Oxford Journal of Law and Religion, 2021, 10, 1–15
doi: 10.1093/ojlr/rwab003
Advance Access Publication Date: 7 May 2021
Original Article

Gratian and His Book: How a Medieval Teacher Changed European Law and Religion

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ABSTRACT

Gratian of Bologna, later bishop of Chiusi (died c. 1145), was a remarkably influential lawyer, who is undeservedly little known today. He was a legal expert who specialized in the rules and regulations of the Western Christian church. In around 1140, he put together a law book known as the *Decretum*, which became a great success, remaining foundational for medieval and modern law. The article focuses on three legal areas: tithes, marriage, and natural law. It discusses how Gratian used scholastic methods and classroom exercises to come to grips with the many contradictions that existed in the more than ten centuries of law that he strove to collect and synthesize. It highlights how Gratian's innovations in marriage law, natural law, and procedural law still influence modern law. Gratian left Bologna before he had finished the course, and the article reflects on the differences in his later fate and that of his book.

It has long been a common-place among medieval historians that there was something special about the 12th century.[1] This was a pivotal moment in European history and religion, when many of the institutions and structures came into place that, for better or for worse, characterize the rest of the Middle Ages and Modernity: universities, administrative government, papal monarchy, international commerce, banks, lawyers, torture, persecution, and bureaucracies. This optimistic view—if indeed it is optimistic—of a particular medieval century suffers from all kinds of analytical and historical problems.[2] Instead of discussing those, I would like to focus on a single 12th-century person, his life and his work, which, I will argue, made a real difference at the time, and still continues to shape modern society.

The argument of this article is, in brief: Gratian of Bologna, later bishop of Chiusi (died c. 1145), was a remarkably influential lawyer, who is undeservedly little known today. He was a legal expert who specialized in the rules and regulations of the Western Christian church. In around 1140, he put together

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1 This article was delivered as a keynote lecture at the annual meeting of the European Academy of Religion in Bologna on 7 March 2018. It is meant to address an audience who do not necessarily have expertise in medieval law.

2 The classic statement is Charles Homer Haskins, *The Renaissance of the Twelfth Century* (Harvard University Press 1927). Every textbook on medieval history addresses the idea. Cogent critiques are found in many places, eg: R N Swanson, *The Twelfth-Century Renaissance* (Manchester University Press 1999).

a law book for that church, a work that became a roaring success. The book, which is known as the *Decretum*, remained foundational for teaching and practicing canon law until as late as 1917, when the pope finally extinguished its long-lived validity.[3]

Gratian's *Decretum* is important not only because it is so central to the formation of the laws and regulations of the Western church but also because it became a model for all Western law, religious as well as secular. As such, the book continues to influence the way some aspects of law function in the 21st century. Whatever one thinks of the 12th century, it is easy to agree that Gratian and his book matter.

1. THE MAN AND HIS BOOK

Unfortunately, we do not know as much as we would like about the person Gratian. Contemporary sources contain practically no biographical information about him, while the fame of his book ensured that a veritable flora of myths and legends arose within a few decades of his death. Many still believe that he was a monk in an identifiable monastery in Bologna. There is no basis in historical evidence for this myth, which developed over the centuries to fill the glaring gap in our knowledge of Gratian's biography.[4]

What we know with certainty about Gratian may quickly be summarized. He surely once was educated to become a cleric. Gratian was trained to read and interpret the Bible and theological classics, such as works of St. Augustine, St. Jerome, and other church fathers.[5]

Gratian must have come to Bologna as a young man in the 1130s and he began to teach there, not theology as such, but one of the practical applications of theology. He taught the rules and regulations of the Christian church, what we call canon law. He was in fact the first person ever to teach canon law as an academic subject, which is the reason for why he often is referred to as the 'Father of canon law'.[6]

Gratian had entered upon an ambitious undertaking. The canon law of his time was a huge mass of legal rules descending from a thousand years of church history. Among the sources of canon law were thousands of papal decisions in legal cases, known as decretals, each one with potential legal force as a precedent. Hundreds of church councils had issued legal rules. Some councils are famous ones, such as the council of Nicea in 325, while others were quite local affairs, such as the council at Toulouse, France, in 1119. Then, there were thousands of theological pronouncements with legal import of the church fathers, and, in the background, secular law.

3 For Gratian and his work, see Anders Winroth, *The Making of Gratian's Decretum* (Cambridge studies in medieval life and thought, 4th ser, 49, Cambridge University Press 2000); Giovanna Murano, 'Graziano e il Decretum nel secolo XII' (2015) 26 Rivista internazionale di diritto comune 61; and John Wei, *Gratian the Theologian* (Studies in Medieval and Early Modern Canon Law 13, Catholic University of America Press 2016). The standard edition remains Emil Friedberg (ed), *Corpus iuris canonici* (ex officina Bernhardi Tauchnitz 1879–1882), vol 1. I am working on new editions, see http://gratian.org.

4 John T Noonan, 'Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law' (1979) 35 Traditio 145.

5 This and the following paragraphs are based on my close reading of Gratian's *Decretum*.

6 Stephan Kuttner, 'The father of the science of canon law' (1941) 1 The Jurist 2.

Emperors such as Charlemagne and Justinian had never hesitated to legislate for the church, so they left a large corpus of legal decisions relevant to canon law.[7] In order to present to his students a coherent account of canon law, Gratian had to engage with this huge mass of legal materials.

