

## Chapter 3

The third order of business then is to recount the history of efforts, from the *Summa Parisiensis* on, of legal scholars and historians to find the man behind the name Gratian. Here, you need to lay out the traditional evidence used for solving this puzzle. You are lucky that Noonan, Pennington etc. have laid out the evidence and played with it for you.  
– Stan Chodorow

### Gratian

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, for example that Gratian was a Camaldolese monk at the monastery of SS. Felix and Nabor in Bologna, that many mid-twentieth century handbooks and reference works presented as commonplace.<sup>1</sup>

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<sup>1</sup> John T. Noonan, "Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law," *Traditio* 35 (January 1979): 145–72.

Very little 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>2</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 should 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 aware of, the revival of the study of Roman law in the early twelfth century than we think he should have been. On the other hand, he seems to have been more aware of, and more interested in, the emergence of scholastic theology in northern France than we can easily explain.<sup>3</sup>

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<sup>2</sup> Noonan.

<sup>3</sup> See Stephan Kuttner, "The Father of the Science of Canon Law," *Jurist* 1 (1941): 2–19. Kuttner argues is that Gratian applied Ivo's program as it had been developed in the intervening forty years by scholastic theology, most notably by Abelard, not in its original form: scholastic theology got the program from Ivo, Gratian got it 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: Cambridge U.P., 1969), 214–23.

**You do not need to exhaustively catalog all of the Gratian myths that Noonan debunked, one is enough. As an example of his approach and conclusions, show how Noonan debunked one of the most prominent elements of the mythology surrounding Gratian, the claim that Gratian was a Camaldolese monk.**

Odofredus (†1265), a professor of law at Bologna, claimed that Gratian “was staying” (stabat) at the monastery of SS. Felice and Nabor while working as a rubricator.<sup>4</sup>

Odofredus did not indicate the basis for his statement that Gratian had been a resident of SS. Felice 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 SS. Felice and Nabor as Camaldolese, and inferred from them that the monastery – and by extension Gratian himself – had been Camaldolese

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<sup>4</sup> Noonan identifies Odofredus as the source for associating Gratian with SS. Felix and Nabor (Noonan, “Gratian Slept Here.”, 148), but cf. R. W. Southern, *Scholastic Humanism and the Unification of Europe*, vol. 1 (Oxford, UK ; Cambridge, Mass., USA: Blackwell, 1995), 286n5. Southern draws attention to an inscription found in a Geneva manuscript of the *Decretum*, Bibliothèque publique et universitaire, MS Lat. 60: *Anno 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 SS. Felix and Nabor is therefore unknown, but it is possible that it predates Odofredus.

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, but was put back into circulation in the mid-twentieth century by Van Hove.<sup>5</sup>

Noonan (†2017) was a distinguished professor of law and an appellate judge 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, however, has questioned whether this is an appropriate standard for evaluating historical evidence.**

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<sup>5</sup> Cite Noonan, “Gratian Slept Here.”, but also cite Alphonse van Hove, *Prolegomena Ad Codicem Iuris Canonici*, Editio artera auctior et emendatior, Commentarium Lovaniense in Codicem Iuris Canonici, v. 1, t. 1 (Mechlinae: H. Dessain, 1945). Van Hove’s *Prolegomena* 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 treatment for cancer 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).

To conclude, 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>6</sup>

**Transition: Noonan wrote before the discover of the first recension; recent (post-1996) discussion of the identity of Gratian necessarily focus on accounting for the existence of the first and second recensions.**

### **Winroth's argument**

**(Pennington's argument is largely a response to Winroth's, discuss Winroth's argument first, followed by Pennington's critique of and response to it.)**

"In the interests of simplicity and clarity, I have therefore chosen to call the author of the first recension Gratian 1 and the author of the second recension Gratian 2. These

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<sup>6</sup> Noonan, "Gratian Slept Here," 172.

labels are not intended to suggest that Gratian 1 and Gratian 2 could not have been the same person.”<sup>7</sup>

Winroth’s arguments in chapters 1-5 of *The Making of Gratian’s Decretum* are agnostic as to whether Gratian 1 is the same person as Gratian 2. The question of authorial identity is not relevant to the primary argument that Winroth advances in those chapters, which is that the Admont, Barcelona, and Florence manuscripts represent a coherent first recension of the *Decretum* rather than an abbreviation. In chapter 6 and in his 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 one author underwent such an intellectual evolution in a single generation.

Fourteenth International Congress of Medieval Canon Law, Toronto, 2012.<sup>8</sup>

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<sup>7</sup> Anders Winroth, *The Making of Gratian’s Decretum* (Cambridge: Cambridge University Press, 2000), 122.

