



9-1-2014

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Recommended Citation

Kenneth Pennington, *The Biography of Gratian, the Father of Canon Law*, 59 Vill. L. Rev. 679 (2014).

Available at: <http://digitalcommons.law.villanova.edu/vlr/vol59/iss4/5>

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2014]

THE BIOGRAPHY OF GRATIAN, THE FATHER OF CANON LAW

KENNETH PENNINGTON*

“WHO was Gratian?” asked John T. Noonan, Jr. at the beginning of his classic essay on the biography of the Father of Canon Law. He continued:

That Gratian was the author of the *Concordia discordantium canonum*; that he was a teacher at Bologna; that he was a monk; and that he was a Camaldolese are assertions made by all twentieth-century historians of canon law. That he was dead by 1159 is also often added as a fact, that his school was at the monastery of Saints Felix and Nabor is sometimes stated as certain or probable, and that he was born at Ficulle near Carraria or at Chiusi is occasionally noted as likely. An authoritative history adds that he was probably educated as a monk at Classe in Ravenna. From these statements, meager as they are, a distinct picture emerges of a scholar, bound to a particular monastic tradition, and circumscribed by particular places and dates.¹

At the end of his essay and after a vigorous use of Ockham’s razor, Noonan concluded that:

[W]e have reason to believe that Gratian composed and commented upon a substantial portion of the *Concordia*. In such composition and commentary he revealed himself to be a teacher with theological knowledge and interests and a lawyer’s point of view. He worked in Bologna in the 1130s and 1140s. Beyond these conclusions, we have unverified hearsay, palpable legend, and the silent figure in the shadows of S. Marco.²

Since John Noonan’s superb historical detective work using the standard tools of criticism with admirable dexterity, we have added some very important, undoubted facts to Gratian’s biography. After Anders Winroth’s splendid discovery of an earlier recension of Gratian’s *Decretum* in the

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1. John T. Noonan, Jr., *Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law*, 35 *TRADITIO* 145, 145 (1979) [hereinafter Noonan, *Gratian Slept Here*]. Noonan also wrote a very insightful essay about *Causa* 29 in which Gratian introduced the principle “error of person,” a concept that is still an important norm in canonical marriage law (*Codex iuris canonici* c.1097 § 1). See John T. Noonan, Jr., *The Catholic Law School—A.D.1150*, 47 *CATH. U. L. REV.* 1189 (1998) [hereinafter Noonan, *Catholic Law School*].

2. Noonan, *Gratian Slept Here*, *supra* note 1, at 172.

1990s and the work of other scholars inspired by his discovery, we can also state with absolute certainty that Gratian compiled and commented on the *Decretum* in stages.³ For that reason, in this Essay, I shall abandon the terminology of “Gratian I” and “Gratian II.” Referring to the stages of the *Decretum* as “Gratian I” and “Gratian II” gives a misleading picture of uniformity in how the *Decretum* evolved. Gratian and later jurists who taught and used the book never thought of it as a fixed text. They added canons to it at all stages of its evolution. In this Essay, I will use the terms pre-Vulgate and Vulgate to refer to Gratian’s great law book. By Vulgate, I mean the text that became the basic, introductory canon law text sometime around 1140, without the numerous “paleae” added later in the twelfth century.⁴

The research on the pre-Vulgate manuscripts has been enormously interesting and, not surprisingly, has created areas of disagreement about aspects of Gratian’s life, work, and teaching. These scholarly debates have given birth to a fruitful and vigorous exploration into the teaching and development of law in the first half of the twelfth century.⁵ The issues are many. Perhaps the most important is the lack of consensus about how long Gratian worked on the *Decretum* and how long he taught. That will be the focus of this Essay.

To further complicate the story of Gratian, Winroth has argued that there were two Gratians. The first Gratian compiled the pre-Vulgate *Decretum* that Winroth discovered; a second “Gratian”—*persona incog-*

3. See ANDERS WINROTH, *THE MAKING OF GRATIAN’S DECRETUM* 49 (2000); see also Melodie H. Eichbauer, *Gratian’s Decretum and the Changing Historiographical Landscape*, 11 HISTORY COMPASS 1111 (2013) (presenting most recent discussion of historiographic problems discussed in recent literature with rich bibliography). Orazio Condorelli has written the most recent biography of Gratian. See Orazio Condorelli, *Graziano*, in DIZIONARIO BIOGRAFICO DEI GIURISTI ITALIANI (XII–XX SECOLO) 1058–61 (Italo Birocchi, Ennio Cortese, Antonello Mattone & Marco Nicola Miletti eds., 2013).