All this religious law was available to Gratian in very many different books that collected laws.[8] The mass of law was more or less digested in those books. In the best ones, such as in the famous *Panormia* (c. 1115) and in the collection of Bishop Anselm of Lucca (d. 1086), the law was thematically organized, but not in any real sense synthesized.[9]

But even if ever so well organized, the law of the books that Gratian had in front of him was still confused. For different legislators had come to different conclusions about the law over the centuries. This is not surprising given that they legislated in vastly different contexts at different points in time over many centuries. What Gratian found in the thousands of legal statements available to him was contradictory. How could he possibly know if Pope Gregory was right when Pope Nicolas put forth a different opinion on some important legal issue? Especially if the council of Tribur (895) and Augustine seemed to prefer yet two other solutions, how was it even possible to teach canon law under such circumstances?

Gratian solved this problem. He was the right man at the right time in history: He lived just as the new methods of scholasticism had begun to help scholars make sense of exactly these kinds of confusing and contradictory traditions. The famous names in the early development of scholasticism are French: Anselm of Laon (d. 1117), Peter Abelard (d. 1142), and their schools, but we should not forget the teachers of Roman law, who just in Bologna were similarly trying to make sense of the intricacies of Emperor Justinian's legislation.[10] There were also Italian theologians who taught with the new methods; perhaps Gratian had learned his theology from one or some of them.[11]

Gratian signalled his methods when he gave his book its title. He called it *Concordia discordantium canonum*, 'The Harmony of Discordant Canons'. With these programmatic words, Gratian promised to make sense of the many contradictions

7 Emil Friedberg, *Corpus iuris canonici* (1879–1882), 1.XIX–XLI, outlines the material (ultimate, or original) sources of Gratian's work.

8 Peter Landau, 'Neue Forschungen zu vorgratianischen Kanonessammlungen und den Quellen des gratianischen Dekrets' (1984) 11 Bulletin of Medieval Canon Law 1 remains fundamental for Gratian's use of formal (immediate) sources.

9 The Panormia can no longer be attributed to Bishop Ivo of Chartres, see Christof Rolker, *Canon Law and the Letters of Ivo of Chartres* (Cambridge studies in medieval life and thought 4th ser 76, Cambridge University Press 2010). The best edition of the Panormia is available in draft at <https://ivo-of-chartres.github.io/panormia.html>. The incomplete edition of Anselm's work is in great need for replacement: Friedrich Thaner (ed), *Anselmi episcopi Lucensis Collectio canonum* (Librariae academicae Wagnerianae 1906–1915).

10 The literature on early scholasticism is enormous. Good starting points are provided by Alex J Novikoff, *The Medieval Culture of Disputation: Pedagogy, Practice, and Performance* (The Middle Ages Series, University of Pennsylvania Press 2013); Clare Monagle, *The Scholastic Project* (Past Imperfect Series, Medieval Institute Publications, Western Michigan University 2015).

11 Wei (n 3).

existing in the legal heritage from the first thousand years of ecclesiastical legislation. Later scholars found the title unwieldy and simply called the book the *Decretum*.[12]

2. ARGUING ABOUT TITHES: *CAUSA* 13

An example will illustrate how Gratian applied the scholastic methods, and this particular example will also tell us something about what happened in his class room. Gratian structured his work in an odd way, as is perhaps not surprising for a pioneering scholastic work. He organized most of it around 36 'cases' (*causae*), each of which Gratian introduced by briefly describing a complicated situation that raises several legal questions. He then discussed and answered the questions in turn.

To introduce the subject of his thirteenth 'case', Gratian told his students a short story, and then he apparently gave them an assignment that trained them to become good lawyers.[13] This is Gratian's story: A group of Christians were living peacefully in a certain parish.[14] Gratian does not name the parish in question, which makes his discussion difficult to follow. To facilitate for the 21st century, we shall call it Oldtown. These Christian parishioners paid their tithes (an ecclesiastical tax on the produce of their lands, amounting to a tenth of the income) to the baptismal church in Oldtown, as was proper. Then, a violent war broke out which made life difficult for some among them. They became refugees, moving elsewhere, into another parish, which we shall call Newtown. They still kept property in the form of farmland that they owned in the parish of Oldtown, and when peace returned, they began to cultivate it again. They continued, however, to live in Newtown, and they paid all their tithes to the baptismal church of Newtown, even though their land was not located in that parish. Time passed, and after 50 years did the clerics of Oldtown belatedly realize that they had lost part of their income. They sued the baptismal church of Newtown in church court (I assume that of their superior bishop; Gratian does not say) for appropriating tithes that, they claimed, rightly belong to the church of Oldtown. They argued that if the refugees own lands within the bishopric of Oldtown, they should pay tithes for the produce of those lands there, and not to Newtown, no matter where they live.

After Gratian had told this story, he appears to have organized a debate in the form of a moot court in his classroom. He divided the students into two groups, each to act as the clergy of one of the two baptismal churches in the suit.[15] The

12 Friedrich Heyer, 'Der Titel der Kanonessammlung Gratians' (1912) 2 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung 336; Stephan Kuttner, *Harmony from Dissonance: An Interpretation of Medieval Canon Law* (Wimmer Lecture 10, Archabbey Press 1960), repr in Stephan Kuttner, *History of Ideas and Doctrines of Canon Law in the Middle Ages* (1st edn, Variorum 1980) no I.

13 The following is based on C. 13 in my edition of the first recension of Gratian's *Decretum*, gratian.org. See also Frederick C Paxton, 'Le cause 13 de Gratien et la composition du Décret' (2001) 21 Revue de droit canonique 233.

