Chapter 1

Background

Around 1140, a revolutionary textbook transformed the study of canon law into a systematic academic discipline. It did not have an attribution of authorship. It did not even have a title. However, as it entered widespread circulation in the middle decades of the twelfth century, the new textbook gave rise to a considerable body of commentary, and some early glosses referred to it as the *Concordia discordantium canonum* ("Concordance of discordant canons"). The same glosses identified Gratian, an otherwise unknown teacher thought to have worked in Bologna, as its author.[1] As a

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[1] Eight early manuscripts contain the gloss: "*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.)" See below concerning whether, where, and when Gratian served as a bishop. Bl = Baltimore, Walters Art Gallery 777; Gt = Ghent, Bibl. der Rijksuniversiteit 55; Mt = Montecassino, Bibl. Abbaziale 66; Pf = Paris, Bibl. Nationale lat. 3884 I and II; Po = Pommersfelden, Bibl. des Grafen Schönborn 142 (2744); Ro = Rouen, Bibl. municipale E 21 (707); Sl = St. Paul im Lavant, Stiftsbibl. 25/1 (XXV.2.6); Tr = Trier, Stadtbibl. 906 (1141). Gt, Pf, and Tr indicate that the *Decretum* has two parts; Bl, Mt, Po, Ro, and Sl indicate that it has three. The earliest version of the *Decretum* to survive in more than one manuscript (the first recension) has two parts, while the most widely circulated version (the second recension) has three. Part III of the *Decretum* (*de Consecratione*) is outside the scope of this project, the intent of which is to compare the earliest (first-recension) version with the most widely circulated (second-recension) version for the purpose of determining authorship of those parts of the text traditionally attributed to Gratian himself. Part III is not

result, the book came to be commonly known as the *Decretum Gratiani* ("Gratian's *Decretum*").

The *Decretum* is *not* the kind of document, like the Fournier Register—the record of an episcopal inquisition into Albigensian heretics surviving in a single manuscript—that many non-specialists, with a journalistic eye for the exotic and the extreme, take to be the central concern of medieval studies.[2] The *Decretum* was, instead, both a normal and

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found in the first recension, therefore direct comparison is not possible. In any event the class of text traditionally attributed to Gratian personally (the sayings or *dicta*) are absent from Part III. Therefore, it is not subject to comparative analysis using the techniques available for examining Parts I and II. John T. Noonan, "Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law," *Traditio* 35 (January 1979): 154. Noonan lists Mazarine 1289 (possibly a typo for Pm = Paris, Bibl. Mazarine 1287?) in place of Sl. Rudolf Weigand, "Frühe Kanonisten Und Ihre Karriere in Der Kirche," *Zeitschrift Der Savigny-Stiftung Für Rechtsgeschichte. Kanonistische Abteilung* 76 (1990): 135–55. Kenneth Pennington, "The Biography of Gratian, the Father of Canon Law," *Villanova Law Review* 59 (2014): 698–700, supplements Noonan's discussion of these eight glosses.

The author of the preface to the *Summa Parisiensis* incorrectly thought that Gratian himself had given the collection the title *Concordia discordantium canonum*: "*Magister Gratianus, in hoc opere antonomasice dictus Magister, loco proœmii talem suo præmisit libro titulum: Concordia discordantium canonum, in quo materiam et intentionem breviter exponit* (Master Gratian, antonomastically called in this work 'the Master', in place of an introduction prefaced his book with the following title, *Concord of discordant canons*, by which he concisely sets forth subject matter and intention.)" Terence P. McLaughlin, ed., *The Summa Parisiensis on the Decretum Gratiani* (Toronto: Pontifical Institute of Mediaeval Studies, 1952), 1. English translation from 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), 201.

[2] The manuscript is Vat. Lat. 4030. Jean Duvernoy, ed., *Le Registre d'inquisition de Jacques Fournier, évêque de Pamiers (1318-1325)*, Bibliothèque Méridonale. 2. Ser, t. 41 (Toulouse: É. Privat, 1965). See also Inquisition

a normative text in its own time, and for centuries thereafter. The *Decretum* survives in an unusually large number of manuscripts—around 150-200 from the twelfth century and around 600 for the medieval period as a whole.[3] The *Decretum* was the fundamental textbook for first-year university instruction in canon law through the seventeenth century. As the first volume of the *Corpus iuris canonici*, the *Decretum* remained valid law in the Roman Catholic Church until 1917 and exercised enormous influence over the 1917 and 1983 codifications of canon law that replaced the medieval *Corpus*.

