

## Chapter 3

### Authority, Author, Authorship

The purpose of this chapter is to examine the closely connected questions of the authority, author, and authorship of the *Decretum*.<sup>1</sup>

Scholars, such as Noonan, Winroth, and Pennington, who have investigated the authorship of the *Decretum* in recent decades have primarily been interested in the question of who wrote the exact words the text contains. That emphasis on the attribution of exact words does not accord well with either medieval definitions of authorship or those found in current theories of authorship. (Contemporary theories of literary authorship are, ironically, closer to medieval theories of authorship than either are to the definition of authorship tacitly assumed by most historians and in some interesting cases draw on late antique and medieval sources.)

Medieval sources on whom we rely for most of our evidence about who wrote the *Decretum*, the authors of glosses or of prefaces to twelfth-century *summae* on the *Decretum*, were not uninterested in the question of who wrote the exact words in the

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<sup>1</sup> The purpose of the first (Authority) section of this chapter is to show, more than tell, that most of the medieval statements that modern historians take to be evidence about the biography of the author or the authorship of the text are really statements about the *authority* of either Gratian or the *Decretum*.

text. That question, however, overlapped for them, in a way that it does not for us, with the question of who was the ultimate source of the text's authority. Recent scholarship sometimes misinterprets twelfth-century statements that are really about the authority of the author or of the work as instead being statements about the biography of Gratian or about the authorship of the *Decretum*. The overlapping questions of the authority, author, and authorship of the *Decretum* therefore have to be considered carefully and, where necessary, distinctly.

## Authority

In the middle ages, to presume to take on the role of *auctor* was to make a claim (at least implicitly) to *auctoritas*. Medieval writers were in general quite reticent about making claims to authority on their own behalf and employed a variety of techniques to maintain plausible deniability that they were in fact claiming authorship and the authority that went with it. Some repudiated the role of author altogether and circulated the texts they wrote either anonymously or pseudonymously under the name of a canonical author of unquestioned authority. Augustine was the overwhelming favorite, and Gratian extensively quoted in his *de Penitentia* from a text, *De vera et falsa penitentia*, that circulated under such false pretenses. Others sought to distance themselves from the role of author by locating authority in texts they quoted rather than

in the original use they made of those quoted texts in their own writing.<sup>2</sup> Gratian made use of both strategies. He circulated the *Decretum* anonymously and made no overt claim for the authority of his collection other than that derived from the patristic texts he extracted out of his material sources. In any event, the modern notion that the ultimate source for the authority of a text is the independent judgment passed by a reader on the validity of the arguments it contains is simply not applicable to the twelfth century.

We have already encountered two twelfth-century statements on the authority, author, and authorship of the *Decretum*. The first was the gloss inserted in lieu of a title at the beginning of the early Ghent (Gt), Paris (Pf), and Trier (Tr) manuscripts: “*Concordia discordantium canonum iuxta determinationem Gratiani episcopi quae in duas partes principaliter est divisa* (The agreement of disagreeing canons according to the determination of Bishop Gratian, which is principally divided into two parts.)”<sup>3</sup> The glossator provides Gratian’s name, but advances at best an ambivalent claim with

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<sup>2</sup> “their authority deriving mainly from the fact that they consisted mostly of quotations” Anders Winroth, *The Making of Gratian’s Decretum* (Cambridge: Cambridge University Press, 2000), 191.

<sup>3</sup> John T. Noonan, “Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law,” *Traditio* 35 (January 1979): 154; and Kenneth Pennington, “The Biography of Gratian, the Father of Canon Law,” in *A Service Beyond All Recompense*, ed. Kurt Martens (Catholic University of America Press, 2018), 382–85.

respect to his authorship of the *Decretum*. The glossator includes the possibly helpful information that Gratian had been a bishop. We do not know what basis the glossator had for making this statement and therefore cannot form a judgment as to its reliability. The default stance of modern scholarship would be to understand this as being a statement (whether true or false) about the biography of Gratian. It is, however, the kind of evidence that must be evaluated with particular care. The teaching authority of the church is vested in the bishops. To identify Gratian as a bishop is therefore to make a very specific kind of claim about his authority, and by extension that of the *Decretum*. The glossator presumably had some reason to believe that Gratian had actually been a bishop. The purpose of communicating that information to the reader, however, appears to have been to advance an authority claim on behalf of the collection and its compiler.

The second of the two twelfth-century statements on the authority, author, and authorship of the *Decretum*, which we have also already encountered, is found in the preface of Stephen of Tournai to his *Summa* on the *Decretum*:

*Compositorem huius operis recte dixerim Gratianum, non auctorem. Capitula namque a sanctis patribus edita in hoc volumine composuit, i.e. ordinavit. Non eorum auctor vel conditor fuit, nisi forte quis eum auctorem idcirco dicere velit, quoniam multa ex parte sua sanctorum sententias distinguendo et exponendo in paragraphis suis ponit.* (I should properly say that Gratian is the compiler of

this work, not the author, for he brought together in this volume—that is, he arranged—rulings enacted by the holy Fathers. He was not their author or framer, unless perchance someone wishes to say that he is thus the author since he offered on his own in his dicta many things for clarifying and explicating the opinions of the holy [Fathers].)<sup>4</sup>

Stephen also provides Gratian's name, but specifically denies his authorship of the *Decretum*, demoting him to to the status of a *compositor*. Unlike the anonymous glossator, Stephen at least chooses an active-voice verb to characterize Gratian's creative relationship with the text of the *Decretum*: Gratian, according to Stephen, "arranged (*ordinavit*)" the canons. Gratian's role is a distinctly subordinate one, however, confined to "clarifying and explicating the opinions of the holy Fathers" to whom Stephen looks as the ultimate source for the authority of the *Decretum*.

Most medieval and modern readers of the *Decretum* have seen it as a teaching text, both in the sense that its intended use (or at least one of its intended uses) was as an introductory textbook and also in the sense that it reflected the author's experiences as a classroom teacher. The early manuscript tradition for the *Decretum* displays enough variation, even among the first-recension manuscripts—Admont (Aa), Barcelona (Bc),

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<sup>4</sup> Johann Friedrich Schulte, ed., *Die summa über das Decretum Gratiani* (Aalen: Scientia Verlag, 1965), 5; and Robert Somerville and Bruce Clark Brasington, eds., *Prefaces to Canon Law Books in Latin Christianity: Selected Translations, 500-1245* (New Haven, Conn: Yale University Press, 1998), 200–201.

Florence (Fd), and Paris (P)—to suggest that the text developed continuously over the span of, and in parallel with, a relatively long teaching career—perhaps a decade or more. Gratian’s students would therefore appear to have been the potential witnesses with the best visibility into the authorship of the text of the *Decretum* over the course of the 1130s and possibly as early as the 1120s. Unfortunately, no near-contemporary makes an unambiguous claim to have been Gratian’s student or to have otherwise had first-hand knowledge of the circumstances under which the *Decretum* was composed.<sup>5</sup> Considering the fact that Gratian was universally credited as the author of the foundational textbook for the study of canon law in the classical period, his complete absence from the kinds of academic genealogies and origin stories that Odofredus (†1265) handed down to his own Roman law students is striking indeed.<sup>6</sup> Three twelfth-

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<sup>5</sup> R.W. Southern asserts that no one claims to have been Gratian’s student—“none of the earliest users of his work claims to have been taught by him.” “although other scholars made some very early alterations and additions to the text of the *Decretum*, none of them claimed to have been taught by him.” R. W. Southern, *Scholastic Humanism and the Unification of Europe*, vol. 1 (Oxford, UK ; Cambridge, Mass., USA: Blackwell, 1995), 287, 304.

<sup>6</sup> The tradition of Roman law teaching in Bologna preserved an elaborate genealogy of masters and their students: Pepo preceded Wernerius [Irnerius], who taught the Four Doctors. Odofredus is an important source for this tradition, and his remarks about Irnerius can be found in his commentary on *Dig.* 1.1.6. Odofredus, *Lectura super Digesto veteri*, (2 volumes, Lyon: 1550-1552; repr. Bologna 1967-1968). For a short excerpt from the Latin text with accompanying English translation, see Charles Radding, *The Origins of Medieval Jurisprudence: Pavia and Bologna, 850- 1150* (New Haven: Yale University

century canonists have, however, with varying degrees of plausibility, been identified as having been students of Gratian: Paucapalea (fl. 1140s), Simon of Bisignano (fl. 1174–1179), and Omnibonus or Omnebene of Verona (d. 1185).