14 Strictly speaking, Gratian discussed baptismal churches, their clergy, and their parishes rather than cathedrals. Each baptismal church, however, collected tithes on behalf of the bishop. To simplify the oral delivery, I imagined that the two baptismal parishes were located in different bishoprics and that the bishops themselves were involved in the dispute. Gratian carried on his discussion in general terms ('the clerics') and often in the passive, in order to emphasize the general applicability of his arguments.

15 Teachers of Roman law also trained their students with similar exercises, see Annalisa Belloni, *Le questioni civilistiche del secolo XII da Bulgaro a Pillio da Medicina e Azzone* (Ius commune: Sonderhefte 43,

clergy of Oldtown were the plaintiffs, so they began the argument. They cited a centuries-old decision by Pope Dionysius (259–268), who stated, in essence, that the pope has once and for all set all the boundaries of each diocese, and no one should invade the territory of another diocese.[16]

If Gratian's students representing Oldtown thought this very clear piece of legislation would settle the matter once and for all, they were sorely disappointed. The clergy of Newtown countered by citing first Pope Leo IV (547–855) and then more than a dozen passages from the Bible.[17] Their argument was, essentially, that God had instituted tithes through Moses, and he had then decided that tithes should be given to those who provide spiritual care for souls. Since it is the clergy of Newtown who are doing all the pastoral work for these refugees, who baptize their children and bury their dead, the tithes should go to Newtown. The clergy of Oldtown is just lazy and wants to eat without working. To give this insult some real sting, they quoted the ancient Roman comedian Terence: 'Remember what happens to parasites who are lazy and eat food that belongs to others!'[18]

The students impersonating the clergy of Oldtown were not amused: 'You try to take away from us our rights with your many bold and convoluted arguments. If one believes your words, you take home things of value [i.e., tithes] in return for words [here in court], and not words for words. But if you offered words, you will—God willing—receive some chosen words in return!'[19] After this rhetorical flourish that repeats the word *verba* (words) six times in different grammatical forms, the clergy of Oldtown demonstrated that they, too, remembered the dramas of Terence from school. Their opponents thought, they say, that they had won the argument. But no: When the case has been brought to its appropriate solution, they will complain: 'Oh, poor me: I am pained that such a tempting morsel has been snatched away from my jaws!' Here, they were quoting another play by Terence.[20] Then, more to the point, they suggested that Jesus told his disciples to eat and drink from what their listeners

Klostermann 1989) and Anders Winroth, 'The Teaching of Law in the Twelfth Century' in Helle Vogt and Mia Münster-Swendsen (eds), *Law and Learning in the Middle Ages* (DJØF Publishing 2006).

16 Gratian, *Decretum* C.13 q.1 c.1, gratian.org. Gratian and his students did not know that the text they cited in fact was not issued by Pope Dionysius. It belongs among the ninth-century forgeries of Pseudo-Isidore, which throughout the Middle Ages were accepted as authentic. See Detlev Jasper and Horst Fuhrmann, *Papal Letters in the Early Middle Ages* (History of Medieval Canon Law, Catholic University of America Press 2001) 135. For important updates, see the website of Eric Knibbs, pseudo-isidore.com.

17 In the long C.13 q.1 d.p.c.1 §1–8.

18 C.13 q.1 d.p.c.1 §5: '*Vos autem alieno cibo quasi otiosi pasci gaudetis. Videte ne in vobis vertatur illud: "Videte quid faciat otium et alienus cibus",*' quoting from Publius Terentius Afer, *Eunuchus* 2.2.34 (265), see Robert Kauter and W M Lindsay (eds), *P. Terenti Afri Comoedia* (Scriptorum Classicorum Bibliotheca Oxoniensis Clarendon Press 1963) 124. I have translated somewhat freely, both in order to render the texts as Gratian and his students understood it and to emphasize the rhetorical quality of the arguments. Terence was much read in medieval schools, as evinced by his plays being preserved in more than 700 manuscripts produced between the ninth and 15th centuries, see Rita Copeland (ed), *The Oxford History of Classical Reception in English Literature, vol. 1: 800-1558* (OUP 2016) 26.

19 C. 13 q. 1 d.p.c.1 §9: *'Callida quidem et multiplici argumentatione nostra iura auferre contenditis, ita ut, si fides verbis adhiberetur, non verba pro verbis, sed res pro verbis reportaretis. Sed Deo propicio, si verba dedistis, verba recipietis.'*

20 C.13 q.1 d.p.c.1 §10: ' *Unde cum causa nostra debitum finem sortita fuerit, exclamabitis: "Ah miser, crucior tantum bolum esse ereptum ex faucibus",*' quoting from Publius Terentius Afer, *Heauton timorumenos* 4.2.6 (673), see Kauter and Lindsay (eds), *P. Terenti Afri Comoedia.*

offered them, not that they should rob them or eject them from their houses. They point out that their opponents would have problems finding any hosts that would welcome them, and to drive this point home, they offered a sequence of allusions to proverbs: 'A mouse in a bag, a fire in the lap, a snake in the bosom poorly reward their hosts.' Then they go on in a similar vein, offering invective, proverbs, and general arguments rather than any sophisticated legal analysis.[21]

