *Liber sextus* that permitted “moderate victuals such as can be consumed in a few days” to be given to the judge and his officers.<sup>39</sup> In itself, this exception need not have made much of an inroad in the rule. What is a ham sandwich and a Coke? The question is how the jurists understood the exception; in short, whether it referred to the one, and only, sort of payment that could be made to a judge, or instead whether it was meant as one example of several possible non-corrupting payments. The *glossa ordinaria* defining the word *expensae* shows which of the two it was understood to be by contemporaries: it was to be the latter.

The analysis leading to this result began by drawing an analogy between payments made to judges and those made to witnesses.<sup>40</sup> Payments made to witnesses lawfully encompassed the costs of making the trip to testify as well as food and drink, for the laws were clear that “no man can be compelled to use his property for the benefit of others,”<sup>41</sup> and that “it is not just for a man to labor without reward.”<sup>42</sup> Witnesses must be made whole. Roman law was also called upon for clarification, and Roman law prohibited rewards, not charges (*munera*, but not *sumptus*). It also expressly allowed small gifts (*xenia* and *sportula*) to be made to judges.<sup>43</sup> Citing these authorities with apparent approval, the *glossa ordinaria* opted for a prohibition against large gifts and against any gifts at all where the litigants were poor. But it did not bar the door entirely. Indeed, one might even say that it opened the door. No fixed sum turned a gift into a bribe.<sup>44</sup> The question turned on the resources of the people involved, customary local usages, and actual level of expenses incurred.<sup>45</sup> The term “victuals” might

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39. Sext 1.3.11.4.

40. See *gl. ord. ad Sext 1.3.11.4 s.v. moderatas*.

41. C. 10 q. 2 c. 4; X 2.26.16.

42. C. 7 q. 1 c. 49; C. 12 q. 2 c. 45.

43. See Dig. 1.16.6 and Dig. 1.18.18. See also *gl. ord. ad id.*

44. See Panormitanus, *Commentaria ad X 3.1.10* no 9 (cited in note 25) (noting that it was “doubtful” whether ecclesiastical judges were legally entitled to receive *sportula* at all).

45. See *gl. ord. ad Sext 1.3.11 s.v. paucis*: “Cum numerus non adiicitur crederem arbitrio boni iudicis

even logically extend to include clothing and habitation.<sup>46</sup> In this way, the law as interpreted by the standard gloss left ways in which payments might lawfully be made to court officials. It would not be too surprising to discover that the phrase “moderate expenses” would be interpreted liberally by the litigants and officials involved.

The third refinement of the law stated by the decretals was to distinguish those judges whose offices carried with them sufficient revenues to pay for judging from those judges without such resources.<sup>47</sup> The bishop was the obvious example of the first. By virtue of their office, medieval bishops were endowed with lands and rents sufficient to keep them in some style. Most were rich, and some were very rich. They had a responsibility of doing justice as part of their office, and this office invariably carried with it an adequate income. They had no need to ask for a special payment, and if they did it was very likely to have been meant as a bribe. Its purpose could be presumed. This would have been one reason for condemning the contingent fee arrangement mentioned in the decretal of Innocent III.

The difficulty was that by the mid-thirteenth century, in practice bishops rarely acted as judges themselves. As a papal decretal of 1245 recognized and authorized, bishops commonly appointed men, who were called their *officiales*, to act as judges in their stead.<sup>48</sup> These *officiales* rarely had comfortable incomes from other sources. Indeed some of them came directly out of the law faculties of the universities, and held no other office in the church whatsoever. They were lawyers and professional judges, receiving no “salary” of right from the bishops who appointed them.<sup>49</sup> Unless they were lucky, they also held no benefice to fall back upon for a living. This meant that they fell within the group of judges the canonists allowed to receive gifts from litigants. Because of their need, they were allowed to take some payment for their efforts. In other words, their situation was distinguished from that involved in the strictest condemnations of bribery found in the texts, because they could be distinguished from the judges to whom the condemnations had been issued.

All of these three possible refinements to the prohibition against making payments to judges were found in the standard *glossa ordinaria* of the canon law. They would thus have been commonly known to all ecclesiastical lawyers, and possibly even to some litigants, throughout the Middle Ages. The short of it was that, when the gloss had finished with Innocent III’s decretal, the strong condemnation of the association of money with judging it seems to contain had

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relinquendum, habita etiam consideratione personarum . . . et consuetarum expensarum qualitate.”

