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The History of Medieval Canon Law in the Classical Period, 1140–1234

*From Gratian to the Decretals
of Pope Gregory IX*



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Kenneth Pennington*

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Gratian and the *Decretum Gratiani*

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The name of Master Gratian has long been associated with a twelfth-century collection of Latin sources of canon law. Not only does this collection, definitive and authoritative for many centuries, have systematically arranged texts dating from the early church to the twelfth century, but the texts are discussed and analyzed through Gratian's *dicta* (comments), in which he interpreted the contradictions within the sources and brought them into concordance. By means of his *dicta*, Gratian demonstrated that the canon law of the church was a harmonically complete unity. His goal is also expressed in the original title for the compilation, the *Concordia discordantium canonum*, not *Concordantia*. This title appears early in the manuscript tradition and might well have been coined by Gratian himself.

The name *Decreta* (changed to *Decretum* by later jurists) for Gratian's work is also very early and dates from around 1144. According to modern juristic categories, Gratian's legal collection is regarded as a 'private work', since it was never formally approved by the pope; its supposed confirmation by Pope Eugenius III in Tolentino is a legend. Despite that, from ca. 1140 Gratian's *Decretum* spread rapidly all across Europe and established itself first in Bologna and soon afterwards in other places as the authoritative textbook for teaching canon law. In this way the *Decretum Gratiani* is both the summary of the development of the law of the Christian Church

in the first eleven centuries of its existence and the foundation of canonical jurisprudence until the twentieth century. Gratian has quite appropriately been seen as the father of the discipline of canon law.

As early as the middle of the twelfth century the *Decretum* of Gratian was supplemented by the *ius novum* of contemporary papal decretals, which in their turn were taught at European law schools from about 1180. After papal decretal law had been gathered into authoritative lawbooks during the thirteenth and early fourteenth centuries, the *Decretum Gratiani* was preserved as the first part of the *Corpus iuris canonici* along with the later decretal law. Despite the replacement of the *Corpus iuris canonici* by the *Codex iuris canonici* in 1917 (replaced by a new codex in 1983), many legal rules of current Catholic ecclesiastical law rest fundamentally on texts of the *Decretum Gratiani* (henceforward called the *Decretum* in this essay).

The Biography of Gratian

One is essentially left with suppositions so far as the life of Gratian is concerned, since most of the traditions in his biography come from the thirteenth century or even later. The frequent assertion that he was a Camaldolese monk in the house of Sts. Felix and Nabor in Bologna rests, so far as the Camaldolese part goes, on a tradition originating only in the eighteenth century. The tradition of Gratian's residence in the house of Sts. Felix and Nabor goes back to the period around 1250 and the unreliable glossator Odofredus. His place of birth is doubtful as well, since the tradition for a birth in Chiusi is not confirmed. The connection of Gratian with the house of Sts. Felix and Nabor rests on a notice by the glossator Odofredus (about 1260). Robert of Torigny, abbot of Mont-Saint-Michel, certainly made an error in his *Chronicon*, composed between 1162 and 1184, when he described Gratian as the bishop of Chiusi. In the thirteenth century Orvieto (Boncompagnus, *Rhetorica novissima*) and Chiusi (Martin of Troppau, *Chronicon*) were mentioned as birthplaces; finally, in the fourteenth century the village of Carraria near Ficulle was mentioned (Giovanni Colonna, *De viris illustribus*). Since Carraria lies near both Chiusi and Orvieto, the last notice might indeed give the true place of birth (as Seckel said as early as 1900).

The name 'Gratianus' is the only name given to the compiler of the *Decretum* in the earliest records. This name is given by the first witnesses in decretist commentaries, together with the academic title of 'magister' (master), so that it is possible to conclude that Gratian was continuously active as a teacher. A Bolognese decretist active in the seventies, Simon of Bisignano, often described himself as a disciple of Gratian. The highly de-

veloped juristic method in the *Decretum*, as well as its reception of many texts of Roman law in stages, makes it very probable that Gratian did his writing in Bologna and that he was active in this town as a teacher of canon law.

In his *Summa*, the canonist Huguccio states that Gratian's work was composed during a time when the legist Jacobus was teaching Roman law and Rolandus Bandinelli, later Pope Alexander III, was teaching theology in Bologna. This is probably good evidence that Gratian himself was active as a teacher in Bologna. Finally, the *Decretum* has two formularies of appeal (C.2 q.6 d.p.c.3r) in which the bishops of Bologna and Reggio, as well as an archbishop of Ravenna, are given by name. The shared episcopal years of the three bishops mentioned here lay between 1130 and 1140, and the reference to Bologna could hardly be accidental.

The tradition that Gratian was a monk was first asserted by the author of the *Summa Parisiensis* on the *Decretum*, around 1168. The same *Summa* also mentions Gratian's Italian origin. The great attention paid to monks in the *Decretum* in C.16–20 is significant evidence for the claim of the *Summa Parisiensis*. Still, it is possible that Gratian was a canon regular, because their rights were also particularly respected in the *Decretum*, especially in Causa 19. According to some earlier glosses to the *Decretum*, Gratian was a bishop. In his *Chronicon* Robert of Torigny alleged his episcopal service.

Canonists after 1150 never wrote as if Gratian still lived. Since his work on the *Decretum* ended about 1140, Gratian probably died between 1140 and 1150. The *Summa* of Rufinus, written around 1164, speaks of Gratian as dead. In connection with a judgment of a papal legate in Venice in 1143, a jurist named Gratian is mentioned as one of the assessors of the court, and he may be identified with the father of canonistic jurisprudence. Gratian left his work uncompleted, since there are no *dicta* in the third part. This fact also is firm evidence for the supposition that Gratian could not have completed the *Decretum* in the form in which it circulated after ca. 1145.¹

The *Decretum's* Date of Origin

Scholars have for a long time debated the date when Gratian compiled the *Decretum*. On the one hand Gratian's texts extend through the Second

Lateran Council of 1139, so that 1140 has been set as the year of completion (Fournier, Fransen), while on the other hand the *Decretum* has been connected with the Investiture Controversy, so that the first decades of the twelfth century were conceived as the period of composition (Vetulani, Chodorow).² The period around 1140 has been seen as a probable date for the completion of the work of compilation because the canons of the Second Lateran Council of 1139 constitute the latest group of sources. These texts regularly appear at the end of a quaestio, and summaries of these canons are often lacking in the oldest manuscripts; taken together, these two facts argue for the reception of the canons of the Second Lateran Council at the very end of Gratian's work of editing. Since Anders Winroth has established that Gratian compiled two stages of the *Decretum*, the first of which may contain a reference to the Second Lateran Council and consequently may have been completed ca. 1139, one could infer that the vulgate edition of Gratian's *Decretum* was completed only around 1145.³

Even greater problems arise when one tries to make a more precise pronouncement about the date when Gratian began his work. There has been a partial attempt to connect the work of editing with the conflicts of the Investiture Controversy (Chodorow), but this could not be documented from the text of the *Decretum*. It is better to assume that Gratian's work of editing began only after the Concordat of Worms, perhaps around 1125. The collections of canons used by Gratian all date before 1125. Since the editing of the *Decretum* passed through various stages, a period of perhaps a decade and a half for the work is easily conceivable.

Gratian's Sources: Conciliar Canons

In view of the sparse information about Gratian outside his work, modern research has concentrated on studying his sources, analyzing the immediate provenance of individual texts, and studying the stages of composition for the *Decretum*. The analytical table of sources compiled by Emil Friedberg, the last editor of the *Decretum*, in his Prolegomena is still the best available overview.⁴ Several large categories of sources may be distinguished as having provided Gratian with his materials for the *De-*

2. Stanley Chodorow, *Christian Political Theory and Church Politics in the Mid-Twelfth Century: The Ecclesiology of Gratian's Decretum* (Berkeley-Los Angeles-London 1972) 255–259, who thoroughly discusses the various scholarly theories about Gratian's date of composition.

3. See my discussion of the recensions of the *Decretum* below.

4. *Decretum Magistri Gratiani* (Leipzig 1879, reprinted Graz 1959) cols. xix–xli.

1. For a thorough discussion of the evidence in the chronicles and in the writings of the jurists, see John T. Noonan, Jr., 'Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law', *Traditio* 35 (1979) 145–172, with full bibliographical citations. Stephan Kuttner's essay 'Research on Gratian: Acta and Agenda', *Proceedings Cambridge* 3–26.

cretum: the canons of councils, papal decretals, patristic texts, Roman law, Carolingian capitularies, as well as a large portion of forged legal texts. In addition he cited biblical texts and pseudo-apostolic literature in the form of what is called the Canons of the Apostles.

We may make the following observations about the categories of sources used by Gratian: of the pseudo-apostolic writings only the Canons of the Apostles are used, of which 17 of the 50 canons translated into Latin by Dionysius Exiguus are included. These venerable texts of early ecclesiastical law passed all the way into modern codification of Catholic Church law only through Gratian's *Decretum*.

The role of early conciliar canons in Gratian's *Decretum* is considerable. Gratian used almost two hundred chapters of the Eastern councils from the Council of Nicaea to the Council of Constantinople in 869. To be sure, Gratian did not use all the canons that he could have from the early Latin canonical collections. For example, he took only 8 of the 25 canons attributed to the Council of Ancyra in 314. The texts of the Greek councils are reproduced partially in the form contained in the *Dionysiana* and partially in the form preserved by the so-called *Isidoriana vulgata*, the Latin translation used for the *Collectio Hispana* and later by the compilers of Pseudo-Isidore. The consequence of this tradition is that many conciliar canons appear in Gratian twice.⁵ It is surprising that 17 canons of the Synod in Trullo of 691/692, not recognized in the West as an ecumenical assembly, appear in Gratian. He ascribed these canons to the ecumenical Council of Constantinople in 680, so he had no problems in receiving them. The texts of the Trullan synod had already entered the tradition of Western canon collections through the *Collectio tripartita* attributed to Ivo of Chartres, which is a major source for Gratian. Gratian also included the canons of the Second Council of Nicaea in 787 and the Fourth Council of Constantinople in 869.