We may be surprised that Gratian allowed his students to insult each other instead of offering reasoned arguments based on appropriate legal sources, but I think he was teaching them a lesson about how important it is to be able to think on your feet in the courtroom, and how quick-witted repartee also plays a role there. In the end, the clergy of Oldtown put their insults aside and quoted an appropriate legal text, which states outright that no tithe-payer may on their own initiative reassign tithes from one church to another. Gratian's book here actually allows us to see his students thinking on their feet: they remembered the gist of the law, but they had forgotten its exact formulation and its exact source; they simply said that 'some council has stated', instead of specifying that it was the council of Koblenz in Germany, celebrated in 922.[22]

The clergy of Newtown countered with one further argument, which they based on 'prescription', ie, the rule in canon and Roman law that after a property has been possessed in good faith for a certain number of years, it is considered the rightful property of the possessor. They referred to a decretal of Pope Gelasius I (492–496) stating that when a church has possessed something for 30 years or more, it is to be considered its rightful owner.[23] The students argued that this applied to the case at hand, since the baptismal church of Newtown had possessed the disputed tithes for 50 years, according to how Gratian had framed the question. 'This will silence you', the clergy of Newtown confidently said.[24]

They were wrong. The clergy of Oldtown immediately replied: 'By the same authority as you want to silence us, we now shut *your* mouths'.[25] They then cite another decretal by the same Pope Gelasius to the effect that the boundaries of a diocese may never be moved through prescription.[26]

21 C.13 q.1 d.p.c.1 §9–12: '*Mus in pera, ignis in sinu, serpens in gremio male suos remunerant hospites*'. Desiderius Erasmus, *Adagia optimorum utriusque linguæ scriptorum* (Ex officina Cornelii Sutorii, impensis Lazari Zetzneri, bibliop. 1603) 1409; see also Hans Walther, *Proverbia sententiaeque Latinitatis Medii Aevi: Lateinische Sprichwörter und Sentenzen des Mittelalters in alphabetischer Anordnung* (Carmina Medii Aevi posterioris Latina 2, Vandenhoeck & Ruprecht 1963–1986).

22 C.13 q.1 d.p.c.1 §13: '*in quodam concilio*', citing a text that now appears in a different context in Gratian's *Decretum* as C.16 q.1 c.42, but this part of the *Decretum* might not have been composed yet when Gratian organized the moot court among his students. Gratian there attributed it, erroneously, to a council celebrated in Mainz, but it in fact derives from the 922 council in Koblenz, see Ernst-Dieter Hehl and others, *Die Konzilien Deutschlands und Reichsitaliens, 916-1001* (Monumenta Germaniae Historica Concilia 6, Hahnsche Buchhandlung 1987) 70.8.

23 C.13 q.2 c.1. For canonical prescription, see R H Helmholz, *The Spirit of Classical Canon Law* (University of Georgia Press 1996) 174.

24 C.13 q.2 d.a.c.1: '*Tricennalis obiectio vobis silentium imponit*'.

25 C.13 q.2 d.p.c.1: '*Cuius auctoritate nobis silentium imponitis, eius auctoritate claudimus vestra ora*'.

26 C.16 q.2 c.5, which is cited only by quoting a few words from the central statement in C.13 q.2 d.p.c.1: '*Ait etiam idem Gelasius: "Nulla presumptione statum parrochiarum etc."*' Such cross-references are not

Gratian, acting the role of the judge in the moot court, accepted this last argument from the Oldtown side, although he added two conditions. The argument of Oldtown would only apply if his parish had well-defined boundaries, and only if Oldtown had not at some earlier point in time simply usurped its parish without proper title.[27] Neither of these matters were explicitly addressed in the assignment Gratian had set in his story. By introducing these two conditions, Gratian went beyond the specific example he had presented to his students, now stating with general applicability what the law was. This kind of move from classroom exercises to general law is typical of Gratian and it is what made his book so useful to not only his own time, but to following generations.

The exercise I just retold from Gratian's book might seem to be so much empty posturing of students training to argue in church court, but it illustrates the central core of scholasticism, the methodology that Gratian adapted and helped develop to make sense of contradictory laws: We observed a give and take of reasoned arguments for and against, all based on authoritative texts or other rationales. If the clergy of Oldtown were able to cite both Pope Dionysius saying that diocesan boundaries are set once and for all, and also a decision by the church council of Koblenz to the effect that a person paying tithes does not decide to whom they pay; and if the clergy of Newtown are able to cite Pope Leo IV saying that tithes should be given to the clergy where people go to church, then they have discovered a contradiction in the sources. That is exactly the kind of contradictions that Gratian typically resolved in his work. In this particular case, he had his students themselves practicing the method.

3. THE LAW OF MARRIAGE FORMATION

We may or may not think it important to know which church receives which tithes, although this was the kind of issue that often led to contentious and long-lasting litigation in the Middle Ages. A famous example is the centuries-long dispute between the bishops of Siena and Arezzo about their diocesan boundary.[28] For our present purposes, however, what makes this example informative is that it illustrates Gratian's method. Gratian used the same methods throughout his work, although he usually stylized the battle of ideas or the exchange of divergent opinions in such a way that it becomes difficult to get a good sense of exactly what was happening in his classroom. Causa 13 provides an unusually direct view of Gratian's teaching. Gratian was the first to apply the scholastic method systematically to the law and regulations of the church, and in doing so he typically clarified the law, brought legal

unusual in the *Decretum*. It is difficult to know whether this means that C.16 already existed when Gratian had his students debate the issue at stake in C.13.

27 C.16 q.3 d.p.c.5 and d.p.c.7, to which Gratian referred in C.13 q.2 d.p.c.1: 'Quomodo autem distinguende sint he auctoritates, in causa monachorum invenietur'.

