The Second Part of the Tractatus De Materia Concilii Generalis of Pierre D'aiilly

Patrick Lally

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THE SECOND PART OF THE
TRACTATUS DE MATERIA CONCILII GENERALIS
OF PIERRE D'AILLY

by

Patrick Lally

A Thesis
Submitted to the
Faculty of The Graduate College
in partial fulfillment
of the
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MASTERS THESIS

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SAMPLES OF LEGAL REFERENCES

**Decretum**

D.40, c.6: Distinctio 40, Chapter 6.
C.11, q.3, c.41: Causa 11, Questio 3, Chapter 41.

**Decretals of Gregory IX**

X, 5, 31, c.8: Book 5, Title 31, Chapter 8.

**Liber Sextus**

VI⁰, 5, 11, c.9: Book 5, Title 11, Chapter 9.

**Clementinae**

Clem. 1, 3, c.2: Book 1, Title 3, Chapter 2.

**Glossa Ordinaria to the Decretum**

D.40, c.6, in v. a fide devius: gloss on a fide devius, Distinctio 40, Chapter 6.

**Glossa Ordinaria to the Decretals of Gregory IX**

X, 5, 31, c.8, in v. potestati: gloss on potestati, Book 5, Title 31, Chapter 8.

**Codex Iustiniani**

C.5, 59, 5: Book 5, Title 59, Section 5.

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INTRODUCTION

The Great Schism

The Tractatus de materia concilii generalis must be viewed in the general historical context of the Great Schism in the Latin Church. To understand the work requires some knowledge of the beginning of the Schism, of the roots and course of the dissension, of the attempts at solution and the traditions out of which they came. Here complex issues and events are necessarily given brief treatment. As Brian Tierney writes:

An adequate account of all the intricate schemes that were set on foot in the years of the Schism, the desperate expedients of exasperated churchmen, the evasions of the rival pontiffs, the manoeuvrings of the Catholic princes, could be undertaken only in the context of a full-scale diplomatic and ecclesiastical history of Europe at the end of the fourteenth century.¹

As the College of Cardinals met in electoral conclave on April 8, 1378, the city of Rome was beset by civil disturbances. Since the end of the troubled pontificate of Boniface VIII in the first decade of the century the popes had resided in the papal enclave of Avignon in southern France. They had all been French, and their cardinals had been predominantly so. Though it may be apparent now that a major reason for deserting Rome was the chronic disorder

¹Tierney, Foundations, p. 238.
of the Italian peninsula and the city, though it may be shown that these French popes displayed remarkable independence from the French crown, though it may be shown that the centralizing of policy and finance which characterized the Avignon years was not as totally sinister as was once thought, though the uselessness and decadent luxury of the papal court may be found to have been exaggerated, it is important to realize that contemporaries suspected the worst in all these areas. Italians, especially Romans, felt particularly aggrieved. The absenteeism of their bishop meant the loss of revenue, the dissipation of ecclesiastical property, a slump in tourism, and a general loss in prestige. The outcry of many concerned parties, plus the ravaging of France in the Hundred Years' War, led to a rising impetus toward the reestablishment of residence at Rome. Following up some earlier efforts, Urban V (1362-1370) brought the curia back to Rome, but after three years vainly attempting to reestablish order there, he returned the court to Avignon. His successor, Gregory XI, repeated this action—but died before he could depart Rome.

The sixteen cardinals who were with Gregory (six others were at Avignon, and one was on a mission in Tuscany) immediately met to elect a successor. There were four Italians and one Spaniard; the rest were French. With the clamor of the Roman mob for "a Roman, or at least an Italian!" and the nervous embassies of civic leaders, the conclave itself
lacked harmony. There was a brief stalemate because the French majority was divided: the six Limousin\(^1\) cardinals were as determined to elect the fifth consecutive pope of their region as the other Frenchmen were determined to prevent it. Of the two Roman cardinals, one was considered inexperienced, one too feeble, and anyway the cardinals were reluctant to show total servility to the populace. This opened the way to a compromise candidate favored by the Italian cardinals, Bartholomew Prignano, archbishop of Bari. A man of reputed good character and scholarship, his years of curial service made him agreeable to the cardinals even though he was not of their number. He seemed an admirable choice to at once satisfy the interests of the Church and the cardinals and placate the Roman demands.\(^2\)

But Bartholomew, who took the name Urban VI, soon displayed a lack of tact in attempting to curb the worldliness and extravagance of the cardinals. During May and June all of the cardinals except the Italians made for Anagni, away from Urban. By the end of September they had broken completely with him. Alleging that the mob had put the conclave under duress, they repudiated Urban's election as invalid. On

\(^1\)"Limousin" refers to a region of southern central France, the center of which is Limoges.

\(^2\)For an exhaustive account of the stormy election, with critical examination of sources, see Ullmann, Origins, pp. 9-43.
September 20, they elected a French cardinal, Robert of Gen­
eva. He took the name Clement VII and took his court to Av­
ignon.¹

King Charles V of France, at first hesitant, threw his
support behind Clement. The resulting alignment of papal
allegiances reflected the diplomatic array of rival nations
at the time. France, Scotland, Navarre, Castile, Aragon,
and some German princes adhered to Avignon, while England,
Gascony, Flanders, Portugal, the empire and most of the Ger­
man princes, Bohemia, and Hungary aligned themselves with
Rome. Italy was split as usual.

Who was the true pope? With Europe evenly divided,
with no clear legal theory to resolve the issue, the con­
flict did not often rise above personalities and power pol­
itics. Each side excommunicated the other but expressed
willingness to accept the abdication of the rival on lenient
terms. Since neither claimant could displace the other, the
new break was graver than any of its predecessors within
the Latin Church. It was to last until 1417 and was to be
further complicated when the abortive attempt of the Coun-

¹Ibid., pp. 44-69. Ullmann’s study of the events fa­
vors a definite verdict: the dissident cardinals regarded
Urban’s election as valid at the time of the election, and
until their estrangement due to his tactless and abusive
manner, gave no sign that his legitimacy was a question at
all. In fact, they gave every sign that there was nothing
at all amiss. Also, their case against Urban had little
solid basis in canon law. Tierney concurs in this last
judgment, Foundations, pp. 75-76.
cil of Pisa (1409) to heal the rift led to a third line of papal claimants. At the death of Clement VII (1394), his curia elected Benedict XIII; Urban VI was succeeded by Boniface IX (1389-1404), Innocent VII (1404-1406), and Gregory XII (1406-1415).

The Church suffered grievously. Her cherished unity was shattered. Rival pontiffs appointed rival bishops and abbots, maintained rival courts, sent out rival legates, levied rival taxes. Public worship was disrupted as dioceses were torn apart. Questions arose as to the legitimacy of Masses and sacraments. Scholars, theologians, lawyers, and saints lined up on opposing sides.

People could readily see that the Schism had to be healed. To the chorus of cries for unity were added more strident voices asserting that simple reunion was insufficient. That was only to treat the effect of the Church's maladies. There must be, hand in hand with reunion, a thorough reform in head and members, to root out the abuses that had been plaguing the Church for years.

A variety of schemes were set afoot to heal the Church. Princes sought to bring down the rival pope by resort to political pressure. Many urged the mutual cession of both contenders to pave the way for a candidate of unity. For a time (1398-1403) much of Europe withdrew obedience from both in a vain attempt to force both to yield. But gradually the cry for the calling of a General Council became
most insistent, as other avenues were sealed off or proven unproductive.

Sources of the Conciliar Movement

It has been generally agreed for some time that conciliar theories were not unprecedented novelties invented on the spot to solve the pressing emergency. Understandably the earliest modern works tended to concentrate on relating conciliarism to the immediate situation of the Schism, but there has been a gradual expansion of investigations into the roots of conciliar thought and with it a growing realization of the depths of these roots.¹ It has been commonly pointed out that conciliarist ideas were anticipated by certain imperial, papal, curial, and episcopal publicists of the early fourteenth century, such as John of Paris, William of Ockham, and Marsilius of Padua.

There are objections to locating the sources of conciliarism amid these publicists. It has become evident that the publicists relied heavily upon the legal corpus of the Church for their own ideas.² About William of Ockham Brian

¹For a summary of modern scholarship on this topic, see Tierney, Foundations, pp. 7-13, or Oakley, D'Ailly, pp. 198-207.

²Recently, scholars have fruitfully explored hints of earlier writers about the canonistic sources of Marsilius, William, and John. See C. C. Bayley, "Pivotal Concepts in the Political Philosophy of William of Ockham," Journal of the History of Ideas, X (1949), 199-218. Tierney, in "A
Tierney writes that as far as conciliar theory is concerned, he "was most influential precisely when he was least original." Elsewhere he writes:

> It may be doubted whether even the circumstances of the Schism could have induced so many devout and distinguished churchmen from so many countries to subscribe to doctrines invented by known heretics a couple of generations earlier.

This is an especially cogent argument when applied against any alleged influence of Marsilius, a champion of the secular state. The conciliarists wished to reform the papacy but in general did not deny its divine origin. Nor were they enemies of ecclesiastical prerogatives. As Oakley has pointed out, although the conciliarists, in common with Marsilius, stressed such ideas as the residence of ultimate authority in the community, so did John of Paris and William of Ockham. And these two deduced from them conclusions less

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Conciliar Theory of the Thirteenth Century," Catholic Historical Review, XXXVI (1951), 415-40, and "Ockham, the Conciliar Theory and the Canonists," Journal of the History of Ideas, XV (1954), 40-70, argues that in his methods of manipulating canonistic texts nothing greatly distinguishes Ockham's technique from that of the canonists, and that he and John of Paris were repeating arguments of the canonists Huguccio (d. 1210) and Hostiensis (d.1271) in explaining several of their key doctrines of ecclesiastical authority. In the former article, Tierney also deals with Marsilius. See Tierney, Foundations, pp. 157-78, for a full discussion of the canonistic roots of John of Paris.

1 Tierney, "Ockham," 70.
2 Tierney, Foundations, p. 10.
3 Oakley, D'Ailly, p. 206.
radical, and at least in John's case, more germane than Marsilius'. Significant anticipations of publicist positions are to be found among the early canonists, and if the main lines of indebtedness for the conciliarists are said to run to men like John and William, it must be understood that they also run on crucial issues through and beyond them, sometimes even independently of them, to the medieval canonists.

Another interpretation of the origin of conciliarism has been advanced by J. N. Figgis. He holds that while the contribution of the publicists and the pressure of emergency were important, the real source of conciliarism was the constitutional example of the secular states, that the conciliarists discovered the applicability of secular constitutionalism to the Church, and that conciliarism failed because academic ideas were unable to stand up to political reality or the deep tradition of papal monarchy.¹

It is true that in late medieval times Church and State shared constitutional issues and problems. Both were learning from the experience of corporate organization and the recep-

¹Figgis, Gerson to Grotius, pp. 31-55. Figgis found support in the writings of Otto von Gierke, for example: "More and more distinctly and sharply men were conceiving of the Church as a Polity, and it was natural therefore that in the construction of this Polity they should employ the scheme of categories which had in the first instance been applied to the temporal State." Political Theories of the Middle Age (trans. F. W. Maitland; Cambridge: Cambridge University Press, 1922), p. 49.
tion of Roman law. Centralization stimulated local protest; representative assemblies, first summoned to enhance the sovereign, could learn to give collective expression to such protest and perhaps take advantage of a crisis to assert themselves. The rise of a central bureaucracy, which could also acquire corporate identity, was an added threat to the ruler's exercise of power. Naturally, the rise of papal monarchy involved these problems, and their existence was reflected in the Church's growing legal literature. Tierney points out what Figgis overlooked: when churchmen, including conciliarists, surveyed their difficulties, they would naturally turn for guidance not to secular law and constitutionalism but to ecclesiastical jurisprudence. Indeed, it may even be argued that the resemblance between conciliar theories and secular constitutional experiments is due partially to canonist influence upon the secular sphere.

Tierney, building upon the suggestions of Gierke, H.-X. Arquilliere, V. Martin, Walter Ullmann, and others, has

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2 The growth of representative institutions and organs of restraint is a vast topic, in which the medieval canonists played a large role. Tierney, "Some Recent Works on the Political Theories of the Medieval Canonists," Traditio, X (1954), 594-625, discusses the literature on canonist ecclesiology and political theory, 1945-1954; for later years
set out to account for the origins and early development of conciliar theory. He has concluded that while we must not overlook the impact of other factors, the essential roots of conciliarism are not found in the spontaneous reaction to the emergency of schism, nor in the fourteenth-century publicists, nor in the example of secular states, but in canon law and the canonistic commentaries. Indeed, it is curious that this influence on the conciliarists has been so long overlooked or played down, replete with canonistic citations as some of their works are.

It has been widely held that canonistic doctrines were solely directed toward and useful for the extension of papal absolutism, that this was the canonist theory of sovereignty. It is true that the canonists maintained the superiority of the spiritual power over the secular; they were pro-papal in the sense that they were anti-imperial. But though they did not question the hierarchical conception of the Church, they found room within it for a variety of theories on the

nature of the power implied in the welter of individuals and corporations which formed the Universal Church. Consequently, canon law became the common armory of the most bitter antagonists on a variety of issues. Far from being a reaction against canonistic views, conciliarism was a logical culmination of certain canonistic strands, part of the outcome of attempts by generations of canonists, the greatest of whom were practical men of affairs as well as scholars, to rationalize the everyday life and organization of the Church while maintaining contact with ancient doctrine.

Apart from this misunderstanding of the nature of canon law, the neglect of canonist origins of conciliarism has been fostered, Tierney suggests, by the sort of interpretations of conciliarism mentioned above, in which it is seen as accidental, thrust upon the Church from outside, "rather than as a logical culmination of ideas that were embedded in the law and doctrine of the Church itself."¹ One cannot understand the nature of the ecclesiastical polity nor the constitutional crisis of the Schism without examining the legal background from which all the protagonists drew their claims, upon which any ecclesiastical constitution had to be erected, and in which the late Church formed and disciplined her young clerics.

From the vantage point of the late fourteenth century,

¹Ibid., p. 13.
one might discern two doctrines of Church unity in the canonistic literature of the previous centuries. The most conspicuous one, the one which has often been regarded as the canonist doctrine, held that the unity of the Church could only be secured by the strict subordination of all to the pope. "But side by side with this there existed another theory, applied at first to the single churches and then at the beginning of the fourteenth century, in a fragmentary fashion, to the Roman Church and the Church as a whole, a theory which stressed the corporate association of the members of a church as the true principle of ecclesiastical unity, and which envisaged an exercise of corporate authority by the members of a church even in the absence of an effective head."¹

There was an ambivalence already apparent among the Decretists—an ambivalence produced to some degree by the nature of the Decretum²—over the nature and concept of the Church itself. The Decretists maintained a balance between the doctrines of papal supremacy and the concept of the Church as the whole congregation of the faithful (congregatio fidelium) having its own inherent and indestructible

¹Ibid., p. 240.

²The Decretum (c. 1140) was the work of the Camaldolese monk Gratian. Epic-making in its scientific approach and universal applicability, it was a running argument in which the legal accretions from a millennium of Christian life were cited, with an attempt at clarification and harmonization. The Decretists were the legal scholars involved in studying, teaching, and further elucidating the texts of the Decretum and the dicta of Gratian.
authority, both found in the Decretum, by taking advantage of the Decretum's ambiguous use of the term "Roman Church" (Romana ecclesia). In some contexts it designated the Universal Church; in others, the local church of Rome, superior to the other local churches in dignity and power. An even deeper ambiguity existed: ecclesia itself sometimes designated the prelate who headed a church corporation or community, sometimes all the members of that group, sometimes an intermediate group of clergy. In the late twelfth century the Decretist Huguccio was instrumental in formulating a tradition that was to have great impact in the fourteenth century. He held that any theory of church government must be founded on a distinction between the inherent authority of the Romana ecclesia, understood as the congregatio fidelium, and the power that could be exercised by the local Romana ecclesia, and that in matters of faith, the only Romana ecclesia which bore the divine promise of inerrancy and indefectibility was the Universal Church, the congregatio fidelium. But in line with the general move toward papal monarchy and centralization in the first half of the thirteenth century, especially among the Decretalists,¹ the canonists of that era clarified the status of

¹The Decretum was followed by an accelerated issuance of papal decretals and their collection. The Decretalists were the scholars of this material. At the risk of oversimplification, some comparison and contrast between Decretist and Decretalists may be made. The former were generally prior in time, exhibiting more boldness, vitality, syncr-
Romana ecclesia, defining it as the local church of Rome, which had by divine gift the exercise of all the powers and privileges which Christ had bestowed upon the Church forever. To this Roman Church the other local churches were subordinate, dependent on it for their authority, united to it as body and members to the head.¹

But simultaneously, the thirteenth-century Decretalists had to define ecclesia from a different point of view, due to the pressure of intricate problems of the structure of local churches and other ecclesiastical corporations. Their resolution here pointed in a direction different from that of their larger scale development of the term Romana ecclesia. Combining the Scriptural insistence that ecclesiastical authority is conferred for the good of the Church, not for the prelate's glory, and that cleric's should be servants, not masters, with existing doctrine on counsel, consent, and distribution of ecclesiastical property, and with elements of Roman private law, they worked out the idea that the prelate is proctor of his corporation, that in some way the consent of the corporation is required for affairs pertaining to the general well-being, and that in case of grave default or vacancy in the headship, the governmental

tism, and ambiguity than the later Decretalists, who were more given to dry and labored erudition, systematic analysis, and high papalism.

power (potestas iurisdictionis) devolves to the corporation itself. ¹ The Decretists had become aware of the problems of Matt. 16:17-19 for the relationship of Peter to the other apostles. They had avoided the implication that all the apostles received power equal to Peter's by an influential distinction between the sacramental power of orders which all received equally and the governmental powers of jurisdiction bestowed in a superior fashion on Peter. There was general agreement that the former power was handed down through the agency of an ecclesiastical superior, the latter (the governmental powers), through the agency and election of the Christian community. ² It was to this potestas iurisdictionis that the Decretalists were directing their atten-

¹Tierney has suggested that in the thirteenth-century refinement of proctorial prelacy we may find the line between the earlier medieval concept of representation as personification and the modern one, growing increasingly explicit in the fourteenth century, that representation requires an actual delegation of authority from the community. Tierney, Foundations, p. 126. For a full discussion of the canonist theorizations on the structure of the ecclesiastical corporation, see pp. 106-131 in the same work.

²A problem of medieval political philosophy was the reconciliation of conflicting legacies concerning the font of political power. On the one hand was the Scriptural and patristic tradition of authority descending from God; on the other were the influence of Roman law that political associations are voluntary in origin, of German tribalism that the leader in some way holds authority by popular election, and of feudalism that political associations arise from human contract. The solution adopted by the canonists is expressed philosophically by Aquinas in his Commentary on the Sentences, Book II, Dist. 14, Quest. 2, Art. 2: God is the formal cause of authority, but this ultimate source does not exclude a material cause—a human act—in erecting a particular form of government. As can be seen, Aristotle
tion, and their analysis made more explicit the idea that this power in some way resided in the community.¹

¹Tierney, Foundations, pp. 117-27. It is well to keep in mind that in this discussion the canonists and later the conciliarists of the era of the Councils of Pisa and Con­­stance were not concerned with the sacramental power (potestas ordinis), conferred from above and equal in all apostolic successors, but rather with the power of regulating subjects and governing them to salvation, the governmental power (potestas iurisdictionis). This latter power was not possessed to an equal extent by all of the apostles but was conferred in its fullness (plenitudo potestatis) upon Peter alone. A basic problem confronting conciliarists was that of deciding just what was entailed in the government of the Church by this plenitude of power. The constitutional implications of d'Ailly's brand of conciliarism are often misunderstood due to a failure to see the distinction between orders and jurisdiction. For d'Ailly, conciliarism had to do, not with the power of orders, nor with an unerring magisterium, but with the location within the Church of final responsibility for the potestas iurisdictionis which was normally exercised in fullness by the pope. Still, there seems to have been some confusion and blurring of distinctions. The fact that the issue of the locus of inerrancy is so often raised in discussions of these governmental powers seems to be an indication of how closely these thinkers linked the preservation of pure belief with the indefectibility of the institution and government machinery of the Church. While the main canonist tradition turned the doctrine of papal jurisdic­­tional primacy into a doctrine of an infallible papal teaching au­­thority, the conciliarists used the doctrine of the doctrinal inerrancy of the Universal Church as an argument for the jurisdic­­tional primacy of the General Council. In this paper the attribute of "inerrancy" as I have employed it has over­tones of both "indefectibility" and "infallibility."
Tierney has pointed out the irony of this development; at the very time when the Decretalists were most uncompromisingly proclaiming Rome as mother and teacher and the pope as lord of the world, they were evolving a corporate theory built upon the assumption that a prelate is not a lord but a procurator. Future critics found in the corporative ideas surrounding the proctorial principle "an instrument peculiarly well adapted to sap the foundations of the doctrine of papal sovereignty that the canonists themselves had helped to build up."¹ This Decretalist analysis of corporative theory lay in an area seemingly remote from large issues of ecclesiology and was devoid of intent to damage papal sovereignty,

...but in fact a more detailed analysis of the structure of corporate groups was precisely what was necessary to provide a sounder juristic basis for the rather vague "constitutional" ideas that occur in the Decretist works. At every point where the Decretist arguments ended in ambiguity a coherent theory of corporate law could help to clarify their implications.²

The Decretist suggestion of a diffused power to maintain the faith was clarified by Decretalist discussion of agency and delegation. The status of the cardinals in the local Roman Church could only be understood with an adequate structural theory of the cathedral chapter at hand. Decretalist emphasis on election as the source of episcopal juris-

¹Ibid., p. 243.
²Ibid., p. 96. See also pp. 96-131, 242, 243.
diction made it possible for a bishop to assert that Christ's
delegation of jurisdiction through the apostles came to him
via local election or consent, not via the fullness of power
exercised by the pope. The persistent dichotomy in thir-
teenth-century Decretalist literature between the analysis
of the structure of the whole Church and that which was ap-
plied to the lesser corporations influenced later ecclesi-
ology and made difficult the juristic formulation of the
comprehensive, consistent theory of papal monarchy sought
after by many. "The conciliar theories of the fourteenth
century were nearly all . . . dependent upon the canonistic
corporation doctrines of the preceding century."  

An important phase of conciliar development was the
gradual transfer by the canonists of their corporative the-
ories developed in the analysis of the lesser churches to
the Church as a whole. There was then the possibility of
viewing the Universal Church as a corporation with the pope
as its head. But first it was necessary to establish that
that ecclesia, in the widest sense, Christ's Mystical Body
(corpus mysticum), was indeed a corporation in the legal
sense. One can trace in certain thirteenth-century glosses
the assimilation of the Scriptural-patristic doctrine of the
corpus mysticum, the fusing of this theological concept of
unity in Christ with the juristic idea of legal incorpora-

1 Ibid., p. 105.
tion. A significant contribution to a juristic conception of the whole Church had been made by Huguccio when he suggested that the structure of the whole Church was comparable to that of its lesser corporations. The Decretalist analysis, which stressed the authority of the head of the corporation, was important for the legalization of **corpus mysticum**, in its emphasis on the Roman Church as head of the Body of Christ and the other local churches as members. The transfer was further encouraged by the circumstances of the fourteenth century, with a more explicit doctrine of representation and the subtle analysis of the prelate's authority and of the relationship between the individual churches and the Universal Church.\(^1\)

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\(^1\) *Ibid.*, pp. 132-41. Many objections to understanding the Mystical Body in anything but a mystical sense have been laid to rest by recent scholarship. By the late fourteenth century the doctrine had been almost emptied of mystical and sacramental connotations and had acquired political and corporational associations. Incidentally, this information provides some answer to the charge that those conciliarists who were nominalists, including d'Ailly, were being inconsistent in using a term like **corpus mysticum**. From the thirteenth century on, the idea is commonly found that political organization is an instrument for the pursuit of joint action toward the citizens' common interests. This idea of a set of common interests as the goal of community action is not only a logical offspring of the corporate experience of medieval times; its conception of interests in a collective fashion is most compatible with late medieval nominalism, with its suspicion of universals. While Aquinas could ascribe to the state or the Church a formal unity and a common good formally distinct from the goods of individuals, the nominalists had to conceive of political bodies and common goods in collective terms. For more on **corpus mysticum**, see Ernst Kantorowicz, *The King's Two Bodies* (Princeton: Princeton University Press, 1957), pp. 193-273; see Oakley, *D'Ailly*, pp. 55-61, for a good discussion and references to the important work of Henri de Lubac.
With the application of corporate theory to the whole Body of Christ the weakness of the Decretalist case for papal monarchy becomes more obvious. The Decretalists pursued a doctrine of the corporate unity of all of the churches under the local Roman Church with a view toward presenting the pope, with his *plenitudo potestatis*, as the embodiment of this vast corporation's authority. But there was always the possibility of emphasizing the participatory facet of corporate unity, a view surely in keeping with the canonist theories on the corporate structure of the lesser ecclesiastical corporations. Once these theories had been applied to explain the structure of the whole Church, they invited analysis of the papacy as an elective office analogous to the headship of any ecclesiastical corporation. This was a sensitive issue, because it was just that power in which the pope was held to be superior to other prelates, the *protestas jurisdictionis* that the pope held in fullness, which was the power derived from the community's authority by election in the normal ecclesiastical corporation. The high papalist vision of *plenitudo potestatis* was thus vulnerable at its apparently strongest point, for later radicals could trace the concept to Decretist origins, where the term itself was more fluid. In examining their analog, the lesser ecclesiastical corporation, they could see that the concept

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1. The constitutional ambiguity characteristic of corporate experience has been pointed out by many writers.
could be used to signify an authority conferred by the community on its elective head, a form of proctorial mandate. "The whole concept of plenitudo potestatis, regarded as a basis for the more extreme claims put forward on behalf of the Papacy, was peculiarly ill-adapted to withstand any detailed canonistic analysis . . . ." In this it typified the general weakness of the thirteenth-century theories of papal sovereignty. "The Decretalists built a great edifice of papal claims, but their underlying theories concerning the corporate structure of the Church and the origins of ecclesiastical authority provided an inadequate foundation for such an ambitious superstructure."¹

There were great implications in this transfer of corporate doctrine to the whole Church for the position of the pope or Roman Church in relation to the Universal Church or General Council, as well as for the relationship of the pope to the local Roman Church, especially to the cardinals within it. One could pass from episcopalism to conciliarism; the idea that the corporation must be consulted in decisions touching the general welfare could be developed to favor a General Council representing the entire Church as a permanent organ of ecclesiastical government. The idea of the corporation as the source of its head’s authority made possible an interpretation of plenitudo potestatis from a representative angle. A parallel process was applicable to the

local Roman Church. In the fourteenth century, the cardinals would claim to be a divinely ordained element of ecclesiastical government and would assert the right to participate in shaping policy for the Roman Church. They would even present themselves as the source of papal authority.