Among the texts cited continually since Dionysius Exiguus in Western canonical collections were the canons of the African councils in late antiquity. Gratian took about a hundred chapters from this material, and he also incorporated the larger portion of the *Statuta ecclesiae antiqua* of Southern Gaul, which he attributed to the Fourth Council of Carthage, in keeping with the tradition in the *Hispana*.

The Spanish councils and the *Capitula* of Martin of Braga provided

5. On the *Dionysiana* and the other early medieval collections mentioned in the following paragraphs, see Lotte Kéry, *Canonical Collections of the Early Middle Ages (ca. 400–1140): A Bibliographical Guide to the Manuscripts and Literature* (History of Medieval Canon Law; Washington, D.C. 1999).

Gratian with more than two hundred chapters. While the proportion of Spanish conciliar texts was still comparatively small in Burchard of Worms, they are of central importance in Gratian's *Decretum*. An example of their role can be found in the section of the *Decretum* that justified limiting traditional proprietary-church rights.⁶ In the *Decretum* the sequence of Spanish councils extends from the Council of Elvira in 306 to the Sixteenth Council of Toledo in 693.

The proportion of canons of Gallican councils through the Carolingian era in the *Decretum* is also very considerable. It begins with the Council of Arles in 314 and includes councils up to the late ninth century. Gratian also included Carolingian councils of the eastern Frankish kingdom: the councils of Mainz in 813, of Worms in 868, and of Tribur in 895. He preserved a large part of Merovingian and Carolingian ecclesiastical law with these texts. Many canons of councils that took place in Rome were taken from Carolingian sources.

The councils of the tenth and eleventh centuries, before the Gregorian reform, provided Gratian with only a few texts. In this respect Gratian differed from Burchard of Worms but resembled the tendency of collections in the Reform Era in his reluctance to include the canons of these councils.

On the whole, Gratian incorporated only a small selection of conciliar canons from the period between 1070 and 1140 into his *Decretum*, such as, for example, four canons of the Council of Clermont in 1095. In specific cases Gratian's probable direct sources for these later councils can be established. Hence the sole canon of the Council of Troja in Apulia in 1094 that made it into the *Decretum* (c. 1 Concilium Trosleienze = C.35 q.6 c.4) is obviously excerpted by Gratian from the *Collectio tripartita* (*Tripartita* 3.16.14 = Ivo, *Decretum* 9.53). The canons of the Council of Piacenza of 1095, which were almost all taken up by Gratian, mostly passed into the *Decretum* through the *Collection of Three Books*.⁷ Gratian also included the canons of the two Lateran councils of 1123 and 1139 in his *Decretum*. The chapters of the Second Lateran of 1139 were the last texts that he placed in the *Decretum* and consequently establish a terminus post quem for the end of his work. Some canons otherwise usually attributed to the First

6. e.g. C.16 q.7 c.30 and c.32.

7. In any case c.15 Concilium Placentinum is not found in any collection before the *Decretum*: F.J. Gossman, *Pope Urban II and Canon Law* (The Catholic University of America, Canon Law Studies 403; Washington, D.C. 1960) 121. It is found inserted in a Polycarpus manuscript, Paris, Bibl. nat. 3881; see Jacqueline Rambaud, *L'Âge classique 1140–1378: Sources et théorie du droit* (Histoire du Droit et des Institutions de L'Église en Occident 7; Paris: 1965) 57.

Lateran Council appeared in Gratian with the inscription 'Urbanus papa'. With the current state of research it is impossible to make absolutely secure statements about the immediate provenance of the conciliar texts of the period between 1090 and 1140 in Gratian.

Papal Decretal Letters

The genuine papal decretals in Gratian extend from the earliest surviving decretals of Siricius to a decretal of Pope Innocent II to Bishop Odo of Lucca (C.35 q.6 c.8) that is useful for the dating of the *Decretum*. The letters of Popes Leo I, Gelasius I, Gregory I, and Nicholas I are particularly numerous. It must be stressed that a large portion of the letters of Gelasius I and Nicholas I were received into the canonistic tradition only during the period of the Gregorian reform, and the reform collections provided Gratian with this material.⁸

Gratian placed seven decretals of Pope Paschal II in his *Decretum*. Other than the single decretal of Innocent II already cited, his use of decretal law ends with the pontificate of Paschal II, which permits an inference about the period during which the *Decretum* was composed.

Patristic Texts

Patristic texts are extraordinarily numerous in Gratian. According to the fundamental study of Charles Munier, Gratian attributed 1200 chapters to Fathers of the Church, of which 1022 were authentic.⁹ That means that more than a quarter of Gratian's chapters are taken from patristic sources. This proportion roughly corresponds to the weight of patristic texts in the collections of Ivo of Chartres, particularly in the *Panormia*. The lion's share of the patristic texts is provided by the Latin Fathers Ambrose, Augustine, Gregory I, and Jerome, with Augustine much predominant. Among the Greek Fathers, Gratian cited primarily John Chrysostom, Origen, and Basil. In Gratian a special role is played by adoptions from the works of Isidore of Seville, especially his *Etymologies*, which served as the basis for his doctrine of legal sources in the first twenty distinctions. Patristic texts on the whole are distributed quite unevenly across the *Decretum*. They are particularly numerous in the law of the sacraments and in themes relevant to moral theology. Hence about 80 percent of the chapters in the distinction

8. On the history of papal decretal letters in earlier canonical collections see Detlev Jasper and Horst Fuhrmann, *Papal Letters in the Early Middle Ages* (History of Medieval Canon Law; Washington, D.C. 2001).

9. *Les sources patristiques du droit de l'église du VIIIe au XIIIe siècle* (Mulhouse 1957) 125–126.

De penitentia derive from the Church Fathers, and in the *causae* on oaths and on heresy as well as on the just war (C. 22–23) they provide more than two thirds of the texts. The patristic passages are also numerous in the area of tithes, usury, marriage, and excommunication. In contrast, the Church Fathers have provided only a few chapters on procedural law. Among the writings of the Church Fathers, Gratian particularly cited exegetical writings on the Old and New Testaments. That leads to the question of the extent to which biblical citations were adopted into the *Decretum*. Biblical passages often stood alongside canons of councils and decretals in collections of the Gregorian epoch before Gratian. Gratian broke with this tradition (Le Bras), since he did not adopt a single biblical text among his auctoritates, but rather cited the Bible only in his dicta. He uses or explains about 230 biblical passages, a great many of which come from the letters of Paul. A literal interpretation of commandments from the Old Testament was avoided through the aid of allegorical interpretations. Many prescriptions of the Old Testament were seen as bound to their own time, so that Gratian can actually develop the theme of legal change with the aid of the Bible. In the New Testament, Gratian made particular use of the *auctoritas apostolica*, including the pastoral letters in the context of ordination. The New Testament is also cited to justify papal primacy, which Gratian thought that the Roman Church received from Christ Himself. The function of the Bible as an allegorical model actually compels a supplementary positive law of the church, so that Holy Scripture plays an enlivening function for establishing new law (Le Bras).

Roman Law

The research of Vetulani and Kuttner during the last decades has examined the significance of Roman law in Gratian's *Decretum*, and the process through which Roman law was included in his edition has been extensively clarified.¹⁰ Gratian adopted a small number of texts of Roman law from earlier canon collections (22, according to Vetulani). In contrast, about two hundred texts of Roman law were taken into the *Decretum* without the mediation of earlier collections. They come from all parts of the Digest, from the Codex, and from the *Authenticae* of the Codex. A single text

10. Adam Vetulani's articles were reprinted posthumously in *Sur Gratien et les Décrétales*, ed. Waclaw Uruszczak (Collected Studies 308, Aldershot 1990) and Stephan Kuttner's were also reprinted in *Gratian and the Schools of Law 1140–1234* (2d ed. Collected Studies 185; Aldershot 1994). See now also José Miguel Viejo-Ximénez, 'La recepción del Derecho romano en el Derecho canonico', *Ius ecclesiae* 14 (2002) 375–414, and idem, 'Gratianus magister y Guarnerius teutonicus', *Ius canonicum* 41 (2001) 35–73.

was from the Authenticum, while the Epitome Iuliani was not an immediate source at all. Texts from the *Breviarium Alaricianum*, the *Codex Theodosianus* and the *Constitutions of Sirmond* also entered Gratian's *Decretum* via earlier canonical collections. Roman law was predominantly cited for questions of procedural law, while in the first part of the *Decretum* only very few passages are drawn from the Roman sources. Vetulani concluded, on the basis of the position of Roman-law texts at the end of a particular *quaestio* by Gratian and from the lack of rubrics, that these flowed into the *Decretum* at a late phase of its composition, perhaps only after Gratian's death. The results of the most recent research, according to which we must distinguish two editions of Gratian, has essentially confirmed the thesis of the late incorporation of Roman-law texts, since they are almost all to be found only in the second edition. Yet some passages of Roman law are found in the first edition, including the only text that Gratian took from the Authenticum.¹¹ Thus we must conclude that Gratian planned to use Roman law from the very beginning. Further, it can be established that all the texts of Roman law were already in Gratian's second edition, so that the presumption that later jurists inserted Roman law texts after the conclusion of all the rest of the compilation cannot be sustained. Finally the capitularies of the Carolingian period must still be mentioned, which provided many texts along with the forgeries of capitularies by Benedictus Levita. On the whole, Gratian received a heritage more diverse than that contained in the entire previous textual tradition.

The Canonical Collections used by Gratian

Since the sixteenth century, scholars have dealt with the question of Gratian's immediate sources, the analysis and identification of the work from which Gratian took a particular text, *fontes formales*, rather than locating the original work from which the text was excerpted, that is the *fontes materiales*.¹² In his edition of Gratian, Emil Friedberg included an extensive section on 'Quibus canonum collectionibus Gratianus usus sit' (Which collections of canons Gratian used) with tables comparing Gratian and fifteen pre-Gratian canonical collections and collections of sentences.¹³ One

of those was, to be sure, Peter Lombard, undoubtedly post-Gratian, who, in fact, borrowed texts from Gratian for his *Sentences*. Friedberg demonstrated clearly that as a rule Gratian did not excerpt his texts from original works but usually took them from earlier canonical collections. In recent years intensive comparisons of Gratian's chapters with pre-Gratian canonical collections have fairly certainly identified the direct sources of individual chapters of Gratian. In this process the standard test was that the texts of Gratian appear in similar range and in the same sequence in a specific earlier collection, that Gratian's chapter inscriptions agree with an earlier collection, and that many chapters can be shown to be in only one pre-Gratian collection. In addition there is the consideration that a collection can be considered as a direct source for Gratian only if at least some of its texts are not found in another collection already shown to be a source for Gratian. Consequently a principle of economy rules in postulating the sources used by Gratian.