28 Jean Pierre Delumeau, *Arezzo, espace et sociétés, 715-1230: Recherches sur Arezzo et son contado du VIIIe au début du XIIIe siècle* (Collection de l'Ecole française de Rome 219, Ecole française de Rome 1996); Kenneth Pennington, 'Roman Law at the Papal Curia in the Early Twelfth Century' in Uta-Renate Blumenthal and others (eds), *Canon Law, Religion, and Politics: Liber amicorum Robert Somerville* (Catholic University of America Press 2012) 241; Michael W. Heil, 'Clerics, Courts, and Legal Culture in Early Medieval Italy, c. 650–c. 900', Columbia University 2013).

analysis forward, and defined the parameters for how that law was to be understood for centuries.[29]

We may look at the law of marriage as another example. Many legislators, both secular and ecclesiastical, had issued legal statements on marriage before Gratian. They were so many and they said so many different, more or less contradictory things that they serve more to confuse rather than inform. Gratian devoted no less than ten out of his 36 causae to marriage law (C. 27–36), a substantial portion of his work.

A fundamental issue for Gratian was to define what marriage is, which is really a question about how marriages come about. How does a marriage begin? Gratian could find many contradictory but equally valid laws on marriage formation. He quoted Isidore of Seville (d. 636) saying that 'consent makes marriage'.[30] But he also quoted Augustine of Hippo (d. 430) saying that he did not doubt that there could be no marriage without sexual intercourse.[31]

What was Gratian supposed to do with such blatantly contradictory statements? Does consent make marriage? Or is it sex? He could not question the authority of either St. Isidore or St. Augustine; both were generally acknowledged saints and church fathers, and as such fully acceptable sources of church law. Gratian was also able to find even more authorities on each side. Pope Leo I (440–461), for example, appeared to agree with St. Augustine, while Pope Nicholas I (858–867) agreed with St. Isidore. Pope Gregory I (590–604) seemed to agree with both, at different places in his large oeuvre.[32]

Gratian solved the problem in his typical way, with his scholastic method. He stated that *all* of these authorities, Isidore as well as Augustine, and all the popes were correct, but that they talked about different things. Gratian introduced a verbal distinction, a technique that he would have learned in school when studying the trivium (the three basic subjects of medieval education: grammar, rhetoric, and dialectics). When Isidore said that consent makes marriage, Gratian said, he was talking about 'initiated marriage', what we might call 'betrothal' or 'engagement'. When Augustine said that intercourse is needed for marriage formation, he was talking of 'perfected marriage', ie a fully formed marriage much in the way we think about marriage today.[33]

With this distinction, Gratian managed to finesse a problematic contradiction that existed in the laws on marriage, namely whether there could ever be a divorce or separation between married spouses. A large number of good canonical sources talked about divorce as possible in certain situations, such as when one partner wishes to enter monastic life. Pope Eusebius (310), for example, allowed it.[34] An equally large

29 About Gratian's methods, see Christoph H. F. Meyer, *Die Distinktionstechnik in der Kanonistik des 12. Jahrhunderts: Ein Beitrag zur Wissenschaftsgeschichte des Hochmittelalters* (Leuven University Press 2000).

30 C.27 q.2 d.a.c.1: '*Consensus facit matrimonium*'.

31 C.27 q.2 c.16: '*Non dubium est illam mulierem non pertinere ad matrimonium, cum qua docetur non fuisse conmixtio sexus*'.

32 C.27 q.2 c.17 (Leo) c.2 (Nicholas), c.29 and c.45 (Gregory).

33 C.27 q.2 d.p.c.39: '*Auctoritas illa Augustini* [C. 27 q. 2 c. 16] . . . *ad matrimonium perfectum subintelligendum est*'. The distinction is explicitly stated in C.27 q.2 d.p.c.34: '*Sed sciendum est, quod coniugium desponsatione initiator, commixtione perficitur*'.

34 C.27 q.2 c.27.

number of similarly weighty authorities denied that there could ever be any divorce, for example Pope Gregory I.[35] Gratian solved the problem simply by saying that the former were talking about 'initiated marriages' or betrothals, while the latter were discussing 'perfected marriages'. In other words, when a couple had agreed to get married but not yet had sex, separation was possible in accordance with the rule of Pope Eusebius, but when the couple not only agreed but also had consummated the union, Pope Gregory's rule applied and divorce was impossible. Partners in initiated marriages could be separated; partners in perfected marriages could not.

This is how Gratian created harmony from dissonance, as his title promised. He typically drew distinctions, more or less by sleight of hand, between different meanings of the same word, allowing him to interpret the law in a way that he thought was correct and also useful. His interpretations did not necessarily coincide with the intentions of the original authors, who would probably have protested strenuously had they known what Gratian claimed they had meant.

Gratian used radically new methods, and his methods allowed him to be radical also in other respects. When he, for example, insisted on the consent of bride and groom at the beginning of marriage, he excluded parents from any say.[36] This was very radical for the time. Some of his predecessors, for example the distinguished eleventh-century canonist Anselm of Lucca, quotes with approval what he thought Pope Evaristus had said, that marriage begins with a contract by which a father gives away his daughter in marriage.[37] Anselm clearly did not worry much about what the bride thought, as Gratian did.