46. See *gl. ord. ad C. 10 q. 2 c. 7 s.v. victi*: “sed nomine alimentorum intelliguntur vestes et habitatio.”

47. The distinction was drawn, for example, in Panormitanus, *Commentaria ad X 3.1.10 nos 11-12* (cited in note 25).

48. See Sext 2.15.3.

49. Irene J. Churchill, 1 *Canterbury Administration: The Administrative Machinery of the Archbishop of Canterbury* 543 (Society for Promoting Christian Knowledge 1933).

been considerably diluted. At least it offered possibilities for bringing payments made to court officials within the limits of formal law.

#### IV. WILLIAM OF DURANTIS, HOSTIENSIS, AND JOANNES ANDREAE

In the medieval *ius commune*, the opinions of the commentators often had decisive effect. It is sensible therefore to take a look at the subject as it was dealt with by three of the most prominent jurists from the thirteenth century. I have chosen the most influential proceduralist of the time, William Durantis (d. 1296), and two representative decretalists (i.e., commentators on the *Decretales* of Gregory IX), Hostiensis (d. 1271) and Joannes Andreae (d. 1348). The first of the three men is probably the most important for this subject, although he was the least intellectually able of them. His special importance stems from the fact that his treatise, called the *Speculum iudiciale*, summarized at some length the common learning of the time about procedure and practice in the courts. It became a standard reference work used in the courts themselves and was influential beyond its merits.

The *Speculum iudiciale* has a separate title devoted to the subject of bribery. That title goes over most of the law just sketched out, but it also adds two interesting points by way of suggestion or possibility. First, the treatise took note of the force of custom in regulating practice. Recording that in the patrimony of St. Peter and the Romagna it was the custom to take the value of the suit and give judges twelve pence to the pound of that value, the *Speculum iudiciale* went on to discuss its validity. It gave what can only be called a cautious endorsement of the force of custom.<sup>50</sup> Durantis wrote, "In the aforesaid, it *can be* that the custom is valid."<sup>51</sup> After stating the canonical rule against making any payment to the officials in litigation, he qualified it, saying, "Understand, unless it is otherwise by custom."<sup>52</sup> Custom, here as in many places in the *ius commune*, might have the force of law.<sup>53</sup> Durantis was himself cautious about blessing such customs, because they easily led to abuses. However, he did not altogether condemn custom's role as an argument in favor of the legality of giving a reward to judges for their services. He left the door ajar.

This possibility of a lawmaking role for custom was buttressed by a more technical argument put forward by Hostiensis. He suggested that the custom

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50. See Durantis, *Speculum iudiciale*, Lib I, Pt 4, tit *De salariis*, no 9 (cited in note 37): "Nam in patrimonio beati Petri et in provincia Romaniolae statim post litem contestationem datur de libra xii denarii."

51. Id at no 13: "In praemissis autem potest consuetudo valere."

52. Joannes Andreae, *Lectura aurea super libros decretalium* ad X 3.1.10 (1512): "Intelligas nisi aliud sit de consuetudine." For an extended treatment coming to the same conclusion, see Henricus de Segusio (Hostiensis), *Lectura in libros Decretalium* ad X 3.1.10 s.v. *super decima* (1572).

53. Udo Wolter, *Die consuetudo im kanonischen Recht bis zum Ende des 13. Jahrhunderts*, in Gerhard Dilcher, et al, eds, *Gewohnheitsrecht und Rechtsgewohnheiten im Mittelalter* 87, 104-14 (Duncker & Humblot 1992).

mentioned in Innocent III's decretal of giving a certain percentage to the judge had been condemned because it was "unreasonable."<sup>54</sup> This was indeed the standard canonical reason for invalidating a custom. However, he went on, if this custom were being condemned because it was unreasonable, this must logically imply that some other customs might be reasonable. He did not spell out exactly what they would be, but he too opened up the possibility that there could be a custom that would pass the test of reasonability. If both sides gave something to a judge, he speculated, money might not pervert his judgment.<sup>55</sup> It was possible that such a custom would pass muster. Payments to court officials were therefore not unlawful *per se*.