On the basis of these considerations, several collections analyzed by Friedberg have to be eliminated: the *Collectio Anselmo dedicata*, *Regino of Prüm*, the *Collectio XII partium*, the *Collectio Caesaraugustana*, and the collection of *Deusdedit*. On the other hand, in agreement with earlier research, the central role of the collections attributed to Ivo of Chartres for Gratian's compilation has been confirmed. It can be said with certainty that Gratian zealously exploited Ivo's *Panormia*, which was in any case the most widespread canonical collection in Europe in the first half of the twelfth century. The second place is the *Collectio tripartita*, also attributed to Ivo, the use of which by Gratian is beyond doubt, especially as a source for many conciliar canons and decretals. This conclusion is surprising, since the collection is preserved in only one manuscript from Italy (Berlin, Staatsbibliothek, Hamilton 345). In contrast, comparisons have shown that what is called the *Decretum* of Ivo of Chartres did not serve Gratian as an immediate source, although this has, until now, nearly universally been asserted in scholarly research. In all cases of agreement between Ivo's *Decretum* and Gratian, the texts are also found in the *Panormia* or the *Collectio tripartita*, whose third part (*Tripartita B*) is in any case an excerpt from Ivo's *Decretum*. In keeping with the principle of economy, then, the use of Ivo's *Decretum* by Gratian cannot be accepted any longer. This result is all the more certain because no manuscripts of Ivo's *Decretum* from Italy have been found among those few that have survived. Of the other two collections of Ivo, the *Panormia* was extensively exploited for the first recension; the *Tripartita*, however, was used intensively only for the second recension. The central position of the chapters adopted by Gratian from the

11. To be specific, C.2, q.6, c.28 (Authenticum); C.15, q.3, c.1-4. Roman law is particularly important here for the establishment of the rules permitting women in some cases to give testimony during a trial.

12. For a discussion of the terms 'fontes materiales et formales', see Robert Somerville and Bruce C. Brasington, *Prefaces to Canon Law Books in Latin Christianity: Selected Translations, 500-1245* (New Haven-London 1998) 3-4.

13. *Decretum Magistri Gratiani*, cols. xlii-lxxv.

corpus of Ivo's collections leads to the conclusion that it was his knowledge of Ivo's collections that provided the decisive push for Gratian's undertaking.

After Ivo, Anselm of Lucca provided Gratian with many texts. Among the many editions of Anselm's collection, an expanded version of Recension A (A') must have served Gratian as a source. There are also concordances with Anselm's Recension Bb from Lucca in some of Gratian's chapters,¹⁴ which deserves attention because of Gratian's connection with Lucca, discernible from C.35 q.6 c.8. In any case, Anselm was used as a source in both of Gratian's recensions.

Finally, two Italian canon collections of the early twelfth century can be counted among Gratian's direct sources: the *Polycarpus* of Cardinal Gregory of S. Grisogono (circa 1111–1113) and *Collectio 3 librorum* (*The Collection in Three Books*) from the period 1113–1120. Since the *Collection in Three Books*, which survives in only two manuscripts, borrowed a large portion of its texts from the *Polycarpus*, it is often impossible to decide which of the two collections was Gratian's source. The *Collection in Three Books* has been recognized in the more recent research as a major source for Gratian.¹⁵ It was from there that he took a large part of his Pseudo-Isidorian texts and many patristic excerpts that were noted in Friedberg's edition without provenance. According to Kuttner, Gratian took passages in the *Liber de honore ecclesiae* of Placidus of Nonantula from the *Collection in Three Books*. The same is true of the excerpts that he borrowed from Roman law in the *Epitome Iuliani*. The *Collection in Three Books* was used mainly in Gratian's second edition, even more than the *Tripartita*; he frequently turned to the *Polycarpus* in the first edition. We may assume, I think, that the principal sources used for Gratian's compilation were not all already available to him at the start of his work.

Gratian's Theological and Non-canonical Sources

It has been known for a long time that the *Liber de misericordia et iustitia* of Alger of Liège provided Gratian with texts and also served as a model for his dicta. Gratian's textual adoptions from Alger are, however, restricted to small parts of the *Decretum*, particularly to Causa 1.

Gratian's work contains a considerable body of theological texts, especially in *De penitentia* and *De consecratione*. The collection of theologi-

cal *Sentences* of Master A.—probably Ailmerus of Canterbury—was a major source. According to Kuttner and Landau, it is likely that Gratian used the collection in an expanded version known through a Florentine manuscript.¹⁶ The *Sententiae Magistri A.* were sometimes used for Gratian's first edition. Gratian also turned to this collection of sentences in his chapters on marriage law.

Among Gratian's non-canonical sources were the sections on legal theory in the *Etymologiae* of Isidore of Seville. Here it is conceivable that Gratian had a complete text of Isidore at hand, or at least an excerpted Isidore containing Book Five of his work. Among Gratian's innovations was his use of Isidore when he discussed legal theory and the doctrine of legal sources in his *Tractatus de legibus*, Distinctiones 1–20. The last, but not least in importance, among Gratian's non-canonical sources was the *Glossa ordinaria* of the Bible, a source that he often used. Many of these texts are contained in the treatise *De penitentia*.

Some of the sources that Gratian did not use are significant. Textual comparisons between Gratian and collections before Gratian also make it possible to disqualify certain works as principal sources for Gratian, or to assign them only marginal significance in editing the *Decretum*. The most striking example is the *Decretum* of Burchard of Worms, which was broadly distributed in Italy in Gratian's time, yet Gratian appears barely to have used it in gathering his texts. The use of Burchard can be shown only in the case of about ten to fifteen chapters of Gratian. These include the sequence C.27 q.1 c. 11–14, which, due to a mysterious mislabeling, 'ex concilio Triburiensi', points to the trail of a particular group of Italian Burchard manuscripts. My own earlier thesis that Gratian made no use whatsoever of Burchard cannot be maintained.

Gratian preferred to use recent canonical collections for his *Decretum*. While it was asserted in early research (Peitz) that Dionysius Exiguus was a principal source for Gratian, it has since been shown (Landau) that Gratian inserted at best only six chapters from the *Dionysiana* (*Dionysiana-Hadriana*?) after the plan of the *Decretum* had already been conceived, although the additions were made to the first recension. It is also surprising that Gratian never directly used Pseudo-Isidore for his pseudo-Isidorian

14. D.89 c.5; C.3 q.7 c.7; C.3 q.9 c.7; C.16 q.1 c.1.

15. John H. Erickson, 'The Collection in Three Books and Gratian's *Decretum*', *BMCL* 2 (1972) 67–75.

16. Florence, Laurenziana, Santa Croce Plut. V Cod. 7. Stephan Kuttner, 'Zur Frage der theologischen Vorlagen Gratians', *ZRG Kan. Abt.* 23 (1934) 243–268, reprinted in *Gratian and the Schools of Law*. Peter Landau, 'Gratian und die *Sententiae Magistri A.*', *Aus Archiven und Bibliotheken: Festschrift für Raymund Kottje zum 65. Geburtstag*, ed. H. Mordek (Freiburger Beiträge zur mittelalterlichen Geschichte 3; Frankfurt am Main 1992) 311–326, reprinted in Peter Landau, *Kanones und Dekretalen* (Bibliotheca Eruditorum 2; Goldbach 1997) 161–176.

texts. Horst Fuhrmann's standard work on Pseudo-Isidore cited many chapters in Gratian that he thought were without parallels in pre-Gratian collections. However, when Fuhrmann wrote, the influence on Gratian of the *Collection in Three Books*, which contained many Pseudo-Isidore texts, was not known. It can now be excluded that Gratian made extensive use of Pseudo-Isidore, since we have evidence from only a few passages that he copied texts directly from Pseudo-Isidorian decretal manuscripts.¹⁷

Since Gratian frequently took fragments of letters from the Register of Gregory I—266 in all—using the inscription 'in registro', older research assumed that he must have used this important source in the form of the *Registrum Hadrianum*. According to more recent research (Landau), even these texts from the Register of Gregory I found in Gratian derive almost without exception from canonical collections predating Gratian;¹⁸ the direct use of the Register is probable in only a single case.¹⁹

Roman Law in the *Decretum*

Kuttner put forward the thesis that Gratian in C.2 q.1 c.2 used the *Lex Romana Visigothorum* because Gratian gave the chapter the inscription 'Constantinus imperator'.²⁰ However, Gratian's source in this case was Anselm of Lucca, who also ascribed the same text to 'Constantinus imperator'.²¹ Consequently, one need not postulate the use of the *Lex Romana* or an epitome as Gratian's source. Gratian used texts of Roman law exclusively from pre-Gratian canonical collections and from the *Corpus iuris civilis*.

In summary it can be said that Gratian drew his chapters predominantly from seven pre-Gratian collections of canons and sentences: Anselm of Lucca, Ivo's *Panormia*, the *Collectio tripartita*, the *Polycarpus*, the *Collection in Three Books*, the *Liber de misericordia et iustitia* of Alger, and the *Sententiae Magistri A*. At the present state of our knowledge, the origins of some patristic fragments, a total of about a hundred—only ten percent of the corpus of patristic texts in the *Decretum*—are unknown. Even in the case of these chapters whose origins remain unclear, it is probable that Gratian drew most of them from *florilegia* of patristic sentences. Among these

17. C.6 q.1 d.p.c.11; C.12 q.2 c.21.

18. Peter Landau, 'Das Register Papst Gregors I. im Decretum Gratiani', *Mittelalterliche Texte: Überlieferung-Befunde-Deutungen: Kolloquium der Zentralkommission der Monumenta Germaniae Historica am 28./29. Juni 1996* (MGH Schriften 42; Hannover 1996) 125–140.