In discussing what made a legally valid marriage, Gratian similarly excluded the *necessity* of, for example, banns (the public announcement in church of impending marriage), the blessing of a priest, or witnesses. He stated that these ceremonies may often be observed, but they are not required for lawfully entering marriage.[38] Again, he was radical for his time, and in his radicalism, he set the tone for the continued development of marriage law in the Western tradition. Gratian's views mattered, because every European jurist read his book. Gratian's successors retained the main points of his definition of marriage, including his emphasis on the consent of bride and groom, and nobody else. They modified details of his conclusions, but the essentials of Gratian's system remained and were received into all jurisdictions of Western Christendom.[39] Recognizable traces of Gratian's synthesis are still with us today, with the clearly expressed 'I do' of bride and groom occupying a central position in current wedding rituals, whether ecclesiastical or secular.

35 C.27 q.2 c.19.

36 Anders Winroth, 'Marital Consent in Gratian's Decretum' in Kathleen G Cushing and Martin Brett (eds), *Readers, Texts and Compilers in the Earlier Middle Ages: Studies in Medieval Canon Law in Honour of Linda Fowler-Magerl* (Ashgate 2008) 115.

37 *Collectio canonum Anselmi* 10.1-2, ed. Thaner, 483–484. The text was, unbeknownst to Anselm, a forgery of Pseudo-Isidore.

38 C.28 q.1 d.p.c.17.

39 For an example, see Anders Winroth, 'The Canon Law of Emergency Baptism and of Marriage in Medieval Iceland and Europe' (2018) 29 Gripla 203.

4. GRATIAN AND NATURAL LAW

Gratian had a similar influence in field after field of canon law. He synthesized many disparate laws from the first millennium of church history, using the same scholastic methods that I have exemplified, and usually ending up with a synthesis that became, in its essential outlines, valid for the future, in many cases still in modern law. His syntheses created new ways of thinking about the law.

Gratian was, like many stylistically aware authors of every time period, concerned that his book began in an emphatic and memorable way. After his euphonious title Concordia discordantium canonum ('Harmony of Discordant Canons'), the actual text of the book begins with two beautiful words: *Humanum genus*, meaning 'humankind', or 'humanity'. A 12th-century artist captured the essence of Gratian's idea of humankind in an initial in a manuscript copy of the *Decretum* (See Figure 1). To this artist (and surely also to Gratian), the most fundamental division of humankind was between the laity and the clergy so he painted the leaders of each to symbolize the whole: the emperor and the pope. They are together holding a sceptre, perhaps

Figure 1. The pope and the emperor both grasp a sceptre, which we may understand to symbolize their shared governance of the world. Biberach an der Riss, Stadtarchiv, Spitalsarchiv B 3515, fo. 10ra. Reproduced with permission.

symbolizing the rule of law. At the same time as the two persons embody all of Christian humanity, they also physically make up the letter H that is the first letter of Gratian's first word: *Humanum*.[40]

That first word Humanum of course means 'human', but it may also be translated 'humane', as in 'gentle, kind, civilized, and merciful'. I think this is not a coincidence. Gratian wanted to signal up front that his book might be law set down for humans, but it is not the strict, rigid, and vengeful law that his readers might have encountered elsewhere, for example in Justinian's law books or in the secular law books of the early Middle Ages. It is humane law for humans. We have already seen that Gratian took a more humane approach to marriage than was common at his time. We find him embracing this kind of approach also in relation to other legal topics.

After signalling his interests and approach, Gratian immediately introduced what to him was the most important distinction to be made within legal science. His first full sentence reads: 'Humankind is ruled by two things, namely: natural law and custom'.[41] Gratian continues by explaining that by 'custom', he means all human law, whether it is written law deriving from emperors, popes, or cities, or simply what modern legal theorists would call '(unwritten) custom'. He also explains what he means by 'natural law': it is what is written in the Gospels and in the Law, essentially meaning the New and Old testaments of the Christian Bible. Gratian also summarizes the contents of the Bible with his version of the Golden Rule: 'Each is commanded to do to others what they would have done to themselves.'[42]

This is when it becomes abundantly clear that Gratian was a legal thinker who thought about law from the perspective of Christianity, his religion, and that this is also what made his law humane. Gratian used the humanity of his religion, as he understood it, to temper the rigidity of secular laws, and even strict laws instituted by the church. I am not arguing that Christianity is intrinsically humane, only that this is how Gratian interpreted his religion.

Natural law, Gratian went on to explain, is unchangeable. It was instituted at the same time as humans were created, so it is higher in dignity than any other law. Thus, all humanely instituted law has to yield to natural law, if they disagree.[43] This is the reason why Gratian throughout his work always discusses carefully what the Bible says on any particular legal issue, typically before he gets to the more 'normal'

40 Biberach an der Riss, Stadtarchiv B 3515, fo. 10ra. The same iconographic program appears in other manuscripts, such as in Cologne, Erzbischöfliche Diözesan- und Dombibliothek 127, fo. 9ra, described by Beate Braun-Niehr in Joachim M. Plotzek (ed), *Glaube und Wissen im Mittelalter: Die Kölner Dombibliothek* (Hirmer 1998) 262.

41 D.1 d.a.c.1: '*Humanum genus duobus regitur, naturali videlicet iure et moribus*'. The word '*moribus*' (from '*mos*') is thorny to translate, since the usual translation of this word 'customs' has a quite specific sense in legal parlance. Augustine Thompson translates 'usages' in Gratian, *The Treatise on Laws (Decretum DD. 1-20)* (Studies in Medieval and Early Modern Law 2, 1993) 3.