Winroth interprets an entry in a Siena necrology (Siena, Biblioteca comunale degli Intronati F12, f.5r) as evidence that Gratian died as bishop of Chiusi on the feast day of St Lawrence (August 10) in either 1144 or 1145.

## Pennington's argument

### No transition, and very incomplete

Pennington, depending on Eichbauer, argues that because the number of additional canons found in the margins of Bc, and in both the margins and appendices of Fd and Aa, fall well short of the number that would be expected if they had been copied from a Vulgate *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 intermediate the pre-Vulgate and Vulgate versions. 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

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<sup>8</sup> 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): 105–28.

are a last-minute addition, and poorly if at all integrated into the argument of the *Decretum*.<sup>9</sup>

## Gratian's teaching career

Evidence concerning Gratian's career as a teacher of canon law is contradictory. 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 experience as a classroom teacher. On the one hand, the early manuscript tradition for the *Decretum* displays enough variation, even among the first-recension manuscripts Aa, Bc, Fd, and 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. On the other hand, Gratian's personal obscurity is so profound — Stephan Kuttner compared Gratian to

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<sup>9</sup> Kenneth Pennington, "The Biography of Gratian, the Father of Canon Law," *Villanova Law Review* 59 (2014): 686.



the anonymous builders of Gothic cathedrals<sup>10</sup> — as to suggest a short, or even no, teaching career.<sup>11</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, one of the truly stellar intellectual achievements of the renaissance of the twelfth century, his complete

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<sup>10</sup> “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.” Kuttner, “The Father of the Science of Canon Law,” 4.

<sup>11</sup> **Expand: Winroth argues for a short teaching career, Southern argues for no teaching career.** R.W. Southern is the extreme outlier in this regard, 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. Southern also 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.” Southern, 1:287, 304. **Does Southern provide footnotes to support these statements?**

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>12</sup>

We might be better able to assess Gratian's teaching career and how it influenced the compilation and transmission of the *Decretum* were we in a position to positively identify at least a few of his students. Here again, however, the evidence is mixed at best. Three twelfth-century canonists have, with varying degrees of plausibility, been identified as having been students of Gratian: Paucapalea (fl. 1140s), Simon of Bisignano (fl. 1174–1179), Omnebene (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

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<sup>12</sup> **Expand:** 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 Press, 1988), 159–60. **See also Pennington "Big Bang"**. Note that Odofredus is also the source for associating Gratian with the monastery of SS. Felix and Nabor. Noonan, "Gratian Slept Here," 148.

states that Paucapalea was “[a] pupil of Gratian and the author of the first commentary on the *Decretum*.”<sup>13</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>14</sup>

The omission is potentially 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 would have been 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 of Gratian, his readers would have expected him to do so in his preface. That

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<sup>13</sup> Kenneth Pennington, [Paucapalea](#), *Bio-Bibliographical Guide to Medieval and Early Modern Jurists*.

<sup>14</sup> Johann Friedrich von Schulte, ed., *Die Summa Des Paucapalea über Das Decretum Gratiani* (Giessen: E. Roth, 1890), 3. 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), 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*.

he did not suggest that he may not have known enough about Gratian to credibly do so.<sup>15</sup>

Furthermore, Paucapalea in the preface to his *summa* clearly shows both that he is aware of the third part of the *Decretum, de Consecratione*, and that he uncritically accepts it as having been compiled by the same Master responsible for the rest of the work: “*In extremis de ecclesiarum dedicatione et corpore et sanguine domini atque baptismo nec non et confirmatione pleniter tractat, et in his suum tractatum terminat*. In the end, he treats fully the dedication of churches, the body and blood of the Lord, baptism, and also confirmation, and with these things concludes his treatise.”<sup>16</sup>

If Rambaud is correct that *de Consecratione* was not part of the original *Decretum*, the fact that Paucapalea attributed it to the same unnamed master responsible for rest of the text

<sup>15</sup> **Going to need a very heavyweight footnote here referencing Minnis.** 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). 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>16</sup> Schulte, *Die Summa Des Paucapalea über Das Decretum Gratiani*, 3. Somerville and Brasington, *Prefaces to Canon Law Books in Latin Christianity*, 184–85

on which he was commenting strongly suggests that he did not have direct knowledge of Gratian or his plan of work.

### Omnibonus or Omnebene

Omnibonus or Omnebene (d.1185) composed an abbreviation (*summa*? abridged version?) of the *Decretum* in the 1150s.<sup>17</sup> The basis for the claim that Omnebene was a student of Gratian is an entry for the year 1130 in the chronicle of 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

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<sup>17</sup> Kenneth Pennington, [Omnibonus](#), *Bio-Bibliographical Guide to Medieval and Early Modern Jurists*.

bishop of Verona, who had been his student, afterwards abbreviated them.)<sup>18</sup>

Although the evidence of Robert's chronicle is by Noonan's standard hearsay, Robert's reputation as a well-informed source concerning Gratian has improved in recent years since the Siena necrology has made the identification of Gratian as bishop of Chiusi more probable.