## Paucapalea

Paucapalea was easily the most prominent figure from the early period of the Bolognese school of decretists who followed in Gratian's immediate footsteps. Pennington flatly states that Paucapalea was "[a] pupil of Gratian and the author of the first commentary on the *Decretum*."<sup>7</sup> But in the preface to that commentary, Paucapalea does not refer to Gratian by name: "*Magistri autem hoc opus condentis ipsa decreta sunt materia*. The decrees themselves, however, are the subject matter of the master producing this work."<sup>8</sup>

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Press, 1988), 159–60. See also Kenneth Pennington, "The 'Big Bang': Roman Law in the Early Twelfth-Century," *Rivista Internazionale Di Diritto Comune* 18 (2007): 43.

<sup>7</sup> Kenneth Pennington, [Paucapalea](#), *Bio-Bibliographical Guide to Medieval and Early Modern Jurists*.

<sup>8</sup> Johann Friedrich von Schulte, ed., *Die Summa des Paucapalea über das Decretum Gratiani* (Giessen: E. Roth, 1890), 3; and Somerville and Brasington, *Prefaces to Canon Law Books in Latin Christianity*, 184. Indeed, based on a search through the OCR text layer of a PDF file scanned from the Schulte edition and provided to me by Ken Pennington, Paucapalea appears not to refer to Gratian by name anywhere in his *summa*. Furthermore, "*Sicut uetus testamentum* makes no reference to a named person in its Prologue when it discusses the purpose and method of the author of the *Concordia*." Noonan, "Gratian Slept Here," 165.

The omission is significant. Prefaces to academic books in the twelfth century formed a recognized genre with well-established conventions. In an age resistant to any attempt by the human present to appropriate the authority of the divinely-inspired past, a commentator like Paucapalea was expected to offer an explicit statement in his preface affirming the authority of both the work commented on and its author. If Paucapalea had had something to say about the authority and authorship of Gratian, his readers would have expected him to do so in his preface. That he did not suggests that he did not know enough about Gratian to credibly do so.<sup>9</sup>

## Omnibonus

Omnibonus or Omnebene of Verona (d.1185) composed an adaptation or transformation of the *Decretum* in the 1150s.<sup>10</sup> Even though Omnibonus lived into the 1180s, the adaptation itself seems to date from around 1156, perhaps a decade and a half after the end of whatever teaching career Gratian may have had, so the dates do not

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<sup>9</sup> See A. J. Minnis, *Medieval Theory of Authorship: Scholastic Literary Attitudes in the Later Middle Ages*, 2nd ed, Middle Ages Series (Philadelphia: University of Pennsylvania Press, 1988); and Richard William Hunt, "The Introductions to the 'Artes' in the Twelfth Century," in *The History of Grammar in the Middle Ages: Collected Papers*, ed. G. L. Bursill-Hall, Amsterdam Studies in the Theory and History of Linguistic Science. Series 3: Studies in the History of Linguistics v.5 (Amsterdam: J. Benjamins, 1980), 117–44.

<sup>10</sup> Kenneth Pennington, *Omnibonus*, *Bio-Bibliographical Guide to Medieval and Early Modern Jurists*.



preclude his having been a student of Gratian.<sup>11</sup> The basis for the claim that Omnibonus was Gratian's student is an entry for the year 1130 in the chronicle of the Norman monk Robert of Torigni (†1186):

*Gratianus episcopus Clusinus coadunavit decreta valde utilia ex decretis, canonibus, doctoribus, legibus Romanis, sufficientia ad omnes ecclesiasticas causas decidendas, que frequentantur in curia Romana et in aliis curiis ecclesiasticis. Hec postmodum abbreviavit magister Omnebonum episcopus Veronensis, qui fuerat eius discipulus.* (Gratian bishop of Chiusi brought together very useful decrees out of decrees, canons, doctors, Roman laws, sufficient for deciding all ecclesiastical cases, which are resorted to at the Roman curia and in other ecclesiastical courts. Master Omnebonum bishop of Verona, who had been his student, afterwards abbreviated them.)<sup>12</sup>

Robert of Torigni's brief chronicle entry contains six distinct factual assertions: i.) that Gratian was bishop of Chiusi, ii.) that he "brought together the decrees" (*coadunavit decreta*) in a form useful to, and widely used by, ecclesiastical courts, iii.) that he did so

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<sup>11</sup> There is no print edition of Omnibonus's adaptation (Ken Pennington, email to Paul Evans, 17 May 2021). The only online form in which the manuscript is available is a low-quality digitization of an old microfilm of Paris, Bibliothèque nationale de France, Latin 3886. I was therefore unable to look for any internal evidence in Omnibonus's adaptation (e.g., a comment in a preface), indicating that Gratian had been his teacher.

<sup>12</sup> Stephan Kuttner, *Repertorium Der Kanonistik (1140-1234): Prodromus Corporis Glossarum*, [Vatican. Biblioteca Vaticana] Studi e Testi, 71 (Città del Vaticano: Biblioteca apostolica vaticana, 1937), 453. [MGH Scriptores SS 6, 490](#).

around 1130, iv.) that “magister Omnebonum” was bishop of Verona, v.) that he abbreviated the *Decretum*, and vi.) that he had been Gratian’s student.<sup>13</sup> Three of these factual assertions are uncontroversial: that Gratian “brought together” the *Decretum*, that Omnibonus abbreviated it, and that Omnibonus was bishop of Verona.

Those scholars who interpret the discovery of the first-recension manuscripts as evidence that Gratian’s work on the *Decretum* extended over a decade or more—Pennington and Larson, but not Winroth—have come to see Robert’s 1130 date as more plausible than it had previously been thought to be.<sup>14</sup> Other scholars who accept a twelfth-century reference to a “Gratian of Chiusi, bishop” in a Siena necrology as referring to the Gratian associated with the *Decretum*—Winroth, but not Pennington—have come to see Robert’s claim that Gratian was the bishop of Chiusi as more plausible than it had previously been thought to be. The result is that Robert’s overall reputation as a well-informed source concerning Gratian has improved in this century without there necessarily being much agreement as to whether the claim that Gratian was

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<sup>13</sup> It is worth noting that by characterizing Gratian’s activity as one of “bringing together” the decrees, Robert is making a fairly weak claim on behalf Gratian’s authorship of the *Decretum*. It is also worth noting that Robert’s description of the usefulness of the *Decretum* says nothing whatever about its use as a teaching text.

<sup>14</sup> Atria A. Larson, “Early Stages of Gratian’s *Decretum* and the Second Lateran Council: A Reconsideration,” *Bulletin of Medieval Canon Law* 27 (2007): 54–55.

working on the *Decretum* around 1130 or that he was bishop of Chiusi ought to be considered more credible in light of the newly available evidence.

The best place to look for first-hand evidence from Omnibonus about Gratian and whether he had been Gratian's student, as well as the circumstances under which the *Decretum* was composed, would be in a preface to his abbreviation. Unfortunately, there is no printed edition of the abbreviation, and the only form in which a manuscript of the abbreviation is available is a low-resolution digitization of an old microfilm of Paris, Bibliothèque nationale de France, Latin 3886. It does not appear to have a preface of any kind, but launches immediately into the abbreviation starting with "*Humanum genus duobus regitur.*" In the apparent absence then of any first-hand evidence from Omnibonus himself, we have only Robert's word that Omnibonus was Gratian's student, and so, like Noonan, "[w]e are left to speculate as to how sound his story was."<sup>15</sup> In the end, there may be little more informational content to be extracted from the statement than that Robert understood Omnibonus to be working within a specific intellectual tradition of which Gratian was, by that time, the acknowledged founder.

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<sup>15</sup> Noonan, "Gratian Slept Here," 153–54.