4. See Peter Landau, *Gratian and the Decretum Gratiani*, in THE HISTORY OF MEDIEVAL CANON LAW IN THE CLASSICAL PERIOD, 1140–1234: FROM GRATIAN TO THE DECRETALS OF POPE GREGORY IX 22, 47–48 (Wilfried Hartmann & Kenneth Pennington eds., 2008).

5. See, e.g., Anders Winroth, *The Teaching of Law in the Twelfth Century*, in LAW AND LEARNING IN THE MIDDLE AGES: PROCEEDINGS OF THE SECOND CARLSBERG ACADEMY CONFERENCE ON MEDIEVAL LEGAL HISTORY 2005 41 (Helle Vogt & Mia Münster-Swendsen eds., 2006) (arguing that teaching of Roman and canon law did not begin until 1130s). I have presented evidence that Roman law was cited in court cases and was taught much earlier, probably as early as the traditional dates for the beginnings of the law school in Bologna, circa 1075–1100. See Kenneth Pennington, *The “Big Bang”: Roman Law in the Early Twelfth-Century*, 18 RIVISTA INTERNAZIONALE DI DIRITTO COMUNE 43 (2007) [hereinafter Pennington, *Big Bang*]; see also Kenneth Pennington, *The Beginning of Roman Law Jurisprudence and Teaching in the Twelfth Century: The Authenticæ*, 22 RIVISTA INTERNAZIONALE DI DIRITTO COMUNE 35 (2011) [hereinafter Pennington, *Roman Law Jurisprudence*]; Kenneth Pennington, *Roman Law at the Papal Curia in the Early Twelfth Century*, in CANON LAW, RELIGION, AND POLITICS: LIBER AMICORUM ROBERT SOMERVILLE 233 (Uta-Renate Blumenthal, Anders Winroth & Peter Landau eds., 2012).

nita—doubled the size of the Vulgate *Decretum* during the 1140s. There is very little evidence for his conjecture.⁶ He was compelled to create a second Gratian because he had shrunk Gratian's teaching career to only a few years. I will examine his reasons for doing so below. My main argument for not accepting the theory that there were two Gratians is quite simple. It is difficult to imagine that if a Gratian compiled the pre-Vulgate *Decretum*, and another person doubled the size from circa 2000 canons to circa 4000, the first generation of jurists after Gratian would have not noticed or not known about the second Gratian's work and blithely attributed what was now a massive work to just "Gratian." Further, as we shall see, the additional canons were not added in one fell swoop, but over time. Gratian may have had an atelier of assistants, but it seems unlikely that another completely unknown person would step in to complete the Vulgate *Decretum* with not only many canons but also dicta which all the later jurists recognized as Gratian's.

The main reason that Winroth created a second "Gratian" is because of a text that is found in all the pre-Vulgate manuscripts. At D.63 d.p.c.34 Gratian cited a papal conciliar canon. The passage is contained in all pre-Vulgate manuscripts and also in the Vulgate *Decretum*:

Nunc autem sicut electio summi pontificis non a cardinalibus tantum, immo et^a ab aliis religiosis clericis^b auctoritate Nicolai papae est facienda, sic^c episcoporum electio^d non a canonicis tantum, set^e ab aliis religiosis clericis, sicut in generalif synodo^g Innocentii pape Rome^h habita constitutum est.ⁱ

^a et] etiam PFdBcAa BiFsMeMIMzPd ^b uiris uel clericis BiPd ^c sic] ita et PFdBcAa BiFsMeMzPd, ita MI ^d lectio Bi^{ac} set] set etiam PBcAa BiFsMeMIMzPd set etiam^{ac}, immo etiam^{bc} Fd^f gnala^{ac}, gnalas^{bc} Fd ^g studio *add. ante synodo* Bi^{acg} Roma Me^h constitutum