School, Faculty, University

Both the content and the form of the *Decretum* had an enormous impact on the civilization of medieval Europe. Gratian's methodological breakthrough transformed the study of canon law into a rigorous academic discipline. His imposition of a

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Records of Jacques Fournier ("An on-going English translation of the Inquisition Records of Jacques Fournier, Bishop of Pamiers, France, 1318-1325") by Nancy P. Stork (SJSU).

[3] "My listing of more than 600 manuscripts containing the *Decretum* will appear in Kenneth Pennington and Wilfried Hartmann, eds., *History of Medieval Canon Law*, 11." Anders Winroth, *The Making of Gratian's Decretum* (Cambridge: Cambridge University Press, 2000), 122n2. This list has never made it into print to my knowledge. For a reasonably complete and current list, see the entry for Gratian in Kenneth Pennington's Bio-Bibliographical Guide to Medieval and Early Modern Jurists hosted by the Ames Foundation at Harvard University.

consistent interpretive framework (hermeneutic) on the inherited and internally contradictory mass of canonical texts transformed them into a coherent system of substantive law. A generation before Gratian, Ivo of Chartres (†1115) had proposed the possibility of such a program in the preface to his own canonical collections, but he left its application to his readers. Gratian demonstrated that Ivo's program could in fact be carried out in a truly systematic way and did so at an historical moment when the need for such a sweeping synthesis was particularly compelling. Gratian was working in the immediate aftermath of the Concordat of Worms (1122), which recognized the formal juridical independence of the Church from secular authority. Gratian's *Decretum* provided a comprehensive blueprint for the legal machinery by which the Church ultimately came to govern the many aspects of life in Christian society over which it claimed exclusive jurisdiction.

The form in which Gratian's intellectual achievement was transmitted had as great an impact as its content. The *Decretum* was arguably the first book in the European tradition written from the ground up as a textbook. Gratian's own teaching was probably typical of the relatively informal and unstructured environment of the medieval schools, organized around the activity of a gifted master, learned and

charismatic enough to gather a critical mass of students. The existence of a textbook, however, made it possible for someone other than the original master to teach the same, or a similar, course. A textbook that circulates widely enough becomes a *de facto* standard, and classes taught from it, by whomever, become likewise standardized. The *Decretum*, and classes taught from it or its abbreviations, attained the status of *de facto* standards across much of Europe very quickly—within the two decades between 1140 and 1160. I believe that the new evidence previewed above suggests that while we owe the intellectual substance of at least the first recension of the *Decretum* to Gratian, we owe the words in which that substance was expressed to his students.[4]

The compilation and circulation of the *Decretum* led directly to the formation of faculties of canon law across Europe. Faculties came into being as an institutional response to a new problem raised by standardized classes taught from standardized textbooks: what are the requisite qualifications for the teaching of canon law? In some respects, early faculties were similar to other medieval guilds that regulated competition between

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[4] Gratian provided at minimum the outline for second part of the *Decretum*. How closely the logic and arguments of the *dicta* follow Gratian's classroom presentation, as opposed to being the student's own, cannot be determined using statistical authorship attribution methods.

masters in places where material and political conditions favored the concentration of many masters practicing the same craft in one place.[5] Faculties and craft guilds, however, differed in one important respect: while the most important product of the masters of the guild of shoemakers was shoes, the most important product of the masters of the faculty of canon law was, at least in the first generation, the next generation of masters of the faculty of canon law. The distinctive innovation of the faculty was the conferring of credentials or qualifications (to call them degrees is perhaps anachronistic) on students who completed a prescribed sequence of standardized courses, defined in such a way that the requirements for completion for students coincided with those for admission to teaching. The faculty was a crucial intermediate stage in the institutional evolution from school to university, one that has been obscured by the retrospective myth-making of famous universities, which, once established, sought to enhance the lustre of their names by projecting their origins as far

[5] For example, see R. W. Southern, *Scholastic Humanism and the Unification of Europe*, vol. 1 (Oxford, UK ; Cambridge, Mass., USA: Blackwell, 1995), 310–18, for a discussion of the role that material and political conditions played in the rise of Bologna and Paris as major academic centers.

as possible into the past.[6] It is perhaps going too far to claim that the *Decretum* was the textbook that created the university. It is not, however, going too far to recognize

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[6] "By the first decade of the thirteenth century the private schools of canon law had become part of the corporate structure of the universities in all three places [Bologna, Paris, and Oxford]." James A. Brundage, "The Teaching and Study of Canon Law in the Law Schools," 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), 98–99. Brundage here somewhat overstates the degree of institutional evolution the proto-universities had attained at this time. The corporate structure of the university had fully emerged by the first decade of the thirteenth century only at Bologna. It did not do so at Paris and Oxford until the second decade of the century. The standard handbooks on the history of the university in medieval Europe, Hastings Rashdall, *The Universities of Europe in the Middle Ages*, A new edition, ed. by F. M. Powicke and A. B. Emden (London: Oxford Univ. Press, 1936). and Hilde de Ridder-Symoens, ed., *Universities in the Middle Ages*, History of the University in Europe, v. 1 (Cambridge [England] ; New York: Cambridge University Press, 1992), are less helpful on this point than might be hoped.