A crucial figure in the development was Hostiensis, who was not only important in shaping corporate theory but also in applying it and its corollaries to the Roman Church and the Universal Church. In assuming that the Roman Church was subject like any bishopric to normal corporate law, he was led to form an oligarchic idea of the local Roman diocese, and he saw the implications of corporate theory for the pope's headship of the whole Universal Church. In applying corporate theory to the whole Church he arrived at a doctrine of the Church as one corporation, in whose authority all members participated in the last resort. In certain emergencies, he foresaw the devolution of power from the pope, to the cardinals, to the people and clergy of Rome, and to the Universal Church represented in a General Council. While his doctrine differed from the prevailing theory, it was to have enormous consequences in the fourteenth century. In Hostiensis, the Decretist idea of the inherent authority of the community was transformed from a negative incapacity to err and a passive dominion over goods to a positive power to act in the common interest in emergencies. As Tierney points out, it was only a small step from saying that the power of the cardinals could devolve to the whole Church,
to saying that in their normal exercise of authority the cardinals represented the Church.¹

In the fourteenth century the most respected canonists held that in the corporate whole of the Universal Church all power was concentrated in the head, the pope, by a direct act of divine will. But the same men also held to the principles of corporate structure developed in the analysis of the lesser corporation and carried further the application of these principles to the whole congregatio fidelium and the local Romana ecclesia. Thus, the dichotomy mentioned above persisted into the troubled fourteenth century, with its attendant difficulties for the theorists of high papalism. "The fourteenth-century canonists, the defenders of papal authority, were operating with just the same concept of the Church that . . . was to form the very foundation of the conciliar theories."²


²Tierney, Foundations, p. 205. Tierney suggests that the material with which these Decretalists worked had much to do with their difficulties. Not only was their theory of unitary absolutism faced with the reality of church life, the diverse corporate entities which actually made up the Church, but early in the century the Rosarium of Guido de Baysio resurrected many old Decretist texts, whose more "constitutional" ideas the Decretalists felt compelled to deal with (p. 207). See Ibid., pp. 215-16 for the possible influence of the political situation on the way noted fourteenth-century Decretalists conceived of dealing with an heretical pope, and pp. 199-219 for a general discussion of the fourteenth-century canonists.
The lack of an integrated theory might have been of no consequence in another time, but it was a great embarrassment to the fourteenth-century popes, who stirred powerful and resourceful opposition. The disputes between them and secular rulers, the problems of Celestine V's abdication and of the Spiritual Franciscans with their radical ideas of apostolic poverty, the outcry against the Avignon Papacy and the centralization of ecclesiastical government and finance, and the conflicts within the curia activated analyses of the limits to papal authority and led to renewed emphasis on the claims of other elements of church government. Canonist arguments found their way into imperial, curial, episcopal, and papal treatises of various publicists. The fourteenth century was a time for the drawing out of implications, the rehearsal of the adversaries. The great crisis of the Schism, brought on by the ambition of a curial faction, took to momentary ascendancy a program for ensuring the Church's continued authority over its ruler and its power, through its representatives. General Council, to wield this authority for the common good.¹

¹A point stressed throughout Walter Ullmann's Origins of the Great Schism is that the Schism was primarily a legal and constitutional battle, foreshadowed by the mounting constitutional and legal crises of the fourteenth-century Church, brought on by the dissatisfaction of the cardinals with their theoretical position and their determination to retain the de facto position they had attained. In seeing the Schism and conciliarism as legal and constitutional issues within the Church, Ullmann denigrates the hypothesis of nationalism as the primary cause and dominant influence.
Then the inconsistent principles of the fourteenth-century canonists became critical, for it was to the canonists that perplexed Christians turned for solutions to the Schism. Men found, for instance, that the pope was superior to the laws of the General Council; yet, in certain special cases the Council could exercise jurisdiction over the pope. The pope was endowed with plenitudo potestatis—yet an authority inherent in the whole Church could be superior or equal to his.

It has often been pointed out that the prevailing doctrine of papal sovereignty formed a serious hindrance to all the various attempts at healing the Great Schism, but it should also be emphasized that the Schism could hardly have broken out at all if that doctrine had been expressed with unswerving consistency and clarity in the laws of the Church and the teachings of the canonists. The original claim of the dissident cardinals that Urban's election was invalid was flimsy enough; the subsequent confusion and controversy could hardly have arisen except in an age when the whole problem of the right relationship between Pope, cardinals, and General Council was enmeshed in ambiguities and in legal intricacies that the lawyers themselves could not unravel.¹

To those investigating ways out of the legal impasse between the rival popes, it became obvious that the prevailing doctrine of papal absolutism made a reconciliation of the contenders impossible; any disposition to arbitration could be interpreted as abandonment of the claim to be true pope, who was above human judgment. But the conception of the Church as a corporation lent itself to the restatement

of some early Decretist positions implying a different concept of papal authority, that only the whole Church was unerring in faith, that no pope could act contrary to the Church's general welfare, that as a last resort the pope could be deposed by the Church.

The elaboration of conciliar systems of Church government . . . was made possible by the assimilation of the rather inchoate ideas of the Decretists into the framework of later corporation theory; the principle source of conciliar thought is to be found in the mingling of these two streams of canonistic ideas. . . . The Conciliar Theory, one might say, sprang from the impregnation of Decretist ecclesiology by Decretalist corporation concepts.  

The Conciliar Theory

Given the grave legal and constitutional nature of the crisis of schism and the anxious feeling that the ailing Church had to be not only patched up but reformed and insured against future catastrophes, the great profusion of speculation on ecclesiastical government which occasioned the Schism soon went far beyond the immediate problem of the Schism to probe the basic questions of the nature and location of ecclesiastical authority and the machinery by which that authority should be manifested. The most radical came to question whether the pope should continue to govern at all. With the wide spread of ideological positions, vocations, and national backgrounds of the major con-

1Ibid., p. 245.
ciliarists, it is an oversimplification to talk about the conciliar theory. But it is a necessary oversimplification and, additionally, one justified by a basic unity of thought among the conciliarists.

"The appeal to the underlying authority of the Church, understood as the congregatio fidelium, was the very essence of the conciliary position." The conciliarists insisted that the final authority of the Church and the principle of unity lay not with the pope but with the whole Church. The various conciliar systems were based on this distinction between the Universal Church and the pope or local Roman Church, and they wrapped around this a group of theories concerning the relationship of the Church to the pope and curia. Christ is the primary head of the Universal Church, his Mystical Body. From Christ the Church receives and holds directly the truth, inerrancy, and fullness of power which are exercised and held in some way by the Church's secondary head, the pope. The pope's authority is not absolute but ministerial, delegated to him for the good of the Church. It was commonly held that the pope represented the Church, but in the sense that he personified it and so embodied in himself the whole of its authority. But to the conciliarist the idea

1 It is also an oversimplification to pass over the other programs advanced for the solution of the Schism, such as compromise settlement, mutual cession, or political pressure.

2 Tierney, Foundations, p. 4.
of representation went beyond this common medieval notion of mere personification to imply an actual bestowal of authority upon the representative by those whom he represented, with the corollary that this authority could be withdrawn if abused. \(^1\) Thus even the pope was held to possess only a limited and derivative right to govern, conferred by the Church. He could exercise only such authority as was necessary for the edification of the Church, and if his rule tended to its destruction he could be corrected, even deposed. The organ of ecclesiastical government which was to embody the institutional safeguard was the General Council. The Universal Church might bestow its underlying authority on a General Council, and this Council was regarded as the most reliable representative of the Universal Church's superior and inerrant authority. In addition, as Francis Oakley has pointed out, pure conciliarism was momentarily entwined with the rising demand for ecclesiastical reform (a demand sometimes accompanied over the course of the fourteenth century by the assertion that reform could best be effected by the regular assembling of a General Council) and with the oligarchical theories of the cardinals which had their origin in the increasing de facto governmental role exercised by the cardin-

The beliefs were supported by various theological arguments, analogies drawn from ancient councils, Pauline ecclesiology and other Scriptural elements, the Aristotelian concept of ἐπεξεργασία (in the sense of equity or necessity), with the general impress of the canonist tradition. No doubt the ecclesiastical crises of the fourteenth century, in which anti-papal or pro-reform elements had from time to time touted the General Council as a panacea, contributed. Conciliarism made possible an appeal from the stubborn rivals. The possibilities of the approach were realized at Pisa (1409), where a council convoked without any papal authorization elected a third contender, and more fully at Constance (1414-1417), where two contenders were effectively deposed, one constrained to abdicate, and a new pope of unity elected.  

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1 Francis Oakley, "Pierre d'Ailly," in Reformers in Profile (ed. B. A. Gerrish; Philadelphia: Fortress Press, 1967), pp. 48-54. Oakley notes that the writings of d'Ailly neatly combine these three strands of historical conciliarism. He has also stressed that curialism and conciliarism were only momentary allies. Before and after the time of the Schism, they stood at opposite poles on the important issue of centralization. Tierney has looked at these viewpoints from a different angle. To him their momentary union reveals a common thread: advocates of curial rights or of local rights in the lesser churches all relied upon the application of corporative concepts of the Church, to bolster their own rights and interests. This, Tierney feels, helps to explain the leading position of cardinals such as Pierre d'Ailly and Francisco Zabarella in the historical conciliar movement. Before and after the era of the councils, immediate conflicts of interest tended to keep out of the picture the potential alliance of local and curial opposition to the pope. See Tierney, Foundations, pp. 55, 238-39; Oakley, D'Ailly, pp. 182-98, 207-212.

2 For modern introductory information on conciliarism,
D'Ailly: A Sketch of His Life and Works

Pierre d'Ailly was born of bourgeois parents in 1350 at Compiegne in the Ile de France. His childhood remains obscure. In 1364, he entered the University of Paris as a bursar of the College of Navarre and began his academic career as a member of the French nation in the Faculty of Arts. He became a Bachelor of Arts in 1367 and taught for a year in that Faculty. Then he moved on to the Faculty of Theology, where like his fellows, he was obliged to spend four years studying the Bible and two years studying the Sentences of Peter Lombard. During those years—in 1372 to

see E. F. Jacob, especially pp. 1-24; and T. M. Parker, pp. 127-39. Despite the fact that his treatment is weighted by an in many ways outmoded emphasis on the role of nationalism in causing and influencing the Schism and conciliarism, John Hine Mundy's essay in The Council of Constance (ed. Mundy and Kennerley M. Woody; Records of Civilization Studies and Sources; trans. Louise Ropes Loomis; New York: Columbia University Press, 1961), pp. 3-51, is still good, especially for tracing the undoubted influence of nationalism on the fifteenth-century course of conciliarism. Similarly, although often criticized by later writers, J. N. Figgis, Gerson to Grotius, pp. 31-55, is still a good introduction.

1 The colleges were endowed halls to secure board and lodging for poor scholars and to insure a supply of educated clergy. They were generally presided over by masters who supplemented public lectures by private instruction, general supervision, and aid to their scholars, some of whom held bursarships, or scholarships. The University of Paris was divided into four Faculties: Arts, Theology, Law, and Medicine. The Faculty of Arts was composed of four nations: French, English, Picard, and Norman—none of which coincide with modern national affiliations. See Hastings Rashdall, The Universities of the Middle Ages (ed. F. M. Powicke and A. B. Emden; revised edition; Oxford: Oxford University Press, 3 vols., 1936), I, 299-321, 500, 510-12, 516.
be exact—he was chosen proctor of the French nation. After his six years of study, he was admitted upon examination to the rank of baccalaurius cursor and assumed the concomitant responsibility of lecturing on the Bible to the junior members of the Faculty. The duty of lecturing on the Sentences was assumed upon attainment of the rank of baccalaurius sententiarius. Having finished this course (1378), he became a baccalaurius formatus, and in 1381, after completing his formal disputations, he was granted the authority to teach, thus becoming a Doctor of Theology.¹ In the same year he was granted a canonry of Noyen.

Thus, d'Ailly was emerging into public life as the Schism broke out and spread. The University had recognized Avignon under pressure from King Charles V, although the English and Picard nations of the Faculty of Arts had declared neutrality, and the Parisian scholars Henry of Langenstein and Conrad of Gelnhausen had called for a conciliar solution as early as 1379. The death of Charles (1380) and the succession of a minor gave the University, to which many throughout Europe were looking for leadership, an opportunity to shift its position. In 1381, it openly moved to support conciliarism. That year d'Ailly may have defended this position before the royal court. If so, he was rather indis-

¹See Rashdall, I, 474-82, for details on the career of the student of theology at Paris. Significantly, in his formal disputations d'Ailly discoursed on some matters concerning the ecclesiastical polity; Oakley, D'Ailly, p. 10 n. 3.
creet, because the regent, Louis of Anjou, was banking on Avignonese assistance in his Italian ambitions. The incident may explain d'Ailly's temporary retirement to Noyen. Still, that same year he again advocated the conciliar solution, in his *Epistola diaboli Leviathan*. Oakley has written:

Despite later shifts and hesitations this seems to have been the solution closest to his heart. He never seems to have wavered in his conviction of the superiority of the whole Church to the Pope, and in the years after 1403, when other solutions had failed and when the obduracy of the rival claimants was becoming increasingly apparent, he recurred once again to his earlier advocacy of the Conciliar position.

In the intervening years, d'Ailly continued his academic career and became a leading prelate. During his rise to fame his attitude toward Avignon seems to have fluctuated.

Between 1383 and 1394 he was at Paris and preoccupied with academic affairs. In 1383, he became rector of the College of Navarre. Two years later he was chosen proctor of the Faculty of Theology in a dispute with the chancellor, who

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1D'Ailly claimed in later life to have done so. In his history of France during the Great Schism, Noel Valois has cast doubt upon the story. See Oakley, *D'Ailly*, p. 11 n. 4 for a reference.

2The polemic appeared anonymously. A translation has been published by I. W. Raymond, "D'Ailly's 'Epistola Diaboli Leviathan, '" *Church History*, XXII (1953), 181-91. His *Invectiva Ezekielis contra pseudo-pastores* appeared about that same year.

3Oakley, *D'Ailly*, p. 11.
had begun to arbitrarily levy fees for the authority to teach (licentia docendi). In 1388 he headed a University delegation to Avignon and successfully persuaded Clement VII to uphold the censure of some propositions of the Dominican John of Monzon, who had denied the Immaculate Conception. In the following year he became chancellor of Paris and royal chaplain. D'Ailly seems to have been involved during these years in further University discussions of the Schism despite a royal ban on such activities.

In 1394, a University referendum revealed that its members overwhelmingly supported the way of cession as the most practicable way to end the Schism. D'Ailly responded with

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1 Some relevant source material for this controversy may be found in Chartularium Universitatis Parisiensis (ed. Henry Denifle; Paris: Delalain, 9 vols., 1889-1897), III, 340, 485-86. (The chartulary is useful for investigating details of d'Ailly's academic career.) Significantly, d'Ailly's arguments against the chancellor involved discussions of the source of political authority and the issue of public utility.

2 For material on the Monzon affair, Chartularium, III, Nos. 1559-65, 1582.

3 The chancellor was originally an official of the cathedral church of Paris and actually never attained an official status within the University. In his status as chief theology instructor of the cathedral school, he acquired some measure of control over the schools of Paris, especially in the conferring of the licentia docendi. By the time of d'Ailly's tenure the office retained great prestige but little actual power, having been on the losing side in a series of disputes between the episcopal administration and the University. See Rashdall, I, 278-81, 304-312, 398-402.

4 John B. Morrall, Gerson and the Great Schism (Manchester: University of Manchester Press, 1960), p. 38. The ban was lifted in January of 1394.
an open commitment, despite his apparent preference for the conciliar solution. The way of cession was adopted as the French national policy, and it led to the French withdrawal of obedience from Avignon (1398) in a vain attempt to force cession from that side. Much of Europe went along with France in maintaining neutrality toward both contenders and in demanding the cession of both. D'Ailly, however, opposed the withdrawal.

He acted several times as a royal or University emissary, and on his missions to Avignon he was supposed to urge acceptance of cession. In Oakley's words, he "seems to have been somewhat less than enthusiastic in his advocacy of the cause--possibly because of a succession of favors heaped upon him by the Avignonese popes." In 1389, royal disapproval had blocked Clement VII's plan to make d'Ailly bishop of Lyon. But he did acquire a string of minor benefices, and, in 1395, he relinquished his chancellorship to assume from Benedict XIII the bishopric of Puy. In 1397, he relinquished that for Cambrai, which he held until 1411. Many at court and at the University seem to have felt that he was being bought. When he became bishop of Puy, one of the nations of the Faculty of Arts voted to exclude him from its meetings. The truth is hard to find. First of all, it is known that d'Ailly preferred the conciliar solution to the way of cession. And it may have been that the appointment to Puy was part of

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1Oakley, D'Ailly, p. 12.
a program of Pope Benedict to open his reign on a conciliatory note. On the other hand, d'Ailly staunchly defended Benedict during these years. "...It is certain that d'Ailly opposed the withdrawal of obedience in 1398, was active in bringing about a partial restoration in 1403, tried to absent himself in 1406 from the clerical assembly at Paris which sought to institute proceedings against Benedict XIII, and, when coerced into attending, insisted against opposition on speaking in defense of that pontiff."^1

From 1399 to 1402, d'Ailly retreated from church politics and concentrated on his diocesan duties. He had never visited Puy, and his successor criticized his administration. In Cambrai, however, he seems to have been a model bishop. It was a large diocese, divided by language and papal obedience. It was a microcosm illustrating the ravages of schism. D'Ailly held three diocesan synods and devoted attention to reforms which anticipated ideas to be found in some of his later treatises.

In late 1402, d'Ailly began moving back into wider affairs.2 Though, as has been pointed out, he was still willing to defend Benedict against his most radical enemies at the Paris Council of 1406, his apparent conviction of the Avignonese sincerity about seeking solutions seems to have

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^1 Oakley, in Gerrish, p. 44.

^2 It was in the winter of 1402-1403 that he wrote the Tractatus de materia concilii generalis.
been undergoing gradual erosion. No doubt his personal involvement in the fruitless negotiations of these years contributed to his attitude. In January 1408, he broke with Benedict and returned to Cambrai. At the Council of Aix a year later, he was back to advocating a General Council.

The collapse of negotiations had by this time led a group of cardinals from both camps to drop their separate allegiances and summon a General Council to Pisa. D'Ailly aligned himself with the dissidents, accusing the rivals of blind ambition and foreswearing his allegiance to the Avignon line. En route to the assembly, he sent ahead letters and suggestions.1 Absent on diplomatic missions for the Council during the sessions that witnessed the attempted depositions of the two rivals and the election of the Pisan Alexander V, d'Ailly did not play an active role.

But he continued to rise in prominence within the ecclesiastical hierarchy. In 1411, John XXIII, the second Pisan, made him cardinal priest of St. Chrysogonus. He attended that pontiff's Council of Rome (1412). Although he owed his cardinalate to John, d'Ailly seems to have forthrightly recognized that this "reform" pope was uninterested in reform. The outcry of d'Ailly and others at the vacuity of the Rome

1See Martene and Durand, VII, 916-18, 988, especially 909-912. This last, his Propositiones utiles, is a clear, comprehensive, yet brief statement of conciliar theory. It has been published in English translation: Oakley, "The 'Propositiones Utiles' of Pierre D'Ailly; An Epitome of Conciliar Theory," Church History, XXIX (1960), 398-403.
Council was instrumental in amassing support for the gathering at Constance.¹

D'Ailly's role in the early sessions of that Council "was clearly a dominant one."² From his opening sermon on December 2, 1414, until the election of the new pope of unity, Martin V, in 1417, he was involved in many of the great events of the Council, notably, the condemnations of John XXIII, John Hus, and John Petit (the supposed apologist of tyrannicide). He presided at the third session, after the flight of John XXIII; he was deeply involved in the debates over the status of the Sacred College, the procedure for voting in council, and the future composition and summoning of the General Council.³

At the Council he displayed consummate skill as a political maneuverer. In the early stages of the Council he and William Fillastre were largely the architects of a coalition of French and English conciliarists and cardinals which prevented the Italians from simply confirming John's election and going home. Later, when mainly English and German radical conciliarists seemed to be threatening the hierarchical Church and the quest for unity, d'Ailly inspired a realignment which included the Italians and excluded some of his former con-

¹John Hine Mundy, in The Council of Constance, p. 11.
²Oakley, D'Ailly, p. 13.
³Mundy and Woody, in The Council of Constance, pp. 25-26 and 54, respectively.
ciliarist colleagues.\textsuperscript{1} In the face of those who proposed to first reform the Church, then elect a pope, d'Ailly's party insisted that reunion under one head was the first priority. During the sessions which formally asserted the superiority of the Council to the pope, d'Ailly became "ill" and did not attend. In general, d'Ailly retreated, over the course of the Council, from some of the more innovative measures which he had supported at its outset. His motive seems to have been a dawning realization that such measures were inimical to his primary goal, Church unity, and to his hierarchical conception of the Church, as well as to his own interests as a cardinal. Oakley writes:

\begin{quote}
In his relations with John XXIII, as in his work on the reform commission of the council, he reveals himself to have been more flexible and conciliatory in practice than his theories might lead one to expect. Indeed, despite the radical nature of many of his ideas, the over-all impression given is that of excessive prudence.\textsuperscript{2}
\end{quote}

At the close of the proceedings, the new pope, Martin V, sent him as legate to Avignon. He died there August 9, 1420.

Despite his active involvement in the urgent issues of his day and in the general affairs of the Church, d'Ailly composed more than 170 works—commentaries, tracts, letters, sermons, poems—displaying his competence in theology, philosophy, letters, astronomy, and geography, in addition to conciliar theory. His works have never been amassed in one

\textsuperscript{1}Jacob, pp. 5-6, 49.
\textsuperscript{2}Oakley in Gerrish, p. 46.
collection; very few have been translated into English. A large number of them appeared in print during the late fifteenth and sixteenth centuries. Some of his philosophical, theological, and geographical works appeared in successive editions down into the eighteenth century. Of his writings, a large group concern the Schism and ecclesiastical reform. There are a large group of apologetic, ascetical, Biblical, rhetorical, pietistic, and poetic works. He wrote considerable numbers of tracts on geography, astronomy, and cosmography. Notable is his geography *Imago Mundi* (1410), in which he reasoned, with the aid of ancient authors, that the Indies could be reached by sailing westward. Christopher Columbus possessed a copy in which he made marginal notes.¹ Also, in his *Exhortatio super kalendarii correctione* (1411), d'Ailly vainly advocated the calendar reform later adopted by Pope Gregory XIII (1582).²

D'Ailly's philosophical works are few and generally small. His theological works are more numerous and larger, the most authoritative and comprehensive statement of his views being his *Commentary on the Sentences*. John H. Mundy has called him "the foremost French theologian of his age."³

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¹For references to material dealing with the question of his alleged influence on Columbus, see Oakley, D'Ailly, p. 14 n. 10, and C. A. Dubray, "d'Ailly," The Catholic Encyclopedia, I, 236.

²See Mansi, XXVIII, 370, for this exhortation.

³Mundy, p. 17.
As a philosopher and theologian d'Ailly was an ardent nominalist.¹

The above-mentioned printings of d'Ailly's works during the early modern era imply some interested audience, and d'Ailly does seem to have been widely read over the two or three centuries following his death. His name surfaced frequently in theological, philosophical, ecclesiological, and political literature of the sixteenth and seventeenth centuries. D'Ailly's influence on thought and action concerning ecclesiastical and secular political affairs will be dealt with in the conclusion of this paper.²

¹My treatment of d'Ailly is restricted to the ecclesi­
ological and political ideas expressed in the Tractatus de
materia; treatment of his broad philosophical-theological
stance shall be sparse except insofar as that stance impinges
directly upon the matter of the treatise. Such a method
dealing with the material has another justification besides
limitations of time and space: as will be seen, d'Ailly's
ecclesiology and political theory are not necessarily derived
from the Ockhamite philosophical and theological stance which
he embraced but from certain legal traditions. For more on
d'Ailly's basic philosophical and theological stance, see
Oakley, D'Ailly, pp. 14-32, 86, 89-90, 189-97, 236-40; "Pi-
erre D'Ailly and the Absolute Power of God: Another Note on
the Theology of Nominalism," Harvard Theological Review, LII
(1959), 43-50; William Courtenay, "Covenant and Causality

²Again, treatment is restricted to the issues of the
Tractatus de materia. Page 39 n. 1 alludes to his influence
in geography; p. 40 n. 1 provides some introduction to is-
sues of philosophical-theological influence.