6. His main argument is that the Vulgate *Decretum* is not as well organized as the pre-Vulgate. As I have pointed out in other examples of jurists expanding their texts, their methodology of revising texts inevitably leads to a lack of clear argumentation. See Kenneth Pennington, *An Earlier Recension of Hostiensis's Lectura on the Decretals*, 17 BULL. MEDIEVAL CANON L. 77 (1987); Kenneth Pennington, *Johannes Andreae's Additiones to the Decretals of Gregory IX*, 74 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE KANONISTISCHE ABTEILUNG 328 (1988); Kenneth Pennington, *Panormitanus's Lectura on the Decretals of Gregory IX*, in FÄLSCHUNGEN IM MITTELALTER: INTERNATIONALER KONGREß DER MONUMENTA GERMANIAE HISTORICA MÜNCHEN, 16–19. SEPTEMBER 1986: GEFÄLSCHTE RECHTSTEXTE: DER BESTRAFTE FÄLSCHER 363 (1988). Winroth has also argued that Gratian changed his mind in his treatment of the marriage of unfree persons. See Anders Winroth, *Neither Free nor Slave: Theology and Law in Gratian's Thoughts on the Definition of Marriage and Unfree Persons*, in MEDIEVAL CHURCH LAW AND THE ORIGINS OF THE WESTERN LEGAL TRADITION: A TRIBUTE TO KENNETH PENNINGTON 97 (Wolfgang P. Müller & Mary E. Sommar eds., 2006). I do not find his argument convincing. There are many changes in emphasis and topics as the *Decretum* evolved. These changes are not proof that someone else made them, e.g., Gratian's treatment of Jews. See Kenneth Pennington, *The Law's Violence Against Medieval and Early Modern Jews*, 23 RIVISTA INTERNAZIONALE DI DIRITTO COMUNE 23 (2012).

est] *add. ait enim: Obeuntibus sane episcopis . . . add. Aa in textu, add. Bc in marg.*⁷

In translation:

Now, however, just as the election of the supreme pontiff is not made only by the cardinals but by other religious clerics, as was established by Pope Nicholas II's authority, so too not only canons of the cathedral chapter but also other religious clergy participate in the election of bishops as was established in the general synod of Pope Innocent held in Rome.

Gratian's comment is the last datable text in the pre-Vulgate manuscripts. Pope Innocent II was the bishop of Rome from 1130 to 1143. If one is convinced, as Winroth and others are, that this text can refer only to c.28 of the Second Lateran Council, then one is faced with an almost intractable problem.⁸ In the pre-Vulgate manuscripts, this text is the only one that can be dated after circa 1125. That fact, if true, would raise the question: what was Gratian doing between circa 1125 and 1139; or to put the question differently, why would Gratian have compiled a collection of canon law in the late 1130s that ignored all the conciliar legislation and papal decretals after circa 1125; or to add further complexity, why would Gratian add this reference in 1139 to a recent council and not add the text of the canon; or even more puzzling, why did he not refer to other canons of that singularly important council in his pre-Vulgate *Decretum*(s)?

In a recent article, Atria Larson has attempted to provide a possible answer to some of those questions by arguing that, since late eleventh and early twelfth century councils generally—and Innocent II's councils in particular—repeated canons of previous councils almost word for word, one might explore the possibility that Innocent held a council in Rome before 1139 and that is the council to which Gratian referred.⁹ Larson went on to present evidence that Innocent might have held a council in Rome in 1133, and that council could be the one that Gratian cited. Since the canons of this council are not preserved and since there is no other evidence

7. See GRATIAN, *DECRETUM* [hereinafter *DECRETUM*]. I base the translation on St. Gall, Stiftsbibliothek 673 (Sg), 25–26 which I have collated with Paris, Bibliothèque nationale de France nov. acq. lat. 1761 (P), fol. 65va; Florence, Biblioteca nazionale centrale Conventi soppressi A.1.402 (Fd), fol. 12va.; Barcelona, Arxiu de la Corona d'Aragó, Santa Maria de Ripoll 78 (Bc), fol. 76rb; and Admont, Stiftsbibliothek, fol. 72v of the pre-Vulgate manuscripts, and with these very early Vulgate manuscripts: Biberach, Spitalarchiv B 3515 (Bi), fol. 57vb; Bremen, Universitätsbibliothek a.142 (Br), fol. sine numero; Mainz, Stadtbibliothek II.204 (Mz), fol. 44vb; Munich, Staatsbibliothek Clm 13004 (Me), fol. 78ra; and Clm 28161 (MI), fol. 53v; Paris, Bibliothèque nationale de France lat. 3884-1 (Pf), fol. 78ra, 14317, fol. 52va-vb (Pd). I have not recorded minor scribal errors here and in the text of *Obeuntibus* below.