19. C.27 q.1 c.19 (JB 1496).

20. Kuttner, 'Research on Gratian' 23.

21. Anselm of Lucca, *Collectio canonum una cum collectione minore*, ed. Friedrich Thaner (Innsbruck 1905–1915, reprint Aalen 1965) 3.89 §§ 25–26 (p. 165–166).

hundred or so patristic fragments are six fragments from the work *De vita contemplativa* of Julianus Pomerius, which Gratian attributes to Prosper. Otherwise the corpus is essentially divided among the four great Latin Fathers of the Church. Surprisingly, most of these texts are already contained in Gratian's first recension; only in the case of the excerpts from the works of Ambrose did Gratian add the majority of texts to the second edition. It is to be presumed that Gratian used at least two hitherto unknown patristic *florilegia* for these texts. In the case of Gratian's chapters from Gregory I's *Moralia in Job*, the unusually precise citations in Gratian's inscriptions lead to the conclusion that he used this work directly (as Munier already argued).²² Gratian also used the Pseudo-Augustinian work from the eleventh century, *De vera et falsa penitentia*.

The Plan and Divisions of the *Decretum*

Gratian's *Decretum* is divided into three principal parts, each of them in turn entirely differently constructed. The first part of his treatise is divided into 101 distinctions (*distinctiones*), which, after an introduction on the doctrine of legal sources (D.1–20), primarily treat the ordination and election of clerics. The decretists who followed Gratian (Rufinus, Stephen of Tournai) often designate the first part to be a treatise on ecclesiastical offices, 'de officiis'; the law of offices in this case is, however, always closely tied to the sacrament of ordination. Distinctions 81 to 101 provide additional texts and supplements to the themes already treated, and Gratian himself described it as an 'epilogue' to the first principal part (D.81, pr.). A second part (*Pars secunda*) follows, in which Gratian invented 36 fictive legal cases (*causae*), each *causa* to illustrate a theme. After describing the legal case, Gratian posed a series of questions that the case raised. He then provided the relevant legal texts after each question. In his dicta, Gratian resolved the contradictions in the sources and provided an answer to each question.

The table provides the schema of the *Decretum*'s first two parts with an example of how each part should be cited.

Gratian did not order his *causae* in the second part according to a strict systematic plan, but we can see overarching subject themes in the sets of *causae* that are loosely joined together. The content of the second part was summarized by the decretist Rufinus as 'ecclesiastica negotia' (ecclesiastical legal matters). At the beginning of his *causae*, Gratian dealt with the legal problems of clerics (C.1 to 6) and, at the end, with those of laymen (C.27 to

22. There are six chapters taken from the *Moralia*, and Gratian noted the book and chapter of the text in his inscription: D.13 c.2; D.45 c.9 and c.14; D.46 c.1 and c.2; D.47 c.3. Each text is also in the first recension.

Pars prima
101 Distinctiones
divided into chapters
D.1–20 *Tractatus de legibus*
e.g. D.20 c.2

Pars secunda
36 Causae
divided into questions
that are divided into chapters
e.g. C.11 q.1 c.1
C.33 q.3 contains a *Tractatus de penitentia*
divided into 7 distinctions
e.g. De pen. D.1 c.22

36). He began the more extensive part concerning the clergy with a discussion of simony (C.1), a subject that is closely related to the principal theme of the Pars prima, ordination. He then treated heresy and, from C.2 to the end of C.6, questions of ecclesiastical criminal procedure. This section of the *Decretum* offered the decretists a point of departure for developing an ecclesiastical penal law and law of criminal procedure (*negotia criminalia*).

Causae 7 to 10 are dedicated to questions of ecclesiastical constitutional law and organization and include the following topics: the renunciation of office by bishops, the rights of the metropolitans, and the diocesan power of bishops. In this context, Gratian also deals with questions of diocesan property, including payments to bishops (*cathedraticum*). This last subject provided Gratian with the opportunity to discuss other major questions of property law in C.11 to 14, including the capacity of clerics to testify (C.12), the right to tithes (C.13) and the ecclesiastical ban on usury (C.14). In connection with disputes over property law, Gratian also deals with the 'privilegium fori' (the right of a cleric to have his legal case tried in an ecclesiastical court) (C.11). Causae 16 to 20 are dedicated chiefly to the rights of monks and canons regular, as well as to monastic institutions in general. Here too Gratian does not proceed in a strictly systematic way but shifts to other themes during his discussions, such as the doctrine of prescription (C.16 q.3) and the right of ecclesiastical asylum (C.17 q.4). It is also in this section of the *Decretum* that Gratian's most important comments on proprietary churches can be found (C.16 q.7).

Causae 21 to 26 deal with the general obligations of the clerical hierarchy and discuss highly varied areas of law. Important areas under this rubric are a comprehensive treatment of the oath (C.22), of just war, and with it the nucleus for a medieval law of nations (C.23), excommunication (C.24), privileges (C.25), and finally of the crime of magic (C.26). Gratian developed his treatment of privileges by also outlining his doctrine of papal power in the form of a long dictum (C.25 q.1 d.p.c.16).²³

23. See Chodorow's analysis of this dictum in *Christian Political Thought* 141–148.

Causae 27 to 36 are dedicated to legal matters concerning laymen, and the primary subject of these causae is the law of marriage. Gratian presented a very detailed analysis of impediments to marriage that became the foundation of canonical marriage law. He inserted a treatise on penance into his treatise on marriage law (*De penitentia*) that he divided into seven distinctions after C.33 q.3. In modern literature this section is commonly cited as, for example, De pen. D.1 c.88.

Finally, the second part of the *Decretum* is followed by a third section, entitled *De consecratione*. It is divided into distinctions. In modern scholarship its citation takes the form De con. D.1 c.57, to distinguish it from the distinctions in the first part of the *Decretum*. *De consecratione* was not, however, a part of Gratian's first recension.²⁴ The subject matter of the third part is primarily dedicated to the sacraments and sacramental matters and is divided into five distinctions. It begins with the consecration of a church and other consecrations of ecclesiastical objects (D.1) and goes on to deal with the Eucharist (D.2), festival days and times of fasting (D.3), baptism (D.4), and confirmation (D.5). There are no *dicta Gratiani* in *De consecratione*, which gives the impression that this part of the *Decretum* was left unfinished.

In a late work published after his death, Rudolph Sohm argued that the complicated structure of Gratian's *Decretum* conformed to a general plan corresponding to the ecclesiastical sacraments.²⁵ From the beginning until C.26 the sacrament of ordination determined the order, then marriage and penance, and finally the other sacraments in *De consecratione*. Sohm used this argument to support his general thesis that Gratian's work was the crowning achievement of an epoch of 'Old Catholic Sacramentary Law', in which canon law did not orient itself to the standards of secular jurisprudence. Sohm's impressive and often-rejected thesis (critics have been Gillmann, Mörsdorf, now Landau) fails on the fact that the structure of Gratian's *Decretum* is not completely predetermined in its content by sacramentary law.²⁶ The teaching on legal sources in the *Tractatus de legibus* (D.1–20) must be classified as jurisprudence and legal theory. In the same way, the 'negotia clericorum' of the second part can hardly be seen

24. As demonstrated by Anders Winroth, 'The Two Recensions of Gratian's Decretum', ZRG 114 Kan. Abt. 83 (1997) 22–31 and Rudolf Weigand, 'Chancen und Probleme einer baldigen kritischen Edition der ersten Redaktion des Dekrets Gratians', BMCL 22 (1998) 53–75, especially 75. Winroth expanded and enlarged his argument in *The Making of Gratian's Decretum* (Cambridge Studies in Medieval Life and Thought, 4th Series, 49; Cambridge 2000).

25. 'Das altkatholische Kirchenrecht und das Dekret Gratians', *Festschrift der Leipziger Juristenfakultät für Dr. Adolf Wach* (München-Leipzig 1918, reprinted Darmstadt 1967).

26. See Peter Landau, 'Sakramentalität und Jurisdiktion', *Das Recht der Kirche*, 2: *Zur Geschichte des Kirchenrechts*, ed. Gerhard Rau, Hans-Richard Reuter, and Klaus Schlaich (Gütersloh 1995) 58–95.

as sacramentary law. Finally, solely on the basis of the fact that *De consecratione* was not a part of the first recension of the *Decretum*, Sohm's thesis fails.

The peculiarity of the *Decretum*'s structure becomes most obvious when we compare it with other contemporary legal collections. In keeping with the organizational structure of other Gregorian reform collections, Anselm of Lucca, whom Gratian used directly, treated the primacy of the pope at the beginning of the first book. He then dealt with the right of appeal to the apostolic see, followed by the rules of procedure. The issue of clerical ordination is treated much later in the second section of the collection. In contrast to Anselm, it is Gratian's sharper juristic differentiation in his treatment of legal sources and the unity of his presentation of the law of ordination and duties and rights of clerical offices in the first part of the *Decretum* that sets the plan of his collection apart from others.

Ivo of Chartres begins the first book of his *Panormia* with the themes of the Christian faith and the sacraments of baptism, confirmation, and Eucharist. From the sacraments and sacramentalia he turns to the rights of the clergy and the hierarchical constitution of the Church. Like Gratian he treated the law of marriage only near the end (Books VI–VII). The orientation to the sacraments and hence to theology is more marked in Ivo, both in his *Panormia* and in his *Decretum*, than in Gratian.

In the eight books of the *Polycarpus*, as is the case with Anselm, Cardinal Gregory of S. Grisogono treated papal primacy first. Then he discussed the hierarchical constitution of the church and the rights of the clergy. As in Ivo's work, these clerical matters precede the law of laymen. Gratian's discussion of legal sources, definitions of law, and jurisprudence in the *Tractatus de legibus* is, consequently, an important and original accomplishment. His placement of ecclesiastical law before that of the laity corresponds to the chief tendency of the Gregorian reform. An orientation to theology still clearly characteristic of Ivo of Chartres is replaced with a more jurisprudential approach.