## Simon of Bisignano

Simon of Bisignano (fl. 1174–1179) was the author of a *Summa decretorum* dated c.1177-79, and a number of glosses on the *Decretum* are attributed to him.<sup>16</sup> The evidence that Simon of Bisignano was a student of Gratian comes from at least two internal references in his *Summa*:<sup>17</sup> Simon refers to Gratian as *magister* and to himself as *discipulus* in his comments on C.27 q.2,<sup>18</sup> and again refers to Gratian as *magister* in his comments on D.4 c.31 of *de Consecratione*: “*Quod quamuis Magister noster docuerit, nos tamen in hoc nolumus*

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<sup>16</sup> Kenneth Pennington, *Simon of Bisignano, Bio-Bibliographical Guide to Medieval and Early Modern Jurists*. Pennington does not indicate that Simon of Bisignano was a student of Gratian. Glosses attributed to Simon of Bisignano are indicated by the sigla s., si., and sy. Rudolf Weigand, “The Development of the Glossa Ordinaria to Gratian’s *Decretum*,” in *The History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pennington, History of Medieval Canon Law (Washington, D.C: Catholic University of America Press, 2008), 97. Simon’s glosses are dated earlier than his *Summa*. Weigand, 75.

<sup>17</sup> Stephan Kuttner, “Research on Gratian: Acta and Agenda,” in *Studies in the History of Medieval Canon Law, Collected Studies CS325* (Aldershot, Hampshire, Great Britain : Brookfield, Vt., USA: Variorum ; Gower, 1990), 7. Noonan, “Gratian Slept Here,” 157, rejects this, but Kuttner disagrees.

<sup>18</sup> Simon of Bisignano, *Summa in Decretum Simonis Bisinianensis*, ed. Pier Virginio Aimone-Braida, Monumenta Iuris Canonici. Series A, Corpus Glossatorum ; Vol. 8 (Città del Vaticano: Biblioteca Apostolica Vaticana, 2014), 412. Page numbers may not coincide with the print edition cited: the version of the Aimone edition I have access to is a PDF dated Fribourg 2007.

*eum imitari*. Although our master taught that, we nevertheless do not wish to imitate him in this.”<sup>19</sup> (trans. PLE)

There is, however, a hiatus of almost four decades between the latest plausible date for the end of Gratian’s teaching career and the documentary evidence we have for Simon’s professional career as a canonist. Although it is not quite chronologically impossible for Simon to have been Gratian’s student, it seems far more likely that he described himself as *discipulus* in something like the same sense that we might describe contemporary scholars like Chodorow, Pennington, and Winroth as “students of Gratian.” Yet again, we appear to be dealing with statements that on the surface appear to be about the biography of Gratian—a claim by Simon that he had been Gratian’s student—but that should more plausibly be read as an acknowledgement of Gratian’s authority as the founder of an intellectual tradition. It is an authority that Simon makes clear is not without its limits.

Before moving on from the quite limited claims made by presumably informed contemporaries such as Stephen of Tournai, Paucapalea, Robert of Torigni, and Simon of Bisignano on behalf of Gratian’s authority and authorship of the *Decretum*, two final observations on the question of authority should be added.

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<sup>19</sup> Simon of Bisignano, 542.

The problem of authorship and authority was particularly acute in the first half of the twelfth century, because early scholastic readers were much more alert to the gaps in the armor of traditional authorities than their less-sophisticated predecessors had been. Peter Abelard was unique in the radicalism of his solution to the problem: in *Sic et non*, he subverted and indeed dissolved the entire notion of authority by showing that texts written by equally authoritative authors were in actual, not just apparent, disagreement. Gratian in contrast to Abelard undertook an intellectually conservative hermeneutical project of harmonizing the apparently discordant canons to the level of sophistication demanded by a twelfth-century scholastic audience, and accordingly adopted a strategy of locating authority in the texts that he quoted.

It also seems that the widespread reception of the *Decretum* as itself authoritative benefited from an entirely accidental feature of the text. The page layout of early manuscripts of the *Decretum*—the placement of Gratian's *dicta* inline with the authorities rather than on the margins—had the unintentional effect of promoting Gratian himself to the status of an authority (or at least to a status of near-equality with his authorities). Even though the specific page layout was probably adopted in the 1130s or 1140s for no particular reason other than that the conventions for the various genres of the literature of canon law had not yet been firmly established, readers in the 1150s and 1160s seem to have understood it, at least implicitly, as a claim to authority, a

claim that they were more than willing to accept.<sup>20</sup> This was almost certainly an over-reading of the authority claim actually being made in the *Decretum*.<sup>21</sup>

## Author

In contrast with medieval scholars who were relatively unconcerned about the fact that they knew little to nothing about Gratian, and for whom in any event the question of the textual authority of the *Decretum* was primary, modern scholars have maintained a

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<sup>20</sup> “In the first recension, Gratian I both collected authoritative texts and commented upon them, as did Peter Lombard in his roughly contemporary *Sentences*. Both texts were written to meet the need for a basic text-book in the teaching of their respective disciplines. Other fields, such as Roman law, medicine, and biblical studies, already possessed authoritative texts which could serve as the basis for the teacher’s commentary and interpretation. Gratian I and the Lombard were in effect forced to create their own authoritative texts (their authority deriving from the fact that they consisted mainly of quotations) to be able effectively to teach their subjects. When they did this, they had no reason to separate text from commentary. They could not have suspected that their texts would become standard school-texts, nor did they know that it later would become common to keep text and commentary separate. Could they ever have guessed how great the growth of their subjects would be after their deaths? In their works, we can observe teachers creating tools for their own teaching when there were as yet no standard forms for academic texts in their subjects. The development of glosses, *summae*, *questiones*, *distinctiones*, etc., came later, as did the awareness of teachers like Bernard of Pavia that their compilations might become standard school-texts (and, hence, that comments were best relegated to the margins).” Winroth, *The Making of Gratian’s Decretum*, 191.

<sup>21</sup> At most, there seems to have been a limited claim of authority being made by the authors of the first-recension *dicta* (Gratian 1) on behalf of their *magister*, the author of the case statements (Gratian 0), whose harmonization of the canons was authoritative for them.

resolute focus on the biography of the historical Gratian, on the implicit assumption that if we can identify the historical Gratian, we will have identified the author of the *Decretum*. Very little, in fact, is known about the historical Gratian, and almost everything that previous generations thought was known about Gratian has proved, on closer examination, to be myth.<sup>22</sup> On the evidence found in the *Decretum*, Gratian seems to have been less interested in contemporary ecclesiastical or secular politics in general, and in the Investiture Controversy (1076-1122) in particular, than some modern scholars think he ought to have been. Gratian similarly seems, based on the relatively limited use he makes in the *Decretum* of material from the *Codex* and *Digest* of Justinian, to have been either less interested in, or less well-informed about, the revival of the study of Roman law in the early twelfth century than we think he ought to have been. On the other hand, he seems to have been more well-informed about, and more interested in, the emergence of scholastic theology in northern France than we can easily explain.<sup>23</sup>

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<sup>22</sup> Noonan, "Gratian Slept Here."

<sup>23</sup> See Stephan Kuttner, "The Father of the Science of Canon Law," *Jurist* 1 (1941): 2–19. Gratian implemented the hermeneutical program for harmonizing apparently discordant canons outlined in Ivo of Chartres's *Prologue*. Kuttner argues, though, that Gratian applied Ivo's program as it had been developed in the intervening forty years by scholastic theology, most notably by Abelard, and not in its original form: scholastic theology inherited the program from Ivo, Gratian inherited it in modified form from scholastic theology. See also D. E. Luscombe, "Abelard and the Decretum of Gratian," in *The School of Peter Abelard: The Influence of Abelard's Thought in the Early Scholastic Period*, Cambridge Studies in Medieval Life and Thought, new series, v. 14 (London:



## Noonan

The starting point for all modern scholarship on Gratian himself is John T. Noonan Jr.'s classic 1979 *Traditio* article "Gratian slept here: The changing identity of the father of the systematic study of canon law." Noonan's approach is apophatic, demonstrating that there is no sound historical basis for most of the affirmative statements that many mid-twentieth-century handbooks and reference works presented as commonplace.<sup>24</sup> It is unnecessary to exhaustively catalog all of the many Gratian myths that Noonan debunked. A single example, his examination of the history of the claim that Gratian was a Camaldolese monk at the monastery of Saints Felix and Nabor in Bologna—one of the most prominent elements of the mythology surrounding Gratian—is sufficient to illustrate the nature of Noonan's method and conclusions.