8. See WINROTH, *supra* note 3, at 137.

9. See Atria A. Larson, *Early Stages of Gratian's Decretum and the Second Lateran Council: A Reconsideration*, 27 *BULL. MEDIEVAL CANON L.* 21, 37–39 (2007).

for it, her conjecture cannot be considered conclusive. Nonetheless, if correct, it would explain what Gratian was doing in the 1120s and early 1130s: teaching canon law in Bologna and working on his textbook. He did not finish the pre-Vulgate *Decretum* circa 1140 but rather circa 1133.

Three of the pre-Vulgate manuscripts added the text and a rubric to c.28. The Florence and Barcelona manuscripts placed the canon in the margins of their main texts. Florence also had it in the supplementary appendix at the back of the manuscript. It is striking and important that the marginal and supplemental texts of the canon in Florence are clearly from two different textual traditions and must have been added at different times. The Admont manuscript incorporated it into the body of Gratian's text:

Sicut in generali sinodo Innocentii papae Romae habita constitutum est. Ait enim: Absque religiosorum uirorum consilio canonici maioris ecclesie episcopum non eligant.^a Obeuntibus^b sane episcopis quoniam^c ultra tres^d menses uacare ecclesiam^e sanctorum patrum prohibent sanctiones^f sub anathemate^g interdiciamus, nec^h canonici de sede episcopaliⁱ ab electione episcoporum excludant religiosos uiros, set eorum consilio honesta et idonea persona^j in episcopum eligatur.^k Quod si^l exclusis^m religionis electio facta fueritⁿ, quod absque eorum consensu^o et conuentia^p factum fuerit, irritum habeatur^q et uacuum.

Collated: Fd^{in marg.} Fd^{in suppl.} AaBc^{in marg.} BiCdFsMeMzPdPfSa

^a Absque—non eligant Fd^{in suppl.} BcCdBiMeMzPdPfSa, om. Fd^{in marg.} Aa^b Abeuntibus Fd^{ac, in suppl.} BcMz^{pc} Pf^c quo Aa^d tres om. Aa^{ac}, add. super lin. iii. Aa^{pc} ecclesias COGD2^f prohibent patrum sanctiones tr. COGD2 anathematis uinculo CdFsMzPd^h ne Aa^{pc}, ne Fd^{in suppl.} BiCdFsMeMzPdPfSa COGD2ⁱ episcoporum Fd^{in suppl.} j honestam et idoneam personam Fd^{in suppl.} CdMeMIMz^k eligant Fd^{in suppl.} BcCdMeMIMz^l si om. Aa^{acm} exclusis] eisdem add. COGD2ⁿ facta fuerit] fuerit celebrata COGD2, legi non potest Fd^{in marg.}, fuerit Fs, fuerit facta tr. Pf^o consensu eorum tr. Mz^p conuentia Aa: continentia Fd^{in marg.}, covenientia Sa^{ac}, conuenientia Fd^{in suppl.} BcBiCdFsMeMIMzPfSa^{pc} COGD2, coniuentia Pd, var. in apparatu COGD2^q habeant Fs¹⁰

10. Fd is the base text that is collated with AaBc, the manuscripts listed above in note 7, and with the text in 2.1 CONCILIORUM OECUMENICORUM GENERALIUMQUE DECRETA (Antonio García et al. eds., 2013). 113=COGD2 omits "Ait enim" of Gratian's dictum. The new edition of COD³ did not introduce any changes into the text. The COGD2's reading of "conuenientia," which generally means a meeting, seems less likely than the reading in Aa, which means "consent." "Coniuentia" can be found in many twelfth century sources in contexts in which it means "consent."