The dates do not preclude Omnebene's having been a student of Gratian. Although Omnebene lived into the 1180s, the abbreviation itself seems to date from the 1150s, perhaps a decade after the end of whatever teaching career Gratian may have had, and at precisely the moment that continent-wide interest in the text was increasing most rapidly.

**Is there any internal evidence in Omnebene's abbreviation that Gratian was his teacher? Cite recent editions of Omnebene's abbreviation.**

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<sup>18</sup> Kuttner, *Repertorium*, 453. MGH *Scriptores* (SS) 6 (1844), 490. *Chronique de Robert de Torigny*, ed. Léopold Delisle, 183-184 (see BSB online version). *Chronicles of the reigns of Stephen, Henry II, and Richard I*, ed. Richard Howlett (1884). *Chronica Roberti de Torigneio*, ed. Richard Howlett, RS 82 4.118.

## 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>19</sup> The evidence that Simon of Bisignano was a student of Gratian's comes from references within his writings.<sup>20</sup> Simon refers to himself as *discipulus* and to Gratian as *magister* in at least two

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<sup>19</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* (cite Hartmann and Pennington).**

<sup>20</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. Simon of Bisignano refers to Gratian as *magister* and to himself as *discipulus* in his comments on C.27 q.2, 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. Simon again refers to Gratian as *magister* in his comments on D.4 c.31 of *de Consecratione* Simon of Bisignano, 542. **Page numbers may not coincide with print edition cited: the version of the Aimone edition I have access to is a PDF dated Fribourg 2007. BibTex records in merged.bib are inconsistent as to whether to use the author's or editor's name as the basis for the tag.**

<Q.II> § *Sequitur secunda questio*

Sacram et authenticam pie recordationis Gratianus de matrimonio distinctionem composuit, quam quidam inanis glorie aucupes fecere bifrontem et simplicium potibus inuidentes more seuorum animalium aquas limpidas turbauerunt. Gratianus uero, canonum habita notitia et mente perspecta, dixit



places in his *Summa* (Landau says “frequently”). 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 chronologically impossible for Simon to have been Gratian’s student, it seems more likely that he described himself as *discipulus* in something like the same

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inter sponsum et sponsam esse matrimonium, sed initiatum; inter uirum et uxorem consummatum. Sed quoniam non est discipulus super magistrum nec debet securis contra eum qui secat gloriari timemus os nostrum in celum mittere et eum reprehendere cuius non sumus digni soluere corrigiam calceamenti.

Note that the phrase “sed inanis glorie aucupes fecere bifrontem” also occurs in Rufinus’s treatment of the same question, C.27 q.2. Rufinus, *Summa Decretorum*, ed. Heinrich Singer (Aalen : Paderborn: Scientia Verlag ; F. Schöningh, 1963), 440.

Gratian of pious remembrance composed a sacred and *authenticam* distinction concerning marriage, *quam quidam inanis glorie aucupes fecere bifrontem* and not seeing with the drinks of the simple, [they] troubled clear waters in the manner of *seuorum* animals. But Gratian *habita notitia* of the canon and *mente perspecta*, said that matrimony is between spouse and spouse, but having been consecrated (*initiatum*), is consummated between husband and wife. But since the disciple is not above his master (Matthew 10:24, Luke 6:40), and the axe (*securis*) ought not boast (*gloriari*) against him who cuts (*secat*) (Isaiah 10:15), we fear to send our mouth into heaven (Psalm 72:9?) and to find fault with him the string (*corrigiam*) of whose shoes we are not worthy to loosen (John 1:27) (PLE).

31. *Solet queri*

Quod quamuis Magister noster docuerit, nos tamen in hoc nolumus eum imitari.

Although our master taught that, we nevertheless do not wish to imitate him in this (PLE).





sense that we might describe contemporary scholars like Chodorow, Pennington, and Winroth as “students of Gratian”.

## Epilogue

By the beginning of the thirteenth century, the systematic study of canon law had evolved in a direction of which its father Gratian would probably not have approved, and which he may even have had difficulty recognizing as the same practical or applied branch of theology his own work presupposed it to be. After around 1190, the attention of both academic and practicing canonists decisively turned away from theological jurisprudence in the tradition of Gratian, based on a rich collection of scriptural, patristic, conciliar, and papal source texts, and towards a much more narrowly circumscribed technical jurisprudence focused exclusively on contemporary papal decretals.