Odofredus (†1265), a professor of law at Bologna, claimed that Gratian "was staying" (*stabat*) at the monastery of Saints Felix and Nabor while working as a rubricator.<sup>25</sup>

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Cambridge U.P, 1969), 214–23; and Anders Winroth, "Where Gratian Slept: The Life and Death of the Father of Canon Law," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 99, no. 1 (August 2013): 111.

<sup>24</sup> Noonan, "Gratian Slept Here."

<sup>25</sup> Noonan identifies Odofredus as the source for associating Gratian with Saints Felix and Nabor. Noonan, 148; but cf. Southern, *Scholastic Humanism and the Unification of Europe*, 1:286n5. Southern draws attention to an inscription found in a Geneva manuscript of the *Decretum*, Bibliothèque publique et universitaire, MS Lat. 60: *Anno*

Odofredus did not indicate the basis for his statement that Gratian had been resident at Saints Felix and Nabor, nor did he say that Gratian had been a monk. In 1758, Camaldolese scholars Mittarelli and Costadono discovered papal privileges conferred in 1113 and 1153 identifying Saints Felix and Nabor as Camaldolese, and inferred from them that the monastery—and by extension Gratian himself—had been Camaldolese during the intervening years. The claim that Gratian had a connection to the Camaldolese order attracted criticism in the eighteenth century and fell out of favor in the nineteenth century, before being put back into circulation in the mid-twentieth century by Van Hove.<sup>26</sup>

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*domini MCL a Gratiano S. Feliciani Bononiensis monacho editum*. Pennington does not identify the manuscript as one known to date from the twelfth century (see Kenneth Pennington, [Gratianus](#), *Bio-Bibliographical Guide to Medieval and Early Modern Jurists*), and of course there is no way of knowing how long after the manuscript was produced the inscription was added. The value of the inscription as independent evidence attesting to a connection between Gratian and Saints Felix and Nabor is therefore unknown, but it is possible that it predates Odofredus.

<sup>26</sup> See Noonan, “Gratian Slept Here,” 150–51. Alphonse van Hove, *Prolegomena ad Codicem iuris canonici*, Editio altera auctior et emendatior, Commentarium Lovaniense in Codicem iuris canonici, v. 1, t. 1 (Mechliniae: H. Dessain, 1945) had an outsized impact on the trajectory of medieval canon law studies in twentieth-century North America because of its having been used by the 1964 Yale seminar led by Peter Landau in the absence of Stephan Kuttner, who was undergoing medical treatment at the time. Seminar participants including Charles Donahue and Robert Somerville went on to have unusually influential academic careers in the field (Donahue at Harvard, and Somerville at Columbia where he was Winroth’s dissertation advisor).

Noonan (†2017) was a distinguished professor of law and a judge on the Ninth Circuit Court of Appeals who applied the standards of evidence of the law school and the courtroom to the historical record. Noonan relied heavily on the legal hearsay standard as understood and applied by twentieth-century American courts of law as the basis for his debunking of much Gratian mythology. By Noonan's standards, the statement of Odofredus—hearsay, not attributed to a source, a century after the fact—is nothing more than legend.

Winroth has questioned whether this is an appropriate standard for evaluating historical evidence.<sup>27</sup> Noonan's insistence on adhering to the courtroom rules of evidence can seem like overkill. If, after all, the monastery of Saints Felix and Nabor in Bologna was in the hands of Camaldolese communities in 1113 and 1153, it does not seem unreasonable to infer that it was Camaldolese in the 1120s and 1130s when Gratian was putatively associated with the foundation, whatever we may think the nature of that association to have been. But Noonan's caution seems justified when we consider, for example, that R.W. Southern seized upon the one thinly-sourced datum of

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<sup>27</sup> "Noonan used sound historical methods, but he chose, as a distinguished professor of law and later a prominent judge, to couch his method in lawyerly terms, talking about hearsay and wanting to cross-examine witnesses. To make any headway with as complex and difficult a problem as Gratian's biography, it will be important to cling a bit more closely than Noonan did to classical historical methodology and terminology, as they have been codified from the late nineteenth century on." Winroth, "Where Gratian Slept," 106.

the Camaldolese connection as the foundation for his entire reconstruction of Gratian's intentions and motivations in undertaking the *Decretum* project, including a peremptory dismissal of any possibility that Gratian had a teaching career.<sup>28</sup>

The entry in the chronicle of Robert of Torigni identifying Gratian as bishop of Chiusi and teacher of Omnibonus is another of the many pieces of testimony from the Gratian legendary that Noonan cross-examines, although he ultimately dismisses Robert's identification as unverifiable.<sup>29</sup>

Noonan's wide-ranging skepticism extended considerably further than this or that alleged fact about Gratian's biography; he expressed significant doubt about the assumption that a text like the *Decretum* had a single author:

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<sup>28</sup> Southern takes an extreme position with respect to Gratian's teaching career, citing, as late as 1995, Gratian's supposed association with the Camaldolese order to advance an argument that he had never been a teacher: "Reliable writers after his death affirmed that Gratian was a Benedictine monk of the Camaldolesian Order, a small Italian branch of the Benedictines, which combined austerity of life with considerable freedom to contribute to the work of the Church in a wide variety of ways. This is what Gratian did. He engaged in a very un-monastic branch of study, and produced a law book which became the most widely distributed and probably most generally used of all the masterpieces of twelfth-century learning." "the book, and not the teaching of pupils, was the offering Gratian's monastic life brought to the Church." Southern, *Scholastic Humanism and the Unification of Europe*, 1:286–87, 304.

<sup>29</sup> Noonan, "Gratian Slept Here," 153–54. The recently rediscovered Siena necrology makes Robert's identification more plausible, though by no means certain, than it would have appeared to Noonan.

There are two difficulties when this authorship comes to be determined. One is that the *Concordia* is a book in three distinctive parts, with several distinctive sections within the parts, and these parts have undergone editing as to chapter headings, chapter insertions, and chapter order. Whatever the later formal ascription, is Gratian responsible for all the parts? The other difficulty is the range of roles the one ‘responsible’ person might have had—compiler, commentator, rubricator, reviser. Was Gratian one or all? The difficulties relate to each other, because evidence that Gratian was, say, the commentator of Part II does not establish what role he had in Part I.<sup>30</sup>

Noonan did leave open one affirmative possibility, that a Gratian who was recorded as having participated in an 1143 case in Venice as one of three legal consultants (“magister Walfredus”, “Gratianus”, and “Moysis”, in that order)<sup>31</sup> advising a three-judge panel presided over by a papal legate, Cardinal Goizo, might be the same Gratian as the one responsible for the *Decretum*.<sup>32</sup>

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<sup>30</sup> Noonan, 162–63.

<sup>31</sup> Pennington views the fact that Gratian was referred to second and without the honorific “Magister” as significant. Pennington, “The Biography of Gratian, the Father of Canon Law,” 387–88. There is, however, no reason to assume that the notary who reported on the proceedings would necessarily have been well-informed about Gratian, who was, after all, not a local figure in Venice.

<sup>32</sup> Gundula Grebner, “Lay Patronate in Bologna in the first half of the 12th Century: Regular Canons, Notaries, and the Decretum,” in *Europa und seine Regionen: 2000 Jahre Rechtsgeschichte*, ed. Andreas Bauer and Karl H. L. Welker (Vienna, 2007), 107–22 is

But we can say that it is possible, even plausible, that the unbiased notary who recorded the scene at S. Marco is the only person to have left an eyewitness account of Gratian.<sup>33</sup>

Noonan concludes that

we have reason to believe that Gratian composed and commented upon a substantial portion of the Concordia. In such composition and commentary he revealed himself to be a teacher with theological knowledge and interests and a lawyer's point of view. He worked in Bologna in the 1130s and 1140s. Beyond these conclusions, we have unverified hearsay, palpable legend, and the silent figure in the shadows of S. Marco.<sup>34</sup>

This conclusion is our starting point. Noonan wrote, however, before Winroth's discovery of the first recension. Scholarship on the identity of Gratian in this century has necessarily had to take into account both Noonan's pruning of his biography and the existence of the first and second recensions.