Bologna: "Bologna vies with Paris for the title of oldest and most distinguished university of medieval Europe, but whereas Paris was essentially a guild of masters, Bologna was in origin an association of students. The *universitas scholarium* emerged around 1190 as an organization of the non-Bolognese law students resident in the city, and rapidly developed a complex constitution rather like that of contemporary communes." J. K. Hyde, "Bologna, University of," in *Dictionary of the Middle Ages*, ed. Joseph R. Strayer, vol. 2 (New York: Scribner, 1982), 311.

Oxford: "The origins of the university are shrouded in obscurity." Damian Riehl Leader, "Oxford University," in *Dictionary of the Middle Ages*, ed. Joseph R. Strayer, vol. 9 (New York: Scribner, 1982), 320. "Oxford probably developed in the twelfth century out of an informal group of masters teaching near St. Mary's Church. Among the first known masters was Theobald of Étampes, who was lecturing before 1100 (ca. 1095) and continued until about 1125. This group of scholars seems to have increased markedly following Henry II's prohibition of foreign study in 1170, and by 1185 Gerald of Wales (Giraldus Cambrensis) recorded that they were organized into several faculties (*doctores diversarum facultatum*), which, although likely an exaggeration, indicates there was a varied group of scholars. This development is implied by several other late twelfth-century authorities as well." Leader, 320. "The university was first recognized as a legal corporation by a legatine ordinance of 1214, ending a dispersal of the university following a riot with the townsmen in 1209." Leader, 320.

that its existence was a necessary precondition for the emergence of the faculty of canon law.

In creating his new textbook, Gratian blazed a trail for canon law that theology followed about two decades later. The appearance around 1160 of Peter Lombard's *Sentences* served as the catalyst for a similar transformation of theology into a rigorous academic discipline taught from a standardized textbook in the context of a formally organized curriculum by a degree-granting faculty, and for the displacement of more loosely organized regional schools, such as the one at Laon, by the preeminent theology faculty of Paris.

Paris: "The school of Notre Dame Cathedral on the Cité, and the Abbey of St. Victor and the collegiate church of Ste. Geneviève on the Left Bank of the Seine had already by the end of the twelfth century attracted such famous masters as Hugh of St. Victor, Peter Abelard, Stephen of Tournai, and Peter Lombard. In 1180 Alexander Neckham was able to write of an 'honorable society of masters' who were teaching arts, theology, canon law, and medicine, disciplines that would later form the four faculties of the university. At this time, the right to teach (*licentia docendi*) and therefore to become a master was given out by the chancellor of the cathedral chapter of Notre Dame." Astrik L. Gabriel, "Paris, University of," in *Dictionary of the Middle Ages*, ed. Joseph R. Strayer (New York: Scribner, 1982), 408. "The masters organized themselves into an association between 1180 and 1210, later called *universitas magistrorum et discipulorum*, and both kings and popes granted it protective privileges." Gabriel, 408. "In the beginning, Paris church officials opposed the formation of this independent society, which claimed legal status and its own seal. The papacy, however, sided with the university. Rules regulating its operation, called 'statutes', were granted in 1215 by Robert Courson, papal legate, and these dealt specifically with curriculum and textbooks." Gabriel, 408.

In the first decades of the thirteenth century, both the faculties of canon law and the *Decretum* settled into their permanent places in the organization of medieval academic life, as the faculties of canon law became part of the university (a corporation encompassing several faculties such as those of arts, law, and theology), while the focus of legal scholarship in canon law gradually shifted from the "old law" of Gratian to the "new law" of papal decretals.[7]

Recent complaints about the corporatization of the university notwithstanding, *universitas* means corporation.[8] We think of a corporation as a commercial entity, but medieval legal thinkers looked upon the corporation at a more basic level, as a means for legally creating an artificial, collective person, and then investing that "person" with rights and privileges that could otherwise only be held by a natural person or persons, such as the right to own property and the standing of a litigant in courts of law. The

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[7] This distinction between old and new law comes from the preface of Bernardus Papiensis (†1213) to his Breviary of *Extravagantia* or First Compilation, c.1191. Somerville and Brasington, *Prefaces to Canon Law Books in Latin Christianity*, 219, 230–31

[8] Jacques Verger, "Patterns," in *Universities in the Middle Ages*, ed. Hilde de Ridder-Symoens, History of the University in Europe, v. 1 (Cambridge [England] ; New York: Cambridge University Press, 1992), 37–41.