Second, the *Speculum iudiciale* drew a distinction between demanding a payment and receiving one.<sup>56</sup> The first was clearly condemned; the second was less clear. If the texts prohibiting judges from taking money from litigants were read as forbidding only the *extortion* of money, not its *acceptance* if freely offered and small enough to be otherwise uncorrupting, then the simple fact that money had changed hands would not be sufficient to conclude that a gift constituted bribery. Again, Durantis himself was cautious. He did specify that the amount received must be moderate, and he was far from endorsing a rule calling for such gifts to be made as a matter of right or routine. Still, the distinction meant that justice would not have been sold within the meaning of the law, unless the money was something like a *quid pro quo* demanded by the judge as the price of his learning and his consideration. Under this test, some gifts might be consistent with the purpose of the law, i.e., to prevent a sentence being given in exchange for money.

In condoning the receipt of payments from litigants by court officials, Durantis and the other canonists drew support from the Bible. St. Paul's First Letter to the Corinthians contains a statement that no soldier serves at his own charges.<sup>57</sup> The phrase was incorporated into the canon law,<sup>58</sup> and it appeared time after time in medieval commentaries. Just as no soldier in an army could be compelled to serve without pay, no soldier of the Lord should be compelled to give away his services.<sup>59</sup> The canonists did not read this biblical text as if it contradicted the legal texts prohibiting bribery. That would have been impossible. It would have gone against their basic assumption that the canon law incorporated biblical norms. The biblical text thus served rather to justify the readings of the texts that softened their impact by making exceptions to the canonical rules

54. Hostiensis, *Lectura ad X 3.1.10* (cited in note 52): "Mos iste de decima parte litis exigenda irrationabilis est et contra legem."

55. Id ad X 3.1.10 s.v. *more secularium*.

56. Durantis, *Speculum iudiciale*, Lib I, Pt 4, tit *De salariis*, no 5 (cited in note 37): "Si autem aliquid sponte offertur per modum xenii; si sit moderatum recipere potest."

57. See 1 *Corinthians* 9:7.

58. See, for example, X 2.26.16.

59. See, for example, Hostiensis, *Lectura ad X 3.1.10* s.v. *praeter expensas* (cited in note 52).

against making “gifts” to judges.

From the perspective of medieval theology, which was incorporated into the law of the church at this point, in this area of the law the jurists drew a four-fold classification between different types of human acts. Some things were inherently good and could not be made evil (e.g., praising God). Some things were inherently bad and could not be made good (e.g., adultery). Some things were inherently good, but could also be productive of evil (e.g., pulling out a weed from the ground, whereby support for a structure was withdrawn). Some things were inherently bad, but could be the source of good (e.g., refusing to return a borrowed sword knowing that the lender wished to use it to kill). Which was a gift made to a judge? Joannes Andreae put gifts to judges in the fourth category.<sup>60</sup> In themselves, they were productive of evil, but they might also be means of restoration of the right. That was undeniably true. If justice could not be achieved otherwise, making a gift to court officials could be a bad means to a good end. This perspective, like the others provided, was less than a blanket condemnation of the practice.

From today’s perspective, it is important also to recognize the practical strength of these arguments. The medieval church proclaimed that justice must not be bought and sold, but it did not provide expressly for a way of securing a living for those who served the courts. It was an untenable position. It was quite unrealistic to suppose that men would toil in the courts for no reward. The canonists recognized this. Hence their repeated use of the biblical maxim that soldiers could not be compelled to serve without reward. Their arguments supporting the various customs that allowed both sides to make moderate payments to judges may also be viewed in this light. As Hostiensis himself noted realistically, judges brought expertise to the quarrels that came before them, and “it is wholly inhuman to expect men to desire to receive nothing [in return].”<sup>61</sup>

## V. CONCLUSION

There are two general points to be made in conclusion. First, the commentators on the *ius commune* did not present most of the arguments making inroads in the condemnation of bribery as more than possibilities. A few they regarded as downright wrong. For example, they often noted that there was a way to read a text as prohibiting any but the most insignificant payment to be made to a judge, but it was not unusual for them to add, “However, the text can be understood more broadly,” or “Nevertheless there is an argument to the contrary.”<sup>62</sup>

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60. See Joannes Andreae, *Lectura ad X 3.1.10* (cited in note 52).