42 D.1 d.a.c.1: '*Ius nature est, quod in lege et evangelio continetur, quo quisque iubetur alii facere, quod sibi vult fieri, et prohibetur alii inferre, quod sibi nolit fieri*'. Foundational for natural law in Gratian and his successors, see Rudolf Weigand, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus* (Münchener theologische Studien, III Kanonistische Abteilung 26, Max Hueber Verlag 1967) 121.

43 D.5 d.a.c.1: '*Naturale ius inter omnia primatum obtinet et tempore et dignitate. Cepit enim ab exordio rationalis creature nec variatur tempore, set immutabile permanet*'.

legal authorities, such as papal decretals and conciliar canons.[44] On the discussion of tithes in C.13 q.1, as I outlined above, Gratian's students quoted more than a dozen passages from the Bible, but only a couple of other sources of canon law. The Bible contains natural law, which trumps every law issued by popes and emperors.

What Gratian was doing with natural law, was to take a concept that existed in Roman law and in ancient philosophy and give it a new spin, by declaring that natural law equals God's will, and that natural law, like God's will, is unchanging.[45] He had, thus, created the basis for the idea that some particularly important law always remains the same, and also that it applies to everyone, rich and poor, cleric and lay, Christian and non-Christian. This is very similar to the idea that lies behind the modern, secular concept of inalienable human rights. I think we can all agree that it is a basic and inalienable human right not to be condemned to punishment without a proper court trial. Or as the *United Nations Declaration of Human Rights* put it in 1948: 'No one shall be subjected to arbitrary arrest, detention or exile.'[46] Gratian in fact said as much: 'No one may be condemned without due process.'[47] I am not going to argue, on this kind of evidence, that Gratian was a modern human rights activist before his time. In fact, the path that the law of rights took between the twelfth and twentieth centuries was far from straight-forward.[48] But Gratian's strong claim that natural law is unchangeable laid the foundations for thinking about inalienable rights and opened up for his successors to begin to figure out exactly what kind of law cannot be changed. They particularly discussed procedure and generally argued that judges must observe due process. This constituted a break in the legal tradition of Europe. In earlier law, as for example in the Roman Empire, law courts were thought of as an extension of the powers of the state and those accused of crimes had few rights. Ancient law included the concept of natural law, but Gratian changed its meaning by involving religion. His medieval interpreters and elaborators continued on the path that he had pioneered. I will give a couple of examples of how they argued for the rights of litigants by reading the Bible as a source of unchangeable natural law, just as Gratian had recommended.

One of Gratian's earliest known successors, a professor in Bologna who may have been called Paucapalea and may have studied with Gratian, took the second step towards universal rights in commenting on Gratian's book. He pointed out that there

44 Gabriel Le Bras, 'Les Ecritures dans le Décret de Gratien' (1938) 27 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung 47.

45 For natural law in Roman law, see Weigand (n 42).

46 https://www.un.org/en/about-us/universal-declaration-of-human-rights. Accessed 7 April 2021.

47 C.2 q.1 d.a.c.1: '*Quod autem nullus sine iudiciario ordine dampnari valeat, multis auctoritatibus probatur*'. For the meaning of 'iudiciario ordine', which I have translated 'due process', see Kenneth Pennington, 'Due Process, Community, and the Prince in the Evolution of the Ordo Iudiciarius' (1999) 9 Rivista internazionale di diritto commune 9.

48 Kenneth Pennington, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (University of California Press 1993); Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150–1625* (Emory University studies in law and religion 5, Scholars Press 1997); Brian Tierney, *Liberty and Law: The Idea of Permissive Natural Law, 1100-1800* (Studies in medieval and early modern canon law 12, Catholic University of America Press 2014). Recent work on human rights tend to underplay its deep roots and instead emphasize 20th-century developments, see, eg, Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press 2010) and Samuel Moyn, *Christian Human Rights* (University of Pennsylvania Press 2015).

was due process (or as he called it 'procedure of pleading') already in the Garden of Eden. When Adam ate the forbidden fruit, and God prosecuted him, Adam was allowed to defend himself. He did so by blaming Eve, and by extension God, since he pointed out that it was God who had given Eve to him:

> The procedure of pleading (placitandi forma) seems to have been found initially in paradise, when the first man, questioned by the Lord about the sin of disobedience, used a counteraccusation and a shift of responsibility for the sin, and alleges that the guilt was placed on [his] wife saying, 'The woman, whom you gave, gave to me and I ate.'[49]

Paucapalea's point was that since God allowed Adam to defend himself, and even to enter a counter-plea, God believed in due process.[50] Human courts must, thus, also observe due process, which is part of unchanging natural law.

Later canonists continued to use Gratian's insistence on the primacy of natural law as it appears in the Bible to make ever more complex arguments about due process and the rights of litigants. Addressing the question of whether the pope may judge a notorious criminal without calling him to court (Pope Boniface VIII had claimed such a right), Johannes Monachus (d. 1313) pointed to the Biblical stories about Sodom and Cain. God 'wanted to prove and see before he judged', although their crimes were obvious even to observers who are not omniscient: 'The voice of your brother [Abel]'s blood is crying to me from the ground' (Gen. 4:10). Summons to court clearly belongs to natural law, Johannes said. In continuing his discussion of due process at length and great complexity, Johannes even determined that 'everyone is presumed innocent unless they are proven culpable', thus laying down one of the basic rules of modern criminal law.[51] His comments mattered, for they became included in the standard commentary on the *Corpus* of canon law, which circulated widely by manuscript and print.

I think no modern human rights activist would disagree with Paucapalea and Johannes's conclusions, but they might be uncomfortable with them reaching them by way of their religion.