In translation:

Indeed he [Innocent] says: *Without the counsel of religious men the canons of the major church may not elect a bishop.* Since the decrees of the holy fathers prohibit a church to be left vacant for more than three months, we forbid that under anathema and also that the canons of the episcopal see may not exclude religious men from the election of bishops. Rather with their counsel may an honest and worthy person be elected bishop. But if an election is carried out that excludes those religious men, because it was made without their consent and agreement, the election shall be held to be invalid and vacated.¹¹

Although the manuscript tradition of the Second Lateran Council is rich, there has not yet been a critical edition of the canons. The text in Aa, Bc, and Fd, in other words, cannot provide a proof of its origin by comparing it to any current printed edition. Nonetheless, one significant variant in this canon gives pause. Gratian's text has "facta fuerit," whereas all twenty manuscripts containing this canon from Lateran II that Martin Brett has collated have the reading "fuerit celebrata." "Celebrare" is the verb that one would expect in a papal conciliar decree. The other textual evidence is the word "consensus" in the pre-Vulgate manuscripts instead of "assensus," in the manuscripts of Lateran II that Brett has collated. "Consensus" is juridicially more precise. These two pieces of textual evidence are not, however, a conclusive proof that Gratian's source for this text was not the Lateran II decrees, but it does introduce a modicum of doubt.¹²

What one may more confidently say is that the text in the three pre-Vulgate manuscripts provides further evidence that Gratian "tweaked" his pre-Vulgate *Decretum* after it began to circulate. Of the three pre-Vulgate manuscripts, Florence, Barcelona, and Admont, in which the text of *Obeuntibus* is present, in Florence and Barcelona it is a marginal addition. In Admont, however, it is inserted into the body of the *Decretum*. That does not prove that the inserted text is from Lateran II or from an earlier council, but it does lead one to the conclusion that the canons added later to the Vulgate *Decretum* circulated in stages and were not received at other law schools at one time. The evidence for that last statement is contained in the texts, margins, and appendices of pre-Vulgate manuscripts. They

11. Translation based on Norman Tanner's with minor changes. See 1 *Decrees of the Ecumenical Councils*, NICAEA I-LATERAN V, at *203 (Norman Tanner ed., 1990); 2 *TRENT-VATICAN II* (Norman Tanner ed., 1990).

12. My thanks to Professor Martin Brett for providing me with his preliminary edition of c.28. I am currently working on an "edition" of the canons attributed to Pope Innocent II in all the early manuscripts which will be published this year. The results to date have provided evidence that none of the canons may be attributed to Lateran II. The differences between the canons of Lateran II that Brett has edited and those that Gratian incorporated into his *Decretum* are many and significant. I will publish an edition of the canons attributed to Innocent II in the *Decretum* in the near future.

provide textual evidence that the Vulgate canons were not copied into pre-Vulgate manuscripts from complete Vulgate texts.¹³

There is further evidence in the pre-Vulgate manuscripts that Gratian probably never conceived of his work as a definitively finished product. In the Paris (P), Florence (Fd), and Barcelona (Bc) manuscripts, Distinctions 100 and 101 and the canons of D.99 after c.1 are missing.¹⁴ In Fd, additional texts are inserted by a later hand. However, the scribe of Fd's main text may have known more Distinctions were coming because he ended D.99 c.1 with the notation "§ d.c. (Distinction 100)." The scribe of Admont (Aa) included pre-Vulgate Distinctions 100–101 in the main text. Barcelona added them on an inserted folia. The only conclusion that can be drawn from this textual evidence is that these manuscripts reflect slightly different stages of a pre-Vulgate text that circulated over a wide geographical area. There was a pre-Vulgate *Decretum* circulating with 99 Distinctions and 36 *Causae*. This version reached Northern France (P) and the Iberian Peninsula (Bc). Scribes in Italy learned of two new Distinctions (Fd), left space for them with a notation, and added them later. In Bc, the revisions of the text were handled differently. Originally, the text omitted D.100–101 completely. A folio was inserted into the manuscript at a later time, and D.100–101 of the Vulgate text were included in their entirety.¹⁵ The Admont scribe had an expanded pre-Vulgate *Decretum* at hand and incorporated parts of D.100–101 into the text.¹⁶ The scribe, however, excluded most of the Vulgate text.¹⁷

How much time would have elapsed for these different stages of the text to have circulated to Northern and Western Europe? Again, the evi-