61. Hostiensis, *Lectura ad X 3.1.10 s.v. praeter expensas* (cited in note 52). The source of the statement, however, was Dig. 1.16.6.3.

62. See, for example, *gl. ord. ad C. 12 q. 2 c. 45, rubr* (“Dicit Huguccio quod nomine subsidii intelligitur procuratio tantum, licet posset etiam aliter intelligi”); *gl. ord. ad X 3.1.10 rubr* (“licet sit argumentum contra,” citing C. 14. q. 5 c. 15).

The commentators often described the possibilities they were discussing as “doubtful” or “less likely” than the opposite view. In other words, they made arguments they did not necessarily endorse.<sup>63</sup> This was their habit. It was not peculiar to this area of the law. Later observers found this habit disquieting. Richard Hooker (d. 1600), for example, would describe the *ius commune* as a law “of infinite doubts and difficulties.”<sup>64</sup> But the doubts and difficulties were a regular feature of the law of the medieval church. In the context of money and judges, what can be said is that this feature of the law offered a possible mitigation of rules in texts that otherwise appeared to impose a flat ban on judicial receipt of money from litigants. They provided arguments in favor of such payments, even though they did not always wholeheartedly endorse them.

Second, even given their most extensive reading, the exceptions to the ban on giving money to judges never entirely swallowed the rule, as happened in some other areas of the *ius commune*. The condemnation of bribery remained prominent in the texts. The ideal of justice as something that must not be bought and sold was many times repeated in the canon law. Moreover, the jurists did not directly endorse anything more than a “modest gift” passing into the hands of a judge. What the jurists did do, however, was to provide arguments that judges should receive something in recompense for their efforts. When all is said and done, the prohibition against money coming into the hands of the judges was much less absolute than it appears at first sight. It cannot come as a great surprise to find that in the lists of expenses incurred by litigants in the ecclesiastical courts during the Middle Ages, mention was very often made of something for the judge and other officials of the court.<sup>65</sup>

The greatest of the fifteenth-century canonists, Panormitanus, himself confirmed the essential accuracy of what the records show. About the payments made to judges by litigants, he wrote, “[A]lthough all men today make use of fair words, nevertheless in their own minds they are acting so that the judge will pronounce sentence in their favor.”<sup>66</sup> It was a recognition of reality on his part. Litigants and judges were taking advantage of the arguments offered by the medieval jurists. Panormitanus, although a canonist himself, nevertheless thought that the legal justifications found in their writings were in fact covers for attempts to influence the outcome of litigation.

At least from the perspective of contemporary critics, the words of Panor-

63. See, for example, *gl. ord. ad C. 12 q. 2 c. 45 s.v. stipendium*: “Item est hic argumentum quod iudices licite possunt petere sumptus a partibus.”

64. Richard Hooker, *Of the Laws of Ecclesiastical Polity* Bk 8 c 3.5, 3, in W. Speed Hill, ed, 3 *Folger Library Edition of the Works of Richard Hooker* 353 (Belknap 1981).

65. See, for example, Brian Woodcock, *Medieval Ecclesiastical Courts in the Diocese of Canterbury* 136-37 (Oxford 1952); C.L. Feltoe and Ellis H. Minns, eds, *Vetus Liber Archidiaconi Eliensis* 163 (Cambridge Antiquarian Soc’y 1917); Roland A. Marchant, *The Church Under the Law: Justice, Administration and Discipline in the Diocese of York, 1560-1640*, 246 (Cambridge 1969).

66. Panormitanus, *Commentaria ad X 3.1.10* no 8 (cited in note 25) (“nam licet omnes hodie utuntur bonis verbis nichilominus mente id agunt ut iudex ferat pro eis sententiam”).

mitanus stand as a confirmation of the truth of the complaints so frequently made about the courts of the medieval church. Money was changing hands. Critics, at least if they were like John of Salisbury, would not have been much impressed by the sophisticated analysis of the jurists. Nor would the “fair words” offered by the men involved have convinced them. They would have seen the payments and concluded that the object of the church’s legal system was to collect the money. Whether the judges involved would themselves have done more than accept the system as it existed is a harder question to answer. A few, like William Doune, surely did so. But Doune’s self-reproach came only at the end of his life. By then, he himself was soon to face a judge to whom no money could be given.