most fundamental right of a corporation, however, was the right of self-governance, including the right of the corporation to select its own leadership. The classic medieval example of corporate self-governance was the right of a cathedral chapter to elect a bishop. For an academic faculty, the exercise of the right of corporate self-governance took the particular form of determining the qualifications for teaching, something often contested by the local bishop.[9] The incorporation of several faculties as a university provided a form of organization well-adapted for achieving both permanence and

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[9] "Four steps would seem to have been pre-eminently necessary to give to mere customary meetings of masters for the initiation of new members or similar purposes the character of a definite and legally recognized corporation: (1) the reduction of their unwritten customs to the form of written statutes or by-laws, (2) the recognition or (if authoritative recognition was unnecessary) the exercise of the right to sue and be sued as a corporation, (3) the appointment of permanent common officers, (4) the use of a common seal." Rashdall, *The Universities of Europe in the Middle Ages*, 299.

Medieval law knew no regular procedure for incorporation. Every effort to form a corporation therefore involved an intensive and frequently protracted effort to persuade the relevant authority, whether pope, emperor, king or commune, to grant the privilege. In addition, medieval legal thought tended to conceive of rights rather more concretely than modern legal systems do. Every right or privilege was thought of as coming at the expense of some other right-holder, and therefore attempts by the early universities to form corporations were contested by those, usually local bishops, at whose expense the exclusive right to confer a license to teach was being secured.

Although the right of a faculty or university to own property might be considered necessary to realizing any aspirations toward institutional permanence, in practice, academic corporations avoided property ownership in the twelfth and thirteenth centuries. Indeed, the fact that they tended to rent rather than own the lands and buildings they used could become a powerful weapon in the event of "town vs. gown" conflict, allowing the university to credibly threaten to relocate elsewhere, as the masters and students of Oxford did in 1209. Rashdall, 406.

independence from local ecclesiastical authority through the accumulation of legal rights and privileges. The faculties ensured their own long-term survival by incorporating within the larger university.

The *Decretum* remained the standard textbook for the prerequisite first course in canon law throughout the Middle Ages. Around 1190, however, while the evolution from faculty to university was still in progress, the focus of academic canonists shifted away from Gratian and toward the new jurisprudence of papal decretals. Scholarly attention devoted to the *Decretum* after 1190 tended to focus on improving its utility as a teaching text. Between 1214 and 1217, Johannes Teutonicus (c.1170-1245) compiled more than a half-century's worth of accumulated commentary on Gratian into the *Glossa Ordinaria*,[10] and Bartholomeus Brixiensis (fl.1234-1258) revised the ordinary gloss between 1234 and 1241.[11] By then, the interest of thirteenth-century teachers and students centered on a

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[10] 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), 82–86.

[11] Weigand, 88–91.

new advanced second course in canon law taught from Raymond de Peñafort's *Decretales Gregorii IX* (1234), edited from five earlier compilations of papal decretals that had become a teaching library of decretal law. The *Decretum* retained its status as a classic textbook but never again held the intellectual attention of the discipline in the way it had during the second half of the twelfth century.

The emergence of faculties of canon law in the second half of the twelfth century was a feature of a wider intellectual and social revolution. There had been a revival in Bologna of the formal study of Roman law during the second and third decades of the twelfth century. The immediate impetus for the revival was the recovery of the great *libri legales* from which law had been taught in the late Roman world, most important, the *Digest* of Justinian, because it provided the pattern for jurisprudence as a systematic intellectual activity.[12] The early Romanists therefore did not need to create textbooks for their students as Gratian had to for his.

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[12] The Digest was not recovered all at once, but in three parts: the *Digestum vetus* (Dig. 1.1-24.2), the *Infortiatum* (Dig. 24.3-38.17), and the *Digestum novum* (Dig. 39.1-50.17). Manlio Bellomo, *The Common Legal Past of Europe: 1000-1800*, Studies in Medieval and Early Modern Canon Law, v. 4 (Washington, D.C: Catholic University of America Press, 1995), 62–63. Wolfgang P. Müller, "The Recovery of Justinian's

The twelfth-century revolution in legal science did not take place in a vacuum. It took place because of the emergence, especially in Italy, of an increasingly urban and commercial society with many moving parts. Such a society needed a correspondingly complex and sophisticated legal system, and, because it had much in common, both culturally and materially, with the society of the late Roman world, it was able to borrow extensively from Roman law.