The sketch of d'Ailly's life and works here is large-
ly drawn from Oakley, D'Ailly, pp. 9-14, and in Gerrish, pp.
40-57. Dubray, pp. 235-36, was also a source. The most
valuable overall treatments of his life and works remain
Paul Tschackert, Peter von Ailli (Gotha, 1877) and Louis
The Tractatus de materia concilii generalis survives in four manuscripts, three of them from the fifteenth century. Until the edition of the tract produced by Oakley appeared, the treatise had never been edited in full. Three fragments had appeared in print, none in original form and one incorrectly attributed.¹

Paul Tschackert was unaware of this tract, which Oakley calls "one of d'Ailly's two most extensive and important works on matters connected with the Schism,"² when he wrote his standard work on d'Ailly (1877).³ It appears that Louis Salembier was the first modern scholar familiar with this tract, and, writes Oakley, "ignorance of its very existence has continued to cause confusion in Conciliar studies."⁴

Salesbier, Petrus de Alliaco (Lille, 1886). Salembier's Le Cardinal Pierre d'Ailly (Tourcoing, 1931) contains the most up to date list of his writings. A list of his Latin works may be found in Tschackert, pp. 348-66; his French works are listed in Salembier, Les oeuvres francaises du Cardinal Pierre d'Ailly (Paris, 1907). A bibliography of secondary works on him may be found in Oakley, D'Ailly, pp. 350-56; to it should be added Courtenay's article (see p. 40 n. 1) and Oakley's "Pierre D'Ailly and Papal Infallibility," Medieval Studies, XXVI (1964), 353-58, and "Gerson and D'Ailly: An Admonition," Speculum, XL (1965), 74-83.

¹Oakley, D'Ailly, pp. 244-48. See these pages for fuller discussion of the fragmentary editions, manuscripts, and the problems of editing.

²Oakley, "Gerson and D'Ailly," 77.

³Oakley, D'Ailly, p. 251 n. 26.

⁴Oakley, "Gerson and D'Ailly," 77. On pp. 76-79, the
There has been some dispute over the composition date. Louis Ellies Dupin had placed it in 1416, but this position has been largely abandoned. Salembier maintained that it was written around 1403, not before May of that year; he cited as evidence d'Ailly's reference to the instructions of a delegation sent by the Sacred College to the French king. Salembier said that this particular delegation did not see the king before May 1403. But Noel Valois contended that the tract was composed in late 1402 or early 1403, citing two passages in the tract. The first indicates that Benedict XIII was still imprisoned in the besieged palace of Avignon when d'Ailly was writing; this would indicate a composition date before March 11, 1403, when Benedict escaped. The second indicates that some of the nations that had been honoring the current withdrawal from Avignon, and possibly all but France, had restored obedience. Provence and Anjou had done so in May 1401 and August 1402, respectively, and Castile had followed in February 1403. The suggestion is that the tract was written between August 1402 and March 1403.

The chronological difficulty, which could force one to view the tract as a series of fragments composed at dif-

author touches upon several problems in conciliar studies which have arisen from a lack of awareness of this tract.

1De materia, p. 299.
2Ibid., p. 257.
ferent times and only later put together, is resolved by Oakley's discovery that Salembier had confused two distinct delegations from the Sacred College to the French king. Indeed, the text of the treatise clearly shows that d'Ailly was referring to a delegation which spoke against and not for the pope. The delegation therefore could not have been that of May 1403, but was that of 1398, which in January 1399, in the king's presence, accused Benedict of heresy, perjury, and other crimes. Valois, then, appears to have been correct, and his dating is supported by another passage, which indicates that the tract was written before the Byzantine emperor embarked for home at Venice, April 1403.

The setting, of course, is crucial to a proper understanding of the tract. Oakley points out: "The unrest caused throughout Europe by the seemingly endless prolongation of the Great Schism provides the setting for the treatise, as, more particularly, does the strengthening of ecclesiastical disunity . . . by the most important, though abortive, attempt to bring it to an end—the withdrawal of obedience from Benedict XIII, sponsored by France and adopted by the coun-

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1Ibid., p. 288.
2Ibid., p. 321. For fuller discussion of this chronological problem and for reference to the other opinions cited (which have been unavailable to me firsthand), see Oakley, D'Ailly, pp. 248-49, from which this discussion has been drawn.
tries of the Avignonese obedience."\(^1\)

In the course of the withdrawal, neither pope proved cooperative. And it was soon apparent that the winner in the withdrawal was the Crown. The French Church soon found to its sorrow that the papacy was a less severe taskmaster than the doctors of the University of Paris and the royal favorites. By the time that the *Tractatus de materia* was written, dissatisfaction with the withdrawal was widespread in France.\(^2\)

In sketching the life of d’Ailly I have dealt with the events and issues of his life surrounding the withdrawal: the 1394 referendum, Chancellor d’Ailly’s decision to cooperate, the national policy of withdrawal to effect cession, d’Ailly’s half-hearted ambassadorial role, the suspicion aroused by this and by his lucrative appointments, his preoccupation, 1399-1402, with diocesan affairs, and the gradual crumbling of his loyalty to Avignon. As has been pointed out, although as late as 1406 he was willing to defend Benedict against his worst detractors, he himself seems to have begun losing patience years before.\(^3\)

It is these events, these possible motives, and this mood which we must consider in studying the treatise. In

\(^1\)Oakley, D’Ailly, p. 249.


\(^3\)See above pp. 33-36.
it d'Ailly, either swallowing his growing hostility or bow­
ing to self-interest, held out for a partial restoration of
obedience to Avignon, to root out the schism within the
Schism. Actually the evidence of the tract would seem to
support Oakley's favorable interpretation of d'Ailly's mo­
tives. It seems that a solid Avignon partisan would have
favored a full restoration. Furthermore, d'Ailly does not
just argue for the restoration of necessary spiritual powers.
As if to point out the trend in his thought and to show that
his case for restoration is not a case for papal absolutism,
he goes on to develop and defend his conciliarist ideas.
Thus, the tract expresses both his desire to work with
Avignon toward solving the Schism as well as his readiness
to take more drastic action if necessary.

In discussing the canonist roots of conciliarism, note
was made of the plethora of canonistic citations in concil­
liarist treatises. Concerning this tract alone, Oakley has
remarked that by itself it affords "an impressive demonstra­
tion" of d'Ailly's familiarity with many of the great glos­sators and texts; sometimes the tract reads "like a work of
canonistic scholarship." Among texts, he employed the
Pseudo-Isidorean Decretals, Gratian's Decretum (1140), the

1Oakley, "The 'Propositiones Utiles,'" 399. Here Oak­
ley makes the judgment that d'Ailly had not bowed to the
favors bestowed upon him.

2Oakley, D'Ailly, p. 209 and n. 6.
Decretals of Gregory IX (1234), the Liber Sextus (1298), and the Clementines (1317). He displayed familiarity with the glosses and commentaries of Huguccio (c. 1210), Joannes Paventinus (d. c. 1220), Joannes Teutonicus (d. 1246), Laurentius Hispanus (d. 1248), Goffredus Tranensis (d. 1245), Henricus Boik (d.c. 1250), Innocent IV (d. 1254), Bartholomew Brixiensis (d. 1258), Bernardus Parmensis (d. 1266), Hostiensis (d. 1271) Guido de Baysio (d. 1313), Joannes Andreae (d. 1348), and Bernardus Compostellanus Antiquus (early thirteenth century). Oakley, while emphasizing that d'Ailly himself was not a legal scholar and that at times his dependence is indirect—through writers such as John of Paris and William of Ockham—maintains that his knowledge of canonist literature is indisputable and more than a secondhand acquaintance.¹

This canonist influence seems to belie d'Ailly's condemnations of legal studies. In his Epistola diaboli Leviathon (1381), he had depicted the devil urging the study of Justinian and Gratian.² And in Part Three of Tractatus de materia, he castigated the precedence that legal studies had taken over spirituality among the clergy.³ Tierney has

¹Ibid., pp. 164, 209-210. As the latter pages show, evidence of d'Ailly's familiarity with canonist literature is by no means limited to the Tractatus de materia.

²See the translation of this polemic by I. W. Raymond (cited p. 32 n. 3); reference is to p. 188.

³De materia, p. 330.
sought to explain the condemnations which d'Ailly and other conciliarists expressed as directed against contemporary canonists who were generally pro-papal.\(^1\) Perhaps we see this in Part Two of our tract, where, amid numerous canonist citations, d'Ailly states that the older texts ought to be adhered to rather than the contrary theories of the new doctors.\(^2\) Oakley has suggested that d'Ailly's antagonism arose from his belief that the jurists forgot the role of equity in interpreting positive law and thus preferred the letter to the spirit. Other works of d'Ailly, in which he rankles at the alleged attempts of the lawyers to bind an absolutely free and powerful God by created laws, seem to suggest a deep hostility, founded upon his nominalist (or voluntarist) theology.\(^3\)


\(^2\)*De materia*, p. 306: "...Magis sunt notanda et sequenda quam cuiuscunque novelli doctoris opinio contrarium asserentis."

\(^3\)Oakley, *D'Ailly*, p. 163 and n. 3, 164. A central tenet of nominalism from a theological view was the absolute freedom and power of God; hence the voluntarist label, emphasizing God's absolutely free and powerful will. To the nominalist, even the natural law was grounded in divine fiat. Created, or human laws, are products of creatures radically contingent upon this all-powerful being, with no necessary bond of participation in his intelligence. Hence the nominalist might adopt an attitude of hostility toward the jurist who treated created laws as final and grounded in the principles of the universe, when to the nominalist they were more flexible rules of human conduct. See above p. 40 n. 1, and Oakley, *D'Ailly*, pp. 163-97.

This of course raises the question of how much weight d'Ailly himself gave to his own arguments on the basis of canon law. Since I have had no access to his strictly phil-
It would be worthwhile to conclude this introduction with a warning about the conciliarist use of canonist texts. As has been pointed out, the conciliarists were able to extract from earlier canonistic works ideas that seemed to be clear anticipations of their theories. On the one hand, the leading canonists of that earlier era were not conciliarists in the fourteenth-century sense. They were not interested in hampering daily papal governance of the Church nor in erecting comprehensive ecclesiologies, but in rationalizing the Church's working structure. There is danger and usually futility in attempting to amass a canonists's scattered glosses, written on various problems, into a consistent whole. It is unlikely that the canonists were very often aware of the wider implications of many of the doctrines they formulated.1

1 The Decretists especially assembled valuable raw material for later thinkers; they advanced many ideas significant for diverse later developments but maintained them in patterns often quite different from those in which later interpreters would arrange them. For an introduction to medieval canonistic literature and scholarship, see Fernando Della Rocca, Manual of Canon Law (Milwaukee: Bruce Publishing Company, 1959), pp. 23-40.
On the other hand, it is not fair to accuse the conciliarists of deliberate distortion. "They approached the works of the twelfth and thirteenth centuries with minds formed in a later tradition of canonistic thought, which led them almost inevitably to see in the early texts shades of meaning different from those that the original authors had intended."¹ In a similar way, the Scriptural and patristic elements of the Decretum, quoted by conciliarist and high papalist alike, had undergone a transmutation at the hands of medieval canonists, so that when the protagonists of the fourteenth century quoted Scripture and the Fathers (from the Decretum) "the connotations of the terms they employed were determined less by their original texts than by the impress they had received from the thirteenth century canonists."² Walter Ullmann's warning should also be kept in mind: "It was perhaps the most characteristic feature of the legal and canonistic scholarship of the Middle Ages that the jurists tried to elicit general principles from terms and notions which their originators had perhaps not used with a generally applicable meaning."³ This attitude, largely due to the casuistic nature of the raw material, was shared by the late medieval publicists

¹Tierney, Foundations, p. 19.
²Ibid., p. 241.
and conciliarists. Finally, the methods of medieval jurists and other men who went to the legal corpus for support are not so strange or unique. Jurists of every era have to one degree or another engaged in the ransacking of sources for suitable legal ammunition and have resorted, when confronted with a legal impasse or the obvious opposition of the law, to verbal analysis and appeals to necessity or equity.
The tract itself consists of three parts. Although we shall deal only with the Second Part, some explanation must be made of the others.

In his introduction, d'Ailly dedicates his work to the Trinity and outlines the three parts. Part One covers some general considerations on the matter and form of a proposed council of the Avignon obedience. In this section d'Ailly maintains that such a council should not hear accusations of perjury and heresy against Benedict XIII and that innovative measures to end the Schism should be avoided as potentially disastrous, and useless anyway, since the three proposed avenues of cession, compromise, or council are adequate if pursued. Part Three covers "certain special considerations of the necessary reformation of the Universal Church of Christ." Here he proposes a reform program touching every level from pope to laity. D'Ailly closes his introduction with a warning to the reader. He wishes no one to understand his following statements as having been said "assert-
ively or determinatively, but only recitatively and disputa-

tively," except those things approved by the authority of the
Church.¹

In Part Two, d'Ailly deals with the question vexing
many at the time, whether the obedience withdrawn from the
pope ought to be restored to him before the meeting of the
proposed council of the Avignon obedience.² Because there
were so many different opinions on the topic, d'Ailly again
warns that he desires nothing he writes to be understood as
having been said "determinatively," but only "disputatively."
He wishes to review the various opinions so that more learned
men may point out the most worthy solution. He covers three
opinions. Despite his admonition against seeing his expres-
sion of approval anywhere, it is hard not to conclude that
the third opinion was the one which he personally preferred.
This can be judged from his general tone and slant through-
out the work, the length of his discourse on the third opin-
ion, and his acts and words at other times.³

¹" . . . Assertive aut determinative, sed solum reci-
253-80; Part Three, pp. 314-42.

²" . . . Utrum ante huiusmodi concilium subtracta Pa-
pae oboedentia eidem restitui debeat?" De materia, p. 280.
The importance of this question arises from the virtual cer-
tainty that at such a council Benedict would be faced with
serious charges. At that time, then, his status in relation-
ship to the papacy would be an issue.

³Oakley, D'Ailly, p. 250 and n. 24, agrees. D'Ailly
opposed the withdrawal in the first place and argued at the
synods during the first decade of the fifteenth century
The first opinion is that obedience ought to be restored. D'Ailly notes that the opinion seems to have the support of many sacred canons. He then presents the supporting texts. This was an opinion supported at the time by Pierre Ravat, Nicholas Clamanges (a student of d'Ailly), Jean Fiot, and the Duke of Orleans. Essentially it is an appeal to the rule of law. The argument centers around the canon law on spoliation and restoration: it is a principle of long establishment in civil and canon law that no one, despoiled of his possession or office on account of alleged crime, may be accused and brought to judgment until his possession or office has been restored to him, until the proper court has been constituted, and until the proper legal procedures for trial have been satisfied. The argument is that Benedict has not been granted the necessary rights of the accused in the withdrawal, which amounted to a despoliation without trial.

The mass of canonistic citations is largely repetitive, and lengthy quotation is not called for. D'Ailly

that there should be a partial restoration, in line with the third opinion. See pp. 34-36.

1 Ibid., p. 280 n. 1.

2 Texts cited are from the Pseudo-Isidorean Decretals (pagination from the edition of Hinschius, Leipzig, 1863), Praefatio, c.6, pp. 18-19; cc.2-6, pp. 131-32; c.12, p. 133; cc.4-6, p. 184; c.10, p. 201; cc.3-4, pp. 214-15; c.8, p. 227; c.12, p. 237; pp. 662-64, 664ff., 676. From the Decretum, C.2, q.7, c.41, Item cum Balaam, 10; C.3, q.1, 2; from

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is led by the amassed evidence to comment that all these considerations deserve great weight. If they hold regularly for minor bishops, how much more grave and solemn is the responsibility to observe correct procedure in the case of the pope, who has no superior. D'Ailly points to the celebrated case of Pope Symmachus as an example of this principle at work.¹

D'Ailly concludes that the first opinion produces conclusive evidence of the established rule that one despoiled without the correct process of law, without a judge, must be restored.² Nevertheless, he says, as the gloss notes,³ the regular rule fails in certain cases.

Intrusio is such a case. D'Ailly follows through the discussion of Gratian on this point.⁴ Gratian charges that

the Decretals of Gregory IX, X, 2, 13, cc.5-7. And from the glossa ordinaria to the Decretum, D.17, c.6, Hinc etiam, in v. praecipisset; C.3, q.1, in v. quod restitutio.

¹De materia, pp. 283, 287, 284-85. Hinschius, pp. 662-64; D.17, c.6, in v. praecipisset; C.2, q.7, c.41, Item cum Balaam, 10. Symmachus (498-514) had been deprived of the control of Church property due to allegations of notorious crime. However, a synod summoned by the Ostrogoth Theodoric to judge him decreed the restoration of this control to Symmachus (501), since he was still the legitimate pope. At this point d'Ailly omits mention of the synod's reasoning: that no true pope is subject to human judgment. Apparently d'Ailly's only point here is that without a trial there can be no spoliation.

²"...Quod spoliatus a non iudice vel sine iuris ordi ne restituendus est..." De materia, p. 286.

³X, 2, 13, c.6, in v. Clam possessione intrasse.

⁴C.3, q.1, c.6, Patet ergo. Without access to the glos-
when institution is not legitimate in the first place, no restoration can follow a despoliation, for he is not proven deprived who was not first instituted. He cannot demand restoration.

Those therefore whose election is defective, or who have not been elected by the clergy, or sought by the people, or who through simony took office, must not be held among the bishops. And therefore, if they have been expelled from the seats which they seemed to hold, they cannot seek restitution before they are called to trial.1

Gratian then adverts to a text 2 in which Pope Nicholas II pronounced concerning one who uncanonically acquires the papacy through violence. Here, d'Ailly notes, it is said that if someone by popular or military disturbance, without canonical election, is enthroned in the Apostolic See, it is permissible for the cardinals 3 to anathematize the invader

sa ordinaria to the Decretals of Gregory IX, I have been unable to determine whether the gloss on X, 2, 13, c.6, in v. Clam possessione intrasse directs d'Ailly to this text of the Decretum.

1"Illi ergo, quorum electio vitiosa est, vel qui a clero non sunt electi, vel a populo expetiti, vel qui per simoniam irresperunt, non sunt habendi inter episcopos. Et ideo, si a sedibus, quas tenere videbantur, expulsi fuerint, non possunt restitutionem petere, antequam vocentur ad causam." C.3, q.1, c.6, Patet ergo. If the translations of canonist writings presented in this paper appear wanting, I can refer the reader to Brian Tierney (Foundations, p. 20 n. 1) for at least one reason: "It is difficult, and sometimes impossible, to translate accurately the technical language of the canonists . . . ."

2D.79, c.6.

3In paraphrasing this text, d'Ailly omits aliis clericis timentibus Deum et laicos, who are associated by the text with this action by the cardinals.
and expel him, with human aid. Gratian immediately points out that this is a special case—that in which the Apostolic See is occupied by violence. For in such a case no judge can be found superior to the usurper.¹

Gratian thus blunts the objections to the first opinion by showing that this exception holds only in the case of violent occupation of the Apostolic See. The lesson is that this emergency provision does not apply to the Avignonese pope, since he did not gain the See by such an intrusio. In the course of the argument, d’Ailly gives his opinion of the Roman pope’s status. It is obvious from these considerations, he says, that those who contend that obedience ought to be restored to Bartholomew (i.e. Urban VI) or his successor before he comes with us to a General Council hardly have the law on their side, “since his intrusion into the papacy by popular tumult is a notorious fact.”²

D’Ailly then points out that the above-mentioned gloss enumerates other cases in which the established rule on restoration fails. But it is pointless to go on enumerating them because, according to the first opinion, such consider-

¹ “Qui casu iudex non inventur, cuius officio ille apostaticus possit exclusi. In alius autem locum non habet, cum violenta possessio, nisi per iudicis sententiam, violento detentori detrahi non possit... Si ergo episcopi a sedibus, quas quoquomodo tenere videbantur, non per iudicem, sed violenter electi fuerint, post electionem restituendi sunt ante regularem ad synodum vocationem.”

² “...Cum eius intrusio in Papatum per tumultum populi facta fuerit notoria.” De materia, p. 286.
ations have no place in the affair of whether or not obedience ought to be restored to the pope, "since in his case it is not permissible for his underlings to limit or judge his deeds." ¹ It is written in the canons:

No one shall judge the first seat, desirous of testing justice. For not by Augustus (that is, the Emperor), nor by all the clergy, nor by kings, nor by the people shall the judge be judged.²

Likewise there is found:

God wished the cases of other men to be bound by men, but He has reserved the bishop of that see from judgment except for His investigation. He wished the successors of Blessed Peter the Apostle to owe innocence only to heaven . . . .³

Pope Gelasius wrote:

The most holy Roman Church has to be judged in all things by divine law, and it is not permissible for anyone to pass judgment on its judgment. . . . But we do not pass over those things, because the Apostolic See, without any synod preceding, has the faculty both of pardoning those whom an unjust synod has damned and of damning, with no synod in session, those whom it behoves. Doubtless this is on account of

¹"Cum de eius causa non liceat subditos definire vel eius facta iudicare, ut 9, q.3, cap. Nemo, et capitulis sequentibus." Ibid., p. 287. Reference is to C.9, q.3, c.13ff.

²"Nemo iudicabit primam sedem iustitiam temperare desiderans. Neque enim ab Augusto, neque ab omni clero, neque a regibus, neque a populo iudex iudicabitur." C.9, q.3, c.13.

³"Aliorum hominum causas Deus voluit per homines terminari, sed sedis istius praesulem suo sine quaestione reservavit arbitrio. Voluit Beati Petri Apostoli successores caelo tantum debere innocentiam . . . ." C.9, q.3, c.14; d'Ailly also cited from cc.15-16.
the lordship which Blessed Peter the Apostle held and always shall hold from the Lord's voice.¹

The first opinion concludes that the pope (the Avignon pope) was not granted the necessary rights of the accused when he was despoiled by the withdrawal. A canonical deprivation cannot be made of one who is not present at the proceedings; Benedict was despoiled before and without trial. Before any further action may be taken against him in a General Council, he must be restored.²

There is an imbalance in this first opinion, or at least in the way it is presented. The opinion is preoccupied with the necessary rights of the accused to fair judicial proceedings, and it concludes that since Benedict has been despoiled before and without trial, he must be restored before he is again examined. Yet there is the matter supporting the point of view that the pope can be judged by no man. This

¹"Sacrosancta Romana Ecclesia fas de omnibus habet iudicandi, neque cuidam de eius liceat iudicare iudicio. . . . Sed nec illa praeterimus, quod Apostolica Sedes sine ulla synodo praecedenti et solvendi quos iniqua synodus damnaverit, et damnandi, nulla existente synodo, quos oportet habuit facultatem. Et hoc nimirum pro suo principatu, quem Beatus Petrus Apostolus Domini voce tenuit et semper tenebit." C.9, q.3, c.17. Here d'Ailly allows his opinion to intrude in a way which foreshadows the manner in which he will later in the treatise treat such texts. He notes that the remarks made here concerning the synod must not be understood to apply to the universal synod canonically celebrated, but to the local synod or to the universal synod uncanonically celebrated. De materia, p. 288.

²De materia, p. 288.
is another argument altogether. It is a point equally well entrenched in the canons and is certainly a more forceful stance. But it is not given preeminence in the argument and does not seem to figure in the final summation of the first position. Moreover, to admit the cogency of such an argument is to render superfluous the rest of the arguments. If one believes that the pope has no human judge, then what is the point of debating the rights of the pope when he is being accused and judged?  

D'Ailly depicts the argument from the judicial supremacy of the pope only being used to strike down the exceptions to the established rules on restoration, when logically it is also fatal to the established rules, at least as they are applied to the pope.

Perhaps we must be on guard here against d'Ailly's handling of a position with which he is known to have disagreed. He was opposed to full restoration and to the argument that the pope has no human judge. Other factors may have contributed. D'Ailly may have been summing up the opinions of men who supported the full restoration but for two different reasons. Or the first opinion may mean to say that if one does not admit that the pope cannot be judged by any man, at least one must admit that he must be granted the regular rights of the accused when proceedings are made against him.  

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1 There is no hint in the argument of that subtle distinction of Huguccio, by which a pope manifestly guilty of notorious crime is ipso facto no longer pope. See Appendix.
Whatever the explanation, it is hard to believe that d'Ailly was aware of the extent to which the more extreme claim nullified the exceptions to the laws on restoration and yet was unaware of the extent to which the same claim made superfluous the application to the pope of the laws themselves.

The Second Opinion

Now d'Ailly turns to the second opinion, that there should be no such restoration to Benedict. He states that he has drawn the arguments from the points raised against Benedict in the instructions of the cardinals sent to the French king by a faction of the Sacred College. This refers, apparently, to the mission of the Cardinals de Malesset, de Thury, and de Saluces sent to Paris in 1398-1399 by the Sacred College, bringing charges of heresy, perjury, dissoluteness, and injustice against Benedict. The arguments, d'Ailly says, are reducible to certain points raised in a gloss followed by many doctors, in which cases of the failure of the established rule on restoration are laid out. Of the points discussed therein, d'Ailly proposes to raise only the eight which he considers germane and to which the other arguments may be reduced.

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1 Oakley, D'Ailly, p. 288 n. 5. This is one of the passages which have been used to date the tract. See above pp. 42-43.

2 C.3, q.1, in v. restitutio.

3 De materia, pp. 288-89.
The first case is dilapidation (dilapidatio). By the authority of Pope Pelagius, "It is said, let him be removed from administration who badly administers the affairs of the Church, until the facts of the case are known." While it is allowed that the gloss here warns that today spoliation must follow legal proof of guilt, this opinion brushes the objection aside with the assertion that this is not necessary when dilapidation is notorious. Joannes Andreae is cited in proof.