13. *Contra* WINROTH, *supra* note 3, at 130–33 ("The first recension of the *Decretum* was not a living text. It was a finished product which its author considered ready to be circulated. . . . I know of no manuscript (beyond Aa) which contains a version of the *Decretum* that is longer than the first recension but shorter than the second and that could be an intermediate stage . . ."). However, as Melodie Harris Eichbauer has demonstrated, if the canons added to Fd, Bc, and Aa were entered into the body of a new *Decretum*, it would not equal a Vulgate text. See Melodie H. Eichbauer, *From the First to the Second Recension: The Progressive Evolution of the Decretum*, 29 BULL. MEDIEVAL CANON L. 119, 150–53 (2012).

14. See DECRETUM, *supra* note 7 (Paris, Bibliothèque Nationale de France nov. acq. lat. 1761 (P), fol. 83v; Florence, Biblioteca nazionale centrale Conventi soppressi A.1.402 (Fd), fol. 18vb-19ra). Fd added the omitted texts in a hand that is similar to the other marginalia and textual corrections in the manuscript. The hand of the main text ended on fol. 18vb with the notation: "§ d.c.", i.e. "distinctio centum", which may indicate that the scribe knew that additional text would be made available. The scribe left room for the additional text. In P, the scribe left room after the last words of D.99 c.1., but the space would not have been sufficient for D.100 and 101. Winroth overlooked those omissions in his analysis. See WINROTH, *supra* note 3, at 204. In Bc, the missing texts are added on a new folio.

15. There was not enough room on folio 98r–98v for the entire text. The scribe squeezed D.100 d.p.c.8 to D.101 c.1 into the left hand margin of 98v. For a discussion on the inserted leaves in Bc, see Eichbauer, *supra* note 13, at 126–27.

16. See DECRETUM, *supra* note 7 (Aa fol. 92v-93r).

17. Admont also added D.99 c.4, 5, and D.101 c.1 to the main text of the *Decretum*.

dence does not provide us with any clues beyond the text itself. One may say, however, that the geographical spread of the manuscripts alone would dictate that the time for these texts to circulate could not have been less than a few years before they reached Northern France and the Iberian Peninsula. What was Gratian doing during those years? I would say: teaching and expanding his text in Bologna.

More can be said about the stages evident in pre-Vulgate texts. Melodie Harris Eichbauer has done a careful study of the canons that were added to the margins and to appendices in the Florence and Admont manuscripts and to the margins of Barcelona.¹⁸ Winroth had concluded that these canons must have been taken from Vulgate exemplars of Gratian's text.¹⁹ I was puzzled from the beginning why a jurist, institution, or scribe would go to the trouble of creating an updated text that would have been so difficult to use. Eichbauer's study revealed that the appendices could not have been drawn from a Vulgate text. The proof is in the numbers and in the fact that they were added by different scribes at different times. As it is, neither Admont nor Florence has all of the canons that Gratian added when he compiled his Vulgate text.²⁰ The numbers are not small: Admont omits eighty-seven canons and Florence sixty-two from the Vulgate.²¹ Significantly, the omitted canons are different in each manuscript. If one puts the numbers a little differently, between the two manuscripts, circa 117 canons are missing from the Vulgate text. In percentage, circa 8% of the Vulgate's canons are not included in the margins or the appendices of these two manuscripts. These numerous omissions could not be attributed to sloppy, careless scribes. There are just too many missing canons. These numbers are the evidence for Eichbauer's conclusion that the canons added to the pre-Vulgate texts in Paris, Florence, Barcelona, and Admont must have been done in stages and over a period of time. Her evidence also points to Gratian having circulated a large bulk of the additions in one fell swoop but then having updated these additions afterwards.

There is one last powerful piece of evidence that militates against pushing the date of the Vulgate *Decretum* too far in the 1140s: the Second Lateran canons. Eichbauer's research has convinced me that Gratian did not add the canons of the Second Lateran Council in a flurry of last minute additions as scholars have previously believed. Gérard Fransen, more than fifty years ago, had argued that the Second Lateran's canons were hasty and last minute additions to the *Decretum*. At first glance, some of them, but not all, seem as if they were added without carefully integrating them into the flow of Gratian's arguments. In his study of the rubrics or

18. See generally Eichbauer, *supra* note 13 (especially her conclusions on pages 150–52).

19. See *id.* at 123 n.12.

20. Not taking the evidence of the Barcelona manuscript into account, which would not alter the picture substantially.

21. See Eichbauer, *supra* note 13, at 145.

summaries of the canons, Titus Lenherr found textual evidence that supported Fransen's conjecture.²² He charted the textual variants in the summaries and saw that they varied more frequently than was usual in *Decretum* manuscripts.