The emergence of distinct faculties of arts, law, and theology in the middle decades of the twelfth century gave rise to a rapidly proliferating number of major universities throughout Europe, recognizably continuous in form with those of the present day. The

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Digest in the Middle Ages," *Bulletin of Medieval Canon Law* 20 (1990): 1–29. Michael H. Hoeflich and Jasonne M. Grabher, "The Establishment of Normative Legal Texts: The Beginnings of the Ius Commune," 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), 5. The standard modern edition of the *Digest* can be found in Paul Krüger and Theodor Mommsen, eds., *Corpus Iuris Civilis* (Berolini: apud Weidmannos, 1928). There is a recent English translation of the *Digest* in Alan Watson, ed., *The Digest of Justinian* (Philadelphia, Pa: University of Pennsylvania Press, 1985). [See review in Charles Donahue, "On Translating the "Digest"," *Stanford Law Review* 39, no. 4 (1987): 1057–77.] There is an excellent facsimile edition of the *Codex Florentinus* (Firenze, Biblioteca Laurenziana, *sine numero*), the sixth- or seventh-century manuscript that served at least indirectly as the basis for the eleventh- and twelfth-century recovery of the *Digest* in Alessandro Corbino and Bernardo Santalucia, eds., *Justiniani Augusti Pandectarum Codex Florentinus* (Firenze: Olschki, 1988).

existence of standardized textbooks such as Gratian's *Decretum* and later Peter Lombard's *Sentences* was an absolutely essential precondition for the formation of academic faculties organized along formal disciplinary lines, offering standardized courses of instruction for their students. Those faculties in turn supplied the foundation for the medieval, and, by extension, the modern European university. Gratian's *Decretum* can be seen from the point of view of this series of historical developments as the textbook that set the stage for the emergence of the university.

Roman Law

There is good evidence that canon law emerged as a distinct, formally organized, academic discipline about two decades after Roman law and about two decades before theology. Therefore, any information that allows us to refine our knowledge of the dates by which those disciplines, but especially Roman law, emerged has considerable evidentiary value for the dating of the emergence of canon law as well. The current consensus among historians is that the teaching of Roman law got under way as an organized activity in Bologna between 1100 and 1110 and that the teaching of canon law got under way, also at Bologna, a little later, perhaps between 1120 and 1130.

It is first necessary to distinguish the body of Roman law formally codified in the sixth century under the emperor Justinian (†565) from the forms of Roman law that had survived through continuous use and adaptation in southern Europe from late antiquity into the eleventh century. Early medieval Europe had not forgotten Roman law, and, in particular, the *Lex Romana Visigothorum* or *Breviary of Alaric* (506), derived from the Theodosian Code (438), was a major source of Roman law concepts and terminology throughout the early middle ages. The codification produced by Justinian's commissioners under the guidance of Tribonian (†545?) received limited reception in the sixth century in those parts of Italy then under Byzantine control. However, it disappeared from view around the beginning of the seventh century. The last known reference to the *Digest* in the Latin-speaking and -writing West is found in a letter of pope Gregory I in 603.[13]

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[13] The reference is to Dig. 48.4.7.3. "XIII, 49 Iohanni defensori exempla legum tradit, secundum quas iudicet" in Dag Ludvig Norberg, ed., *S. Gregorii Magni Registrum Epistularum, Libri VIII-XIV, Appendix*, Corpus Christianorum. Series Latina, 140 A (Turnholti: Brepols, 1982), 1058–64. Translated as "13.49 Gregory to John, his defender, going to Spain. An example of a law," August 603, in John R. C. Martyn, trans., *The Letters of Gregory the Great*, Mediaeval Sources in Translation 40 (Toronto: Pontifical Institute of Mediaeval Studies, 2004), 863–66.

What was new in Italy from the late eleventh century on was the revival of the study and application of Roman law as codified in the *Corpus iuris civilis* of Justinian: the *Institutes*, the *Codex*, the *Digest* or *Pandects*, and the *Novels*. (The *Novels*, unlike the other volumes of Justinian's *corpus*, were originally written in Greek, and were known in this period in the form of a Latin translation, the *Authenticum*.) The first documentary evidence for this revival is a reference to the *Digest* found in the *Marturi placitum*, the record of a court case held in 1076 in present-day Poggibonsi in Tuscany.[14]