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frequently cited in connection with the 1143 court case: "Recently, Gundula Grebner uncovered more evidence that would confirm Gratian's presence in a Venetian courtroom and change Noonan's plausible to certain." Pennington, "The Biography of Gratian, the Father of Canon Law," 387.

<sup>33</sup> Noonan, "Gratian Slept Here," 171.

<sup>34</sup> Noonan, 172.

## Winroth

Winroth discusses the biography of Gratian directly in the sixth chapter of *The Making of Gratian's Decretum* ("The men behind the 'Decretum'"),<sup>35</sup> and in a 2013 ZRG KA article, "Where Gratian Slept: The Life and Death of the Father of Canon Law."<sup>36</sup> The article expands on material Winroth presented at the Fourteenth International Congress of Medieval Canon Law, Toronto, 2012. Furthermore, Winroth vigorously participated in the debate over the Sankt Gallen Stiftsbibliothek 673 (Sg) manuscript of Gratian's *Decretum*, most notably in a 2014 BMCL article, "Recent Work on the making of Gratian's Decretum,"<sup>37</sup> and his views on Sg influence the arguments he makes about the trajectory of Gratian's teaching career.

In *The Making of Gratian's Decretum*, Winroth adopts the convention of referring to the author of the first recension as Gratian 1 and to the author of the second recension as Gratian 2. The arguments he makes in the first five chapters of his book are agnostic as to whether Gratian 1 is the same person as Gratian 2: "These labels are not intended to

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<sup>35</sup> Winroth, *The Making of Gratian's Decretum*, 175–92.

<sup>36</sup> Winroth, "Where Gratian Slept."

<sup>37</sup> Anders Winroth, "Recent Work on the Making of Gratian's Decretum," *Bulletin of Medieval Canon Law* 26 (2004): 1–29.

suggest that Gratian 1 and Gratian 2 could not have been the same person.”<sup>38</sup> The question of authorial identity is not relevant to the primary argument that Winroth advances in those chapters, which is that the Admont (Aa), Barcelona (Bc), and Florence (F) manuscripts represent a coherent first recension of the *Decretum* rather than an abbreviation. In his sixth chapter and conclusion, however, Winroth observes that the second recension reflects a considerably more sophisticated legal culture than that reflected in the first recension, notably in the reception of concepts and terminology from the study of Roman law, and argues that it is unlikely that an author would have acquired a deep knowledge of Roman law and then incorporated it into a second recension of his work in the course of a normal career.<sup>39</sup>

Winroth is strongly committed to a late date (1139) for the first recension on the grounds that he thinks D.63 d.p.c.34 *must* refer to canon 28 from the Second Lateran Council of 1139. That first-recension *dictum* makes a reference to a canon, D.63 c.35, that

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<sup>38</sup> Winroth, *The Making of Gratian's Decretum*, 122.

<sup>39</sup> Winroth has since come to contextualize the differences between the first and second recension with respect to the use of Roman law within a broader context: “The argument about two authors is based on textual (you could almost say literary) analysis: formulations, practices of organization, source use, etc. Justinian’s Roman law books [are] really the only category of source only used in one of the two recensions. I used to think that there were other sources, such as 3L, that were only used in the second recension, but this turned out to be an accident of the specific sections I used as case studies (C. 24 and C.11 q.3).” (Anders Winroth, email to Paul Evans, 18 May 2021).



was later incorporated into the second recension of the *Decretum* as D.63 c.35<sup>40</sup> Winroth explicitly rejects Atria Larson's suggestion that the canon referred to at D.63 d.p.c.34 is *not* canon 28 from Lateran II but rather a canon from an earlier council or synod convened by Innocent II at Rome in 1133 that was reissued at the 1139 council, a common practice in the early twelfth century.<sup>41</sup>

Furthermore, Winroth accepts an entry in a Siena necrology (Siena, Biblioteca Comunale degli Intronati F.I.2, f.5r) brought to scholarly attention by Francesco Reali as evidence that Gratian, the author of the first recension, died as bishop of Chiusi on the feast day of St. Lawrence (August 10) in either 1144 or 1145.<sup>42</sup> The datum provided by the necrology, recording the death of a "Gratian of Chiusi, bishop", considered along with Winroth's axiomatic assumption of an 1139 *terminus post quem* for the first recension, strengthens the case from his perspective that Gratian, having been elevated

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<sup>40</sup> See Anders Winroth, "The Making of Gratian's *Decretum*" (Columbia University, 1996), 345, where he appears open to the possibility that D.63 d.p.c.34 is an interpolation, without committing to it. Winroth ultimately accepted the argument of Rudolf Weigand (†1998) that the interpolation hypothesis is a slippery slope—once you start rejecting problematic passages because they are inconvenient (chronologically or otherwise), there is no obvious place at which to stop.

<sup>41</sup> See Larson, "Early Stages of Gratian's *Decretum* and the Second Lateran Council", along with Winroth's rebuttal in Anders Winroth, "Innocent II, Gratian, and Abbe Migne," *Bulletin of Medieval Canon Law* 28 (2008): 145–52.

<sup>42</sup> Winroth, "Where Gratian Slept."

to a bishopric not long after having finished work on the first recension, was unlikely to have been the author of the second recension.

Winroth rejects claims that the Sg manuscript of the *Decretum* is descended from a version earlier than the first recension and argues instead that it is an abbreviation of the first recension with some interpolations from the second.<sup>43</sup> While not a direct

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<sup>43</sup> Much of the debate over whether the *Decretum* was the result of a continuous or discontinuous process of composition has focused on the Sankt Gallen Stiftsbibliothek 673 (Sg) manuscript. Pennington, Eichbauer, and Larson have argued that it represents, at some unknown number of removes, an earlier version of the *Decretum* than Winroth's first recension. Winroth and Wei have argued that Sg is a relatively uninteresting abbreviation of a first recension manuscript with some second recension interpolations. See Melodie H. Eichbauer, "Gratian's *Decretum* and the Changing Historiographical Landscape," *History Compass* 11, no. 12 (December 2013): 1111–25 for a good recent overview of these debates.

The version of the *Decretum* preserved in the Sg manuscript contains somewhat fewer than 1,050 canons ("poco menos de 1,050 *auctoritates* y en torno a los 650 *dicta*." ) Carlos Larrainzar, "El Borrador de la 'Concordia' de Graciano: Sankt Gallen, Stiftsbibliothek MS 673 (=Sg)," *Ius Ecclesiae: Rivista Internazionale di Diritto Canonico* 11, no. 3 (1999): 601. 1,050 is an approximation, not an exact count. Sg is therefore considerably shorter than either the first recension (1,860 canons) or the vulgate (3,945) versions of the text. "The second recension contains 3,945 canons (including the paleae) in the editions. The first recension contains only 1,860 canons (47 percent)." Winroth, *The Making of Gratian's Decretum*, 122. 3,945 is a conventional number.

Formally, Sg is not divided into parts; all of its content is presented in the form of cases. The first case, however, is unique to Sg and is referred to as *Causa Prima* to distinguish it from the *Causa I* found in all other pre-vulgate and vulgate versions of the *Decretum*. (*Causa I* appears as *Causa II* in Sg.) It contains a subset of canons and *dicta* found in Part I of the first recension and the vulgate, presented in almost exactly the same order in which they appear in those versions of the *Decretum*. (There is one relatively minor exception with respect to the ordering of the texts: the four canons corresponding to

intervention in a debate over the biography of Gratian, Winroth's argument against Sg being a version of the text of the *Decretum* earlier than the first recension is an indirect argument against a long teaching career for Gratian 1, as Winroth conceives him, and against a long period of incremental development for the text of the *Decretum*.

## Pennington

Pennington discusses the biography of Gratian directly in his article "The Biography of Gratian, the Father of Canon Law", which has appeared in multiple, successively revised, versions.<sup>44</sup> Pennington, too, has been a vigorous participant in the debate over the significance of the Sg manuscript of the *Decretum*, most notably in his 2004 chapter "Gratian, Causa 19, and the Birth of Canonical Jurisprudence."<sup>45</sup> In addition,

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D.32 c.3, c.4, c.6, and c.7 are inserted between the canons corresponding to D.31 c.6 and D.31 c.7.) Larrainzar, "El Borrador de la 'Concordia' de Graciano," 653. Notably, *Causa Prima* contains no texts (canons or *dicta*) from the *tractatus de legibus* (distinctions 1-20) and none from Gratian's "epilogue" (distinctions 81-101).