The Stages of Composition and the Two Recensions of the *Decretum*

The somewhat bizarre organization of the *Decretum*, particularly the placement of the *Tractatus de penitentia* (C.33 q.3), has often led to the supposition that there must be stages of composition of the *Decretum*. As early as 1660 the German scholar Stephan Bochenthaler ascribed a

treatise *De penitentia* to Abbot Ernst von Zwiefalten, from whom Gratian was supposed to have taken this portion of the *Decretum*.²⁷ However, since Gratian also refers to *De penitentia* in Causa 11, an insertion after the completion of the rest of the work is unlikely.²⁸ The third part, *De consecratione*, was also seen as a later addition.²⁹ Finally, intensive analysis of the Roman-law excerpts in the *Decretum* by Adam Vetulani and Stephan Kuttner showed that these texts must have been added later and perhaps not by Gratian.³⁰ Determination of the immediate sources used by Gratian in his individual chapters also led me to the conclusion that Gratian did not draw on all his collections at the same time, and that conclusion led me to assume that there were stages of composition.³¹ A decisive turn in this discussion came recently with the discovery of a first recension of the *Decretum* by Anders Winroth.³² The first recension is preserved in the following manuscripts: Florence, Bibl. Naz. Conv. Soppr. A. 1. 402; Admont 23 and 43; Barcelona, Archivio de la Corona de Aragon, Ripoll 78; Paris, B. N. nouv. acq. lat. 1761.³³ Gratian's text in these manuscripts was earlier interpreted as an abbreviation; Winroth proved that it is an earlier version of the *Decretum*. His study confirms the use of the *Panormia*, the *Tripartita*, Anselm of Lucca, *Polycarpus*, and the *Collection in Three Books* as Gratian's chief sources. The recensions permit us to see much more clearly Gratian's successive use of sources. Ivo's *Panormia* appears to have been the first excerpted, followed by *Polycarpus* and the *Tripartita*, with the *Collection in Three Books* mainly at the end. Canons from the *Tripartita* and the

27. Joseph de Ghellinck, *Le mouvement théologique du XIIIe siècle* (2d ed. Bruges 1948) 512–514.

28. C.11 q.3 d.p.c.24, although not in earlier recensions.

29. John H. van Engen, 'Observations on "De consecratione"', *Proceedings Berkeley* 309–320.

30. Vetulani and Kuttner's essays are cited above, n. 10.

31. Peter Landau, 'Gratians Arbeitsplan', *Iuri Canonico Promovendo: Festschrift für Heribert Schmitz zum 65. Geburtstag*, ed. Winfried Aymans and Karl-Theodor Geringer (Regensburg 1994) 691–707.

32. Winroth, *The Making of Gratian's Decretum*.

33. Kenneth Pennington and Carlos Larrainzar have argued that St. Gall, Stiftsbibliothek 673 is an even earlier recension of Gratian's *Decretum*; see 'Gratian, Causa 19, and the Birth of Canonical Jurisprudence', *La cultura giuridico-canonica medioevale: Premesse per un dialogo ecumenico* (Rome 2003) 215–236 and an expanded version in 'Panta rei': *Studi dedicati a Manlio Bellomo*, ed. Orazio Condorelli (Roma: Il Cigno, 2004) 4339–355 and C. Larrainzar, 'El borrador del la "Concordia" de Graziano: Sankt Gallen, Stiftsbibliothek MS 673 (= Sg)', *Ius ecclesiae: Rivista internazionale di diritto comune* 11 (1999) 593–666. Anders Winroth has continued to argue that the St. Gall manuscript is an abbreviation: see "The Teaching of Law in the Twelfth Century," *Law and Learning in the Middle Ages: Proceedings of the Second Carlsberg Academy Conference on Medieval Legal History*, 2005 (Copenhagen 2006) 41–61. For the Florentine manuscript see also C. Larrainzar, 'El Decreto de Graciano del código Fd (=Firenze, Biblioteca Nazionale Centrale Conventi Soppressi A.I.402)', *Ius ecclesiae* 10 (1998) 421–489.

Collection in Three Books are very often missing from the first recension. The relation of the first to the second recension proves to be complicated. Supplements of additional texts have been added to all the manuscripts of the first recension. The second recension could rest on an irregularly expanded exemplar of the first recension, which would perhaps explain differences in the sequence of chapters. The second recension certainly does not derive from an authentic, clearly established, archetype. Instances of incoherence between the *dicta Gratiani* and their texts are to a large extent the result of the second recension. The framework of *dicta* was essentially worked out for the first recension. The *dicta* inserted in the second recension are, in part, long and very thorough. One might say that they correspond to the type of 'summula'.

The discovery of a first recension makes possible new, clear conclusions on the sections *De consecratione* and *De penitentia*. *De consecratione* is completely missing in this recension, while *De penitentia* is to be found in a shortened version but already divided into seven distinctions. The Roman law texts are almost all additions of the second recension; only three texts were already included in the first recension, including Gratian's only citation from the Authenticum (C.2 q.6 c.28). Comparisons of the two versions made since the discovery of the first recension make it possible that the same author was not responsible for both versions; one might conclude that Gratian may be considered the author only of the first recension. The only division for which Gratian was responsible was the division of the thirty-six *causae* of the *Pars secunda* into questions. The division into distinctiones in *Pars prima* was never mentioned by Gratian in his cross-references; rather Gratian described *Pars prima* as the *Tractatus ordinandorum* (C.1 q.7 d.p.c.6). Paucapalea was probably responsible for the division of *Pars prima* into distinctiones as the two canonists who wrote the twelfth-century *Summa Parisiensis* and the *Summa 'Antiquitate et tempore'* attest.

In the middle of the twelfth century some manuscripts divided the text of the entire *Decretum* into titles with rubrics indicating content. The extent and coverage of the titles correspond in part to the distinctions of *Pars prima* and to the questions of *Pars secunda*, but some questions were also divided into various titles and various questions were united into a single title. In *Pars prima*, the number of titles (33) is substantially less than that of the distinctions—the texts of legal sources in D.1 to 14 are brought into a single title, 'De iure scripto et non scripto'. In connection with the division into titles, there is also a division of the *Decretum* into four parts (Leipzig, Universitätsbibl. Haenel 17, Codex F in Friedberg's edi-

tion). These divisions are the result of the post-Gratian canonists' interest in bringing canon law into closer conformity with Roman law. Stephen of Tournai and the French School that he founded were important for this development. In Bologna, by contrast, Rufinus and others stressed the independence of canon law and rejected Roman law's tendency to divide works into titles. The division of the *Decretum* into three different parts became definitive by the end of the twelfth century. In the long run the canonists succumbed to the model of Roman law when they began to compile papal decretals in collections.³⁴

Alterations and Falsification of Texts in Gratian

Until now, uncertainty about Gratian's immediate sources has hindered the investigation of how he altered or edited the texts that he incorporated into his *Decretum*. Gratian did, without doubt, occasionally shorten or alter his sources (for example, C.2 q.7 c.10). Since he interpreted his texts so skillfully through his *dicta*, he hardly ever needed to alter texts so extensively that he altered their sense. Although he lived in an era that produced many forged conciliar canons and decretals, so far no one has been able to find a forgery that he intentionally composed. Insofar as Gratian included obvious forgeries in the *Decretum* (for example, D.68 c.3), he probably took them from unknown sources. We may also note that when he borrowed inscriptions, in contrast to Burchard of Worms, for example, Gratian followed his immediate source.

Gratian's *Dicta*

The work of Gratian is distinguished from earlier canonical collections by his extensive *dicta*, which in the second recension became in some cases small treatises. Through these *dicta*, Gratian's work took on characteristics of a textbook that has been provided with a plethora of sources. Behind the *dicta* Gratian's range of ideas is clearly visible. He did not mechanically borrow solutions for contradictory sources but provided clear conclusions in his *dicta*. Cross-references in the *dicta* to other parts of the *Decretum* show that the *Decretum* was, in its first recension, already conceived as a unified work for the classroom.

It is remarkable that in his *dicta* Gratian refers to sources that are not cited in the *Decretum*. Many biblical citations, for example, are found only in the *dicta*. They are often tied to important theological reflections, as,

34. See Chapter 9 on systematic decretal collections by Kenneth Pennington, below.

for example, in C. 22 where he explains an oath.³⁵ In one *dictum* Gratian also makes a singular reference to Plato, whose philosophy he knew from the Chalcidius translation of the *Timaeus* (D.8 d.a.c.1). In another *dictum* Gratian refers to the *Breviatio* of Ferrandus, a systematic canonical collection not otherwise used by him and not widely disseminated in manuscripts (D.63 d.p.c.34). He may have used Ferrandus as a lexicon for locating canons. The alteration and expansion of *dicta* in Gratian's second recension must still be investigated in detail.

Gratian's Method

Gratian's method is already defined in the title that he himself certainly gave his work, *Concordia discordantium canonum* (A Concord of Discordant Canons). He starts with concrete problems of canon law for which contradictory answers were possible on the basis of the sources that he collects. Finally Gratian evaluates the legal force of the sources, often ranking them according to their importance. Methodologically he presumes that the force of canons may be limited by cause, person, place, and time, 'ex causa, ex persona, ex loco, ex tempore' (D.29 c.1—a text probably independently formulated by Gratian borrowing from Isidore of Seville).

In addition, Gratian knew Ivo of Chartres' *Prologue* to his collections and could rely on the principles developed in it.³⁶ Alger of Liège was the first to comment on and to compare canonical sources in his *Liber de misericordia et iustitia*, from which Gratian took his methodology and also many texts. Further, it is probable that Gratian was also familiar with the scholarly method of early scholasticism, especially Abelard's *Sic et non*.³⁷ Finally, Gratian's achievement is unthinkable without the influence and jurisprudence of the Bolognese school of glossators. Their treatment of the legal texts that they studied in civil law exercised a strong influence on him. Gratian's notable dependence on the Bible in his *dicta* shows that he was thoroughly shaped by a Christian world view deeply steeped in theology.

35. See the interesting study of Titus Lenherr, 'Die "Glossa ordinaria" zur Bibel als Quelle von Gratians Dekret', BMCL 24 (2000) 97–129.