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[14] Cesare Manaresi, ed., *I Placiti Del "Regnum Italiae."*, Fonti Per La Storia d'Italia, Pubblicate Dall' Istituto Storico Italiano Per Il Medio Evo 97 (Roma: Tip. del Senato, 1955), 333–35. (no. 437) The *Marturi placitum* does not explicitly identify the passage in the *Digest* to which the citation refers, but the fact that the legal principle being invoked is *restitutio in integrum* is by itself sufficient to narrow it down to *Dig*. 4. Radding and Ciaralli identify the passage as *Dig*. 4.6.26.4 (with some wording borrowed from *Dig*. 4.1.5). Charles Radding and Antonio Ciaralli, *The Corpus Iuris Civilis in the Middle Ages: Manuscripts and Transmission from the Sixth Century to the Juristic Revival*, Brill's Studies in Intellectual History, v. 147 (Leiden ; Boston: Brill, 2007), 183–84. Nordillus, the judge, decided the case "*lege Digestorum libris inserta considerata* (after he considered the law inserted into the books of the *Digest*)" [translation suggested by Atria Larson]. The translation turns on the interpretation of the participial adjective *inserta*. "I think the straight-up 'inserted' makes sense here. The writer would seem to be noticing that the Digest is not itself *lex* but includes commentary on the *lex*, the written law, and refers to and inserts many elements of *lex* throughout." (Atria Larson, email to Paul Evans, July 21, 2017.) The alternative is to translate *inserta* as "introduced," describing a passage from the Digest that an advocate for one or the other of the litigants brought to the attention of the court in support of their case as having been "introduced." For an English translation of the *Marturi placitum*, see Bruce Clark Brasington, ed., *Order in the Court: Medieval Procedural Treatises in Translation*, Medieval Law and Its Practice 21 (Leiden: Brill, 2016). (See West Texas A&M University: Order in the Court: Medieval Procedural Treatises in Translation.)

Because of the title *Corpus iuris civilis*, "the body of civil law," Roman law was also referred to as civil law, and students, teachers, and practitioners of Roman law were referred to as civilians. Gratian, following Isidore of Seville (†636), used a much older definition: "*Ius civile est, quod quisque populus vel civitas sibi proprium divina humanaque causa constituit* (Civil law is what each people and each commonwealth establishes as its own law for divine or human reasons)."[15] Gratian, again following Isidore, referred to Roman law as the law of the Quirites (*Ius Quiritum*).[16]

The scholarly consensus that the teaching of Roman and canon law were going concerns in Bologna by around 1110 and 1130 respectively has had two notable recent dissenters, Charles Radding and Anders Winroth. Radding has proposed that the epicenter of the revival of the study of Roman law was not Bologna, but Pavia, and places the date somewhat earlier, in the late eleventh century. Radding's claim is that research into

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[15] D.1 c.8. *Decretum Gratiani*, First Recension, edition in progress. Anders Winroth, 3/21/2017, 2. English translation from Augustine Thompson and James Gordley, trans., *The Treatise on Laws: (Decretum DD. 1-20)*, Studies in Medieval and Early Modern Canon Law, v. 2 (Washington, D.C: Catholic University of America Press, 1993), 7.

[16] D.1 c.12. *Decretum Gratiani*, First Recension, edition in progress. Anders Winroth, 3/21/2017, 3.

Roman law developed from its having been used as an analytical tool for the explication of the central text of the Lombard legal tradition, the *Liber Legis Langobardorum* or *Liber Papiensis*. Radding's argument has not met with widespread acceptance.[17]

Anders Winroth is by far the more consequential dissenter from the consensus. He draws attention to the underdeveloped way in which Gratian uses Justinianic Roman law in what Winroth calls the first recension, the earliest version of the *Decretum* to survive in more than one manuscript.

There are only three places in the first recension of the *Decretum* that incorporate material taken directly from Justinianic Roman law sources: C.2 q.6 c.28 (an excerpt from the *Authenticum*), and C.15 q.3 cc.1-3 and C.15 q.3 c.4 (three excerpts from the *Codex* and four from the *Digest*).[18]

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[17] Charles Radding, *The Origins of Medieval Jurisprudence: Pavia and Bologna, 850- 1150* (New Haven: Yale University Press, 1988).

[18] Winroth, *The Making of Gratian's Decretum*, 146–48.

Gratian does not deploy the proper Justinianic shades of meaning to the concepts of ownership and possession when discussing the issue of *restitutio in integrum* in the first-recension version of C.3 q.1 d.p.c.2. Instead, he uses concepts and vocabulary that, Winroth argues, derive from pre-Justinianic Roman law sources such as the *Lex Romana Visigothorum*.[19]

Furthermore, there are places in the first recension where Gratian, in Winroth's opinion, would have reached different conclusions had he used Justinianic Roman law. He points to Gratian's treatment of false (or at least unsuccessful) accusers in C.2 q.3, and the penalties, including infamy, incurred by them. Gratian's analysis —he distinguishes three categories of false accusers based on material indirectly derived from the *Lex Romana Visigothorum*— is incompatible with the well-developed Justinianic jurisprudence on the subject.[20]

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[19] Winroth, 148–51.

[20] Winroth, 153–56.