<sup>44</sup> Kenneth Pennington, "The Biography of Gratian, the Father of Canon Law," *Villanova Law Review* 59 (2014): 679–706; Kenneth Pennington, "La biografia di Graziano, il Padre del diritto canonico," *Rivista Internazionale di Diritto Comune* 25 (2014): 25–60; and Kenneth Pennington, "The Biography of Gratian, the Father of Canon Law," in *A Service Beyond All Recompense*, ed. Kurt Martens (Catholic University of America Press, 2018), 359-391.

<sup>45</sup> Kenneth Pennington, "Gratian, Causa 19, and the Birth of Canonical Jurisprudence," in *Panta Rei: Studi Dedicati a Manlio Bellomo*, ed. Orazio Condorelli, vol. 4 (Roma: Il Cigno, 2004), 339–55.

Pennington directed a 2010 dissertation by Melodie Eichbauer, “From Gratian’s *Concordia discordantium canonum* to Gratian’s *Decretum*: The Evolution from Teaching Text to Comprehensive Code of Canon Law, that contributed to the debate over Sg.

Pennington builds on Larson’s conjecture that the canon referred to at D.63 d.p.c.34 in the first recension and later incorporated as D.63 c.35 in the second recension is not canon 28 from the Second Lateran Council (1139) but rather a canon from an earlier council or synod convened by Innocent II at Rome in 1133 that was reissued at Lateran II, a common practice in the early twelfth century.<sup>46</sup> Pennington supports Larson’s conjecture by noting that the text of the canon as it appears in the *Decretum* includes variants (*facta fuerit* vs *fuerit celebrata*, and *consensus* vs *assensus*) found in none of the twenty manuscript witnesses to the Lateran II canons edited by Martin Brett.<sup>47</sup>

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<sup>46</sup> See Larson, “Early Stages of Gratian’s *Decretum* and the Second Lateran Council”. Pennington asserts that “[t]he main reason that Winroth created a second ‘Gratian’ is because of a text [D.63 d.p.c.34] that is found in all pre-Vulgate manuscripts.” Pennington, “The Biography of Gratian, the Father of Canon Law,” 362. D.63 d.p.c.34 is central to Winroth’s arguments in favor of a late date for the first recension (1139), and for a short teaching career for Gratian, but is not relevant to his argument in favor of the two-author hypothesis. “The reference to Lateran II only proves that the *Decretum*, as transmitted by extant manuscripts (and I have checked several dozens, ‘vulgate’ as well as ‘pre-vulgate’), cannot have been written before 1139.” (Anders Winroth, email to Paul Evans, 18 May 2021). As noted in Chapter 2 and the footnote above, the original basis for Winroth’s two-author hypothesis was that the second recension makes much more sophisticated use of Roman law concepts and terminology than the first recension.

<sup>47</sup> Pennington, “The Biography of Gratian, the Father of Canon Law,” 365; Brett’s edition is unpublished.

Pennington argues that there is enough doubt as to whether D.63 d.p.c.34 refers to canon 28 from Lateran II that it cannot be used as the sole or primary basis for imposing a *terminus post quem* of 1139 on the first recension of the *Decretum*.

Pennington, building on Eichbauer's findings, argues that because the number of additional canons found in the margins of the Barcelona (Bc) manuscript, and in both the margins and appendices of the Admont (Aa) and Florence (Fd) manuscripts, fall well short of the number that would be expected if they had been copied from a vulgate manuscript of the *Decretum* (87 are missing from Aa, and 62 are missing from Fd), these manuscripts represent an intermediate "next-to-last" stage in the development of the *Decretum* text between the pre-vulgate and vulgate versions.<sup>48</sup> Furthermore, the fact that the Lateran II canons *are* present in this "next-to-last" stage undermines the argument going back to Fransen and supported by Lenherr that the Lateran II canons are a last-minute addition, and poorly if at all integrated into the argument of the *Decretum*.<sup>49</sup>

Pennington also cites early manuscripts of the *Decretum* with 99 distinctions in Part I as

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<sup>48</sup> Pennington, 367; and Melodie Harris Eichbauer, "From the First to the Second Recension: The Progressive Evolution of the *Decretum*," *Bulletin of Medieval Canon Law* 29 (2012): 145.

<sup>49</sup> Pennington, "The Biography of Gratian, the Father of Canon Law," 367–68.

evidence for the continuous evolution of the text between the first and second recensions.<sup>50</sup>

Pennington's strongest argument in favor of his position that Sg is not an abbreviation is that the unique *Causa Prima* (an ordered subset of canons and *dicta* from Part I of the first recension of the *Decretum*) includes neither texts from the *tractatus de legibus* (distinctions 1-20) nor from the "epilogue" (distinctions 81-101). Moreover, four cases, 24-26 and 28, are missing from Sg entirely. There would have been no compelling reason for an abbreviator starting from a pre-vulgate version of the *Decretum* to make such changes.<sup>51</sup>

There are two aspects to Pennington's reservations about identifying the Gratian named in the Siena necrology with the author of the *Decretum*. Pennington is open to the possibility that the author of the *Decretum* eventually became a bishop somewhere, but questions whether the person named in the necrology was either the bishop of Chiusi, or the author of the *Decretum*. He notes that the necrology refers to "Gratian of Chiusi, bishop", not to "Gratian, bishop of Chiusi."<sup>52</sup> Pennington's second reservation

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<sup>50</sup> Pennington, 366.

<sup>51</sup> Pennington, 379–80.

<sup>52</sup> Pennington, 386–87.

concerning the identification of the Gratian mentioned in the Siena necrology as *the* Gratian is closely related to his reservation about Grebner's identification of the Gratian mentioned in the record of the 1143 Venice court case: neither record accords Gratian the kind of prominence that might be expected for a figure of such importance. Gratian appears second on the list of the three legal consultants in the Venice case and is not referred to with the honorific title "*Magister*." And the Siena necrology records nothing beyond the bare facts of a name, a day (but not year) of death, and that the defunct had been a bishop from or of Chiusi.<sup>53</sup> In his assumption, however, that Gratian must have been well-known, even famous, in his own lifetime, Pennington disagrees with Kuttner, who sees Gratian as a figure shrouded in profound personal obscurity: "He is one of those deeply admirable men of pious modesty, like the builders of the medieval cathedrals, whose person is hidden and effaced completely behind their immortal works."<sup>54</sup>

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<sup>53</sup> "The final problem with this entry in the Sienese necrology is that if this is the Gratian who compiled one of the most famous textbooks of the twelfth century and who taught canon law at Bologna for a long time, can we believe that he would have been given such a modest entry?" Pennington, 387.

<sup>54</sup> Kuttner, "The Father of the Science of Canon Law," 4.

## Authorship

Authorship on any significant scale in the pre-modern world required wrapping a specialized and expensive scribal infrastructure around the figure of the author.<sup>55</sup> Three examples from the classical period and late antiquity illustrate the possible ways in which this requirement could be met. Cicero (†43 BCE) pursued his literary ambitions with the support of highly skilled but unfree labor purchased out of his personal wealth, most famously his slave and later freedman Tiro. A wealthy lay patron named Ambrose paid for the secretarial staff that supported the authorial activities of Origen of Alexandria (†253).<sup>56</sup> Quasi-monastic members of the episcopal household of Augustine of Hippo (†430) provided the scribal support that made his prodigious authorial output possible. The mode of production pioneered by Augustine and his household in which monastic labor enabled the creation of original texts by their authors as well as the

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<sup>55</sup> James Joseph O'Donnell, *Augustine: A New Biography*, 1st ed. (New York: HarperCollins Publishers, 2005), 136, 139. The need for scribal or secretarial support presupposes that authors create texts by dictating them.