36. Ivo's *Prologue* has recently been translated into English and French: *Prefaces to Canon Law Books in Latin Christianity: Selected Translations, 500–1245*, ed. Robert Somerville and Bruce C. Brasington (New Haven–London 1998) 132–158 and Jean Werckmeister, *Yves de Chartres: Prologue* (Sources canoniques 1; Paris 1996). See now Bruce C. Brasington, *Ways of Mercy: The Prologue of Ivo of Chartres: Edition and Analysis* (Münster 2004).

37. On the influence of Abelard's methodology now see Christoph H.F. Meyer, *Die Distinktionstechnik in der Kanonistik des 12. Jahrhunderts: Ein Beitrag zur Wissenschaftsgeschichte des Hochmittelalters* (Mediaevalia Lovaniensia, series 1, studia 29; Leuven 2000).

Basic Characteristics of Gratian's Thought in the *Decretum*

At the beginning of his work, Gratian discussed legal sources and types of law in great detail (D.1–14). He distinguished natural law, positive law, and custom from one another. He identified natural law with moral law found in human nature. Consequently, he thought that natural law and biblical law are largely identical. His doctrine became the most important foundation of the medieval doctrine of natural law until Thomas Aquinas.³⁸

Gratian's ecclesiology is based on a strict division of clerics and laity in the church: 'Duo sunt genera Christianorum' (C.1 q.12 c. 7). The clergy encompasses those selected by God for exclusive service in the Church; the laity is defined as the 'populus', the people, to whom marriage and the accumulation of property are permitted. In this position, Gratian was probably influenced by Hugh of St. Victor and his *Summa de sacramentis*. The clergy is hierarchically organized according to its grade of ordination (D.25 c.1—the apocryphal Isidorian *Epistola ad Leudefredum*), with each level of ordination tied to distinct official duties. Gratian did not yet make any legal distinction between the powers and rights of orders and the rights obtained through election for ecclesiastical offices.³⁹ Consequently he did not recognize any distinction in ecclesiastical power between the 'hierarchy ordinis' (hierarchy of order) and the 'hierarchy iurisdictionis' (hierarchy of jurisdiction). But since Gratian does distinguish between 'potestas' (power) and 'executio potestatis' (exercise of power), he has criteria to hinder the illegitimate exercise of power in the Church. The 'executio potestatis' can be effective only if the ordination of an office holder takes place within the Church. Thus Gratian prepared the ground for a conception and division of ecclesiastical offices that is relatively independent of the rank of a cleric by his ordination. The supremacy of the archdeacon over the archpriest, unknown before Gratian, D.25. c.1, is one example. He also underlined the importance of the authority of the archdeacon to control elections to ecclesiastical offices in D.63 c.20.

According to Gratian, ecclesiastical offices are bestowed by election,

38. The first twenty distinctions of Gratian's *Decretum* have been translated into English: *The Treatise on Laws (Decretum DD.1–20) with the Ordinary Gloss*, translated by Augustine Thompson and James Gordley, with an Introduction by Katherine Christensen (Studies in Medieval and Early Modern Canon Law, 2; Washington, D.C. 1993).

39. See most recently L. Villemin, *Pouvoir d'ordre et pouvoir de juridiction: Histoire théologique de leur distinction* (Paris 2003).

with the laity strictly prohibited from participating in them. Election is not yet tied to the principle of majority, and disputed elections are to be decided by superiors. Metropolitans, for example, decide disputed episcopal elections. Although Gratian, unlike Anselm of Lucca, did not place papal primacy first, he stressed the power and authority of the pope, particularly over legislation. For him, conciliar canons and papal decretals are legal sources of equal rank. The statement that the pope possesses the 'ius condendi canones' is made for the first time in a *dictum* that he expanded into a treatise (C.25 q.1 d.p.c.16);⁴⁰ the formulation corresponds to that in the *Dictatus papae* of Gregory VII.

Even conciliar canons receive their validity as law through the consent of the Roman Church. The pope is in principle bound to the law he has established, but he may alter it at any time and break it in individual cases by granting privileges to institutions or persons. In addition, on the basis of his power to legislate he has an interpretative monopoly over canon law. In bestowing privileges the principle of equity should be respected; consequently, privileges must always be bestowed with the reservation of possible future suspension, 'salva tamen in omnibus apostolica auctoritate'. The formula used by Gratian had already entered papal documents under Pope Celestine II (1143–44).⁴¹ The comprehensive right of the popes, developed by Gratian, to legislate and interpret the law was the foundation for the explosive expansion of papal decretal law starting with the pontificate of Alexander III (1159–81).

In keeping with the principal tendencies of twelfth-century theology, Augustinian tradition in sacramental law predominates in Gratian. He accepted the view that the efficacy of the sacrament does not depend on the worthiness of the dispenser; reordination and rebaptism are excluded from ecclesiastical practice.

In marriage law, Gratian emphasizes the principle of consent and stresses the consummation of the marriage ('copula carnalis'), through which alone a marriage resting on consent becomes a completely valid bond. Gratian's marriage theory, in which copulation played a role in determining the validity of a marriage, did not persuade future theologians and canonists. Peter Lombard and the Parisian theologians defended a theory based solely on consent. But Gratian thought that the free consent of the partners was also indispensable for the creation of a marriage.

Hence, by himself and without reference to earlier canonistic sources, he developed a differentiated doctrine of erroneous marital situations (C.29). In keeping with a Christian tradition reaching back to the third century A.D., Gratian represents the principle that free persons could contract valid marriages with unfree persons. The Church should separate relatives who marry within the forbidden degrees of consanguinity. It was incest. The separation has a penal character. The classification of impediments to marriage and the development of a special marital jurisprudence emerge only in the epoch of decretists following Gratian.

Gratian devoted much attention to the law of ecclesiastical property. This is true for his treatment of the benefice, and he applied the concept of an ecclesiastical benefice with juristic precision. He also discussed the law of tithes and ecclesiastical ownership rights in great detail. The Roman law of prescription was central to his analysis of these concepts. He considerably reduced the proprietary right of laymen to the churches built or endowed by them. Through Gratian, the concept of a lay 'dominium' over churches gradually vanished and was replaced, by the decretist Rufinus, with the new concept of patronage. In sum, Gratian created several new rules for a specifically ecclesiastical law of property.

In the law of procedure, Gratian borrowed more texts from the Pseudo-Isidorian Decretals than in other areas. He adopted Pseudo-Isidore's rigid rules about the very high standards that accusers and witnesses had to meet before they could be heard in court. By applying these stringent rules to the procedure of ecclesiastical courts, in which ancient Roman modes of proof were employed ('ordo iudiciarius'), Gratian greatly increased the difficulty of bringing about conviction in ecclesiastical criminal cases. Despite his extensive reception of Pseudo-Isidore in procedural matters, Gratian did not accept all of the ninth-century forger's opinions. Hence in a way somewhat different from Pseudo-Isidore, he presumed that a subordinate may accuse someone superior to him in the hierarchy; to him, accuser and accused are of equal moral value; the accused does not suffer any legal consequences because of his status. Gratian did adopt some of Pseudo-Isidore's legal principles, such as the ban on trials of absent persons. In the law of proof, the *Decretum* has a complicated mixture of Roman law and the oath of purgation common in the early Middle Ages ('purgatio canonica'). Appeal from the court of first instance has a great importance in procedural law, since it may be made at any point in the procedure, even before the final sentence of a lower court. On the basis of the texts received by Gratian, a specialized canonistic literature of procedure originated (*Ordines iudicarii*), which developed the principles

40. Chodorow, *Christian Political Theory* 141–147.

41. Friedrich Thaner, 'Über Entstehung und Bedeutung der Formel "Salva sedis apostolica auctoritate" in den päpstlichen Privilegien', Vienna SB 71 (1872) 807–851.

of the Roman-canonical trial that became standard for Europe up to the nineteenth century.⁴²

For Gratian, excommunication was the most important ecclesiastical sanction. Further penalties for clerics were deposition and suspension. Within excommunication itself, Gratian distinguished between the anathema (later called major excommunication), which excludes one from the community of the faithful, and minor excommunication, which has as a result only the exclusion from the Eucharist (C.11 q.3 d.p.c.24 § 1). Gratian expressly rejected the declaration of excommunication without trial—'latae sententiae'—which later became common in the twelfth century when the church dealt with heretics.⁴³

Gratian as the Father of Canonistic Jurisprudence

Rudolf Weigand's research on the composition of the glosses and apparatus to the *Decretum* dates the first glosses on the text of the *Decretum* to ca. 1150.⁴⁴ The *Summa* of Paucapalea, a student of Gratian, with which the decretist summa literature began, was composed as early as 1148. The *Decretum* was also epitomized very early in what were called abbreviations. Early works of this type were the *Abbreviatio* 'Quoniam egestas' dating to ca. 1150 in Southern France (Provence) and the *Abbreviatio* authored by the theologian and canonist Omnebene around 1156, which also circulated outside Italy.⁴⁵ The 'abbreviations' of the *Decretum* should be distinguished from what are called 'transformationes', which bring the material of the *Decretum* into a different order and with independent commentaries. Among these latter the *Compilatio decretorum* of Cardinal Laborans is of particular interest. This master, who was promoted to the rank of cardinal in 1173, worked between 1162 and 1182. His *Compilatio* is divided into six books, and it combines the sources with a commentary of its own;

42. Linda Flower-Magerl, *Ordines iudicarii and Libelli de ordine iudiciorum* (from the Middle of the Twelfth to the End of the Fifteenth Century) (Typologie des sources du moyen âge occidental 63; Turnhout 1994) and Kenneth Pennington, 'Due Process, Community, and the Prince in the Evolution of the Ordo iudicarius', RIDC 9 (1998) 9–47.