But there is one question—C.15 q.3—in the first recension of the *Decretum* in which Gratian makes substantive use of Justinianic Roman law concepts and vocabulary as a part of his argument in the *dicta* and does so more or less correctly in Winroth's judgment. This is significant from Winroth's point of view, because it demonstrates that Gratian did not have an ideological objection to the use of Roman law, as Vetulani and Chodorow argued.[21] Rather, Winroth argues that where Gratian either failed to use Roman law, or used it incorrectly, it was because he lacked the knowledge of that tradition.[22]

For reasons that I will discuss more fully below, Winroth is convinced that the first recension of the *Decretum* cannot have been completed or entered circulation earlier than around 1140. The underdeveloped way in which Justinianic Roman law is used in

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[21] Chodorow explains Gratian's "deletion" of Roman law as a consequence of what he sees as Gratian's adherence to the party of the papal chancellor Haimeric and proponents of the Concordat of Worms (1122). 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 and Renaissance Studies, U.C.L.A., 5 (Berkeley: University of California Press, 1972), 60–63.

[22] Winroth, *The Making of Gratian's Decretum*, 151–53.

the first recension therefore leads Winroth to argue that the study and teaching of Roman law in Bologna had not progressed nearly as far by 1140 as the consensus holds.

Some corollaries to Winroth's argument that Roman law teaching got off to a late start are fairly far out of the mainstream. A notable example is his dating of the famous letter of an anonymous monk to abbot B (probably Bernard III Garin) of Saint-Victor, Marseille —the content of which Winroth has so memorably summarized as "[m]y donkey is dead, so I am going to law school"—to the 1180s rather than the 1120s. But it is extremely difficult to imagine that a letter that shows no apparent awareness that either civil (Roman) or canon law were being taught in Bologna can have been written in the 1180s.[23]

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[23] Anders Winroth, "Law Schools in the Twelfth Century," in *Mélanges En L'honneur d'Anne Lefebvre-Teillard*, ed. Bernard d' Alteroche et al. (Paris: Éd. Panthéon-Assas, 2009), 1060. For the text of the letter, see Jean Dufour, Gérard Giordanegno, and André Gouron, "L'attrait Des 'Leges': Note Sur La Lettre d'un Moine Victorin (Vers 1124/1127)," *Studia et Documenta Historiae et Iuris* 45 (1979): 504–29. For an English translation of the letter, see Anonymous, Letter to Abbot B[ernard III] of Saint-Victor, Marseille (1124/27) in Katherine Ludwig Jansen, Joanna H Drell, and Frances Andrews, eds., "Roman Law and Legal Studies: Three Texts (ca. 1124-66)," in *Medieval Italy: Texts in Translation*, trans. Sean Gilsdorf, The Middle Ages Series (Philadelphia: University of Pennsylvania Press, 2009), 167–72.

Kenneth Pennington has pointed to the *Authentica Habita* (1155/1158) issued by the emperor Frederick I (†1190), which has traditionally been taken as extending imperial protection to the law school of Bologna, its faculty, and its students.[24] Pennington makes the common-sense point that a privilege like this is unlikely to have been granted to an

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[24] "[O]mnibus, qui causa studiorum peregrinantur, scolaribus et maxime divinarum atque sacrarum legum professoribus hoc nostre pietatis beneficium indulgemus, ut ad loca, in quibus litterarum exercentur studium, tam ipsi quam eorum nuntii veniant et habitent in eis securi." Heinrich Appelt, ed., *Die Urkunden Der Deutschen Könige Und Kaiser*, vols. X, 2, Monumenta Germaniae Historica. Diplomata Regum et Imperatorum Germaniae (Berlin: Weidmannsche Verlagsbuchhandlung, 1979), 39. "[W]e bestow this pious gift upon all who travel for the purpose of study, students and especially teachers of divine and sacred laws: namely, that they as well as their messengers may travel safely to the place where they are engaged in the study of letters and safely dwell there." Jansen, Drell, and Andrews, "Roman Law and Legal Studies," 167–72.

The date of *Authentica Habita* is uncertain. Frederick ordered the constitution inserted into the *Codex* as an act of imperial propaganda. No medieval manuscripts of the *Codex* give a date for the proclamation. Early modern print editions of the *Codex*, however, associated it with the Diet of Roncaglia in November 1158, and modern editions have retained the ascribed date. Kenneth Pennington, "The Beginnings of Law Schools in the Twelfth Century," in *Les écoles Du XIIe Siècle*, ed. Cédric Giraud (Leiden: Brill, 2018). (p.20, fn.53 in MS Word version.) The uncertainty arises because a contemporary poem, the *Carmen de gestis Frederici I. Imperatoris in Lombardia* gives a first-hand account of an incident that took place near Bologna in 1155 in which Frederick, in response to a petition brought by a deputation of doctors and scholars from the city, issued a proclamation matching the description of *Authentica Habita*. Some modern scholars attempt to split the difference by accepting the November 1158 date for the version of the text that we have, but characterizing it as a re-issue of the 1155 proclamation described the *Carmen de gestis*. There appears to be no good reason to believe that *Authentica Habita* was promulgated twice, in 1155 and 1158, as opposed to just once, in 1155. In any event, the uncertainty (within a narrow and circumscribed range) about the date *Authentica Habita* was promulgated does not take anything away from the validity of the point Pennington is making.