Hence, these men who support the second opinion conclude that withdrawal of administration from Benedict was deservedly done and that there ought not be a restoration, because it is notorious that Benedict is insufficient and useless to the papal regime, a delapidator and dissipator of the Church, that he has most of all exhibited negligence in the settling of the Schism, being unwilling to or negligent in submitting to the cardinals and others working for a solution.

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1 C.3, q.2, c.9.
2 "Dicitur quod ab administratione submoveatur qui res Ecclesiae male ministrat, donec de causa cognoscatur." De materia, p. 289.
3 C.3, q.2, c.9, in v. Donec causa.
4 Glossa ad X, 5, 3, c.31. See Oakley, D'Ailly, p. 289 n.2, for fuller reference.
5 De materia, p. 289.
The second case is enormity of crime. The case cited is that of a presbyter, who evidently came under suspicion concerning the death of his bishop and was removed. Pope Alexander II ordered him to be tried and only then restored, if proven innocent. The gloss notes that this was done "because he was gravely disgraced." Most of all this holds true in the case of heresy, as is pointed out by The Archdeacon, Innocent IV, Bernardus Compostellanus, and Henricus Boik. And Hostiensis concurs, when, among cases in which restoration is to be denied, he cites heresy.

The third case is "ill-fame and proof of crime." It

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1 C.2, q.5, c.11.
2 " . . . Quia graviter erat infamatus." C.2, q.5, c.11, in v. Beneficia.

3 References are made to Guido de Baysio (The Archdeacon), Rosarium, glossa ad D.8, c.1; Innocent IV, upon X, 5, 31, c.11 (from which d'Ailly repeats Innocent's warning: "Sed si aliud crimen sibi obiciatur, ut quod sit adulter, perjurus, vel simoniacus, quia per huiusmodi crimina non amittit ius suum, non credit huiusmodi exceptiones admittendas."); Bernardus (Antiquus), upon X, 1, 6, c.28; Henricus, upon X, 5, 31, c.11. For more complete references, see Oakley, D'Ailly, p. 290 nn. 2, 3, 8. 9. Guido de Baysio (d. 1313) was archdeacon of Bologna and a glossator of the Decretum. Innocent IV (d. 1254) was not only pope but a noted Decretalist. Bernardus, archdeacon of Compostella, was a thirteenth-century canonist, referred to as Antiquus to distinguish him from a later namesake. Henricus Boik (1310-1350?) was a Decretalist.

4 Upon the rubric De restitutione spoliatorum. See Oakley, D'Ailly, p. 290 n. 5 for fuller reference.

5 " . . . Infamia et crimis evidentia, ut 2, q.5, Presbyter, et q.1, Scelus, et cap. Manifesta." The references are to C.2, q.5, cc.13, 21, 15.
is said that if a presbyter is the object of rumors of disgraceful conduct among the people and if the bishop is unable to establish the facts with legitimate witnesses, the presbyter should be suspended until there is a worthy resolution "lest the people of the faithful suffer scandal in this." On this point the gloss says that this is meant for cases of notorious, manifest, or infamous crimes which scandalize the faithful. In C.2, q.1, cc.15, 21, it is shown that even without formal accusatio a manifest crime is to be judged and punished. The gloss agrees on this point, and other doctors have written in the same vein. So, the adherents of the second opinion claim that Benedict has committed enormous crime, that he is a partisan of schism, that he is under suspicion of heresy in his words and deeds contrary to his oath concerning the peace and union of the Universal Church, and that he labors under ill-fame and evidence of crime, with the spreading of notorious scandal among his cardinals and the princes and people of his obe-

1"Presbyter si a plebe sibi commissa mala opinione infamatus fuerit, et episcopus si legitimis testibus approbare non potuerit, suspendatur usque ad dignam satisfactionem, ne populus fidelium in eo scandalum patiatur." C.2, q.5, c.13.

2C.2, q.5, c.13, in v. suspendatur. D'Ailly also cites from X, 3, 2, cc.7, 8, 10.

3C.2, q.1, c.15, in v. manifesta, where it is noted, says d'Ailly, "quod 'aliud est infama, aliud manifestum, aliud notorium,' et quod 'notorium triplex est, scilicet notorium facti, notorium iuris, et notorium praesumptionis.'"
dience.  

The fourth case is contumacy. It is written\(^2\) that he who neglects to appear for his own hearing ought to be sentenced. The individual who is called to court and fails to appear is presumed to have confessed guilt by not appearing. The argument is applied by analogy to Benedict, certainly because he has neglected to be present for his trial in the prosecution of the union of the Church and contumaciously, so it seems, has scorned to place his trust in the counsel of his cardinals and notable princes, who most earnestly exhorted and humbly asked that he pursue the cause of the said union through the more fitting route, namely the way of cession. Wherefore, the said opinion concludes from these things that he is contumacious and on this account that he must be suspended from administration and not restored.\(^3\)

The fifth case is scandal. It is shown in the canons\(^4\) that the deposition of certain bishops "made in the face of or beyond the cognizance of the Roman Pontiff the Church tolerates to preserve peace among certain kings and to avoid the scandalizing of the churches."\(^5\) As the text concludes:

\(^1\) *De materia*, p. 291. 
\(^2\) C. 3, q. 9, c. 10. 
\(^3\) "Quia scilicet neglixit adesse causae suae in prosecute unionis ECClesiae et contumaciter, ut videtur, contempsit credere in consilio cardinalium suorum et principium notabilium, qui causam dictae unionis prosequi per viam convenientiorum, scilicet per viam cessionis, instantisimue suadebant et humiliter requirebant. Quare dicta opinio eum ex his conclusit contumacem ac idea ab administratione suspendendum nec esse restituendum." *De materia*, p. 292. 
\(^4\) C. 3, q. 6, c. 10. 
\(^5\) "Contra vel praeter 'conscientiam Romani Pon-
"Indeed, it is not necessary that the churches of the Lord suffer through the discords of kings any of the damages of division when they are eager to mutually and among themselves preserve the peace (insofar as it comes from them) which they proclaim."¹ Thus the second opinion holds that the withdrawal from Benedict done to stop the scandal of the Schism and to restore the peace of the Church must be borne until unity is accomplished. D'Ailly notes that the exception concerning scandal mentioned in the third case more aptly belongs here, because this opinion holds that the people of the faithful (populus fidelium) under Benedict suffer by his scandalous action, in that Benedict contumaciously rejects the way of cession, clasps in his hand the crime of schism, as some say, and runs into suspicion of heresy.

The sixth case is drawn from marriage law by analogy. Normally an estrangement is settled by the restoring of the woman to her lawful husband. But if this would endanger her because of his hatred for her, she must be entrusted to a safe guardianship until the case is decided.² This is aptificis factam' tolerat Ecclesia pro pace servanda inter quosdam reges et ecclesiarum scandalo evitando." The phrase quoted by d'Ailly is from the text cited in n.4, p. 64, as the following sentence. De materia, p. 292.

¹"Non enim ecclesias Domini per discordias regum divisionis aliqua pati damna necesse est, cum (quantum ex se est) pacem, quam praedicant, servare studeant invicem et in omnes."

²"Si autem capitali odio ita vir mulierem perseque-
plied to Benedict, since it is asserted that he is a cruel and vindictive man whose ferocity and mortal hatred are to be feared by those who with good intentions brought on the withdrawal. Therefore, they say, until the decision of the case, that is, the termination of the Schism, restoration ought to be reserved.¹

The seventh case concerns an oath or pact made.² Benedict swore upon his election to work for unity by all routes and rational means. Because he has not done this, a withdrawal of obedience has been performed, and there must be no relenting at least until he has effectively implemented his oath.³

Eighth and last, and more to the point than the seventh, it is stated "that one despoiled of his possession is not restored when he held it under a condition. . . ."⁴ According to the second opinion, Benedict received and held his office under the condition expressed in his oath. Since he has not implemented the condition, he deserved spoliation

¹De materia, p. 293.
²X, 2, 13, c.3, is cited in support.
³De materia, p. 293.
⁴" . . . Quod non restituitur a possessione sua spoliatus quando sub conditione possidet, ut Extra, De restitutione spoliatorum, Olim." The text cited is X, 2, 13, c.16.
and must not be restored.¹

The Third Opinion

The third opinion, states d'Ailly, is midway between the two extreme and contrary opinions above, since it asserts that in the present case, a restoration of obedience should be made in some things but not in others. It draws a distinction between the essential and necessary powers of the papacy and those which are accidental and adventitious.

For certain things were essential and by necessity attached to the papal dignity, namely those rights, those preferments, and those honors which as much by reason of orders as by reason of jurisdiction are owed by divine law to the pope as supreme head of the Universal Church. Other things were accidental and adventitious and, as it seems in certain cases, usurped to the prejudice of the prelates and lesser churches, as the dispositions and collations of episcopacies, to the prejudice of elections, reservations of ecclesiastical benefices to the prejudice of the collations of ordinaries, the reception of vacancies to the prejudice and often to the greatest injury of the churches, retentions and reservations of offices to the prejudice of visitations and corrections and the reformation of the ecclesiastical state of life and to the grave scandal and peril of souls, and also many other things of this kind, which are called rights of the Apostolic Chamber. And these all were not attached to the papacy of old, and neither Peter nor the greater number of the most holy successors of this most perfect pope had the use of such things; but from some other times they have been introduced, more de facto than de iure, since these things seem to be against the common law, indeed against the

¹De materia, pp. 293-94.
divine law.\textsuperscript{1}

This opinion posits two conclusions arising from this distinction. First, there ought to be a restoration of those things which are comprehended by the first part of the distinction. This agrees with the first opinion and is founded upon the same authorities. Second, there ought to be no restoration of those things comprehended by the second part of the distinction. This agrees with the second opinion, but it is not founded on the allegations made in its behalf.\textsuperscript{2}

D'Ailly perceives that the most serious challenge to partial withholding of obedience comes from the many authorities cited in favor of the first opinion; no bishop may be

\textsuperscript{1}"Nam quaedam erant essentialia et necessario annexa dignitati Papatus, scilicet illa iura, illae praeminentiae et illi honores, qui tam ratione ordinis quam ratione jurisdictioinis de iure divino debentur Papae tanquam suprema capiti universalis Ecclesiae. Alia erant accidentalia et adventitia et, ut quibusdam videtur, usurpata in praestium praelatorum et ecclesiarum inferriorum, sicut dispositiones et collationes episcopatum in praestium electionum, reservationes beneficiorum ecclesiasticorum in praestium collationum ordinariorum, receptiones vacantium in praestium et saepe in maximam destructionem ecclesiarum, retentiones et reservationes procurationum in praestium visitationum et correctionum ac reformationum status ecclesiasticorum et in grave scandalum et periculum animarum, ac etiam multa alia huiusmodi, quae vocabantur iura Camerae Apostolicae. Et haec omnia antiquitus non erant annexa Papatui, nec Petrus nec plures eius sanctissimi successores Papae perfectissimi talibus utebantur; sed ab aliquibus temporibus introducta sunt, magis de facto quam de iure, cum ista contra ius commune immo etiam contra ius divinum esse videantur." \textit{Ibid.}, p. 294. D'Ailly's reference to \textit{ius commune} is to the canon law. See Oakley, D'Ailly, pp. 173-76, for discussion. See also below p. 121 n. 2.

\textsuperscript{2}De materia, pp. 294-95.
accused and judged while he stands despoiled. In this case Benedict stands despoiled, and there must be a restoration before further legal proceedings. To this objection the third opinion can make two responses.

First, as to those things which have been usurped by the Roman Curia from the bishops and lesser churches, Benedict was not, properly speaking, despoiled by the withdrawal. According to Geoffrey de Trani, spoliation "is violent and injurious ejection from the possession of an immobile thing or the taking away of a mobile thing." Geoffrey then explains that "injurious" (injuriosa) is added because notwithstanding how often someone is ejected violently from a possession, he must be understood to be ejected injuriously, as for example when someone ejecting another is immediately and as though in a continued war repulsed. For even if he is shut out by violence, he is still not restored.

The bishops and lesser churches can argue that the popes, against their rights, and in the face of their protests or their silent, fearful unwillingness, have usurped such things, and now through withdrawal, "as though in a continued war,"

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1. "Est a possessione rei immobilis violenta et injuriosa eici et mobilis rei ablato." On the rubric De restitutione spoliatorum. For full reference see Oakley, D'Ailly, p. 295 n. 3.

2. "Quia non quotienscunque quis de possessione violenter eicitur, injurioso eicii intelligendus est, ut cum quis alium eiciens incontinenti et quasi bello continuato reicitur. Nam etsi per violentiam excludatur, non tamen restituitur. . . ." In support Geoffrey (and d'Ailly) cited X, 2, 13, c.16; C.3, q.1, c.6, Patet ergo; C., 8, 4, 4.
they repulse such a usurpation and return to the old possession of their rights, not in this bearing injury to the pope. They have not despoiled him, as it is said, "'he who makes use of his own right does injury to no one."' D'Ailly concludes that the bishops should not now be despoiled, nor should they ever have been despoiled, of those things which they now hold as they held them in antiquity, that is, the pope's accidental powers.

Second, even supposing, although improperly, that the pope were actually despoiled of his possession in the withdrawal from him of his accidental powers, nevertheless, it is not necessarily to be conceded from this that he ought to be restored. As has been pointed out above, there are many cases in which the rule on restoration fails. Some of these are seen to pertain here.

First is the case in which immediately the despoiler wishes to prove exception. In the present case, the prelates immediately and promptly are able to prove exception because all *iura communia* and most of all the ancient laws instituted by the holy fathers support their case.

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1 *Qui iure suo utitur, nemini facit iniuriam.*  *De materia*, p. 296.

2 *De materia*, p. 296. As above, d'Ailly bases his discussion on C.3, q.1, *in v. quod restitutio*.

3 As in X, 2, 13, c.13.

4 *De materia*, p. 296. Here is another point at which the later drift of d'Ailly's discussion intrudes. He follows the above remarks by saying "Et si aliquae novae de-
Second is the case in which possession has been gained "by favor or entreaty." It is written in the canons that beyond ancient custom bishops can exact nothing from their flocks, even such exactions as have grown up by usage. These are to be denied to them "lest we seem in the Church of God to be named exactors rather than High Priests of God." And the gloss comments that prolonged possession does not make the law and that time does not induce obligation; other canons testify to this. Because a usurper remains long in possession without being proceeded against, it does not follow that he may not at length be brought to an accounting. And Hostiensis, among twenty-four cases in which restitution is to be denied, sets down three in which spoliation is charged against the one seeking restitution. Notice, says d'Ailly, that the bishops charge that they have been despoiled of their rights.

Next, d'Ailly turns to face the objections raised by the second opinion, that no restoration at all ought to be 

cretales epistolae seu papales constitutiones in favorem dic- 
tae possessionis emerserint, illae per generale concilium 
retractandae et corrigendae sunt vel saltem moderandae .. 
.."

1"Ex gratia vel precario." De materia, pp. 296-97. 
D'Ailly cites in support X, 5, 31, c.7 and C.10, q.3, c.6. 
From the latter the following material is drawn.

2"...Ne videamur in Ecclesia Dei, exactores potius 
quam Dei Pontifices nominari."

3C.10, q.3, c.6, in v. praesumpta. Cited by d'Ailly 
in support are D.93, c.22; C.24, q.1, c.34; X, 3, 39, c.5. 
4For reference see Oakley, D'Ailly, p. 297 n. 5.
First, the Lord Benedict and his followers deny all the crimes charged in the above-mentioned objections; consequently they deny that their crimes are notorious or evident. Furthermore, concerning these charges, Benedict has made known his readiness for discussion, as is obvious from his letters to the French prelates. On these things an audience must not be denied to him. "Indeed, it seems most unjust that he be punished unheard and not despoiled by his own judge."¹

Second, supposing that Benedict has in any way sinned or erred in these affairs, in error he has not persevered. As is obvious from the public records signed by him, whatever has been sought in the affairs of the Church at the instance of the French king, he has conceded. Nor has he been obstinate, as is obvious from the protestations often made by him, in which he has submitted himself, his faith, words, and deeds in the matter of union to the correction and determination of the Church. Thus he cannot be called a heretic or schismatic. As Augustine wrote: "I can err, but I am not a heretic."² It is obvious, says d’Ailly, that

¹"Immo inustissimum videtur ipsum non auditum puniri et a non iudice suo spoliari." De materia, p. 298.

²"Errare potero, sed haereticus non ero." To quote Oakley, D’Ailly, p. 298 n. 2: "The idea is St. Augustine’s cf. De Trinitate, I, c.3; PL 42, 822-23; also De Haereticis in the Preface; PL 42, 20ff. The actual words, however, are St. Bonaventure’s, Sent., 4, dist.13, dub.4."
here the exception of heresy noted in the gloss\(^1\) (that is, the exception, in the case of heresy, to the rule on restoration) has no place.

For truly this exception has a place in the case of one who is stubbornly heretical or who holds obstinately a manifest and already-condemned heresy, as in D.19, c.9, where it is read that clerics withdrew themselves from him. But there the gloss says that they did this because it was a case of heresy already-condemned, and it is obvious in the text that he was even blatantly communicating with a manifest heretic, cherishing his error and contumaciously persevering in it.\(^2\)

It cannot be said that Benedict has obstinately persisted in manifest heresy already condemned.

Third, it is well known that withdrawal in France was made in an attempt to force Benedict to agree to pursue the via cessionis. Since he has indicated his willingness to do this, obedience ought to be restored to him, at least in

\(^1\)D.8, c.1, in v. Nam iure divino. The gloss cites C.23, q.5, cc.1, 3, 35.

\(^2\)"Haec namque locum habent in eo qui pertinaciter est haereticus, vel qui tenet obstinate haeresim manifestam et alias damnatam, ut in cap. Anastasius, 19 dist., ubi legitur quod ab eo se subtraxerunt clerici. Sed dicit ibi glossa quod hoc ideo fecerunt, quia incidebat in haeresim iam damnatam, et patet in textu quod etiam communicabat notorie cum manifesto haereticum, eius errorem fovendo, et in eo contumaciter perseverando." De materia, p. 298. D'Ailly here echoes certain opinions of the great Decretist Huguccio. See Appendix. Cited here are D.19, c.9 and the gloss upon it, in v. Abegerunt. The text of D.19, c.9 discusses the case of Pope Anastasius II (496-498), whose friendly reception of the deacon Photinus, a partisan of the Acacian Schism, prompted the Roman clergy to renounce communion with him. According to medieval legend, he was then struck dead as an apostate by God.
those things already advocated. The cause having ceased, let the effect likewise cease.

Fourth, experience has shown that despite good intentions to settle the scandalous Schism, the withdrawal has not done so. Rather, the Schism is strengthened, and within the Avignon obedience a further schism has arisen. When experience teaches that well-intentioned withdrawal makes no progress but is prejudicial to it, it ought to be halted. If not, in one way after another scandal shall be given, against the Gospel's warning: "Woe to that man through whom scandal comes."¹

Fifth, it seems hardly just to impute to Benedict ferocity and mortal hatred against those who made the withdrawal after he has announced his readiness for reconciliation. Nor does it seem just for him to be detained a prisoner on suspicion of such sentiments, because in other more just and honorable ways the initiators can be protected.²

Indeed, those who have invaded Benedict's dwelling and have been detaining him there seem more open to such accusations. Their acts will in no way aid the solution of the withdrawal problem. Furthermore, the king, in his letters, has expressed disapproval of the acts of Benedict's enemies and has placed Benedict in royal safeguard. D'Ailly apparently refers to the letter of safeguard delivered to Benedict.

¹Matt. 18:7.
²De materia, p. 299.
on April 10, 1399, and to the letter of August 1, 1401, disavowing the violence organized by the Sacred College. D'Ailly warns that those who persist in this violence evidently show that they are the king's enemies.

Sixth, the third opinion responds to the seventh and eighth points of the second opinion. From the oath of Benedict, taken before or after his election, it is not to be inferred that his election to or reception of the papacy was conditional or done under a condition, because the election of a pope cannot be conditional. Besides this, Benedict has expressed his readiness to implement the conditions of the oath, thus fulfilling it inasmuch as he personally can. D'Ailly seems determined to put a good construction on the often questionable conduct of Benedict.

To the administration of the papacy Benedict ought to be restored, argues d'Ailly, since even those who withdrew are unable to deny that Benedict holds the right to the office. They named him to it, and after the withdrawal, they sought the way of cession from him. If he is not the pope, then how can they ask him to cede the papacy?

Seventh, d'Ailly lays down a general response to the second opinion. In the eight cases touched upon therein, in which restoration is not carried out, the laws advanced

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1 Oakley, D'Ailly, p. 299 n. 9.
2 De materia, p. 300. He passes over legal citation here "causa brevitatis."
in support do not speak directly concerning bishops, but only lesser persons, as is inductively obvious in all the texts cited there, except C.3, q.1, c.10. Even there, he notes, the exception is not introduced by the disposition of the law, but by tolerance or permission. The laws on spoliation and restoration, which support the first part of the third opinion (that there should be a partial restoration) always hold in the cases of bishops and popes. The exceptions to these rules cited by the second opinion do not hold in their cases, unless they consent to them. It is the law that bishops deprived of their sees and honors must be restored before being called to the synod for judgment. The rule is to be closely observed here, because the pope is more privileged than the lesser bishops, as laws human and divine proclaim.¹

It may be well at this point to review the arguments. D'Ailly states that he agrees with the first opinion that the necessary powers ought to be restored and that he shares the same reasoning. Moreover, he agrees with the second opinion on not restoring the accidental powers, but he does not share the reasons of the second opinion.

Then he turns to face the objections of the first opinion that the accidental powers as well as the necessary powers ought to be restored. His primary argument is that regarding these accidental powers, there was not actually a

¹De materia, p. 300.
spoliation, since the pope never rightfully possessed them. Therefore, there can be no restoration. D'Ailly's secondary argument is that, even conceding, improperly speaking, that the pope was despoiled by the removal of his accidental powers, it is not necessary to concede that there should be a restoration, because, as has been pointed out in the second opinion, there are exceptions to the rule on restoration, applicable to this case, which deny the necessity of the restoration.

Now he faces the objections of the second opinion that the necessary powers should likewise be denied to the pope. D'Ailly's first six arguments are miscellaneous. His final, general rebuttal is that the exceptions in favor of the second opinion are inapplicable to the case of a bishop unless he consents.

First, there is an understandable oversimplification when he says that he agrees with the reasoning of the first opinion on the restoration of necessary powers. He agrees with the argument of the first opinion that the pope was, in this case, unjustly despoiled. He does not agree with the other argument that the pope is subject to no human judge. This would bar the lesser bishops from recapturing the usurped powers and most of all would fly in the face of part of the tract yet to come, in which d'Ailly argues that the General Council can judge the pope. Actually it is only in the last part of the third opinion that he answers the more extreme proponents of the first opinion.
It is interesting to note that in advancing his primary argument against the objections of the first opinion, he is saying why he does not support the reasoning of the second opinion. He is agreeing with the second opinion, in opposition to the first opinion, that the accidental powers should not be restored. But whereas his rationale is that no actual spoliation occurred, since the pope did not rightfully possess them, the rationale of the second opinion is that the exceptions to the laws on restoration allow the spoliation of Benedict which occurred. Involved here is his distinction of necessary and accidental powers. His argument applies only to the accidental powers, while the argument of the second opinion applies broadly to both.

It is when we arrive at his secondary argument against the first opinion and compare it to his summary argument against the second that there is potential trouble. D'Ailly attacks the first opinion by saying that there are exceptions to the rule on restoration that allow such a spoliation, and that they apply here. But then, in answering the second opinion, he denies the applicability of such exceptions to bishops or popes, unless they consent. It seems that in laying to rest the arguments of the second opinion d'Ailly has negated part of his argument against the first.

A solution may be at hand for this. First, it should be noted that d'Ailly, in his secondary argument against the first opinion, is not expressing his own opinion. He states that to admit the argument's assumption—that the pope
has actually been despoiled in regard to the accidental powers—is to speak improperly. What he is actually doing is employing the same types of arguments, drawn from the same gloss detailing cases in which the rule fails, that the entire second opinion is founded upon. He is using the arguments of the second position against the moderate position represented under the first opinion, that spoliation in this case was unjustly done. He has agreed with the first opinion to the extent that the necessary powers ought to be restored. He has given his own reason for not restoring the accidental powers and has backed it up with someone else's argument, for someone else's benefit. But this latter argument is one which, if clung to, would deny restoration of the necessary powers as well. So, his aim when he comes to attacking the second opinion is to deny its arguments that the necessary powers should not be restored. He then does this by undercutting the exceptions upon which the second opinion is based.

D'Ailly was a practical and flexible man, engaged here in writing a publicist tract. It seems that he was attempting to offer as many arguments as possible to as many men as possible, men who did not necessarily agree on all the legal points but who did want desperately to find a solution. The men against whom the secondary argument is directed were most likely not at all the vigorous opponents of papal centralization to whom the primary argument would appeal. D'Ailly was using his secondary argument against the
point of view which regards withdrawal of accidental powers as unlawful spoliation. Perhaps d'Ailly felt free to use such an argument against those holding such a point of view because his later denial, in attacking the second opinion, that such an argument is effective, would not have had an effect on men who were supporting full restoration. The argument was not directed against them but against the point of view that complete withdrawal of necessary and accidental powers should be maintained. It is likely that those men would have joined d'Ailly in opposing this last point of view, no matter what d'Ailly's own reasoning might be. It appears that d'Ailly is characteristically preoccupied with the end of his arguments rather than the means employed in getting there.