43. Elisabeth Vodola, *Excommunication in the Middle Ages* (Berkeley–Los Angeles–London 1986) 28–30.

44. See Rudolf Weigand, 'The Development of the Glossa Ordinaria to Gratian's Decretum', Chapter 3 in this volume.

45. On three German abbreviations of the *Decretum* see Alfred Beyer, *Lokale Abbreviationen des "Decretum Gratiani": Analyse und Vergleich der Dekretabbreviaturen "Omnes leges aut divine" (Bamberg), "Humanum genus duobus regitur" (Pommersfelden) und "De his qui intra claustra monasterii consistunt" (Lichtenthal, Baden-Baden)* (Bamberger theologische Studien 6; Frankfurt am Main 1998).

it is preserved in a single manuscript and obviously had almost no success.⁴⁶

Paleae and Addenda to the *Decretum*

The word, 'paleae' designates additions to the text of the *Decretum* that were inserted into the manuscripts after the completion of the second recension of the *Decretum* around 1145. They augment the *Decretum* with older canons not included by Gratian but also with contemporary *ius novum* and more recent forgeries. Chapters were and are also designated as paleae that entered the *Decretum* twice due to the *Decretum's* multifarious sources that often duplicated material. These chapters were repetitious and superfluous. The duplicate chapters were originally paleae and were gradually eliminated from the text of the *Decretum* in the twelfth century. The enigmatic term paleae might derive from the name of the canonist Paucapalea, who was perhaps the first to add supplements to the text of the *Decretum*. A major source of paleae was the *Decretum* of Burchard of Worms, which was widely available in Italy during Gratian's lifetime but which he barely used. The insertion of paleae into the *Decretum* can be dated to the period between 1145 and 1180. There are several particularly well known texts among the paleae, such as the chapter on electoral law of the *Regula Benedicti* (D.61 c.14), parts of what is called the *Decretum Gelasianum* (JK 700 in D.15 c.3), and the Donation of Constantine (D.96 c.13 and 14).

From the fourteenth century on, lists of paleae were made. In modern times, since there have been disputes over which chapters may be confidently called paleae, a definitive number of paleae in the *Decretum* cannot be given. Rambaud counted 149 paleae in 1965 and Weigand 169 in 1998; in each case these numbers can be considered only a starting point.⁴⁷ In more recent research the assumption has been made that the supplementing with paleae probably rested on a paleae collection independent of the *Decretum* (Rambaud), but the existence of such a collection has not yet been proved.

In the first decades after 1140 canonists inserted paleae into the text of the *Decretum* and other supplements, called addenda to the *Decretum*.

46. Norbert Martin, 'Die "Compilatio Decretorum" des Kardinals Laborans: Eine Umarbeitung des gratianischen Dekrets aus dem 12. Jahrhundert' (Ph.D. dissertation, Universität Heidelberg, 1994).

47. On the problem of the paleae, see now Jürgen Buchner, *Die Paleae im Dekret Gratians: Untersuchung ihrer Echtheit* (Pontificium Athenaeum Antonianum, Facultas Iuris Canonici 127; Rome 2000) counted 152 paleae.

These addenda usually collected decretal letters that were not in Gratian or in collections prior to Gratian. For the most part these decretals dated to the years after the completion of the *Decretum*. Among the decretals predating Gratian in these addenda are particularly the decretals 'Relatum' of Leo IX (JL 5153) and 'Inhaerentes' of Honorius II (JL 7401). Post-Gratian texts were taken from the decretals of Popes Eugenius III, Hadrian IV, and especially Alexander III. Some of the addenda also included the canons of the Council of Tours of 1163 and the *Authentica 'Habita'* of Frederick Barbarossa of 1155. Most of the addenda were inserted into Gratian's text between 1150 and 1170. With the growth of the mass of decretals under Alexander III, the necessity emerged to create autonomous collections of decretals, including the older ones, so that the addenda mentioned are lacking in subsequent manuscripts of the *Decretum*.⁴⁸

Gratian's European Reception: Early Manuscripts

The European reception of Gratian began even before the completion of the second recension. The *Decretum* was certainly known at the papal curia from the pontificate of Celestine II (1143–44); it was used in a decision by the bishop of Siena in 1150 (Nardi).⁴⁹ The first recension of the *Decretum*, still preserved today in five manuscripts, including three in Austria, France, and Spain, can document the rapid dissemination of the text beyond Italy. The two Admont manuscripts (Admont, Stiftsbibliothek 23 and 43) that preserve the *Decretum* in this original form divided into two volumes were written in Admont itself between 1160 and 1170. The monks of this religious house must have learned of Gratian around 1160. A further manuscript of this recension (Barcelona, Archivio de la Corona de Aragón, Ripoll 78) comes from the Benedictine house of Ripoll in Catalonia, and hence it documents early knowledge of the *Decretum* in Spain.

If manuscripts of the second recension are added to these first recension texts, a total of about 160 manuscripts of Gratian can be attributed to the twelfth century. The *Decretum Gratiani* reached Germany before 1160. Manuscript Mainz, Stadtbibliothek, II.204 was the model for the Gratian manuscript Bremen, Universitätsbibliothek, a.142, which was given to the Bremen Cathedral Library before 1168 by Archbishop Hartwig. Accord-

48. For information about the first independent collections of decretals, see Charles Duggan's 'Decretal Collections from Gratian's *Decretum* to the *Compilationes Antiquae*: The Making of the New Case Law', Chapter 8 in this volume.

49. See Thaner, 'Entstehung und Bedeutung'. For Siena see Paolo Nardi, 'Fonti canoniche in una sentenza senese del 1150', *Life, Law and Letters: Historical Studies in Honour of Antonio García y García*, ed. Peter Linehan (SCG 29, Romae 1998) 661–670.

ing to its library catalogue of 1165, the house of Prüfening near Regensburg possessed a codex of Gratian in two volumes that must have been obtained by Prüfening around 1160. This codex can be identified with a manuscript now in Munich (Munich, Staatsbibliothek, lat. 13004). As early as 1170 a Gratian codex was transcribed by the monk-priest Adalbert in the house of Schäftlarn near Munich (Munich, Staatsbibliothek, lat. 17161). Among the oldest *Decretum* manuscripts are Cologne, Dombibliothek 127 and 128, which were written ca. 1160. These manuscripts slightly predate the flowering of the school for canonistic studies in Cologne, which became a significant place to study canon law ca. 1170–1185. The *Abbreviatio decreti* of Omnebene was also transcribed on the lower Rhine after 1160.

Many French Gratian manuscripts of the twelfth century come from the north of France (such as Arras, St. Omer) or from Burgundy (Troyes, Bibl. mun. 103 from Clairvaux). A manuscript comes from southern France about 1180 that later was located in Cîteaux (Baltimore, Walters Art Gallery 777). What is possibly the oldest French codex of Gratian is a manuscript of Paris (Paris B.N. lat. 3884 I and II) that can perhaps be placed as early as around 1160. In Provence the *Decretum* was already known in 1150, which may be gathered from the evidence of the *Abbreviatio 'Quoniam egestas'*. For England, the flourishing of the Anglo-Norman school of canon law after 1180 proves extensive knowledge of Gratian at that time. What is possibly the oldest English manuscript of Gratian is an unglossed codex in Lincoln (Lincoln, Cathedral Chapter Library 138); among the oldest Gratian codices preserved in England are Cambridge, Pembroke College 162 (certainly from Italy) and Cambridge, Gonville and Caius 6 (from France).

In Italy the *Decretum* became a known text in both the north and the south; a codex in Vercelli dates to ca. 1180 (Vercelli, Archivio capitolare, XXV), and a manuscript of Verona was written around 1185 (Verona, Bibl. cap. CLXXXIV). Another manuscript of Gratian in Sicily can be dated to around 1160 (Beaune, Bibl. mun. 5). The early distribution of the *Decretum* in Spain, besides the manuscript from Ripoll of the first recension already mentioned, is witnessed particularly by a codex in Tortosa (Tortosa, Biblioteca Capitulare, 240). The miniatures of this manuscript show a close relationship with those of the manuscript from Ripoll. In summation it may be said that the European distribution of the *Decretum* of Gratian began between 1150 and 1160 and reached its apex about 1180.

Editions of Gratian

The *Decretum* of Gratian has been printed frequently since the fifteenth century. There are 45 incunable editions that were printed before 1501 and

more than 150 editions printed after that date. The earliest incunable edition appeared in Strasbourg in 1471. Among the printed editions of the sixteenth century is what can be called the first critical edition, produced by the canonist Antoine de Mouchy (Antonius Monchiacenus Demochares); he divided the text with indications of contents (paratitla).⁵⁰ The edition of the canonist Le Conte (Contius), a student of Cujas and a professor in Bourges, incorporated the text of Demochares and first appeared in 1570. Le Conte noted the apocryphal nature of many chapters in Gratian. The edition by the Protestant jurist Charles Dumoulin (Molinaeus) was printed first in 1554. It introduced the numeration of the chapters used in later editions and accompanies the text with Dumoulin's critical apostillae. This edition was placed on the *Index librorum prohibitorum*. Later publishers suppressed Dumoulin's apostillae.

