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 (R1) has two parts, while the most widely circulated version (R2) 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 (R1) version with the most widely circulated (R2) version for the purpose of determining authorship of those parts of the text traditionally attributed to Gratian himself. Part III is not found in R1, therefore direct comparison is not possible. In

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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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 overall.[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 right up until 1917, and exercised enormous influence over the 1917 and 1983 codifications of canon law that replaced the old *Corpus*.

The *Decretum* was arguably the first book in the European tradition written from the ground up as a university textbook. (Abelard's *Sic et Non* is the other book for which such an argument might be advanced.)

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-Bibliographic Guide to Medieval and Early Modern Jurists hosted by the Ames Foundation at Harvard University.

Gratian's exposition of his method – the *content* of the *Decretum* – transformed the study of canon law into a rigorous academic discipline. The existence of the *Decretum* transformed the social context for the teaching and study of canon law. It seems likely that Gratian's own teaching took place in a fairly informal and unstructured environment: a master surrounded by a circle of students for whose studies he provided a focus. But the existence of a standardized textbook paved the way for academic faculties formally organized along disciplinary lines to offer standardized courses of instruction and to confer degrees on those who completed them. Within a few generations, and certainly by the end of the twelfth century, organized faculties of canon law had largely displaced – at least at major centers such as Bologna, Paris, and Oxford – informal gatherings of students around a master, although the older model probably continued at more peripheral schools.[4]

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[4] "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.

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,

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* of the late Roman world, most important, because it provided the pattern for jurisprudence as a systematic intellectual activity, the *Digest* of Justinian.[5] The twelfth-

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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.

[5] 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 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).

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 with the society of the ancient Roman world, it was able to borrow extensively from Roman law.

Gratian, in compiling the *Decretum*, solved a problem for the new academic discipline of canon law that his counterparts teaching Roman law had sidestepped: the Romanists had not needed to create textbooks for their students because they had recovered the textbooks from which the law had been taught in late antiquity. By doing so, 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.

The emergence of distinct faculties of Roman law, canon 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 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.[6]

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*, translated from Greek into Latin in the form of 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.[7]

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[6] 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.

[7] 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

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)."[8] Gratian, again following Isidore, referred to Roman law as the law of the Quirites (*Ius Quiritum*).[9]

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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.)

[8] 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.

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

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 Roman law developed from its having been used as an analytical tool for the explication of the central text of the Lombard law tradition, the *Liber Legis Langobardorum* or *Liber Papiensis*. Radding's argument has not met with widespread acceptance.[10]

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.[11]

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

[11] **Defined so as to sidestep (for now) the controversy over Sg.**

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*).[12]

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, Gratian uses concepts and vocabulary that, Winroth argues, derive from pre-Justinianic Roman law sources such as the *Lex Romana Visigothorum*.[13]

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

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

[13] Winroth, 148–51.

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.[14]

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.[15] Rather, Winroth argues that where Gratian either failed to use Roman law, or used it incorrectly, it was because he lacked the knowledge to do so.[16]

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[14] Winroth, 153–56.

[15] 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. **Extend footnote to include views of Vetulani.**

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

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 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.[17]

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[17] 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

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.[18] Pennington makes

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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.

[18] "[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 with Rainer Maria Herkenrath, and Walter Koch, eds., *Friderici I. Diplomata inde ab a. MCLVIII usque ad a. MCLXVII*, vol. 10/2, MGH DD F I (Hannover: Hahn, 1979), 39. **Regenerate footnote from Zotero, BibTeX, and Pandoc.** 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)

the common-sense point that a privilege like this is unlikely to have been granted to an institution just getting off the ground.[19] Winroth counter-argues that the privilege mentions neither Bologna nor those involved in legal studies specifically.[20]

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

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about the date *Authentica Habita* was promulgated does not take anything away from the validity of the point Pennington is making.

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

[20] 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*.

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 bolts of fabric. There was not in 1299, nor is there now, much doubt as to Mengho's guilt – a search of his place of 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 committed at night such as Mengho's. In the absence of a voluntary confession or witness testimony, 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.[21]

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 (1927) of presenting the revolution in legal science as an intellectual triumph that took place in the classroom. All revolutions, including the revolution in legal science, have winners and losers, and some of the losers we do not feel very sorry for.[22] 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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[21] 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.

[22] 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.

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