

## 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>

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

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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.

<sup>2</sup> Noonan.

seems to have been less interested in contemporary ecclesiastical or secular politics in general, and in the Investiture Controversy 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>

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

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<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.

<sup>4</sup> Noonan identifies Odofredus as the source for associating Gratian with SS. Felix and Nabor (, “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

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 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.

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. By Noonan's standards, the statement of Odofredus – hearsay, not attributed to a source, a century after the fact – is nothing more than legend.

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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 [Gratianus](#) in 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.

## Pennington's argument

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 (87 are missing from Aa, and 62 are missing from Fd) of the number that would be expected if they had been copied from a Vulgate *Decretum*, 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 are a last-minute addition, and poorly if at all integrated into the argument of the *Decretum*.<sup>5</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 — almost certainly a decade or more. On the

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<sup>5</sup> Kenneth Pennington, "The Biography of Gratian, the Father of Canon Law," *Villanova Law Review* 59 (2014): 686.

other hand, Gratian's personal obscurity is so profound — Stephan Kuttner compared Gratian to the anonymous builders of Gothic cathedrals<sup>6</sup> — as to suggest a short, or even no, teaching career.<sup>7</sup>

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<sup>6</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>7</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 Camaldolese 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.

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 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>8</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).

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<sup>8</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.

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>9</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>10</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 divine 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

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<sup>9</sup> Kenneth Pennington, [Paucapalea](#), *Bio-Bibliographic Guide to Medieval and Early Modern Jurists*.

<sup>10</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*.

expected him to do so in his preface. That he did not suggests that he may not have known enough about Gratian to credibly do so.<sup>11</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>12</sup>

If Rambaud is correct, this indicates that Paucapalea was personally unfamiliar with the author and his plan of work.

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<sup>11</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>12</sup> Schulte, *Die Summa Des Paucapalea über Das Decretum Gratiani*, 3. Somerville and Brasington, *Prefaces to Canon Law Books in Latin Christianity*, 184–85



## 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.

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