The *Editio Romana* appeared in 1582 as the official edition of the Catholic Church, and it has remained the definitive text of Gratian for the Church on the basis of the letter of promulgation, *Cum pro munere pastoralis* of Gregory XIII dated 1580. The edition was edited by a commission, called the *Correctores Romani*, that had been established by Pius V in 1566. The cardinals and academic canonists who belonged to the Commission of *Correctores* included the Cardinals Ugo Buoncampagni (later Pope Gregory XIII) and Felice Perreti (later Pope Sixtus V). The Cardinals Francesco Alciati and Antonio Caraffa played a leading role in the commission. For their edition, the *Correctores* compared previous printed editions with the Gratian manuscripts from the Vatican. In order to check the texts in Gratian critically, they drew on pre-Gratian canonical collections, including Anselm of Lucca, as well as on editions of councils and of the works of the Fathers of the church. The goal of the *Correctores* was not an edition of the original twelfth-century text of Gratian, but rather a restoration of the original texts of the sources cited by Gratian, since these texts could claim validity as law, but the work of Gratian that included them could not. On the basis of this goal, the *Correctores* as a rule also corrected Gratian's erroneous inscriptions. On the other hand, they restricted themselves in reconstructing the original source texts insofar as they generally preserved both the initial words of a chapter in Gratian as well as the words on which an explanation in the Ordinary Gloss depended. Where Gratian's text differed from the original sources, they noted a 'lectio vera'

50. *Decretorum collectanea* ([Paris]: Apud Carolum Guillard and Gulielmum Desbois, 1547 and 1552); under the title *Decretorum canonicorum collectanea* (Paris: Apud Iacobum Puteanum 1570 and Antwerp: Ex officina Christophori Plantini, 1570 and 1573).

in the margin. The procedure of the *Correctores* can be justified because they wanted to establish a usable text of Gratian together with the medieval gloss, not a philologically correct text based on twelfth-century manuscripts. Their ultimate goal was to preserve the legal tradition of canon law. Through his letter *Cum pro munere pastoralis*, Gregory XIII declared the Roman edition to be the sole authentic version, whose text could not be altered. Yet in this way the *Decretum* of Gratian was not granted legal validity as a code of legislation. After the *Editio Romana*, any edition deviating from its text was excluded from the courts and schools of the Roman Church. After 1586 the *Decretum* was provided with title pages indicating it to be the first volume of the *Corpus iuris canonici*; after 1587 it was ordinarily printed bound together with the *Institutiones Iuris Canonici* of Lancelotti, an introductory textbook.⁵¹

In the following centuries the editions of the Pithou brothers and Justus Henning Böhmer departed from the *Editio Romana*. The edition prepared by Pierre Pithou (1539–96) and François Pithou (1543–1621) did not appear until 1687, long after their deaths; it is a masterpiece of French humanism. The Pithou edition frequently corrected the text of the *Editio Romana* by noting variants taken from French manuscripts. It also provided an alphabetical index of Gratian's chapters.

The leading Protestant canonist, Justus Henning Böhmer (1674–1749), professor at Halle, published a new edition of Gratian in 1747 that offered a text essentially altered from that of the *Editio Romana*.⁵² Böhmer used four Gratian manuscripts, and he relied on the thorough edition of Hardouin as the source of the conciliar canons. His edition became standard for the study of ecclesiastical law at Germany's Protestant universities. The next edition of Gratian was produced in 1836 by the Marburg professor Aemilius Ludwig Richter (1808–64), founder of the historical school of ecclesiastical law.⁵³ In his text Richter adopted the original Roman edition without its later typographical errors; thus the Roman edition can most easily be used today in Richter's edition. Further, he provided comprehensive references to texts and sources in his extensive apparatus on which later editors, especially Friedberg, could build. Emil Friedberg (1837–1910) produced the latest and most critical edition in Leipzig. It was first pub-

51. Giovanni Paolo Lancelotti (1522–1590), *Institutiones juris canonici quibus jus pontificium singulari methodo libris quatuor comprehenditur* (Rome 1588).

52. *Corpus iuris canonici Gregorii XIII pontificis maximi auctoritate, post emendationem absolutam editum in duos tomos divisum et appendice novo auctum* (Haleae Magdeburgicae: impensis Orphanotrophei 1747), reprinted by J.-P. Migne as volume 187 of his PL.

53. *Corpus juris canonici* (Leipzig 1839).

lished in 1879.⁵⁴ Friedberg based his edition on eight manuscripts of Gratian from German libraries, of which six were written in the twelfth century. He noted variations from the *Editio Romana* in a separate apparatus. Friedberg included all earlier research on Gratian in the critical apparatus of his edition. Of all the existing editions, Friedberg's is the only one that reproduces the text of the twelfth-century *Decretum*; hence it could be used as the basis of the five-volume concordance to the *Decretum* published by the Monumenta Germaniae Historica.⁵⁵ Friedberg's edition does not meet current critical standards; Kuttner's classic critique of his edition is still pertinent.⁵⁶ For the future, our goal should be separate editions of Gratian's recensions.

Two classic works of the sixteenth and eighteenth centuries are still of great importance for the critical use of the *Decretum*: (1) Antonius Augustinus (Agustín, 1517–86), *De emendatione Gratiani Dialogorum Libri duo* (Tarragona, 1587), and (2) Carlo Sebastiano Berardi (1719–68), *Gratiani canones, genuini ab apocryphis discreti* (Taurini, 1752–66).

Gratian and Protestant Ecclesiastical Law

The Protestant reformers did not take a unified stand towards Gratian and the validity of his text. Luther severely criticized positive canon law, including the work of Gratian. In contrast, Melancthon viewed Gratian more positively; consequently there are many citations of Gratian in the Apology of the Augsburg Confession. In general the Lutherans valued the *Decretum* more than decretal law. Protestant canonists Benedikt Carpzow (1595–1666) and Justus Henning Böhmer often cited the *Decretum* in their work. Unlike Luther, Calvin thought that the *Decretum* was superior to decretal law, and he also drew theological teachings from the *Decretum*. A critical and scholarly concern with the text and gloss of the *Decretum* also began very early among the members of the Reformed Church (e.g. Charles Dumoulin). Eventually, the whole *Corpus Iuris Canonici* was received into the Protestant churches as a subsidiary source of law. This borrowing still governs property law (patronage) in the German Evangelical churches.

54. *Corpus iuris canonici* (2 volumes; Leipzig 1879; reprinted Graz 1959).

55. *Wortkonkordanz zum Decretum Gratiani*, ed. Timothy Reuter and Gabriel Silagi (5 volumes; MGH, Hilfsmittel 10; Munich 1990). The Bavarian State Library has put Friedberg's edition on the web at: <http://mdz.bib-bvb.de/digbib/gratian/text/>

56. 'De Gratiani opere noviter edendo', *Apollinaris* 21 (1948) 118–128.

Gratian and the *Codices Iuris Canonici* of the Twentieth Century

After Pope Benedict XV promulgated the *Codex Iuris Canonici* on 27 May 1917, the contents of the *Decretum* ceased to have legal force within the Roman Catholic Church in 1918. Despite this, the *Codex* established in can. 6, n. 2, that those canons containing old law (*ius vetus*) are to be interpreted 'ex veteri iuris auctoritate' (from the old authority of the law). That statement leaves open the possibility of making use of the text of Gratian in modern jurisprudence. This ruling recurs almost unchanged in the *Codex Iuris Canonici* of 1983 (can. 6 § 2); the new code of canon law promulgated by Pope John Paul II states that canons incorporating old law 'aestimandi sunt ratione etiam canonicae traditionis habita' (ought to be considered according to the norms of the canonical tradition). There is no doubt that the *Decretum* belongs to the canonical tradition of the Church and that, due to the reception of the canons of the old Church in it and also due to its legal validity in the churches of the Reformation, it also has considerable ecumenical significance.

Final Evaluation of the *Decretum*

The *Decretum* and its importance can be evaluated in three ways: (1) The *Decretum* is a fundamental witness to the medieval intellectual world. It was born in the 'Renaissance of the Twelfth Century', to use Charles Homer Haskins' famous formulation, the most creative period of the Middle Ages. In Gratian's century Europe spawned the institution of the university, the architecture of the Gothic cathedrals, and the first great poetic works in the vernacular languages. As an intellectual achievement it equals the achievements of early-scholastic theology. The old legend that Gratian and Peter Lombard were brothers has a certain core of truth. (2) As the father of the discipline of canon law, Gratian represents the first in a long line of jurists who still teach canon law in ecclesiastical and secular universities throughout the world. Gratian established Western canon law as a legal system that differs significantly from the canon law of the Eastern Christian churches. Canonical jurisprudence after Gratian combined theological principles within a juridical framework that is neither purely theology nor purely jurisprudence. Consequently, Rudolph Sohm's question—whether Gratian was a theologian or a jurist—assumed that he was one or the other. In fact, Gratian was both. Gratian brought theology into law again and law into theology. (3) The *Decretum* forms the bedrock of European legal culture. Its content and its methodology shaped the core

of the Western legal tradition. The heritage of the *Decretum* in the Western legal tradition includes the establishment of natural law as an important element of our legal systems, the establishment of structures of public law, the spread of principles of international law, the presentation of a law of procedure stressing the legal protection of the individual, the recognition of the person, and the autonomy of the woman in marriage law. In terms of its methodology, the *Concordia discordantium canonum* is a challenge to the art of hermeneutics. Gratian's dialectical argumentation in his *dicta* makes it possible to speak of a new legal science from the twelfth century on. Through Gratian, the history of European jurisprudence was decisively influenced by canonists as well as by the jurists of Roman law, the legists or civilians. Both groups of jurists created the medieval and early modern *Ius commune*. Insofar as genuine ecclesiastical law is able to survive alongside state law, the legal order is not reducible to the will of the state alone. This historical constant in the legal history of the West, the co-existence of the two laws, led in the end to modern democratic pluralism. Master Gratian can claim some credit for this development.

3

The Development of the *Glossa ordinaria* to Gratian's *Decretum*

Rudolf Weigand



Glosses on the *Decretum* probably formed the earliest field of activity for canonists.¹ Their first glosses were short explanations of words. This type of gloss was very old. It can be found in the margins of pre-Gratian canon collections from the early Middle Ages, for example, as in the Dionysio-Hadriana in Würzburg M. p. th. f. 3 dating from the beginning of the ninth century, which has Latin and Old High German glosses in different ninth-century hands and in a Würzburg Universitätsbibliothek manuscript M. p. th. f. 146 from the same period.² These early glosses are often more an attempt to get at the correct grammatical meaning than an

1. Johann Friedrich von Schulte offers a first comprehensive account, 'Die Glosse zum Decret Gratians von ihren Anfängen bis auf die jüngsten Ausgaben', *Denkschriften der kaiserlichen Akademie der Wissenschaften* (Philosophische historische Klasse 21; vol. 2, Vienna 1872) 1-97. Kuttner, *Repertorium* 1-122, was an important breakthrough. My *Die Glossen zum Dekret Gratians: Studien zu den frühen Glossen und Glossekompositionen* (SG 25-26; Rome 1991), offers a summary of my own research. There, in four parts, I give first a cumulative edition of the glosses to selected portions of the *Decretum*, which taken together constitute barely one percent of the text, then an overview of important gloss compositions, followed by further information on the glosses of important authors and, finally, a description of the layers of glosses in all manuscripts containing pre-Johannine glosses. This work is the principal foundation for the remarks made in the first parts of the present essay.

2. These manuscripts from the old Würzburg cathedral library are described by Hans