institution just getting off the ground.[25] Winroth counter-argues that the privilege mentions neither Bologna nor those involved in legal studies specifically.[26]

I agree with the consensus that the teaching of Roman and canon law were going concerns in Bologna by around 1110 and 1130 respectively, but the reader should keep in mind that Winroth, a scholar whose point of view is not to be lightly dismissed, thinks otherwise.

In recent years, it has become obligatory to mention at this point in any discussion of the revolution in legal science the case of one Mengho, a resident of Bologna who was hanged in December 1299 after having been tortured into confessing to the theft of some

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[25] Kenneth Pennington, "A Short History of Canon Law from Apostolic Times to 1917," 2002, 17, http://legalhistorysources.com/Canon%20Law/PenningtonShortHistoryCanonLaw.pdf.

[26] It is true that *Authentica Habita* does not mention Bologna explicitly, but instead refers to "the place where they are engaged in the study of letters." But *Authentica Habita* does specifically mention "students and especially teachers of divine and sacred laws" so it is not clear to me why both Pennington and Winroth contest the latter point. "It [*Authentica Habita*] did not mention Bologna nor law students." Pennington, "The Beginnings of Law Schools in the Twelfth Century." (p.18 in MS Word version.) "The law [*Authentica Habita*] does not mention Bologna at all, nor does it mention studies of law." Anders Winroth, "The Teaching of Law in the Twelfth Century," in *Law and Learning in the Middle Ages*, ed. Mia Münster-Swendsen and Helle Vogt (Copenhagen: DJØF, 2006), 41–62. (pp.7-8 in MS Word version.) "The Teaching of Law in the Twelfth Century" has since been superseded by "Law Schools in the Twelfth Century," which does not mention *Authentica Habita*.

bolts of fabric. There was not in 1299, nor is there now, much doubt as to Mengho's guilt—a search of his residence was carried out during the course of the investigation into the crime and he was found to be in possession of the stolen goods, a state of affairs that he was unable to credibly explain. Neither can it be seriously doubted that Mengho's case was conducted according to the due process standards prevailing in that time and place. Full proof necessary to convict a criminal defendant (*reus*) under Roman law required either a confession or the testimony of two witnesses, testimony unlikely to be forthcoming in the case of a crime of stealth, such as Mengho's, committed at night. In the absence of a voluntary confession or the testimony of witnesses, torture of the defendant in order to obtain an involuntary confession was simply the next routine step of due process. Indeed, Hermann Kantorowicz (†1940) brought the story of Mengho to the attention of medieval legal historians, and it remains well known today, precisely because Kantorowicz considered it a textbook example of inquisitorial (as opposed to adversarial) procedure under the *ordo iudiciarius* derived from Roman law.[27]

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[27] Hermann Kantorowicz, *Albertus Gandinus Und Das Strafrecht Der Scholastik*, vol. 1: Die Praxis (Berlin: J. Guttentag, 1907), 203–18. See also Kenneth Pennington, "Law, Criminal Procedure," in *Dictionary of the Middle Ages. Supplement 1*, ed. William C. Jordan (New York: Scribner, 2004), 309–20.

The fact that Mengho was tortured and executed was not the point of the story for Kantorowicz, but it is for us. In the twenty-first century, the story of Mengho is brought up to make a particular point. There is a powerful scholarly tradition going back at least to Charles Homer Haskins of presenting the revolution in legal science as an intellectual triumph that took place in the classroom.[28] All revolutions, including the revolution in legal science, have winners and losers, and some of the losers we do not feel very sorry for.[29] But what happened in the classroom ultimately had consequences in the courtroom, consequences that were enacted on the rights and property, on the bodies and lives, of women and men in the real world.

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[28] Charles Homer Haskins, *The Renaissance of the Twelfth Century* (Cambridge: Harvard University Press, 1927).

[29] R.I. Moore observes that the establishment of the new order brought about by the legal revolution "required another change, no less profound: the replacement of warriors by literate clerks as the agents of government and the confidants of princes." R. I. Moore, *The Formation of a Persecuting Society: Authority and Deviance in Western Europe, 950-1250*, 2nd ed (Malden, MA: Blackwell Publishing, 2007), 128.