Also, it must be remembered that d'Ailly, in arguing against the second opinion, stated that Benedict had expressed willingness to accept correction. Perhaps he regarded this willingness as tantamount to consenting to the admission of the exceptions in the prosecution of Benedict's case. This may serve to answer another question. For what reason did d'Ailly bother to refute the second opinion by denying charges brought under the argument which admitted the application of the exceptions, when he also believed that no such exceptions could be made for use against bishops and popes? Aside from the possibility that here again he is trying to appeal to as many points of view as possible, there is the possibility that he wished to be safe.
and cover all contingencies. So, if some determination were made that Benedict, by his expression of willingness to be corrected, had admitted the application of the exceptions to his case, the argument would still hold up. One could still at least contest the truth of the allegations or the efficacy of the withdrawal policy.

Finally, whether one is inclined to see here subtlety or fuzziness, it seems that the complexity of this matter is at least partly due to the fact that d'Ailly is distinguishing two different types of papal power while he is agreeing and disagreeing with the aspects of two different arguments.

To sum up d'Ailly's position thus far, the pope's necessary powers were taken from him unlawfully and should be restored, while his accidental powers have not really been taken from him—they have, rather, been restored to their rightful owners—and thus cannot be restored to him.

We return now to d'Ailly's argument. He recalls that the first opinion advanced a line of argument which went beyond asserting that in this particular case, Benedict was unlawfully despoiled, to assert that withdrawal can never lawfully be made, especially a withdrawal of the necessary powers attached to the papacy. The laws cited in support of this opinion state that the pope can have no human judge. D'Ailly readily concedes that this is the regular situation.\(^1\)

\(^1\)Ibid., p. 300.
But, he says, some have gotten the wrong idea from the text which states concerning the pope "and not by all the clergy ... shall the judge be judged."¹ From this and other texts, as well as from the glosses on them, some have been led to say that the pope cannot be judged even by a General Council.² This line of reasoning— that the pope has no human judge— denies that the pope can under any circumstances be deprived of his necessary powers. D'Ailly has agreed with the first opinion inasmuch as he agrees that Benedict, in this particular case, was despoiled of his necessary powers contrary to correct legal procedure. He dissents when the first opinion adopts the view that the pope can never be so removed.

The gloss says on the words ab omni clero that

a council cannot judge a Pope, as X, 1, 6, c.4 has it. Whence if the whole world should opine in some affair contrary to the Pope, it would seem that the opinion of the Pope is to stand, as in C.24, q.1, c.14. But there is an argument against this, because the world is greater than the city, as D.93, c.24 has it.³

¹"... Neque ab omni clero ... iudex iudicabitur." C.9, q.3, c.13.

²D'Ailly cites here C.9, q.3, cc.14, 15. These, and c.13, it will be remembered, figure in the first opinion, when it is argued that the pope has no human judge.

³"... Concilium non potest Papam iudicare, ut Extra, De electione, 'Significasti.' Unde si totus mundus sententiaret in aliquo negotio contra Papam, videtur quod sententiae Papae standum esset, et 24, q.1, 'Haec est fides.' Sed est argumentum contra, quia orbis maior est urbe, ut 93, dist. 'Legimus.'" C.9, q.3, c.13, in v. Neque ab omni clero. Tierney, Foundations, p. 253. See Appendix below for some dis-
Conceding that the gloss does not reconcile the contradiction here, d'Ailly notes that Teutonicus directs the reader to his gloss on the much discussed D.40, c.6. There the text discusses the situation in which a pope neglects his own welfare and that of his brother and is found useless and remiss in his duties. It warns that "no mortal presumes to confute faults of this kind, because he who is to judge the rest must be judged by no one, unless he is observed deviating from the faith..." ¹

D'Ailly then turns to the gloss on the words a fide devius.² Teutonicus relied in turn upon Huguccio, who had understood the a fide devius clause as applying when the pope refuses correction for his alleged heresy. For if he is prepared to be corrected, he cannot be accused. D'Ailly points to the correspondence on this last point with the case of Pope Marcellinus (296-304), who, because he openly repented his apostasy, was not condemned for it.³

¹Tamen huiusmodi culpas redarguere praesumit hic nullus mortalium, quia cunctos ipse iudicaturus a nemine est iudicandus, nisi deprehendatur a fide devius..." D.40, c.6.

²D.40, c.6, in v. a fide devius. D'Ailly follows this gloss almost verbatim. It also is printed in Tierney, Foundations, pp. 251-52, as is that of Huguccio (pp. 248-50) upon whom Teutonicus relied.

³De materia, p. 301. D.21, c.7. The gloss and d'Ailly cite C.24, q.1, c.36 in support of the contention that he cannot be accused if he is ready to be corrected. See above, pp. 72-73, 73 n. 2, d'Ailly's similar treatment of the case.
But then the above-mentioned gloss asks whether the pope can be accused of any crime other than heresy. Suppose that his is a notorious crime, by confession or by evidence of the deed. Must it be admitted that if he commits simony or adultery, is admonished, and remains incorrigible, so that the Church is scandalized by his case or his crime, that he cannot be accused? The gloss responds that certainly, if the crime is notorious and thus scandalizes the rest of the Church, and he remains incorrigible, then he can be accused. For contumacy is called heresy, and the contumacious one is an infidel.¹ The gloss seeks a reason why only deviation from the faith is actually mentioned in the Decretum when other crimes may be charged against the pope.

"Here mention is specially made of heresy, because even if the heresy is a secret one, he may be accused of it, whereas of other secret crime he cannot."²

But it is when Teutonicus asks himself whether the pope can decide that he will not admit an accusation of heresy against himself that a more important reason for the expansion of justiciable issues emerges. He responds to his own

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¹ In C.1, q.7, c.1; D.38, c.16.
² "Hic tamen fit mentio specialiter de haeresi, ideo quia et si occulta esset haeresis, de illa posset accusari, sed de alio occulto crimen non posset." D'Ailly is again quoting verbatim from the glossa ordinaria, D.40, c.6, in v. a fide devius, for all the material in this paragraph.
because by this the whole Church would be endangered, which is not permitted, as C.25, q.1, c.6 has it. In this case the Pope would cease to be head of the Church, and so his constitution would not hold.\(^1\)

The third opinion, states d'Ailly, approves this gloss and according to it understands the case of Pope Sixtus, who voluntarily submitted to a synod's judgment.\(^2\) According to it this opinion also interprets the statement of the glossator on this case, when he gives it as an example that "the Pope can be judged by no one, not even by a Universal Council, as D.17, c.6, Hinc etiam, has it."\(^3\) This must be understood to apply to the case of secret crime, which does not agitate and scandalize the whole Church, in line with the prescription of the gloss above on a fide devius. In like manner we are to understand the other assertions in the can-

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\(^1\) Quia ex hoc periclitaretur tota Ecclesia, quod non licet, ut 25, q.1, 'Sunt quidam,' . . . in eo casu Papa desineret esse caput Ecclesiae, et ita non teneret eius constitutio." The argument is again verbatim from the same gloss. The gloss here voices an overriding concern common to the Decretists: maintenance of the general welfare of the whole Church. The argument is ready-made for the conciliarists. As is evident here, already among the Decretists it was being used to expand the area of offenses for which popes could be judged and to supersede the basic charge of heresy. D'Ailly, later in this tract, develops the implications of the canonistic concern for the general welfare. See below, pp. 89 n. 2, 91 n. 3, 97-106.

\(^2\) C.2, q.5, c.10.

\(^3\) Papa a nullo potest iudicari nec etiam ab universalis concilio, ut 17 dist., 'Hinc etiam.' De materia, p. 302. The quotation is verbatim from C.2, q.5, c.10, in v. potuissem.
ons that the pope can be judged by no one.¹

D'Ailly advances another argument to get around the ab omni clero text. One can say that the expression

is not to be taken collectively for the whole of the universal clergy or the General Council, but is to be taken distributively, so that its sense would be that by no clergy, that is, by no part or by no particular college of clergy is the Pope to be judged. Or "all the clergy" is to be taken there for the College of Cardinals or all the Roman clergy or all those of the Roman diocese, as it is assumed above in D.17, c.6, Hinc etiam. . . .²

Taken in this way the text is seen to be no threat to the case for a General Council. The third opinion holds that in certain cases the pope can be judged by a General Council.

Against this some will object that a greater is not judged by a lesser, nor a superior by an inferior.³ The pope is said to be greater than and superior to the General Council; therefore, it cannot judge him. This line of attack goes farther in saying that in the General Council, the pope alone judges and defines. The Council merely advises and

¹C.9, q.3, cc.13, 14, 15.

²"...Non capitur collective pro toto clero universalis seu concilio generali, sed capitur distributice, ut sit sensus quod a nullo cler, id est, nulla parte seu a nullo collegio clerii particulari Papa iudicandus est. Vel capitur ibi omnis clerus pro Collegio Cardinalium seu toto clero Romano vel Romanae dioecesis, sicut etiam supra sumitur in 'Hinc etiam'. . . ." De materia, p. 303.

³D.22, Prima pars Gratiani, is cited in support. As Oakley points out (D'Ailly, p. 303 n. 6), this was an argument employed at the Council of Paris (1406) by William Fillastre.
counsels. Citations are made which show the pope, having consulted the Council, himself then laying down the definitive statement. From such laws some doctors of the canons contend that the pope is not bound to the deliberation or recommendation of the Council. Much less, then, can he be judged by it. Joannes Andreae writes, "Therefore it appears that the opinions of the Pope stand, if he should contradict the Church or the Council." 

D'Ailly discerns three parts to this argument and responds to each in turn. First, conceding that regularly a greater one or superior cannot be judged by an inferior, he points out that nevertheless the rule fails at times. The king of France, who is greater than and superior to anyone in his kingdom, is in certain cases judged and has sentence brought against him in his own Parlement. D'Ailly apparently refers to the frequent condemnations of royal officials by the Parlement or to its clashes with the king over alienations of the royal domain. Similarly, the pope is judged

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1 D'Ailly gives as examples X, 3, 42, c.6; VI, 2, 14, c.2.

2 "Ergo videtur standum sententiae Papae, si contradicat Ecclesia vel concilio." Ad X, 1, 6, c.4; see Oakley, D'Ailly, p. 304 n. 3 for fuller reference. In the section quoted by d'Ailly, Andreae cites in support D.4, c.3; D.15, c.2; D.19, c.9; C.9, q.3, c.13; C.24, q.1, c.6.

3 Oakley, D'Ailly, pp. 123 n. 34, 304, n. 2. Oakley has pointed out the potentially misleading nature of this analogy: in these cases the Parlement was actually working in the real interest of the king.
in the forum of his conscience by a simple priest. Also, in the exterior forum, he can be judged by an inferior if he willingly submits himself.¹

Second, it is not true that the pope is greater than or superior to the council, although he is greater and superior in council when he is the head of all the members. D'Ailly regards this as obvious to reason, because the whole is greater than any part. The pope is part of the council, as the head is part of the body. Therefore, the whole council is greater than the pope, and consequently the authority of the whole council is greater than the authority of the pope.² D'Ailly quotes the words of Jerome often cited in similar discussions by the canonists: "If authority is sought, the world is greater than the city."³ According to the gloss this supports the argument "that the statute of a council is preferable to the statute of a Pope."⁴ D'Ailly

¹De materia, p. 304. In proof of this last point, he cites C.2, q.7, c.41.

²D'Ailly's remarks here are reminiscent of Decretist speculation on the relationship of pope and General Council: the pope surrounded by the fathers of the council is seen as the most exalted authority in the Church. It was in this sense alone that the average Decretist believed in conciliar supremacy. In d'Ailly's remarks here there is a hint of his intention to turn this supremacy against the pope. Tierney, Foundations, pp. 54-55.

³"Si auctoritas quaeritur, orbis maior est urbe." D. 93, c.24.

⁴"Quod statutum concilii praejudicat statuto Papae." D.93, c.24, in v. maior est.
goes on to point out the case of Pope Anastasius II, often adverted to in canonist discussions. Here it is said that many clerics abandoned communion with the pope because, without a council, he had communicated with Photinus the heretic. The gloss here comments "that the Pope is held to require a council of bishops where matters of faith are concerned, and then the synod is greater than the Pope, as in D.15, c.2 . . . " On C.24, q.1, c.1, on the words qui cunque in haeresim

1 D.19, c.9. See above p. 73, n. 2.

2" . . . Quod Papa tenetur require concilium episcoporum, ubi de fide agitur, et tunc synodus maior est Papa, ut 15 dist. . . ." D.19, c.9, in v. Consilio. The inerrancy of the Universal Church was virtually unquestioned in medieval times. But for practical matters a more well-defined locus of inerrancy was required. In this regard, the Decretists considered the question of which authority was to be preferred in the event of a conflict, the pope or the General Council. Gratian had ruled in favor of the pope (dictum Gratiani C.25, q.1, post c.16), but his successors insisted on exceptions. They tended to favor conciliar superiority in the definition of articles of faith. The Decretists also commonly held, in line with their concern for the maintenance of the status ecclesiae, that no pope could dispense from a conciliar decree in any matter touching the Church's general welfare. A pope might disregard conciliar decisions of merely local or temporary significance, but a conciliar statute of universal application (generale statutum ecclesiae) was held to touch the generalis status ecclesiae and was thus inviolable. Subsequently, in discussing the pope's authority to dispense from conciliar decrees, the terms generalis status ecclesiae and generale statutum ecclesiae were often used indifferently, as in the text quoted by d'Ailly, p. 88 n. 4.

D'Ailly above quotes Decretist discussions supporting both kinds of limitations on papal power. But an important distinction must be made between the Decretist and the conciliarist positions. When the Decretists held that a pope was bound by the laws of a council or that a council was superior in matters of faith, the meaning behind their often ambiguous language seems to have most commonly been that a pope surrounded by the fathers in council possessed a greater authority than a pope acting alone. Tierney, Foundations,
semel damnatum labitur, the gloss notes:

Here is a case . . . in which a Pope falls under a canon of broad condemnation. The rule that an equal cannot bind or loose an equal does not prevent this, because if the Pope is heretical, in this he is less than any Catholic: C.12, q.1, c.9 . . . .

Much more then, comments d'Ailly, is he less than the General Council.

Third, from this it follows that it is false to assume that in a General Council only the pope judges and defines, because the whole General Council can do so authoritatively and by the consensus of the council. D'Ailly attacks the opinion of "those doctors" who argue that the council merely counsels and deliberates, but does not define and judge. The contrary is found many times in the canons. We find expressions such as "It pleases the sacred council . . . ," or "the council defines . . . ," or "the holy council determines . . . ." Or we find the pope announcing that by the authority of the sacred council and by the consensus of the faithful

*. There had to be some development from the idea that the superiority of the General Council consisted in the union of all the churches with the Roman Church to the idea that that superiority could be expressed in the association of other churches acting against Rome. D'Ailly's argument illustrates the conciliarist development: the authority of the council is tending to be seen as the authority of the council fathers acting against the pope, rather than with him.

1"Hic est casus . . . in quo Papa in canonem latae sententiae incidit. Nec obviat regula illa, quia par parem solvere aut ligare non potest: quia si Papa haereticus est, in hoc minor est quolibet catholico, 12, q.1, 'Scimus' . . . ."
and by the counsel of other advisors, a matter is defined.¹ D'Ailly quotes the words of Gregory the Great often cited in canonist and conciliarist discussion: "Just as I acknowledge my acceptance and veneration of four books of the Holy Gospel, so I acknowledge my acceptance and veneration of four councils."² Gregory states the reason for this reverence: "because they were established by universal consent."³ He says, notes d'Ailly, not "by papal consent" but "by universal

¹From the Pseudo-Isidorean Decretals (Hinschius, pp. 254-62).

²"Sicut Sancti Evangelii quatuor libros, sic quatuor concilia suscipere et venerari me fateor." D.15, c.2.

³"...Quia universalis consensu constituta sunt." The Decretists made no theoretical analysis of the concept of representation in trying to define the relationship between General Council and inerrant Universal Church. Apparently they saw no need to distinguish their powers. For them the reliability of the council was established by the statement of Gregory the Great that the decisions of the first four councils were inviolable because established by universal consent. That decisions of the General Council were established by universal consent apparently gave such decrees overriding authority. The Decretists in general came to closely associate the generalis status ecclesiae with the generale statutum ecclesiae formulated by the General Council. It seems that until the mid-thirteenth century, when the doctrine that a pope was bound by a general statute had died, the indentification of General Council with Universal Church was so complete that a conciliar canon relating to the whole Church was assumed to be beneficial to the Church, or at least it was supposed that normally the interest of the whole Church would be better guarded in the conciliar statutes than in papal decrees. Among Decretists then there were at least two institutions through which the authority of the Universal Church could be expressed, the papacy and the General Council, and on questions of faith and the general welfare, there was a definite presumption in favor of the council. See Tierney, Foundations, pp. 48-49, 50-53.
consent." D'Ailly goes on to cite other texts which show the council authoritatively defining and judging. These sources, he admonishes, "are to be observed and followed more than the opinion of any fledgling doctor who is maintaining the contrary." 

Fourth, the third opinion states that those who downgrade the definitive authority of councils by exalting and magnifying the pope's authority not only teach contrary to the human laws mentioned, but also contrary to divine law. In the first council, celebrated at Jerusalem, James, the bishop of the city, produced the decision, even though Peter was present. It was as "Apostles and presbyters" that they addressed the Christians of Antioch. Collected as one, they elected men and regarded their judgment as united to that of the Holy Spirit. From this evidence, states d'Ailly, it is obvious that authority of defining and determining in council is not attributed there to Peter, but to the whole council of apostles and elders, whose sentence is carried and promulgated by consensus.

D'Ailly's fifth point is that the authority and determination of the council must be attributed to the Holy Spirit,

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1 Hinschius, pp. 658, 677, 684.

2 "...Magis sunt notanda et sequenda quam cuiuscunque novelli, doctoris opinio contrarium assentit." De materia, p. 306.

3 That is, the canon laws; see below p. 121 n. 2.

according to that passage in Acts: "It hath seemed good to the Holy Spirit and to us ...,"¹ and according to the words of Pope Leo: "the canons of the holy fathers, established by the Spirit of God and consecrated by the reverence of the whole world."² From the texts which indicate the guidance of the Holy Spirit over the General Council, some have argued, says d'Ailly, that the General Council cannot err in matters of faith.³ His sixth point is that the power and authority of the Church are received directly from Christ, her principal head, and not through the pope. Seventh, he holds that the Church is to obey Peter in the things which pertain to its edification, but not in the things which pertain to its destruction.⁴ It seems best to deal with these points together because d'Ailly's arguments tend to run together. Put briefly, he wishes to show that the whole Church holds power directly from Christ; this includes the power of inerrancy, which it may exercise over the pope if he exercises his delegated authority for the destruction of the Church.

An important part of d'Ailly's argument is developed

² "Sanctorum patrum canones, spiritu Dei conditos et totius mundi reverentia consecratos." C.25, q.2, c.5.
³ For more on d'Ailly's opinion concerning the inerrancy of the General Council see below p. 100 n. 1.
⁴ De materia, pp. 306-308.
from canonist discussion of Matt. 16:18-19:

And I say to thee, thou art Peter, and upon this rock I will build my Church, and the gates of hell shall not prevail against it. And I will give thee the keys of the kingdom of heaven; and whatever thou shalt bind on earth shall be bound in heaven, and whatever thou shalt loose on earth shall be loosed in heaven.

The text was a source of ambiguity concerning the nature of the Church: it was to Peter that Christ gave the keys but to the Church that he promised unfailing protection. Exe­gesis could stress the unique position of Peter among the apostles or the indefectibility of the whole Church. While the text was cited repeatedly in the Decretum as a basis of papal authority, the Decretists pursued the other possibility as well, albeit without intention to question papal primacy. While the one emphasis led to claims, heavily supported by the Decretum, of supreme legislative and judicial authority for the pope over the Church, the other, with the aid of a few texts, suggested that the delegation of the keys was to all the apostles, not just to Peter.

1 For example, D.12, c.2; D.19, c.9; D.21, cc.2, 3.
2 For example, dictum Gratiani ad C.24, q.1, post c.1; C.24, q.1, c.6.
3 In the thirteenth century, the power of the keys— that of binding and loosing (potestas ligandi et solvendi)— was commonly identified with the sacerdotal power conferred on all the apostles and not limited to the pope (Jn. 20:22-23). Gratian used the term potestas ligandi et solvendi in two senses, one being the sacramental power to remit sin conferred on all the apostles (dictum Gratiani ad C.24, q.1, post. c.4), the other being the power of jurisdiction inherent in the papacy. Gratian argued that in the settlement of legal disputes papal decrees were preferable even to the opinions...
Gratian and the Decretists came upon a unifying concept which allowed a consistent understanding of the whole Gospel text. They followed Augustine's explanation (C.24, q.1, c.6) of the relationship of pope and Church found in the text: in receiving the keys Peter signified the Church. He stood in figura ecclesiae. This interpretation was also commonly applied to Luke 22:32-33, and again below d'Ailly echoes the Decretist treatment. In discussions of this text of Luke, the faith which Peter declared and Christ's prayer for that faith are seen respectively as symbolic of the faith of the whole Church and Christ's care for it. Peter symbolizes the Church in the faith he holds and in the power of the keys he has received. This symbolic position of the pope is constitutionally ambiguous. On the one hand, it could and did support a doctrine of the papacy as the unique and illimitable epitomization of all ecclesiastical authority. On the other hand, it might mean that the pope had the limited exercise of a power originally and fully inherent in

of revered theologians because of this latter aspect of the delegation (dictum Gratiani ad D.20, ante c.1). This led to the recognition of two types of authority comprised in the sacerdotal power of the keys. It made possible the canonists' acceptance of Gratian's double use of potestas ligandi et solvendi as applied to the pope and the satisfactory exposition of Decretum texts which claimed equal powers of binding and loosing for all the apostles, while accepting Gratian's dictum that the power was uniquely papal. The sacramental power was equal in all the apostles and their successors. But in Peter and his heirs the power of government—jurisdictio, administratio, dispensatio—was superior. For more details, see Tierney, Foundations, pp. 30-33.
the whole Church, to which he was perhaps accountable for the exercise of the said authority.¹

It is likely that in points five, six, and seven d'Ailly relies directly upon John of Paris and thus indirectly upon the canonists.² The inerrancy of the Universal Church and the superiority in matters of faith of the General Council were unquestioned among medieval canonists. But from John comes the consistent assumption that the whole Church is subject to the same rules that the canonists had evolved in considering the affairs of lesser ecclesiastical corpora-

¹The canonists and later conciliarists were aided in their symbolic interpretation by their willingness to see the rock of Matthew's account as other than a synonym for Peter. For more on the canonist discussion of Christ's delegation, see Tierney, Foundations, pp. 25-47, 133, 192.

²John of Paris was able to combine Decretist ideas on the underlying authority of the whole Church with elements of later canonist corporative theory, all deployed in such a fashion as to reach conclusions more radical than the canonists foresaw. Especially important for John was Hostiensis, who organized the doctrines relating to the constitutional structure of lesser ecclesiastical corporations and showed how they might be applied to the Roman Church and the Church as a whole. Hostiensis saw the implications for papal headship of the whole Church viewed as a corporation and explored them in the hypothetical case of the extinction of the College of Cardinals during a papal vacancy. The right of the people in this case to authorize a council to elect a pope he derived from D.65, c.9, which permitted the people of a diocese to summon bishops from the neighboring dioceses in cases of necessity, if their own bishop neglected to do so. This argument implies that the doctrines of corporate law apply not just to governing prelates but to all levels of the ecclesiastical hierarchy. John of Paris took the principles of Hostiensis and other canonists and extended them systematically to the corporate structure of the whole Church and the position of the pope. For more on Hostiensis and the Roman Church, see Tierney, Foundations, pp. 149-53.
John’s guiding principles were the proctorial nature of any prelacy and the constitutional analogy of the Universal Church to lesser ecclesiastical corporations. To John the pope’s relationship to the Universal Church was the same as that of any prelate to his ecclesiastical corporation. In the disposition of ecclesiastical goods and in the determination of articles of faith the highest authority was not the pope but the whole corporate Universal Church, represented by the General Council. This implied that the inherent and inerrant authority of the Church was not concentrated in the pope. There existed in the Church centers of authority whose powers could be used to supplement or oppose his authority. These independent powers, both of orders and jurisdiction, came not from the pope but directly from Christ, the principal head of the Church, who delegated them to all the apostles and their successors. It was John also who introduced the texts and terms of II Corinthians to this discussion; all ecclesiastical authority is given for the edification, not for the destruction of the Church.

D’Ailly develops his case with similar arguments. That the General Council has an authority which does not originate in the pope is already implicit in his fourth point. He goes

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1 See p. 94 n. 3.

2 For more information on John of Paris and references to his work, see Tierney, Foundations, pp. 152-78; see also below p. 108 n. 1.
on to argue that Christ, the Church's principal head, has given directly to the Universal Church powers of orders and jurisdiction and has maintained these through the Spirit's guidance. He, like many other conciliarists, employs arguments derived from John's use of II Corinthians, arguments which imply that the whole corporate Church retains certain rights over her sovereign.

Those who see in the Gospel text "And I say to thee, thou art Peter, and upon this rock I will build my Church,"¹ proof that the power and authority of the Church are immediately from the pope are open to three charges, according to d'Ailly. First, sacerdotal authority is not always derived immediately from the pope, since a pope who is not a priest cannot properly confer priestly orders. Second, even without a pope existing, the Church has abundant powers of both orders and jurisdiction; such powers then are not derived from the pope. Third, the Universal Church has the authority that in faith it cannot err, and this neither mediately nor immediately depends upon the pope, because he does not have it.²

When Christ said, "I have prayed for thee, Simon, that thy faith fail not,"³ he was not speaking of Peter's person-

¹Matt. 16:18.