<sup>56</sup> John Anthony McGuckin, "The Life of Origen (ca. 186–255)" in *The Westminster Handbook to Origen*, 12. McGuckin got this story from Eusebius, *Ecclesiastical History* 6.23.2.



subsequent copying and circulation of finished texts proved a durable one and predominated in the Latin West until the thirteenth century.<sup>57</sup>

Given the material and social technologies for authorship available in the twelfth century, creation of a text the size of Gratian's *Decretum* would necessarily have been a collaborative effort. Pennington has noted that "Gratian may have had an atelier of assistants,"<sup>58</sup> but that observation suggests that the nature of the collaboration between Gratian and those Pennington conceives of as his assistants needs to be examined closely. What substantive intellectual contributions, if any, did Gratian's collaborators make to the project?<sup>59</sup> There are a number of indications, discussed in the previous chapter, that the *Decretum* outgrew the ability of a single author to effectively manage the development of the text. The question is whether Gratian's partial loss of control of

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<sup>57</sup> Monastic modes of text production were gradually replaced by commercial ones, e.g., around the University of Paris. See Richard H. Rouse and Mary A. Rouse, *Manuscripts and Their Makers: Commercial Book Producers in Medieval Paris, 1200-1500* (Turnhout: Harvey Miller, 2000).

<sup>58</sup> Pennington, "The Biography of Gratian, the Father of Canon Law," 362.

<sup>59</sup> The quasi-monastic model of text production leaves open a range of possibilities. Those who have read the *Vita Augustini* written by Possidius of Calama († c.437) are likely to be unimpressed by the intellectual caliber of Augustine's episcopal household and to assess its contribution to his work accordingly. Peter Brown indirectly refers to the absence of classical education among members of Augustine's "monastery" when he characterizes them as "younger men, whose tastes, culture, and past history did not resemble that of Augustine and his friends." Peter Brown, *Augustine of Hippo: A Biography* (Berkeley: University of California Press, 1967), 143.

the project opened up a space for genuinely collaborative authorship. The starting point for this inquiry is a theoretically informed understanding of what authorship is.

The recent work on the life of Gratian by Pennington and Winroth<sup>60</sup> reviewed in the preceding section tacitly assumes that if we can identify the historical Gratian, we will have identified the author of the *Decretum* (or at least the author of the first recension), with authorship of the text understood in a way not unlike the way in which we might understand the authorship of a modern literary text. (Noonan entertains a more nuanced concept of authorship, allowing for the possibility that there might have been multiple authors.) In conducting this kind of “quest of the historical Gratian,” historians have uncritically accepted a conceptualization of authorship that is somewhat anachronistic when applied to a medieval text and has been largely discarded by literary scholarship over the last half-century. Roland Barthes’s 1967 essay “The Death of the Author” and Michel Foucault’s 1969 response “What Is an Author?” are foundational readings in the theory of authorship and provide an appropriate

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<sup>60</sup> Winroth, “Where Gratian Slept”; Pennington, “The Biography of Gratian, the Father of Canon Law”; and Pennington, “The Biography of Gratian, the Father of Canon Law”.

starting point for a theoretically-informed reconsideration of the authorship of Gratian's *Decretum*.<sup>61</sup>

## Barthes

"The Death of the Author" holds a place in literary studies somewhat similar to the place that Noonan's "Gratian Slept Here" holds in canon law studies—it is a clearing of the ground of older ways of thinking in the field. Although the title of the essay was a lightning-rod in 1980s theory war polemics, taken as if Barthes were arguing that texts somehow wrote themselves, medievalists will recognize the French title of the essay, "La mort de l'auteur," as a pun on *Le Morte d'Arthur*. Barthes's essay is short and relatively free of arcane technical terms. Barthes was a literary critic and scholar making an argument to other literary critics and scholars against the practice of close-reading literary texts with the focus on the biographical and historical context of the author and its relationship to the text.

Barthes uses the term "Author" to indicate the conceptualization of authorship he is arguing against and the term "author" where he intends to use the word in its more

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<sup>61</sup> Roland Barthes, "The Death of the Author," in *Image, Music, Text*, trans. Stephen Heath (New York: Hill; Wang, 1977), 142–48; and Michel Foucault, "What Is an Author?" in *Aesthetics, Method, and Epistemology*, ed. James D. Faubion and Paul Rabinow, trans. Robert Hurley, Essential Works of Foucault, 1954–1984, v. 2 (New York: New Press, 1998), 205–22.

general and non-technical sense. An Author is the creative intellect uniquely responsible for a literary text and “is in the same relation of antecedence to his work as a father to his child.”<sup>62</sup> Barthes argues that authors cannot be Authors—no person or persons can have a parent-child relationship to a text since all literary texts, which he describes as “a tissue of quotations drawn from the innumerable centres of culture,”<sup>63</sup> are socially constructed. This description is certainly more applicable to the *dicta* than to the modern texts that Barthes had in mind. Gratian may be the author of the *dicta* but he is not their Author.

Barthes’s central argument is against precisely the kind of reading that is prevalent in scholarship on Gratian and the *Decretum*:

To give a text an Author is to impose a limit on that text, to furnish it with a final signified, to close the writing. Such a conception suits criticism very well, the latter then allotting itself the important task of discovering the Author (or its hypostases: society, history, psyche, liberty) beneath the work: when the Author has been found, the text is ‘explained’ - victory to the critic.<sup>64</sup>

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<sup>62</sup> Barthes, “The Death of the Author,” 145.

<sup>63</sup> Barthes, 146.

<sup>64</sup> Barthes, 147.

Barthes uses the term “scriptor” to indicate an alternative conceptualization of authorship in which the performative aspect of the author’s act is the central focus. Barthes uses the terms “criticism” and “critic” to refer respectively to the activity of subjecting a literary text to close-reading and to one engaging in that activity. Translating the terms as “reading” and “reader” would not be seriously misleading. Gratian as author of the *dicta* is therefore, using Barthes’s definitions, both scriptor and critic. The *dicta* were originally delivered in a classroom setting and thus have both a performative and a contemporaneous aspect (“there is no other time than that of the enunciation and every text is eternally written *here* and *now*”<sup>65</sup>). The *dicta* are also the record of a particular close-reading of a selection of authoritative texts. Barthes’s critique of the concept of the Author, then, suggests some interesting ways in which the conceptualization of authorship usually invoked in scholarship on the *Decretum* fails to capture, or at least insufficiently emphasizes, certain important aspects of Gratian’s creative activity.

## Foucault

Barthes’s criticism of the idea of authorship is apophatic, concerned mostly with what, in his view, authorship is not. Barthes warns against the conceptualization of

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<sup>65</sup> Barthes, 145.

authorship, centered on the biographical-historical context of the individual author, that most historians (including those who have written about Gratian's authorship of the *Decretum*) take for granted. In place of the conceptualization of authorship rendered suspect by Barthes, Foucault proposes the idea of the "author function." He starts by asking "[w]hat is an author's name? How does it function?"<sup>66</sup> and then goes on to observe:

... if we proved that Shakespeare did not write those sonnets which pass for his, that would constitute a significant change and affect the manner in which the author's name functions. If we proved that Shakespeare wrote Bacon's *Organon* by showing that the same author wrote both the works of Bacon and those of Shakespeare, that would ... entirely modify the functioning of the author's name.<sup>67</sup>

Foucault has a reputation for using esoteric vocabulary in his writing—his critics would say jargon—in a way that many historians find objectionable. The technical use of the term "author function" is a case in point. However, the idea that he is attempting to convey is relatively straightforward. Abstract away the biographical details about the author from the work that the *idea* of the author does for us when we read a text, and what remains is the author function. Ironically, given the rather avant-garde reputation

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<sup>66</sup> Foucault, "What Is an Author?" 209.

<sup>67</sup> Foucault, 210.

that is still attached to his name, at least in the English-speaking world, Foucault derives the substantive content of the idea of the author function almost entirely from Jerome (†420).

In *De Viris illustribus*, Saint Jerome explains that homonymy is not sufficient to identify legitimately authors of more than one work ... The name as an individual trademark is not enough when one works within a textual tradition.<sup>68</sup>

This point is significant. We face in the *Decretum* a problem concerning authorship that medieval textual scholars like Abelard and Gratian himself would have found quite familiar: a textual tradition to which the name of Gratian became attached quite early on “as an individual trademark.” Furthermore, Foucault’s theory of literary authorship is substantially derived from the work of Jerome, the figure that Gratian’s twelfth-century contemporaries, most notably Abelard, considered supremely authoritative on precisely this kind of problem.<sup>69</sup>

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<sup>68</sup> Foucault, 214.