5. FROM BOLOGNA TO CHIUSI

We may perhaps imagine that Gratian remained an increasingly important person as the most prominent teacher of canon law at Europe's foremost law school in Bologna. That would, however, be to apply an anachronistic perspective. To be an

49 Robert Somerville and Bruce C Brasington, *Prefaces to Canon Law Books in Latin Christianity: Selected Translations, 500–1245* (Studies in Medieval and Early Modern Canon Law 20, 2 edn, Catholic University of America Press 2020) 150, quoting Genesis 3:12; see also Pennington (n 47). The most recent scholarship has abandoned the attribution to Paucapalea, see José Miguel Viejo-Ximénez, 'La suma Quoniam in omnibus y las primeras summae de la Escuela de Bolonia' (2016) 33 Bulletin of Medieval Canon Law 27.

50 Kenneth Pennington, 'The Biography of Gratian, the Father of Canon Law' (2014) 59 University of Villanova Law Review 679, 142.

51 Jean Chappuis (ed), *Decretales extravagantes communes*, vol 4 (Ulrich Gering and Berthold Remboldt 1500–1501), fo. xi vb, doi.org/10.11588/diglit.24425. See also Pennington (n 48); Kenneth Pennington, 'Innocent until Proven Guilty: The Origins of a Legal Maxim' (2003) 63 The Jurist 105.

ever so famous professor in a medieval university was in fact not a good job, and certainly not a lucrative one in the 12th century. People who went into academic teaching in the Middle Ages did not do so with the goal of remaining teachers forever. They were generally young men who used teaching posts as a means to gather merits for what they thought of as a real job. That meant a position with an endowment, or as we might say, a job with a salary, typically an ecclesiastical position. As an ever so skilled teacher in Bologna, Gratian would only have earned as much as he could persuade his students to give him in return for his teaching. He was active long before any institutional university existed that set tuition fees and professorial salaries.[52]

Recent research into Gratian's teaching and his biography reveals that Gratian, like every young teacher, strove to gain entry to the hierarchy of the church.[53] He succeeded in this endeavour, probably at least partially thanks to the merits he had earned through his teaching. Probably in 1143 or 1144, Gratian became bishop of Chiusi in southern Tuscany. As such, he finally received a regular income, and a good one, from the landholdings that belonged to the bishopric, and of course also from the tithes that all inhabitants paid. His study of the law of tithes and of ecclesiastical property suddenly became highly relevant to him in practical terms, although there is no actual evidence of his activities as a bishop, least of all about any involvement in law suits.

Alas, Gratian did not long enjoy the fruits of his promotion, for he soon died, probably as early as in 1144 or 1145. We know his death date, 10 August, St. Lawrence's feast day, but not the year, because the priests serving in the cathedral of neighbouring Sienna prayed for his soul on the anniversary of his death. To remind themselves, they entered his name in their calendar, which has been preserved to this day.[54]

When Gratian was offered the job of bishop of Chiusi, he surely did not think twice about it. He abandoned his poorly paid teaching job, leaving to others to continue. He never finished the course of canon law, for while he had already dealt with the law of priestly ordination, penance, and marriage, he never got to the other sacraments, such as baptism, the Eucharist, and last rites, which simply were missing from his book. Gratian had other and greater things to worry about now when he had become a bishop.

Others followed Gratian in Bologna as teachers of canon law. They had one great advantage over Gratian, for they had access to a suitable textbook, Gratian's *Decretum*. Except it was unfinished. So, they added what they thought should be included, such as regulations for baptism, confirmation, the Eucharist, and last rites. They also added a host of laws that Gratian had decided not to put into the book. In the process, they doubled the size of the *Decretum*. Unfortunately, their methods were not as refined as Gratian's; they simply cumulated more laws. Unlike Gratian,

52 Anders Winroth, 'Law Schools and Legal Education' in John C Wei and Anders Winroth (eds), *The Cambridge History of Medieval Canon Law* (Cambridge University Press 2022).

53 This section summarizes Anders Winroth, 'Where Gratian Slept: The Life and Death of the Father of Canon Law' (2013) 99 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung 105, outlining what I think is the most likely of the two possible scenarios. Cf Pennington (n 50).

54 Siena, Biblioteca comunale degli Intronati F I 2, fo. 5r, edited in Alessandro Lisini, 'Kalendarium ecclesiae metropolitanae Senensis', *Rerum Italicarum scriptores: Raccolta degli storici Italiani; Nuova edizione 15:6: Chronache Senesi 1* (Nicola Zanichelli 1931).

they included only little running commentary in the text of the *Decretum*. Thus, they did not resolve the new contradictions that arose between laws, and all their additions obscured the arguments of Gratian's original work. They certainly addressed those problems in their lectures on canon law, some record of which is preserved in the many and multifarious annotations, glosses, that survive in the margins of manuscripts of Gratian's *Decretum*.

Their expanded Decretum was, nevertheless, the one that was used in law schools and in church courts until the early 20th century. Gratian's original work still survives in a handful of manuscripts. Those manuscripts are easily overlooked when his successors' expanded version exists in some 600 medieval manuscripts and many dozens of printed editions. The original work has never been printed.

When Gratian abandoned teaching and moved to Tuscany, it was a great career move for him. But it also meant that he disappeared from view in Bologna and in the wider world. His name became little more than an empty label, except that it remained attached to the disfigured second edition of his highly original and radically innovative book. Gratian deserves better! His efforts to use a religious perspective to make sense of and explain European law is still affecting the way we live our lives almost eight hundred years later.