²As has been pointed out, only the Universal Church was generally recognized as inerrant in medieval times. The canonists conceded to the pope the supreme exercise of governmental powers.

al faith, because Peter did in fact err. This is shown by Paul, who said that he withstood Peter to his face because he was incorrect and not walking the straight path of the Gospel. Rather, he was speaking of the faith of the Universal Church. Notice, says d'Ailly, that Christ, in making the delegation to Peter, said "I will build," not "you will build," and "my Church," not "your Church." Augustine several times wrote that the keys of the kingdom were given to the Church when they were given to Peter, that not Peter alone but the Universal Church received and exercises power from Christ to bind and loose. The Universal Church was also referred to by Christ when he said "and the gates of hell shall not prevail against it." Christ did not say "against you," that is, Peter.

The pope is conceded to be the head of the Church, but it must be understood that the Church is under the principal and essential headship of Christ. The subordination of the body of Christ to the pope is accidental; to Christ it is essential. From Christ immediately and directly, and not from Peter, the Church has authority and power and the privilege of speaking without error in matters of faith. This privilege the Church does not receive from the pope, and the authority of the pope when he does speak without error is

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1 Gal. 2:11-14.
2 Matt. 16:18.
3 De materia, pp. 306-308.
also directly from God, according to Matt. 16:18.

Apparently, for d'Ailly, the inerrancy of the Universal Church is best preserved in the General Council which represents it. He holds that the authority and determination of the General Council must be attributed to the Holy Spirit sent by Christ and regards it as obvious that the judgment of the General Council must be preferred to that of the pope, who is capable of error in matters of faith.

1 The uncertainty here may be evident. The general opinion of scholars seems to be that d'Ailly ascribed certain inerrancy only to the Universal Church, on this point, at least, going no farther than Ockham or the canonists. And here, when he first airs the opinion that the General Council is inerrant, he is careful to avoid personal endorsement: "Et hinc trahitur secundum aliquos quod concilium generale non potest errare in his quae sunt fidei." But he follows immediately with "Quod etiam probatur ex illo verbo Christi: 'Petre, rogavi pro te ut non deficiat fides tua,' quia hoc non est dictum de fide personali Petri, cum ipse erraverit, sed de fide universalis Ecclesiae, quae representatur in concilio generale, de qua etiam ibidem dictum est: 'et portae inferi non praevalebunt adversus eam,' scilicet Ecclesiam. Non enim dictum est 'adversus te,' scilicet Petrum. Ex quibus patet, quod iudicium concilii praeferendum est iudicio Papae, cum ipse in his quae fidei sunt possit errare . . . ." (pp. 306-307). Here he fails to distinguish clearly whether he regards Christ's prayer as applying to the General Council or just to the Church Universal. But his final argument seems to imply the General Council's inerrancy, because the reason why its judgment is preferred to that of the pope is that the pope is capable of error. Possibly I am wrong to attribute this reasoning to him; d'Ailly may be continuing to give the opinion of those who did believe in conciliar inerrancy. This, the insistence of scholars on d'Ailly's rejection of conciliar inerrancy (see Ray C. Petry, "Unitive Reform Principles of the Late Medieval Conciliarists," Church History, XXXI (1962), 171), and my lack of access to certain other works have dictated my cautious treatment.

D'Ailly nowhere spells out in what way the General Council can be said to be representative of the Universal Church here, though according to Oakley, D'Ailly, p. 149 and n. 35, he does say elsewhere that it derives its authority from the
D’Ailly then follows John of Paris in concluding that the Church ought to obey Peter just as its own head in those things which pertain to the edification of the Church, but not in those things which pertain to its destruction. This is approved by Paul where he says "For if also I should boast somewhat more of our power, which the Lord hath given us unto edification and not for your destruction . . . . ." He also wrote: " . . . that, being present, I may not deal more severely, according to the power which the Lord hath given me unto edification and not unto destruction . . . . ." 1 It is only for the edification of the Church that the pope is given power from the Church, and it is only for the edification of the Church that he can legitimately wield that power. When the pope uses his delegated powers for the edification of the Church he has many special privileges, residing in him alone. 2 But these privileges the pope does not have when

consent of the faithful as well as from the authority of Christ. In Oakley’s words (pp. 147-48), "His criterion of the adequacy of representation would seem to be the proximity of the representative body to the whole community. Thus, although the Pope and the Roman Church can claim to represent the Universal Church, in that they act in its place and name, it is nevertheless the General Council which has the strongest claim to be representative." Perhaps the idea that the council is the body most representative of the whole Church causes d’Ailly to see it as, if not strictly inerrant, at least as close to inerrancy as any body outside of the assembling of the whole Church could be. It seems that d’Ailly shares with the Decretists a failure to precisely define the relationship between the General Council and the Universal Church or to analyze thoroughly the theory of representation.

1 II Cor. 10:8, 13:10.
2 D’Ailly refers to the pope’s powers as final arbiter.
he works the destruction of the Church.¹

Bound up in the arguments of d'Ailly is the canonistic conception of the maintenance of the status ecclesiae. The Decretists, like civilian lawyers from the thirteenth century on, made the maintenance of the common welfare an overwhelming concern. But unlike the civilians and some later canonists and papal publicists, their view of the principle was restrictive.²

In the Decretist writings (as in the Conciliarist works of two centuries later) the necessity to preserve the status ecclesiae was always presented as imposing a limit on papal authority rather than as a ground for extending it. The question of the status ecclesiae was most commonly considered in discussions on the limitation of papal authority by a General Council, and it is this that gives to the Decretists' claims their special significance. For them the "state of the

and caller of the General Council. He cites the following which illustrate the pope's powers: X, 1, 7, c.1, in v. Pertinet; X, 5, 31, c.8, in v. Pertinere; X, 5, 30, c.4, in v. Reservata; Geoffrey de Trani, on the rubric De officio legati (see Oakley, D'Ailly, p. 309 n. 2 for fuller reference); C.2, q.6, c.17; C.3, q.6, cc.7, 9; C.16, q.1, cc.48, 52, 53; D.17, cc.1, 2, 3; C.24, q.1, c.13; C.7, q.1, cc.34, 44; C.9, q.3, cc.17, 18.

¹He cites C.25, q.2, c.4 ("Statuta Apostolicorum decessorum Apostolicus destruere non debet.").

²Civilian lawyers commonly contended that the preservation of the status regni justified governmental resort to extraordinary measures in cases of emergency or necessity, even if counter to law and private rights. See Gaines Post, "The Theory of Public Law and the State in the Thirteenth Century," Seminar, VI (1948), 42-59. For a discussion of writers who gave the same broad license to the pope over the Church, see Tierney, Foundations, pp. 140-42; Ullmann, Medieval Papalism: The Political Theories of the Medieval Canonists (London: Methuen and Co., 1949), pp. 1-37.
Church" was not a vague indefinable concept which might be used to justify any extraordinary action of the Church's ruler, but was rather a living reality, closely identified with the rules of ecclesiastical life laid down in the laws of General Councils and confirmed "by universal consent."  

Traditionally the canonists envisaged no distinction between the acts of the General Council and those of the whole Church, and the conciliarists were to cling to this. The Decretists commonly held that a pope could not dispense against the decrees of a General Council in any matters affecting the Church's general welfare (generalis status ecclesiae). Apparently, among the Decretists, the identity between General Council and Universal Church was so complete that a canon of a council relating to the whole Church (generale statutum ecclesiae) was assumed to be beneficial to the whole Church, or at least to be normally more effective in guarding the Church's interest than a papal decree. Hence papal action against a general statute of a General Council was seen as prejudicial to the "state of the Church." The principle that papal authority could not be used to injure the Church was familiar to thirteenth-century canonists and was upheld by later Decretalists as well as the Decretists.  

But while the Decretists built up a theory that the pope could be deposed for conduct prejudicial to the welfare of the whole Church, they did not explicitly formulate any doc-  

1Tierney, Foundations, pp. 51-52. 
2Ibid., pp. 50-53. See also p. 89 n. 2. above.
trine of judicial supremacy for the General Council over
the pope, and they did not argue that because the congre-
gatio fidelium was inerrant that it possessed an active gov-
erning power superior to the pope's. While the conciliarists
would treat indefectibility as a positive authority inherent
in the Universal Church, which could be used against the pope,
the Decretists saw it "rather as a kind of negative capacity
in the Church, an inability to err simultaneously in all its
parts." The promise of an unfailing Church was not associ­
ated with an institutional safeguard. Yet, the Decretists
assumed that when a General Council was needed to provide a
head for the Church, it could be summoned somehow. And their
suggestions that the pope could be judged by the whole Church
and that in matters of faith the General Council was superior
could aid in the development of a conciliarist posture.

Again, it was the fermentation of such thought with cor­
poration law which led to the institutionalization of safe-

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1 Alanus excepted, Ibid., p. 67 n. 1. As has been point­
ed out, when the Decretists wrote that the pope was bound by
the laws of the General Council or that in matters of faith
it was superior, they generally seem to have meant that the
pope surrounded by the fathers in council possessed greater
authority than when alone, Ibid., p. 54. See also Tierney,
"Pope and Council; Some New Decretist Texts," Mediaeval Stud­
ies, XIX, (1957), 203-205, for a discussion of a small group
of Decretist works which adequately handled the problem of
a disagreement between council and pope, at least in the par­
ticular case of the heretical pope, without resort to Alanus'
position.

2 Tierney, Foundations, p. 46.

3 Ibid., pp. 45-46, 54, 67.
guards for the general welfare. Later canonists, notably Hostiensis, gradually applied the principles of the inherent authority of the chapter and the proctorial power of the head to all levels of the hierarchy, at least implying that the pope's governmental power (potestas iurisdictionis) could devolve to the cardinals and that that authority could in turn devolve to the Roman clergy and people, and even to a General Council representing the Universal Church. The underlying authority of the congregatio fidelium was emerging as a positive power to act in the interest of the whole Church, able to be invoked at least in emergencies. In the canonist application of the idea that in grave default or vacancy the authority of the head devolved to the corporation, which could then effect a remedy, lay a ready-made suppletive principle for the conciliarists, who would hold that the Universal Church could remedy the failure of its governing organs and preserve the status.¹

Here again John of Paris played his role of developing for the later conciliarists the "constitutional" implications of many canonist doctrines. It has already been pointed out that John consistently applied to the whole Church the doctrines of corporative thought, assuming that certain powers always inhere in the corporation and that the head's powers are representative, delegated, derivative, ordained to the ends of the community. This allowed John to give the canon-

¹Ibid., pp. 50-51, 57-58, 130, 142, 149-53, 224.
ists' diffused indefectibility an institutional enforcer for the status ecclesiae; the General Council representing the Universal Church.¹ John's assertion that a pope could be held responsible to a General Council for abuse of spiritual powers and dissipation of church goods rested upon the assumption that the Church's inherent authority was not concentrated in the pope; there existed in the Church centers of authority whose powers were not derived from the pope, powers which could be used to oppose his authority. While the papacy was of divine origin, it was not the only such power in the Church; there existed in the College of Cardinals or in the whole Church an authority at least equal to the pope's. John's use of the Pauline texts on edification and destruction were an apt addition to the issue of preserving the status.

In establishing a theoretical basis for the deposition of a pope whose acts injured the Church's general welfare,

¹ Through writers such as John, d'Ailly and other conciliarists came to see in the idea of representation more than mere personification. It was commonly held by high papalists that the pope represented the Church, in the sense that he personified it and embodied the whole of its authority. But to the conciliarists representation implied an actual bestowal of authority upon the representative by the community, with the corollary that the authority could be withdrawn if abused. For more on the issue of the shift from personification to delegation in conceiving of representation, see Tierney, Foundations, pp. 4-5, 35-36, 55-56, 125-57; Oakley, D'Ailly, pp. 135-38; Ullmann, Medieval Papalism, p. 165. That representation could be conceived of as either irrevocable personification or limited delegation shows the ambiguity of such "constitutional" developments.
John applied an established juristic distinction between the office and the person who for a time occupies that office, a distinction we find implicit in d'Ailly's arguments. The intrinsic authority of the papacy was conferred directly by God and thus was immutable, but the decision as to which individual should exercise that authority was made—and in John's view unmade—by men. The divine origin of papal authority did not confer immunity from deposition.\(^1\) John also made use of the canonistic distinction between the power of orders and the power of jurisdiction. It was commonly held by the canonists that in orders all the apostles were equal; Peter's primacy consisted in superiority of jurisdiction. Furthermore, while the canonists regarded orders as a supernatural and indelible gift, they felt that jurisdiction (potestas iurisdictionis) was conferred on a prelate solely by the human election and consent of the community. John of Paris accepted and extended this principle, applying it to the papacy: the pope's potestas iurisdictionis was conferred by the election of the whole Church, with the cardinals acting in her behalf, and was subject to removal by loss.

\(^1\)It should be noted that neither John nor Pierre intended to deny the divine origin or permanent nature of papal primacy or to encroach upon the daily working of papal government. The recognition of papal headship was an indispensable base for the application of corporative theories to the Church. Both John and Pierre upheld the jurisdictional primacy of the pope in normal circumstances and the divine origin of this primacy. For references to primary material, see Oakley, D'Ailly, pp. 121, 165-66.
of that approval, again through the agency of the cardinals, though more properly a General Council should be summoned. Since jurisdictional primacy was the distinguishing element of papal authority, a pontiff deprived of it ceased to be pope, though he remained priest and bishop due to the indelibility of orders.¹

Also in the fourteenth century, William Durantis, bishop of Mende, gave the General Council a regular constitutional role in all matters affecting the general welfare. In such matters, he held, the General Council was superior to the pope.² During the fourteenth century the ideas of men such as John and William tended to slip into Decretalist glosses.³ By the fifteenth century, the idea that the


³These fourteenth-century Decretalists, generally regarded as high papalists, did not lose sight of the idea that there was diffused throughout the Church or in the College of Cardinals an authority for its preservation, normally dormant, but capable of being invoked in emergencies. Mainly such emergencies were limited in their thinking to cases of heretical popes. Yet some Decretalists preserved a broader span of justiciable offenses against the status ecclesiae. For example, Joannes Andreae quoted approvingly the solution of Hostiensis to the extinction of pope and cardinals and considered the solution applicable to the case of schism, in which grave doubt existed as to which man was validly elected. He seemed to admit that not only an heretical or criminal pope but even a true pope could be held subject to
whole community was the source of political authority was a commonplace among canonists and civil lawyers. This is indicated by the ease with which conciliarists were able to apply it to the Church.

The eighth point in d'Ailly's attack is a summary argument in which he wishes to show that his conciliarism is supported by reason, even beyond his seven points above. That the pope can in many cases be judged and condemned by the Universal Church or by a General Council representing it, and that appeal can be made beyond him to a General Council in many cases, clearly in those touching the destruction of the Church, he regards as evident to reason as well as mandated by laws human and divine. Briefly stated, his course is to apply to the Church the idea that every civil body naturally resists its own destruction. The bridge to these arguments on the basis of reason from those above based mainly on the canonists is the restrictive principle of the maintenance of the status ecclesiae. Every rightly ordained polity naturally resists a threat to its status, if need be by setting aside the letter of the law in the interest of equity.¹

¹The arguments of the seventh and eighth points of the tract are somewhat elliptical. D'Ailly has omitted direct
That d'Ailly has not left John of Paris and the canonists behind becomes evident when he reaches the question of the extinction of the pope and cardinals at once.

D'Ailly's use below of the term *politia* to refer to the Church presents no large difficulty. A perusal of the texts shows that most often he uses *universalis Ecclesiae* or *congregatio fidelium* to refer to the whole Church. But he does not avoid this other term indicating the similarity of the Church to a secular kingdom.

Although his opinions have not remained unchallenged, J. N. Figgis years ago discussed the connection between the mention of the location of the *plenitudo potestatis* and has abbreviated his thoughts on the resistance of a body to its own perdition. One must turn to his *Propositiones utiles* (1409) or his *Tractatus de ecclesiastica potestate* (1416) for fuller arguments. Probably drawing upon John of Paris, d'Ailly held that by natural law any natural body resists its own division, and in a like manner any rightly ordained civil body resists its own destruction. In this tract, he jumps right into speaking of the civil community, omitting the broader, more basic model of the natural body. Also, in his 1416 tract, he held that while the pope's authority derives directly from God, it depends ministerially upon human agency. The flock is not deprived after the election of the natural right of all over whom authority is exercised: the right to preserve itself. Though the plenitude of power resides in the pope because he has the general exercise of it, it belongs to him in a ministerial way and is ordained to the ends of the Universal Church. Thus, if he uses the power against those ends he is subject to judgment by the General Council, which represents the Universal Church. Otherwise, the Church is not a rightly ordained body, naturally resisting its own division. For discussion and references, see Oakley, *D'Ailly*, pp. 62-63, 119-20. For *Propositiones utiles*, see Martene and Durand, VII, 909-911, or 398-403. D'Ailly covers some of the same ground in his "Conclusiones in civitate Tarraconensi," Martene and Durand, VII, 916-18.
constitutional examples of the secular states and the tendency of the conciliarists to treat the Church, analogous in many ways to the secular state, as a political society.\footnote{Figgis, Gerson to Grotius, pp. 36, 42, 44-45.} Oakley and others have pointed out the extent to which the long struggle of popes and monarchs had brought about a secularization of man's conception of the Church.\footnote{Oakley, D'Ailly, p. 53.} As an international organization, the Church shared with the state many constitutional issues and problems; both learned from the experience of corporate organization and the reception of Roman law. Tierney has stressed that it was long the practice of canon lawyers to apply terms and concepts applicable to all corporations to the Church.\footnote{Tierney, Foundations, pp. 108-153, passim.} While scholars may not agree on the source of the attitude, there is little dissent from the view that the Church at this time was being considered as, in some ways, a political society, and there is general agreement that the conciliarists were not the source of the attitude. Finally, it must be remembered that d'Ailly and his conciliarist colleagues were not concerned with the potestas ordinis but the potestas iurisdictionis. As Oakley writes, this "enables him to set aside that aspect of ecclesiastical power which could hardly be confined within the profane categories of corporational and political ar-
His preoccupation is with the constitution of the Church, with the governmental power somehow conferred on Peter.

The attitude which conceived of the Church as in certain ways analogous to a secular state is implicit above, where d'Ailly refutes the claim that because a greater cannot be judged by a lesser, the pope cannot be judged by a General Council, through arguing by analogy to the French king and Parlement. And below, when he finds it necessary to qualify the application of the dictum princeps legibus solutus, he does so not in terms of the irrelevance of the secular maxim to the Church, but in terms of the superiority of divine to human law.\(^2\) That d'Ailly disagreed with some of the arguments based upon the application of the principle is evident; yet, in Oakley's words, "his failure to question its very application reveals his own commitment to the conception of the Church which made it relevant."\(^3\) In a sense, d'Ailly says that if the arguments concerning the source and purpose of political authority cannot be applied to the Church, then Christ did not ordain and establish it sufficiently. Since to affirm this last is unthinkable, the arguments based upon the maintenance of the status and the nature of the rightly ordained polity are seen to apply to

\(^1\) Oakley, D'Ailly, p. 61.
\(^2\) De materia, pp. 304, 313.
\(^3\) Oakley, D'Ailly, p. 54.
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any organized body, secular or ecclesiastical.

D'Ailly argues then that no communitas is sufficiently ordained which cannot resist its own perdition and public demolition. Yet, this judgment would have to be made of the Ecclesiastical Polity if a pope, through manifest heresy, open tyranny, or another notorious crime tried to subvert it, and no one were able to question him and resist him by way of the law: appealing from him, accusing him, and by means of a General Council judging him. It would follow that Christ himself, "the true and supreme head of the Church and her most wise founder,"¹ has not perfectly and sufficiently ordained the Church. This position is heretical and contrary to that passage from Deuteronomy: "The works of God are perfect."² It would be to concede power to the pope not for edification but for destruction, contrary to the word and example of Paul.

On the basis of Paul's reproof of Peter³ d'Ailly asserts that the pope need not necessarily be heretical to merit conciliar reproof. It is seen that Paul justly reproved Peter by rational means, because he was not walking strictly according to the Gospel's truth. Nevertheless, we receive no inkling from the text or from any gloss that Peter had

¹"Verum et supremum caput Ecclesiae et institutorem eius sapientissimum": De materia, pp. 309-310.
²Deut. 32:4.
³Gal. 2:11-14.
strayed into heresy. A pope may in many cases other than heresy stray from the correct faith, as when he scandalously agitates and manifestly destroys the Church. Consequently, in such cases, the pope, even though not a heretic, can be corrected, accused, and judged.¹

What is to be done in the sort of cases mentioned here, if the pope refuses to convoke a council, even after it is sought of him? D'Ailly argues that a council must be called "just as if a similar necessity arose while the see was vacant."² In these two cases (that is, in the event of a papal vacancy or in the event of a pope's refusing to convoke a council), when the welfare of the Church demands the convoking of a General Council, a council is able to be celebrated without a pope or his authority, by the authority of Christ and the Universal Church.³ It shall be convoked by

¹D'Ailly dismisses as unconvincing arguments against this opinion gleaned from those popular texts, C.2, q.7, c.13, and D.40, c.6. He uses these very texts to support his point of view. Apparently, the difference hinges on the interpretation of the clauses nisi a recte fide exorbitaverit and nisi deprehendatur a fide devius, with d'Ailly adopting the broad position that straying from the faith is not always heresy. The first of these texts does not refer specifically to the pope, but to pastores in general. The Pauline texts under question are, as above, Gal. 2:11-14, II Cor. 10:8, 13:10.

²"Sicut si sede vacante similis occurreret necessitas." De materia, p. 311.

³"Nam in his duobus casibus, . . . poterit concilium sine Papa vel sine eius auctoritate celebrari, scilicent auctoritate Christi et universalis Ecclesiae." De materia, p. 311. Here is a good example (but not the only one) of the application by d'Ailly of corporative principles to the entire Church: in such an emergency power devolves to the entire corporation. It is interesting that d'Ailly's argument para-
the greater prelates, or in support of the law and at their instigation by the secular princes, as it has more often been done in the past. The reason for these arrangements is obvious, says d'Ailly, because in the event of a vacancy or of a pope's refusing to convok a council, unless a remedy can be applied in the above manner, it follows that the Church has not sufficient strength and resources to preserve and continue itself. In this way, again, it would be possible for the Christian Polity to fail completely, contrary to the words of Christ: "I am with you . . . .even to the consummation of the world."¹

What happens when there is no pope and the cardinals resolve not to elect a successor, and attempt to produce sedition and to agitate the Church in a hostile manner? Or what happens if some tyrannical princes prevent their convocation or imprison them? Or suppose that they also are all dead or join the pope in manifest heresy. Again, if in these and similar cases, "the remnant of Christianity, which would then be the Church, could not form a council and elect a new pope through the other clergy and beneficially provide against these and similar occurrences, it would be necessary for the

¹Matt. 28:20.
Ecclesiastical Polity to perish and fail."¹ To obviate such crises, the Universal Church can, by the authority of Christ, gather a General Council. Christ said, "Where there are two or three gathered together in my name, there am I in the midst of them."² He said, "in my name," not "in Peter's name," or "in the name and authority of the pope." We must consider this message in conjunction with what he said elsewhere: "whatsoever you shall ask the Father in my name,"³ for his name is the name of salvation. He thus promises us whatever we seek pertaining to salvation. We must understand that the salvation of the Church becomes the duty of the congregatio fidelium if those to whom the duty regularly pertains cannot or will not carry it out. And if the Scriptural evidence here is commonly understood to refer to the authority of the congregatio fidelium to pray, it ought also by reason be understood to refer to its authority to demand, for the Church's salvation, a correct solution to such difficulties as are discussed above.⁴

The appeals to Scripture, the immediate authority of Christ, and the inherent power of the congregatio fidelium

¹erno Residuum Christianitas, quod tunc esset Ecclesias, non posset concilium facere et novum Papam per alium clerum eligere et contra casus praedictos aut similes salubriter providere, necesse esset perire et deficere Ecclesiasticam Politiam." De materia, p. 311.
²Matt. 18:20.
³John 14:13, 16:23.
⁴De materia, pp. 311-12.
show that d'Ailly has not left behind Scripture or the canonists. But his arguments from reason on the nature of the rightly ordained polity have a life and cogency of their own. As Oakley points out, to simply assert that d'Ailly has proven on the basis of Scripture that in some crucial ways the Church must be regarded as a political society is to overlook the initial assumption of the eighth point, an assumption essential to the validity of his Scriptural argument: no community is sufficiently ordained if it cannot resist its own ruin and open destruction.¹

D'Ailly draws his arguments to a close with a return to emphasizing that the integrity of the Church is guaranteed by divine law and the immediate direction of Christ. He deals with two potentially troublesome texts and the gloss on one of them.² Some, he says, will raise objections to the above opinions by arguing on the basis of certain canons that the principal see (prima sedes), that is, the Roman Church (Romana ecclesia), confirms every synod by its own authority and that all councils are produced and receive their strength by its authority. D'Ailly's reply parallels a common approach of the canonists when faced with the problem of the locus of inerrant authority: the examination of different connotations of Romana ecclesia.