<sup>69</sup> “*Illud quoque diligenter attendi convenit ne ... falsa tituli inscriptione vel scripturae ipsius corruptione fallamur ... Unde fidelissimus scriptor et veracissimus interpres Hieronymus ... nos praemonuit.*” Peter Abelard, *Sic et non: a critical edition*, ed. Blanche Beatrice Boyer and Richard McKeon (Chicago: University of Chicago Press, 1977), 91. “We must also be very careful not to be deceived by a false attribution of authorship or by a corrupt text ... Jerome, that most reliable writer and most faithful translator, has given us forewarning of this.” Peter Abelard, “Prologue to the Yes and No,” in *Medieval Literary*

How, then can one attribute several discourses to one and the same author? How can one use the author function to determine if one is dealing with one or several individuals? Saint Jerome proposes four criteria:<sup>70</sup>

The four criteria that Foucault synthesizes from Jerome consider the author separately as “a constant level of value”, “a field of conceptual or theoretical coherence”, “a stylistic unity”, and an “historical figure at the crossroads of a certain number of events.” Each is a criterion for the *exclusion* of a given text from the canon of a particular author. Three of the four criteria, the first, second, and fourth, have figured to some extent in recent scholarship on the authorship of Gratian’s *Decretum*; the third has not.

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*Theory and Criticism, c.1100-c.1375: The Commentary Tradition*, ed. A. J. Minnis, A. Brian Scott, and David Wallace (Oxford: Clarendon Press, 1988), 89.

<sup>70</sup> Foucault, “What Is an Author?” 214. Foucault claims to have derived the four criteria for determining whether a given “discursive set” has one or several authors from Jerome’s *De Viris illustribus*. He provides, however, no citations. Walzer and Inabinet indicate that “similar principles” can be found in Karl Kelchner Hulley, “Principles of Textual Criticism Known to St. Jerome,” *Harvard Studies in Classical Philology* 55 (1944): 105–9. Arthur E. Walzer and Brandon M. Inabinet, “Who Wrote the Rhetoric? A Response to Brad McAdon,” *Advances in the History of Rhetoric* 14, no. 2 (July 2011): 188. The section of Hulley’s article on “various points pertinent to questions of authorship” is in fact almost certainly the ultimate source for Foucault’s four criteria, and provides citations to many works by Jerome (not just *De Viris illustribus*) relevant to the question of determining the authorship of a text or texts.



(1) if among several books attributed to an author one is inferior to the others, it must be withdrawn from the list of the author's works (the author is therefore defined as a constant level of value);

(2) the same should be done [i.e., a book must be withdrawn from the list of the author's works] if certain texts contradict the doctrine expounded in the author's other works (the author is thus defined as a field of conceptual or theoretical coherence);

Winroth has argued that the second recension of the *Decretum* reflects a level of reception of Roman Law doctrine so much more advanced than the first recension that the two recensions cannot be attributed to a single author. It is possible to transpose Winroth's argument into Foucault's framework either by defining the author as a constant level of value or as a field of conceptual or theoretical coherence. Winroth himself seems to lean in the direction of defining the author as a constant level of value: the *dicta* in the first recension of the *Decretum* are in some sense "inferior" to those in the second because they reflect a more rudimentary understanding of Roman Law. While arguments that Gratian made an explicit ideological choice to de-emphasize Roman law do not presently play a large role in scholarly debates over the *Decretum*, they have done so in the past and may do so again in the future.<sup>71</sup> To make an argument of this

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<sup>71</sup> Stanley Chodorow, *Christian Political Theory and Church Politics in the Mid-Twelfth Century; the Ecclesiology of Gratian's Decretum*, Publications of the Center for Medieval

kind would be defining the author as a field of conceptual or theoretical coherence. To be clear, the point is not that scholars such as Pennington and Winroth *are* framing their arguments in the terms Foucault borrows from Jerome but rather that if the biographical details of their respective historical Gratians were abstracted away, their arguments *could* be reframed in those terms.

A work like the *Decretum* can, of course, be evaluated on more than one scale of value, and lapses in the Latin grammar of the case statements suggest a standard other than the use of Roman law on the basis of which texts might be included in or excluded from the Gratian canon. For example, Gratian in C.3 d.init. uses the reflexive pronoun *sibi* to refer to enemies of a bishop who is not the grammatical subject of the clause in which the word occurs, where *eius* might instead be expected: “*accusatores testes de domo sua producunt, et alios sibi inimicos extra suam prouinciam* (the accusers bring forward witnesses from [the bishop’s] own household, and other enemies of his (*sibi*) from outside his province).” (trans. PLE) Similarly, in C.29 d.init. Gratian uses the reflexive pronoun *sibi* to refer to a noblewoman who is the grammatical subject of neither the sentence nor the relative clause in which the word appears, and where *ei* might instead be expected: “*Ille, qui sibi prius placuerat, tandem uenit, eamque sibi in coniugem petit*

(Finally he who had previously pleased her (*sibi*) comes, and asks [for] her in marriage to himself)." (trans. PLE) It is outside the scope of this dissertation to follow up on anecdotal evidence of this kind, but the examples at least suggest a possible direction for future research.<sup>72</sup>

(4) finally, passages quoting statements made or mentioning events that occurred after the author's death must be regarded as interpolated texts (the author is seen as a historical figure at the crossroads of a certain number of events).<sup>73</sup>

The fourth criterion that Foucault derives from Jerome is, for obvious reasons, the most attractive one from the point of view of the historian: arguments about the authorship

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<sup>72</sup> When I first encountered Gratian's unexpected use of *sibi* in C.3 d.init., I assumed that I was misconstruing the grammar. Soon thereafter, however, I came across John Noël Dillon, "Case Statements (themata) and the Composition of Gratian's Cases," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung* 92, no. 1 (2006): 316n42, confirming that Gratian's use of *sibi* is in fact incorrect by the standards of Classical Latin. This usage is not unique to Gratian; Dillon referred me to Keith C. Sidwell, *Reading Medieval Latin* (Cambridge ; Cambridge University Press, 1995), 365–66, which discusses ways in which the use of demonstratives and pronouns in Medieval Latin differs from their use in Classical Latin.

Thanks to Anders Winroth, who pointed out that C.29 d.init. contains a similar construction. John T. Noonan, "Catholic Law School - A.D. 1150," *Catholic University Law Review* 47 (1997): 1189–1205 thoroughly discusses C.29 in the context of the canon law of marriage and consent. Noonan translates the sentence more idiomatically than I have done as "[h]er first choice at last arrived to seek her in marriage" Noonan, "Catholic Law School - A.D. 1150," 1189.

<sup>73</sup> Foucault, "What Is an Author?" 214.

of a text are framed in terms of the known facts of its putative author's life. This criterion, however, has extremely limited usefulness in the case of an author like Gratian about whom almost nothing is reliably known. Winroth's argument about D.63 d.p.c.34, for example, can be transposed into Foucault's framework for this criterion only by shifting the starting point and running the logic in reverse. Winroth starts with the axiomatic assumption that the first recension of the *Decretum* contains no interpolations and reasons from that axiom to the conclusion that Gratian could not have finished the first recension before 1139. There is nothing inherently suspect in the framing of arguments about the authorship of a text using Foucault's fourth criterion, but it is extremely difficult to reach conclusions that will command general assent in the absence of any established facts about a putative author's life, especially when the controverted text in question has an unknown history of its own (as is the case with the variant texts we know from the Second Lateran Council as canon 28 and from the *Decretum* as D.63 c.35.)

Jerome's remaining criterion, the third, has **not** figured significantly in recent scholarship on the authorship of Gratian's *Decretum*.

(3) one must also exclude works that are written in a different style, containing words and expressions not ordinarily found in the writer's production (the author is here conceived as a stylistic unity);

From this point forward, the dissertation will be taken up with an extended application of Jerome's third criterion, the criterion of stylistic unity, to the question of the authorship of the *dicta* in Gratian's *Decretum*. The introduction offered a preview of the finding that when the alleged details of Gratian's biography are abstracted away from the idea of the author, and we instead look for the author in the stylistic unities predicted by either the one- or two-author hypotheses, we will not find them. Style is defined in a rigorous and quantitative way and applied using computational techniques unimaginable certainly to Jerome and perhaps even to Foucault, but conceptually it is Jerome's insight that guides the work in the following chapter.