¹Oakley, D'Ailly, p. 64.
²C.25, q.1, c.1; C.25, q.1, c.1, in v. Oportet; X, 1, 6, c.4.
The Decretists had followed Gratian in upholding the power of the pope to settle doctrinal disputes but also in treating this power solely as an outgrowth of his judicial supremacy. "His decisions commanded the assent of the Church as the sentences of a supreme judge, not as the teachings of an infallible doctor."¹ They ascribed inerrancy in faith only to the Universal Church, and no claim that the pope was necessarily inerrant in his doctrinal decisions was ever made by them. There were texts explicitly declaring that the Romana ecclesia never erred in faith (C.24, q.1, cc.9-18), but the Decretists did not employ them to tout papal infallibility, apparently because they were deterred by some texts implying and demonstrating that popes could be and had on occasion been heretical.² Thus the Decretists were presented with a Universal Church incapable of error in matters of faith, an immaculate Roman Church, and a judicially supreme pope who might be a heretic. They sought a solution by examining the different connotations of Romana ecclesia.

Gratian made no attempt to distinguish among the powers of pope, Apostolic See, and Roman Church, and used the terms interchangeably. Most often in the Decretum the term Romana

¹Tierney, Foundations, p. 37; dictum Gratiani ad D.20, ante c.1; see also D.17, c.5; C.2, q.6, cc.4-10; C.24, q.1, cc.9-14.

²We have become familiar with some of these texts in following d'Ailly's arguments: D.21, c.7; dictum Gratiani ad C.2, q.7, post c.39; D.19, c.9.
ecclesia described the local church of Rome. But a different meaning was suggested by certain passages emphasizing the unity of faith between the local Roman Church and the Universal Church. In this sense the Roman Church could be identified with the Universal Church.¹

Huguccio was an important figure in this discussion. He was apparently the first to see that the paradox surrounding the papal authority might be rooted in some confusion concerning the nature of the Roman Church. He made it clear that in matters of faith any theory of ecclesiastical authority consistent with the Decretum would have to be based on a distinction between the inherent powers of the whole Church and the authority that could be exercised by the local Roman Church.

Besides the two senses of Romana ecclesia, Huguccio found another distinction apt, for the term Romana ecclesia, was doubly ambiguous. Not only did Romana have two senses, but ecclesia had many more. It might refer to the head of the corporation in question, all of its members, or some intermediate group. Thus, Romana ecclesia might refer to the pope, the pope and cardinals (or some other intermediate group representing the local church), or the whole congregatio fidelium. Huguccio did not deny the acceptability of the other understandings of Romana ecclesia.² But when the term was

¹See, for instance, C.24, q.1, c.25.
²He believed that the local Roman Church enjoyed a posi-
used to describe the bearer of Christ's promised unerring authority, it seemed evident to him (as to any later conciliarists) that the Roman Church understood as pope or pope and curia could not be the Roman ecclesia that was to be forever sinless and inerrant; this could only be the Universal Church.

Huguccio's interpretation was widely accepted among later Decretists and was incorporated into the glossa ordinaria to the Decretum. This gloss, the work of Joannes Teutonicus, was the most available of Decretists texts to the conciliarists and a work with which d'Ailly displays familiarity. In the fourteenth century, the most common understanding of Roman ecclesia seems to have been congregatio fidelium.¹

It should come as no surprise that we find d'Ailly below appealing above human law to divine law and the immediate direction of Christ.² It was a natural corollary of the

tion of authority among the local churches, who were required to obey the Roman Church in matters of ecclesiastical discipline and judicial decisions.

¹Tierney, Foundations, pp. 36-45, 71, 202-203; see also "Ockham," 47, 49, 63-67. For the glossa ordinaria's discussion on this matter, see glossa ad C.24, q.1, c.9, in v. Novitatibus, printed in Foundations, pp. 253-54. The Decretist distinction between the authority of the Roman Church and the whole Church in matters of faith Tierney calls "the essence of later conciliar thought." (Foundations, pp. 45-46). Of course, the Decretists never took the step of formulating for the congregatio fidelium an active governing power over the pope. But the distinction between the local and universal Roman ecclesia was no invention of fourteenth-century publicists.

²The human law to which d'Ailly refers is the canon law,
restrictive concept of the *status ecclesiae* that the letter of the law must be set aside when it actually threatens the interest it has been ordained to serve. The appeal to necessity and emergency is implicit in the canonist and publicist arguments above. The Decretists never troubled to discuss a question heatedly argued in the conciliar era—whether the cardinals really had any right to summon a General Council. The principle that only a pope could summon a General Council was explicit in the *Decretum*. Yet all assumed that when a General Council was urgently needed to provide a head

which, following contemporary usage, he sometimes refers to as *ius commune* or *iura communia* (*De materia*, pp. 294, 296; for discussion, Oakley, *D'Ailly*, pp. 173-73). When d'Ailly discusses the accidental powers of the pope, he observes that these "usurpations" of local rights violate not only *ius commune* but *ius divinum* (p. 294). Or below, he regards the concentration of definitive authority in the Apostolic See set down in the canons as human law, capable of being set aside, since by divine law the whole Church holds power and authority immediately from Christ (pp. 312-13). His assumption that canon law is not divine law is contrary to the opinion of a good number of the canonists but in line with Ockham's. D'Ailly nowhere defines *ius commune*, but remarks made in Parts One and Three of this tract (pp. 253, 266, 320) lead one to think that an important part of his definition would be its promulgation by the legislative authority. He apparently regarded the will of the proper law-making authority and the common consent of those affected as essential elements of human law. I have not treated d'Ailly's discussion of natural law and its relation to divine law at all, since he does not mention natural law in this tract. For our purpose, the essential point is that d'Ailly places canon law among human laws and that in his philosophy of law the basic dichotomy is between human and divine law. This is borne out at points by the phrases of the tract: "tam de iure divino quam humano," "iura tam divina quam humana," "non solum...iura humana...sed etiam...ius divinum," "tam de iure humano quam divino." (pp. 295, 300, 306, 309). D'Ailly seems to have used *ius* and *lex* interchangeably without discrimination.
for the Church, it could be summoned, if necessary, by an alternative method. Hostiensis, in support of his point of view that power could devolve to the cardinals and even to the Universal Church, could make use of appeals from the letter of the law to legislative intent and equity found in the glossa ordinaria to the Decretum. Ockham's appeals to necessity were no more new than were those of the conciliarists. Like the other conciliarists, d'Ailly saw a large role for Aristotlean ἐπικείμενα in solving the Schism. Below he tries to show that positive law must in some cases be interpreted or set aside in the light of equity, necessity, or the spirit of the law.¹

D'Ailly then has pointed out that some will take exception to his arguments by citing sources which designate the Romana ecclesia as the source of every council's authority. If, replies d'Ailly, Romana ecclesia is understood as the Ecclesia universalis, as it is often necessary to understand it in the canons, then we have here an argument for, not against,

¹I have not discussed d'Ailly's conception of ἐπικείμενα at length because in this particular tract he does not deal with it directly. For treatment and reference to sources, see Oakley, D'Ailly, pp. 160-61, 164, and n.4. As was stated before, d'Ailly was upset by the legalistic spirit of his age. He felt that it encouraged men to forget the role of equity in interpreting positive law and to prefer the letter to the spirit. Tierney writes: "The fourteenth-century Conciliarists were not original in relying on a doctrine of epikeia and 'necessity' to justify extra-legal actions, but only in thinking that the explicit formulation of such a doctrine was indispensable to their case. The Decretists seem to have taken their epikeia for granted." Foundations, p. 77.
the third opinion. If *Romana ecclesia* is taken to mean the College of Cardinals and the clergy of the Roman diocese, such a *Romana ecclesia* is conceded to have no authority over a General Council. More than that, the College of Cardinals receives from the General Council authority to elect a pope and to exercise its other privileges; as it happens, it has usurped from the councils many things.\(^1\) If, however, in the above canons, *Romana ecclesia* is taken for the pope, as is often assumed in the law, it is conceded that by him, regularly, councils are confirmed, produced, and receive their strength. By his authority they are and ought to be congregated, as the laws which preface the eight consideration above prove.\(^2\) But the point which d'Ailly wishes to stress is that these powers regularly wielded by the pope exist by the disposition of human law. "The Church has reasonably established this and for good reasons has bound herself in this authority . . . ."\(^3\) D'Ailly points out that in apostol-

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\(^{1}\)"Immo tale particulare Collegium, quantum ad electionem Papae vel alia eius privilegia, a generalibus conciliis auctoritatem accepit, et forte contra ea plurima usurpavit." *De materia*, p. 312. Here is an example of d'Ailly's application of the laws of ecclesiastical corporations to every level of the hierarchy. He emphasizes the derivative nature of the power of the local Roman Church as, in a sense, the head of the Universal Church.

\(^{2}\)*De materia*, pp. 308-309, where d'Ailly has conceded the pope's prerogatives when used for the Church's edification.

ic times no such limitation of the original divine gift to the whole Church had yet been made, as is witnessed by the proceedings of the Council of Jerusalem. Thus, in the present situation we are dealing with limitations of purely human origin, and in spite of all these human laws, it is still true "that by divine law and from Christ directly the Church has had and shall always have special power and authority to assemble a council and there to define and determine, especially in the above-mentioned cases."

D'Ailly accords this treatment specifically to one of the troublesome texts above and to some words of the glossator on it. Pope Gelasius wrote, "It behoves no see more than the first to execute before the rest the constitution of any synod which the assent of the Universal Church has approved." The gloss comments that this refers to consideration or propriety and not necessity. This is true "because 'the prince is unfettered by laws.'"

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1 Acts 15:4-30.

2 "Quod iure divino et a Christo immediate Ecclesia sua habuit et semper habebit specialem potestatem et auctoritatem concilium congregandi et ibi definiendi et determinandi, maxime in casibus supradictis." De materia, p. 313.

3 "Uniuscuiusque synodi constitutum, quod universalis Ecclesiae probavit assensus, nullam magis exsequi sedem prae ceteris oportere, quam primam . . . ." C.25, q.1, c.1.

4 It is extremely difficult to render this argument in English. It centers around the interpretation of a Latin verb and a Latin maxim. "Generaliter tamen in docto cap. Confidimus dicit Gelasius Papa: "Uniuscuiusque synodi constitutum, quod universalis Ecclesiae probavit assensus, nul-
But this maxim (*princeps legibus solutus*), d'Ailly argues, applies to the pope only in the case of the human laws which he issues.

On the other hand, concerning divine laws or those instituted with divine authority by the Universal Church, this is not conceded to be true generally and in all cases, and especially in those which touch the whole body and status of the Universal Church. But concerning particular persons and in certain cases the Roman Church can by her own authority ordain and dispense with respect to those conciliar statutes and those of her own laws which pertain only to human mores, and once conceded by her, necessity with respect to piety or reason and the consideration of equity are adequate grounds to change them either in whole or in part, as Gratian shows, C.25, q.2, c.21, *His ita.*

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lam magis exsequi sedem prae ceteris oportere, quam primam,' scilicet Romanam Ecclesiam. Ubi super verbo 'oportere' dicit glossa quod 'hoc verbum "oportet" est hic verbum honestatis' et non necessitas. Et hoc ideo dicit 'quia princeps legibus solutus est,' ut in dicto cap. *Significasti.* "Tamen honestum est ut secundum legem vivat," ut testatur Imperator." *De materia,* p. 313. The quoted passages are from C.25, q.1, c.1; C.25, q.1, c.1, in v. *Oportet;* X, 1, 6, c.4, the three texts with which d'Ailly has wrestled in this final section, which grant special privileges to the prima sedes or Romana ecclesia. The difficulty of this passage is enhanced by the apparent lack of a solid connection between the thought expressed by the matter from C.25, q.1, c.1, and that from X, 1, 6, c.4. The connection apparently is between the meaning of *oportere* and the meaning of the maxim *princeps legibus solutus:* when one speaks of what a ruler ought to do, what it behoves him to do, one must remember that this refers only to what it is proper or honorable for the ruler to do. Strictly speaking, according to the maxim *princeps legibus solutus,* the ruler is above the law. In introducing the maxim in this way d'Ailly is perhaps only following the lead of the *glossa ordinaria* in its treatment of C.25, q.1, c.1, but without access to anything but a fragment of this gloss, I have been unable to determine this. The whole passage seems to be merely d'Ailly's way of introducing this maxim; he now proceeds to rob it of force in this case.

1"De legibus autem divinis aut divina auctoritate ab
This distinction in applying the maxim princeps legibus solutus must be kept in mind, warns d'Ailly, for a correct interpretation of many canonist texts.¹

Thus, in the emergency situation, the underlying authority of the whole Church, which no human law can eradicate, may be asserted to save the Church. D'Ailly finds his point firmly based in Scripture, canon law, reason, and divine law.

Part Two of De materia is closed with a prayer:

universalis Ecclesia institutis generaliter et in omnibus verum esse non concedit, et maxime in his quae totum corpus et universalis Ecclesiae statum tangunt. De particularibus autem personis et in certis potest Romana Ecclesia circa statuta conciliorum et leges suas, quae mores humanos respicient, sua auctoritate ordinare et dispensare, et pietatis vel necessitas intuitu rationis aequitate considerata, semel a se concessa valet vel in totum vel in partem commutare: ut ostendit Gratianus 25, q.2, His ita respondetur." De materia, pp. 313-14. The concession which d'Ailly grants to papal power with respect to human regulations is reminiscent of the Decretist claim that the pope might disregard decisions of the General Council which were of merely local and temporary import, but that conciliar statutes which were of universal application, touching the status ecclesiae, were inviolable. For more see Tierney, Foundations, pp. 52-53.

¹D'Ailly cites as an example Joannes Andreae's gloss on X, 1, 6, c.4, where, according to d'Ailly, Joannes wrote that "videtur quod solus Papa sine concilio vel eius parte possit interpretari statuta concilii." For more complete reference see Oakley, D'Ailly, p. 314 n. 7. Also cited are D.17, c.4; VI, 5, 11, cc.9, 13; Clem. 1, 3, c.2; Sane; VI, 1, 3, c.11; Clem.1, 3, c.4; ther is also a general reference to the glossa ordinaria on VI', 1, 3, c.11. Joannes Andreae produced this gloss. Oakley, D'Ailly, pp. 111-12, writes that "D'Ailly...is echoing a well-established Decretist position when he argues that the dictum, princeps legibus solutus, is true of the Pope only in the case of those laws of his own promulgation, but not in the case of 'divine laws or of those laws promulgated with divine authority by the Universal Church...above all in those matters which affect the whole body and status of the Universal Church."
In this . . . diversity and adversity of opinions may the Lord Jesus Christ grant us to choose the one which he knows to be more beneficial and suitable for the honor of his name and the salvation of his holy Church. Amen.¹

¹"In hac . . . opinionum diversitate et adversitate det nobis Dominus Jesus Christus id eligere, quod scit utilius esse et convenientius ad honorem sui nominis et salutem Ecclesiae suae sanctae. Amen." De materia, p. 314.
CONCLUSION

This conclusion is designed to give some account of the way in which the Second Part of De materia relates to d'Ailly's conciliarism as a whole, events of the following years, and any later changes of point of view. Then there will follow some words on the subsequent course of such ideas as are found in the Second Part.

It will be recalled that d'Ailly had opposed the withdrawal of obedience from Avignon in 1398 in the first place. The message of De materia joined a chorus of voices demanding restoration. The March 11, 1403, escape of Benedict XIII from Avignon spelled the end of effective resistance to restoration. By March 29, Benedict's cardinals had all returned to him, and he was calling for a council to unite the French Church. At the Paris Council of 1403, on May 28, though the dukes of Berry and Burgundy and Simon of Cramaud still opposed restoration, France joined the other nations of the Avignon obedience, who had already resubmitted, in resubmitting to Benedict, on the sole condition that he promise to explore the possibility of cession. D'Ailly announced the

1Secondary sources present conflicting accounts of the French restoration, and most standard church histories give it quick and simplified treatment. Crucial primary sources have not been available to me. There seems to be some general agreement on the nature of the restoration of 1406 discussed below; it seems that it was the position of d'Ailly which was adopted then. But, for instance, Dubray (p. 236)
decision of the synod in a sermon in Notre Dame of Paris.¹

By the time of the election of Gregory XII to the Ro-
man See, November 30, 1406, Benedict's favor in France was
again on the decline. Thus, when Gregory announced his de-
termination to seek a possible cession, Benedict was more
inclined than ever to make terms, especially after the fail-
ure of his mission to Italy that year. The University of
Paris was becoming impatient again, and discussions about
withdrawal of obedience were again current. By November of
1406, definite proposals for such a withdrawal had been drawn
up, and on November 18, when the University, the king, and

represents the 1403 restoration in the same way and makes
no mention of 1406. Oakley's words are ambiguous (D'Ailly,
pp. 12, 252, 294 n. 6), but he seems to say that in both ca-
ses the restoration was along the lines recommended by d'Ail-
ly. Mansi, XXVI, 1001-1031, is not entirely conclusive on
this point. Therein we find that upon the 1403 restoration
Benedict promised to abdicate if his rival ceded or died and
that in 1407 the French Church reclaimed certain enumerated
liberties. There is no clear indication in these documents
of what precise relationship between the pope and the French
Church was established by the Paris Council of 1406. I have
adopted the reconstruction of J. H. Smith, The Great Schism,
Morall, Gerson and the Great Schism (Manchester: Manchester
University Press, 1960), pp. 63-64; 69; and Bishop Creighton,
A History of the Papacy from the Great Schism to the Sack
of Rome (New York: Longmans, Green and Co., 6 vols., 1897),
I, 179-80, 195-96, 201-202. It seems most in keeping with
the course of events. This interpretation is strengthened
by the treatment by Ch. V. Langlois, "Political and Social
Conditions from 1337 to 1494," in Medieval France: A Com-
panion to French Studies (ed. Arthur Tilley; New York: Haf-
which may be a source of confusion: properly speaking, in
1406 France was not restoring essential powers to the pope,
but withdrawing nonessential ones, since a full restoration
had been made in 1403.

¹Creighton, I, 179-80.
the French clergy met in council at Paris, Simon of Cramaud and Jean Petit proposed that the king make himself sovereign in his land and obey neither pope. However, d'Ailly spoke strongly in support of papal authority and Benedict's right to wield it. He cited from the canons to prove that a pope could be condemned only for recognized heresy and that to withdraw obedience would be to transfer the Church's authority from the heart to the outlying members. An even more pro-papal stand was taken by William Fillastre, whom Benedict would soon elevate to the cardinalate. It is interesting that d'Ailly's arguments may not be exactly the same as those of De materia, in which he had admitted that a pope could be condemned even for secret heresy, default, or negligence, and that the congregatio fidelium held potentially greater power than the pope. But "flexibility" in debate was not uncharacteristic of d'Ailly. Most importantly, the end to which he argued at Paris was the end to which he ar-

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1 Simon of Cramaud was titular patriarch of Alexandria and had presided over the 1398 assembly which had initially withdrawn obedience. Petit was a Dominican scholar most famous for his vindication of tyrannicide.

2 There must be a word of caution here. This assessment of d'Ailly's statements at the synod is derived from secondary sources (Smith, p. 166), due to the inaccessibility of the primary sources. It is possible that Smith oversimplifies in condensation. I am uncertain about how to interpret his "recognized heresy." Does this mean "open," or "already-condemned?" And on the question of the relative strength of the powers in the Church, the difference between 1402-1403 and 1406 may be simply one of emphasis, because d'Ailly was not one inclined to strip Rome completely of prerogatives.
gued in *De materia*. And it was the policy accepted by the French: the "necessary" spiritual powers of the pope were to remain unimpaired, but the "ancient liberties" of the French Church were to be denied him.

It is impossible on the basis of the evidence to say exactly what part *De materia* played in the events described above. It can only be said that it was part of the chorus that brought on the restoration, that the specific sort of restoration which it advocated was the one accepted, and that d'Ailly defended just such a restoration orally as well during the first decade of the fifteenth century. But the partial restoration was the short-range motive for which the tract had been composed. We must also consider the arguments which he aired concerning the authority of the Universal Church and General Council over the pope. The further course of events is instructive.

In the short run, the pressure for cession generated by the withholding of nonessential powers seemed to pay off. The Paris Council decrees were published January 7, 1407, and within a week Benedict had agreed to meet Gregory XII. But there followed the farcical episodes in northern Italy, 1407-1408. In January 1408, d'Ailly finally broke with Benedict. Exasperated by his years of involvement in fruitless negotiations, he returned to his own diocese. In September of 1409,

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1 Smith, pp. 166-70.
2 Oakley, *D'Ailly*, p. 12.
France again withdrew obedience. That same year, d'Ailly was back to calling for a General Council.

What might be called the long-range motive for writing the tract—the vindication of the conciliarist point of view—must be considered against the background of these events. The arguments for the authority of the General Council do not form part of the central thrust of the tract, which was to bring about a partial restoration. But they ward off possible misunderstanding of d'Ailly's motives in favoring restoration. They show that he was not a member of the extreme papal party. They form the more enduring and consistent current in his thought, for both before and after his flirtation with Avignon, he was a defender of the conciliar solution. Moreover, they point in the direction to which all of the reformers were beginning to turn: the convoking of a General Council of the Universal Church.

Evidence that De materia, in its expression of the inherent authority of the Universal Church and its representative, the General Council, represents the mature opinion of

1Smith, p. 171.
2Dubray, p. 236.
3On the other hand, the tract shows that d'Ailly was not a member of the radical wing of the conciliarists. He admits the papal prerogatives when used for the Church's edification, and he actually ends the Second Part on a discussion of the cases in which the pope is solutus legibus. Our discussion of the extent to which d'Ailly's conciliarism leans heavily upon curial and even papal prerogatives has been limited, since d'Ailly does not deal directly with these aspects in the Second Part of De materia. See Oakley in Gerrish, pp. 55-56; Oakley, D'Ailly, pp. 127-28; Tierney, Foundations, pp. 238-39.
d'Ailly may be found in his *Tractatus de ecclesiastica postestate* (1416). This tract is, in many ways, a verbatim reproduction of the conciliarist arguments of *De materia*; in fact, at the end of this later tract, d'Ailly referred back to *De materia* as the source of his arguments.¹ Later writings of d'Ailly reveal changes of opinion on some issues in Parts One and Three of *De materia*.²

¹Oakley, *D'Ailly*, pp. 246-47.

²So, in his *Disputatio de iure sufragii quibus competat* (1415), he tries to explain away a position he took in the First Part (pp. 268ff.) of *De materia*. There he had held that the definitive authority of the council rests with the bishops alone. By 1415, he was convinced that other elements had to be admitted, on the general principle that representation belongs to those who are preeminent in wisdom and influence. See Oakley, *D'Ailly*, pp. 151-54, 246-47.

Changes were also made in the substance of Part Three. Oakley disagrees with Matthew Spinka's opinion, in *Advocates of Reform from Wyclif to Erasmus* (Philadelphia: Westminster Press, 1953), p. 103, that d'Ailly's reform tract of the Council of Constance, *Tractatus super reformatione ecclesiae*, was dependent upon a tract of Henry of Langenstein. Oakley finds no borrowing of words or, necessarily, of ideas. Nor does he accept the idea of Paul Tschackert and J. P. McGowan that it is a redaction of the *Tractatus agendorum in concilio generali de ecclesiae reformatione*, a work of disputed authorship. Rather, Oakley regards it as a redaction of the Third Part of *De materia*. D'Ailly abbreviated it to eliminate anachronisms and superfluities. Also, he deleted a passage in which he had attacked the College of Cardinals and substituted for another passage—in which he had merely expressed disapproval of the supression of the College—a flat condemnation of such ideas. D'Ailly was by then himself a cardinal. Oakley, wishing apparently to vindicate him, sees these changes as "probably less indicative of his own self-interest than of the strengthening of the conservative and moderate elements of his character, for it is clear from the original text that he was never an extremist." Oakley, *D'Ailly*, p. 251. For further information on the above, see *Ibid.*, pp. 201 n. 13, 246-47 and n. 11; see Oakley's Appendix V, pp. 346-47, for some pertinent excerpts from the 1416 tract. *In De materia*,

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It is difficult to say with certainty just how much or in what way *De materia* influenced men and events at the time of the Schism. But it is more difficult to trace any influence it had over the larger span of the following centuries.\(^1\)

The whole subject of later borrowings from the conciliarists has been only sketchily examined. Research does not seem to have reached the stage at which scholars would be prepared to search for borrowings from a specific tract such as *De materia*. But some more broadly-based remarks on the possible influence of d'Ailly's conciliarism, and conciliarism in general, may be valuable.\(^2\)

The immediate practical importance of conciliar theory was that it opened the way for an appeal beyond the stubborn rivals to a decision of the faithful expressed in a General see pp. 322ff., 328ff. The reform tract was to have a long history. The Third Part of *De materia*, in its sweeping reform program, anticipated in many ways the measures of the Catholic Reformation, a fact, as Oakley points out, which is not as much a mark of d'Ailly's vision as it is a sign of the persistent nature of the problems. In its revised form of 1416, the tract was published many times in the next two centuries and translated into German as late as 1600. It seems to have been used by Protestants and other dissenters, as might be guessed from the title under which it appeared in Basle, 1551: *De squaloribus Ecclesiae Romanae*. See Oakley, *D'Ailly*, pp. 250, 252, and n. 33.

\(^1\) Except for that of the Third Part and its revised version of 1416, which are discussed above in p. 134 n. 2.

\(^2\) As has been indicated before, the subject of d'Ailly's influence in topics ranging from the route to the Indies to impanation is simply too large to make reference to here. A good introduction to his influence on a broad philosophico-theological plane is William Courtenay, "Covenant and Causal- ity in Pierre d'Ailly," *Speculum*, XLVI (1971), 94-119.
Council. The long-range significance of conciliarism ought then to be sought among the constitutional implications of such stances as the conciliarists developed to accomplish their aim. Conciliarism called into question the evolution of papal monarchy and stressed the communitarian and collegial facets of ecclesiastical authority. It looked toward the creation of constitutional machinery set up to prevent abuse of papal power.  

Oakley has been primarily interested in d'Ailly's conciliarist ideas to the extent that they are "political," that is, bearing on the problems of the exercise of the Church's potestas iurisdictionis and thus potentially upon the problems of any rightly ordained polity. Insofar as he has been able to investigate the future of these political ideas, Oakley discerns a twofold influence, one ecclesiastical, one secular.

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1Oakley in Gerrish, p. 53, points out that the nature of these constitutional implications has often been misunderstood because historians have not always been aware of the distinction between the powers of orders and of jurisdiction, a commonplace of canonistic and conciliarist thinking, and because they have been distracted by the efforts of the later conciliarists of the Basle era, who attempted to impose a parliamentary regime on even the daily affairs of the Church.

2Oakley writes that "the central problem of political philosophy is the necessity of finding rational grounds for political obligation. This is the problem that lay at the heart of ancient political speculation. This is the problem that has served as the conscious focus of its modern counterpart. It can hardly be said, however, to have exercised the majority of medieval political thinkers . . . The bulk at least of the early medieval literature was dominated . . . not by questions relating directly to political obligation,
First, while pure conciliarism suffered a great drop in support after the practical solution of the most urgent issues of unity and reform had passed, there was still some support of the theory among canonists and jurists of the fifteenth century. These theories apparently enjoyed some currency in England, where no strong university tradition of conciliarism had developed, contrary to the general continental situation. Pamphleteers of the early English Reformation cited the superiority of the General Council in spiritual affairs, over king and pope, appealed to ancient practice and to Constance and Basle, and invoked writers such as Gerson and d'Ailly. A strong Scottish conciliarist tradition also developed over the course of the fifteenth century. 1

But in the fifteenth and sixteenth centuries, Gallican France, especially the University of Paris, was the real bastion of conciliar theory. 2 D'Ailly's name figures in the pol-

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2Jedin, I, 32-34.
emical battles in support of the independence of the French Church from close papal control; he was cited or echoed, along with other conciliarists, by Gallican spokesmen down into the early eighteenth century. In a sense, he was the founder and inspiration of a series of conciliarists and Gallicans at the College of Navarre: Gerson, John Major, Jean Courtecuisse, Jacques Almain, Bishop Bossuet. D'Ailly and his ideas were by no means forgotten, and over the two centuries after his death many of his works, even ones of no immediate value to the polemicists, continued to be read and printed.¹

Thus, in the first area of the twofold influence of d'Ailly's "political" writings, "that full formation of his thought about the government of the ecclesiastical polity which is found in his Tractatus de ecclesiastica potestate remained, along with the teaching of his pupil Gerson and

¹ For fuller discussion, see Oakley, D'Ailly, pp. 211-17. This would be the appropriate place to discuss d'Ailly's influence on curialist thought subsequent to its divorce from its short marriage with conciliarism. But again, the issue must be passed over since the curialist aspects of d'Ailly's conciliarism do not emerge in De materia. But see Oakley, D'Ailly, pp. 216-17, for a discussion and for reference to source material concerning d'Ailly's influence on Torquemada in this respect. There is a dearth of information on d'Ailly's immediate influence on his fellow conciliarist contemporaries. See Oakley, "Gerson and D'Ailly: An Admonition," Speculum, XL (1965), 74-83, for discussion of his influence on his illustrious pupil Jean Gerson. Paul Sigmund, Nicholas of Cusa and Medieval Political Thought (Cambridge: Harvard University Press, 1963), p. 107, has noted that of the earlier conciliarists d'Ailly is probably the one closest in tone and argumentation to Nicholas of Cusa.
of their disciples Major and Almain, the abiding inspiration of theological Gallicans . . . ."\(^1\)

In the light of the general trend of the most recent scholarship, it is no longer the fashion to view conciliar theory as proceeding in any simple or direct way to the Protestant Reformation. The theological orthodoxy of a man like d'Ailly--demonstrated by his opposition to the Hussite and Wyclifite movements--may help us to see more of the orthodoxy of his ecclesiology and reform measures, in which he never attacked the divine origin of the papacy nor its right to carry on the Church's daily government. Oakley prefers to see d'Ailly's footprints not only in the tradition of the Gallicans, but in the disciplinary legislation which emerged at Trent and in the ecclesiology emerging from the Second Vatican Council.\(^2\) "There can be little doubt . . . about the real influence of d'Ailly's political ideas upon later theories concerning the nature of the ecclesiastical polity."\(^3\)

The second facet of influence is the more difficult one to pursue. This is the question of the alleged influence of conciliar thought on later secular political thought: "in particular can d'Ailly's political thought be assigned any individual part in this development?"\(^4\) Many have written in

\(^1\) Oakley, D'Ailly, p. 229.

\(^2\) Oakley in Gerrish, p. 48.

\(^3\) Oakley, D'Ailly, p. 217.

\(^4\) Ibid., p. 218.
support of this influence of the conciliarists. For instance, Harold Laski views conciliarism as a political theory in its own right, "the one universal expression to which medieval constitutionalism attained." The conciliarists regarded the community as the sovereign and the headship as a trust; the road from Constance to 1688 was "a direct one."¹ Otto von Gierke thinks that the conciliar movement formed "an important chapter in the historical development of 'Nature-Right' theories of the State," and contributed immensely to the success of the political doctrine of papal sovereignty."² J. N. Figgis has followed Gierke's lead and suggests that the conciliar arguments were important because they were "more purely political than those of the earlier Middle Ages," concerned not with conflicts between rival authorities "but with the depositary, the function and the limits, of sovereign power in a perfect society." Figgis has suggested that it was precisely the lack of concern for the medieval preoccupation with the relationship between regnum and sacerdotium that gives the conciliarists' speculations their peculiar value. Their theorizing on the General Council as the depositary of sovereignty within the Church "drove


the thinkers to treat the Church definitely as one of a class, political societies."¹ Walter Ullmann writes that "Monarchy versus oligarchy was the real issue of the Schism, or seen from a different angle, absolute versus constitutional monarchy."² Finally, G. H. Sabine comments:

The controversy in the Church first drew the lines upon which the issue between absolute and constitutional government was drawn, and it spread the type of political philosophy by which in the main absolutism was to be contested . . . . From the Conciliar theory of the fifteenth century there is a directly developing line of thought to the liberal and constitutional movement of the seventeenth and eighteenth centuries.³

The a priori case for such influence is good. As has been pointed out, the constitutional movement in the Church paralleled certain secular developments. Also, the medieval canonists had not regarded their juristic principles as exclusively ecclesiastical.⁴ By late medieval times, the Church was being conceived of as a political community similar to

¹J. N. Figgis, Gerson to Grotius, pp. 44-45; quoted material, in order, pp. 49, 42. Oakley, D'Ailly, p. 52, has pointed out that the apparent error of Figgis in locating the source of conciliarism in the examples of secular states does not damage his observations here; even his opponents agree that the Church was being conceived of as a political community.

²Ullmann, Origins, p. 6.


⁴For example, Huguccio had applied canonistic doctrine on the deposition of an heretical pope to justify, in certain cases, the deposition of a tyrannical king by his barons; Brian Tierney, "The Canonists and the Medieval State," Review of Politics, XV (1953), 381.
others. In d'Ailly's case, we have seen that he regarded his "political" concepts as true for any rightly ordained polity and that he justified their application to the Church on that very basis. Oakley has emphasized the significance of d'Ailly's conception of the inherent authority of the governed. D'Ailly not only asserted the existence of an actual institutional machinery for retraining monarchical abuse of power; he went on to envisage continuously operating institutional restraints, in the form of regular assemblings of the General Council. A basic problem with medieval theories on resistance to princely abuse of power was that effective remedies were essentially dependent on "the verdict of the individual outraged conscience." In this as in other areas, d'Ailly and his conciliarist colleagues brought into relatively explicit statement what had been vague suggestion. "It is, accordingly, in its faltering moves toward the institutionalization of what had been essentially personal rights to enforce the limitation of government to its proper goals that the interest and value of d'Ailly's position concerning forms of government is to be found." E. F. Jacob, who is apparently skeptical of the claim that the conciliarists are among the organizers of the Western constitutional tradition--for he suggests that the conciliarists held a theological ra-

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1In Part Three of De materia.

2Oakley, D'Ailly, p. 116; for the following quotation, Ibid., p. 117.
ther than a political and constitutional conception of the Church—writes that "The passages where the constitutional analogy is pressed are not always the most essential part of Conciliar doctrine, save perhaps, in the writings of Pierre d'Ailly." Finally, as Hubert Jedin has pointed out, "it is a commonplace with the writers of the period of restoration that the democratic ideas of the epoch of the Councils were a danger to monarchy as an institution."2

Such considerations, coupled with obvious similarities between conciliarist views on the nature of the political community and the ideas of seventeenth-century constitutionalists, make the generalizations of historians sound true. But with the exception of some scant research by Figgis the case has remained largely a priori. Some writers have regarded conciliarism as irrelevant to the history of political

1E. F. Jacob, Essays in the Conciliar Epoch (South Bend: University of Notre Dame Press, 1963), p. 4. Jacob's position is not clear. He seems to have reacted against the assertion of Figgis that the conciliarists borrowed from the examples of secular states by denying not only this assertion but its reverse as well. He seems to slide unconsciously from saying that the conciliarists did not borrow from the earlier examples of secular states to saying that the conciliarists are not among the ancestors of Western constitutionalism in secular politics. It seems like an error opposite to that of Figgis, who was aware of the influence of the conciliarists on later political theory and then linked conciliarism to earlier developments in the secular states. At the close of his book (pp. 241-42), Jacob emends his assessment of the conciliarist conception of the Church to admit that it is juristic as well as theological, while he still maintains that it is not political or constitutional. But how is a conception of the institutional Church, especially a juristic conception, not also a constitutional one?

2Jedin, I, 137 n. 1.
theory.\(^1\) Oakley suggests that there is good reason for this situation—the lack of exhaustive analysis and elucidation of the political thought of leading conciliarists except Nicholas of Cusa. He suggests that no general evaluation of the place of conciliarism in the history of European political thought be made until a great deal more is known about the political thought of individual conciliarists.\(^2\)

Much less then, at this time, can we expect much information on possible influences of the *Tractatus de materia* itself. Yet some facts have emerged, and Oakley suggests that we have allowed the Protestant Reformation to obscure "more distant prospects" in the landscape of late medieval and early modern political thought, that men living closer to the events have recognized the enduring influence of conciliar ideas, and even of d'Ailly's in particular, in a number of ways beyond somehow being Protestant precursors.\(^3\)

For example, such writers as John of Paris, Marsilius of Padua, William of Ockham, d'Ailly, Zabarella, Gerson, John Major, and Jacques Almain were repeatedly cited in the seventeenth century as having supported the right of the people to resist tyranny. English sources are the most fertile, but

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\(^2\)Oakley, *D'Ailly*, pp. 6-7. It was Oakley's hope in writing this volume to perform this task in d'Ailly's case.

\(^3\)Ibid., p. 219.
the French also yield some material. Allusion has been made to the continued publication of conciliarist works, and there is evidence that the early seventeenth-century editions were read and cited from not only by Gallican and Anglican proponents but by the advocates of constitutional government, especially in England. While some of the seventeenth-century writers seem to have drawn directly upon the conciliarists for principles which they regarded as applicable to the political order, nearly all of them drew heavily upon their more immediate predecessors, the Protestant and Catholic monarchomachs of the sixteenth century. Thus, in order to establish a solid link of conscious continuity from the conciliarists down into the seventeenth century, one must establish the fact that these sixteenth-century writers were conscious inheritors of the tradition. A good deal of trouble is experienced here with many of the sixteenth-century writers, but it can be shown that four very important works of that century, at least three of which were very influential in seventeenth-century English political thought, display this conscious dependence. These are John Ponet's *Shorte Treatise on Politicke Power*, George Buchanan's *De iure regni apud Sco-tos*, Theodore Beza's *Du droit des magistrats*, and the anonymous *Vindiciae contra tyrannos*. The relationship of conciliar doctrine to issues of the sixteenth and seventeenth centuries and the uses to which it was put during those times.
are topics too involved to be discussed here.¹

Oakley concludes that the "Conciliar tradition was a living tradition in the sixteenth and seventeenth centuries, and as such it helped to mould secular as well as ecclesiastical political thinking."² Grounded on principles more universal than Scripture or natural constitutional precedent, conciliar theory proved of value in several countries. Conciliar theories are among the direct sources at least of Pocock, Buchanan, Beza, and the Vindiciae, and they were consulted and quoted by many including some of the English constitutionalists of the seventeenth century.³

"If these facts are kept in mind, it may not seem unreasonable to suggest that the history of early modern political theory should be viewed a little less in terms of the upheaval occasioned by the Protestant Reformation and a little more in terms of late medieval antecedents."⁴ The ideas of the popular origin of political authority and of common interest as the criterion of legitimacy of governmental acts locate d'Ailly and most of his conciliarist colleagues with-

¹For a full discussion of the influence of d'Ailly and other conciliarists on secular political theory, along with copious references to source material and further reading, see Ibid., pp. 219-32.

²Ibid., p. 229.

³Of course, the survival of such a tradition on an international scale raises the question of why constitutionalism only survived the era of absolutism in England, a question, needless to say, outside the purview of this survey.

⁴Oakley, D'Ailly, p. 230.
in the tradition of European constitutionalism, which matured in the seventeenth century, but which originated in the daily life, civil and ecclesiastical, of the Middle Ages. Oakley does not doubt the important political consequences of the Reformation but would place them on the practical rather than the theoretical level. It was reluctantly, in spite of themselves, and by necessity, that religious groups were led to employ doctrines which are now recognized as a common Western heritage. It was the failure of any of the religious groups to command universal allegiance, rather than any necessary theoretical deductions from their religious doctrines, which insured the survival of constitutional ideas. In England, it may be doubted whether the quasitheocratic principles of those Puritans were as important a factor in providing an initial theoretical justification for the opposition to monarchical absolutism as that "Whig" tradition of which was so well expressed in the Vindic and in the works of Ponet and Buchanan. This tradition was not the offspring of the Reformation but rather the legacy of the Middle Ages, and it had received its clearest and most universal theoretical formulation in the thought of the fourteenth- and fifteenth-century conciliarists, not least in that of Pierre d'Ailly.1

1Ibid., pp. 231-32.
APPENDIX: SOME NOTES ON THE GENESIS OF THE GLOSSES ON D.40, C.6, A FIDE DEVIUS

The glossa ordinaria to the Decretum was the best known of the early Decretist glosses in the fourteenth century and the most influential in forming fourteenth-century opinion. Tierney has remarked concerning its author, Joannes Teutonicus, that

precise of terminology was not one of his virtues. What is at any rate certain is that the Glossa Ordinaria to the Decretum provided a useful source of arguments for later thinkers whose views were more radical than those of Joannes Teutonicus himself.1

The availability as well as the character of this work made it popular among the conciliarists, including d'Ailly. In the evolution of Decretist literature, D.40, c.6, a text which hints at the liability of the pope to judgment for heresy, became the object of glosses which expanded upon the theme of the pope's liability to judgment. This appendix is presented to show something of how the gloss of Joannes Teutonicus came to say what it did, to shed more light on d'Ailly's use of the text, the gloss, and related Decretist literature. Perhaps the illustration of this one issue will give some idea of the chinks in the armor of pa-

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1Tierney, Foundations, p. 66. See the appendices to this work, where Tierney presents the glosses of Huguccio (pp. 248-50) and Joannes Teutonicus (pp. 251-52) on D.40, c.6, in v. a fide devius, which are discussed below.

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pal monarchy which proved useful to the conciliarists.

The earlier Decretists had struggled with the troublesome ambiguity of the Decretum on the relationship between the authority of the pope and that of the whole Church. The Decretum contained several explicit assertions that the pope stood above all human judgment.¹ Gratian cited five cases of popes who had submitted to judgment, but he maintained that their submissions were made voluntarily. He never admitted that any man or group had the right to condemn an erring pope.² But one text left the pope open to the charge of heresy: D.40, c.6, with its admonition that the pope was to be judged by no man, unless he was found to be deviating from the faith.³ This text became the basis of "a formidable edifice of canonistic speculation,"⁴ as the Decretists sought to reconcile these texts and explain why heresy was mentioned as the one case in which a pope apparently had a judicial superior. Quite early, schism was coupled to heresy, since its prolongation was seen as always productive of heresy. Also current was a tendency to extend justiciable

¹ C.9, q.3, cc.10-18; D.17, post c.6; D.21, cc.4, 7; D.79, post c.10; c.17, q.⁴, c.30.
² The five cases were D.21, c.7 (Marcellinus); D.17, c.6 and C.2, q.⁷, post c.41 (Symmachus); C.2, q.⁵, c.10 (Sixtus III); C.2, q.⁷, post c.41 (Damasus); C.2, q.⁷, post 41 (Leo IV).
³ "... A nemine est iudicandus, nisi deprehendatur a fide devius."
⁴ Tierney, Foundations, p. 57.
offenses to all cases touching the welfare of the entire Church (*status ecclesiae*).

Huguccio presented in one comprehensive gloss the first detailed discussion of the issue. In answer to the question why heresy should be mentioned as the one crime that could be charged against the pope, he quoted the accepted opinion that heresy in the pope was peculiarly injurious to the Church as a whole. But he did not consider heresy the only crime so injurious. Huguccio conceived of other offenses (for example, notorious fornication, robbery, sacrilege) injurious to the whole Church which could not be tolerated. To scandalize the Church by contumacious persistence in such notorious crime was tantamount to heresy and punishable as such.¹ Finally, he stated that those statutes declaring papal immunity from all human judgment could not have been intended to apply to such crimes; his reason for this, explicitly stated, was that no statute was to be interpreted in a sense that endangered the welfare of the whole Church. Papal immunity from judgment could not extend to a crime in which the whole Church's welfare was at stake.²

¹Contumacy was likened to heresy in the *Decretum*: C.1, q.7, c.1; D.38, c.16. Huguccio suggested that heresy was mentioned alone by way of example or perhaps because a pope could be accused of it even when it was not notorious.

²This aspect of the problem, clearly and decisively set out by Huguccio, aroused little comment in later Decretalist glosses. His view won general acceptance among the De-
But Huguccio went on to tackle the problems of legal procedure involved in bringing a pope to court. Although D.40, c.6, might withhold immunity from an heretical pope, other texts stated that the pope had no judicial superior and that an inferior could not even accuse a superior. Why Huguccio was unsatisfied with simply establishing that a pope could be tried for heresy or crimes tantamount to it is evident. He saw the difficulty facing the canonists in framing a consistent theory and stated it in considering the problem of why the normal procedure—which allowed for denunciation for secret crimes—could not be applied in a pope's case: the pope lacked a competent judge. Who was to decide whether the pope was a heretic? Once elected by two-thirds of the cardinals (even if simoniacally) he was legally true pope, and no exception could be brought against him. He remained pope until a charge of heresy could be legally established. If a pope denied a charge of heresy, it did not seem as if any court was competent to judge the issue. The principle of papal immunity could lead to an impasse. "A Pope could only be brought to trial if he were a heretic; but the fact of his heresy could normally only be

1 On the pope's judicial superiority, see p. 149 n. 1. On the ban on inferiors accusing superiors, see D.22, Prima pars Gratiani, C.2, q.7.
established in the course of a trial."

As Tierney writes, "The juristic problem was to define the circumstances in which a Pope could be presumed guilty of heresy, and so no longer a true Pope, without any trial being held." Huguccio's solution defined the circumstances in which a charge of heresy could be brought against the pope and recognized limitations to the exercise of this power. A pope could only be accused of heresy when he publicly announced his willful adherence to a known heresy and refused to abandon his position after due admonition. No accusation could be made against him if he propounded a new idea suspected of heresy or if he held in secret a heresy already condemned but denied the fact. To be liable to accusation his heresy had to be public or his crime notorious. He could never be accused of a secret crime.

These reservations, the heart of Huguccio's argument, sought to meet the difficulty that no court was competent to try a pope by eliminating the necessity for the trial of a pope as such, and to achieve this, Huguccio was applying to the pope a series of arguments Gratian had applied to the position of lesser prelates. Although Gratian felt that no inferior could condemn a superior, he also held that no formal condemnation was necessary in the case of a man who

1Tierney, Foundations, p. 61.
2Ibid., p. 62.
embraced a heresy already condemned. Such an individual's blatancy was regarded as a willful self-inclusion in the standing condemnation. ¹ This explains Huguccio's distinction between novel and known heresy and his insistence that a charge brought against the pope must be one of adherence to the latter. Gratian also conceded that accusations by inferiors against superiors might be admitted in the case of heresy, since in matters of faith the heretic was lower than the worst Catholic. ² He added that this applied only in cases of acknowledged heresy; a prelate of good repute who did not admit being a heretic was not subject to such accusations. ³ Hence came Huguccio's reservation that the pope could only be accused of publicly preached heresy, and not secret heresy. And the deposition of any prelate thus self-convicted would not involve a breach of the principle that a superior could not be condemned by an inferior, since such a man was inferior to any true Catholic. ⁴ Thus, if a pope announced his adherence to known heresy and held to it despite due admonition, or, what amounted to the same,

¹C.24, q.1, ante c.1.
²C.2, q.7, post c.26; C.6, q.1, c.20.
³C.6, q.1, post c.21.
⁴There is no evidence that Huguccio's argument rested on any alleged conciliar supremacy. He did not consider a General Council necessary to condemn a pope for heresy. He held that the cardinals could deal adequately with one who was "minor quolibet catholico." Tierney, "Ockham," 54.
contumaciously persisted in notorious crime, he was ipso facto condemned, lower than the worst Catholic, and so no longer pope. The problem of finding a competent judge was neatly circumvented by regarding the heretic as automatically degraded and condemned.

The effect of Huguccio's analysis was to augment the number of charges admissible against a pope, since all notorious crimes were regarded as tantamount to heresy, but also to severely limit the circumstances in which the charge could be brought. Tierney points out that Huguccio's reservations concerning this latter point were essential to his position and that if the canonists wished to adhere strictly to the principle that a legal pope stood above all human judgment, they could only hold him liable to deposition for heresy in the circumstances described by Huguccio.¹

But though the Decretists of the next generation fully accepted Huguccio's view that the pope could be deposed for any notorious crime, they came to reject or ignore his careful reservations concerning the legal procedure, to the compromise of the principle of papal immunity which Huguccio had defended. No distinction was made between secret and open heresy or new and known heresy. A pope could be accused without his self-incrimination. No suggestion was made that the man brought to trial had ceased to be pope before he was found guilty.

¹Tierney, Foundations, p. 63.
As has been pointed out, the glossa ordinaria to the Decretum stands out among the Decretist works because of its especially fertile ambiguity and its availability during the conciliar era. In it Joannes Teutonicus held that a pope could be deposed for any notorious crime, but even for secret heresy. He made no distinction between old and new heresy, nor did he restate Huguccio's solution to the difficulty of an inferior accusing a superior. Teutonicus closely associated the judicial immunity normally conceded to the pope with the doctrine that normally his decisions could stand against the whole world.\(^1\) But he was more outspoken than other Decretists in emphasizing that in cases in which articles of faith were involved, the General Council was superior to the pope.\(^2\) Tierney speculates that Joannes may have believed that a General Council had superior jurisdiction in matters of faith, enabling it to judge a pope on charges of heresy. Such an interpretation would explain why Joannes felt that a pope could be accused even of secret heresy but not of other secret crimes. If this glossator felt that a pope's liability to judgment for heresy rested on a superior authority of the General Council in matters of faith, not on any idea of self-condemnation and


\(^2\)D.15, c.2, in v. Praesumit; D.19, c.9, in v. Concilio; Ibid., pp. 250-51.
automatic degradation, there would be no need for him to reproduce Huguccio's cautious reservations. But Tierney also sees sufficient reason to suspect that Joannes had confused the authority of the General Council understood as the pope surrounded by the fathers in council with the authority of those fathers acting against the pope. Without a doubt, the ambiguities of the glossa ordinaria to the Decretum were to prove fruitful for later radicals.  

1In 1954 ("Ockham, 56-57), Tierney argues that Joannes Teutonicus did support the idea of the judicial superiority of the General Council in matters of faith. By 1955 (Foundations, pp. 65-66), he seems more hesitant to choose between the alternatives.

2For a fuller discussion on the subject matter of this appendix, see Tierney, Foundations, pp. 57-67, and "Ockham," 50-53. My discussion is drawn largely from these. This appendix does not trace subsequent Decretalist treatment of the topic, since d'Ailly seems to have drawn from and expanded upon Joannes. But the issue of papal liability to judgment received renewed interest in the fourteenth-century glosses, after a slump in the thirteenth, because of the crises of those years. Guido de Baysic, for example, held a doctrine which had been common in the thirteenth century: resistance to an heretical pope could not take the form of an exceptio (an allegation that he had never been true pope or had ceased to be one because of his heresy), but must be expressed in an accusatio, which necessitated a trial. He also held that a pope could be accused even of secret heresy and that the competent tribunal was a General Council. Joannes Andreae and Henricus Bohic expressed approval of this. While none of these three claimed that a General Council was superior in cases involving articles of faith—they expressly denied it—their ignoring of Huguccio's arguments, which had shown how a pope could be brought to trial without the need of such a doctrine, carried the readily-exploited implication of conciliar supremacy. Meanwhile, some of the anti-papal publicists reaffirmed Huguccio's point on automatic degradation. For more on these fourteenth-century developments, see Tierney, "Ockham," 57-59.
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   Appendix III: Tractatus de materia concilii generalis.

   A translation with notes and commentary.

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