The pre-Vulgate manuscripts have confirmed that the canons were added only to the later stages of Gratian's text. However, they were not added at the last minute. Almost all of the canons attributed to Lateran II are in the margins or the appendices of the Florence and Admont manuscripts. The Florence manuscript, which is the earliest of the four pre-Vulgate manuscripts discovered by Winroth, omitted two canons attributed to Pope Innocent II completely.²³ One of those canons is also not to be found in Admont. The remaining canons were added to the appendices or to the margins of the pre-Vulgate manuscripts. One canon that was added to the appendix and the margin of Florence came from two different textual traditions, i.e., the text in the margin is different from the text in the supplement.²⁴ This is good evidence that the canons attributed to Lateran II were not added to the pre-Vulgate manuscripts at one time. Consequently, they cannot be texts that Gratian added in a final, rushed effort to complete the Vulgate as Lenherr has argued.

An even larger question looms over Innocent II's canons. Are they all, in fact, canons from Lateran II? In the Vulgate *Decretum*, modern scholars, but not Gratian, have attributed fifteen canons to it (out of thirty promulgated by Lateran II). Their attributions are problematic for several reasons. Canon 28 (D.63 c.35) was from the beginning identified as a canon promulgated by Innocent II in Rome but not as having been promulgated in the Lateran. Without an explicit attribution, as Atria Larson has argued, one cannot be absolutely sure it belonged to the council of 1139. I have already demonstrated above that the text of Gratian's Canon 28 has significant variants not in the manuscripts of the Lateran II's Canon 28 outside the tradition of Gratian's *Decretum*.

Another canon in the Vulgate *Decretum* combined Canons 18, 19, and 20 of the Second Lateran Council (C.23 q.8 c.32) and is identified only as having been taken from "a universal council under Innocent II," which cannot be attributed to Lateran II with any certainty.²⁵ As Larson has

22. See Gérard Fransen, *La date du Decret de Gratien*, 51 *REVUE D'HISTOIRE ÉCCLÉSIASTIQUE* 521 (1956); Titus Lenherr, *Die Summarien zu den Texten des 2. Laterankonzils von 1139 in Gratians Dekret*, 150 *ARCHIV FÜR KATHOLISCHES KIRCHENRECHT* 528 (1981).

23. See *DECRETUM*, *supra* note 7 (referring to D.90 c.11 and C.21 q.2 c.5 of Florence manuscript, which is also omitted by Admont).

24. See *id.* (referring to D.63 c.35, Fd fol. 12va and fol. 113va.). I am completing an edition of the texts attributed to Lateran II in the pre-Vulgate and early Vulgate manuscripts.

25. Canons 18, 19, and 20 combined into one: C.23 q.8 c.32: "De incendiariis quoque Innocentius secundus in uniuersali concilio generaliter constituit dicens." *DECRETUM*, *supra* note 7. Clm 13004, fol. 228rb and 28161, fol. 195ra have the same reading. In the Biberach manuscript and Salzberg, Stiftsbibliothek a.xi.9, the

demonstrated in detail, the adjective “universalis,” when attached to synod or council, did not automatically mean what we mean today by an ecumenical council. A “concilium” called by the pope and having participants of different nationalities could be termed “universale.”²⁶ All the other canons that scholars have attributed to the Second Lateran Council have the inscription of “Innocentius II” and nothing more. Their inscriptions bear no indication that they are conciliar canons promulgated at the Lateran II or at any other council. To be sure, their texts are very close to the canons that we have accepted as products of the Second Lateran. But many of them differ significantly from the texts of Lateran II. The common repetition of wording that is characteristic of conciliar canons in this era and the lack of an explicit inscription to Lateran II in all the canons make an attribution to the council of 1139 problematic. As Martin Brett has explained to me, “there can be no argument about the extremely close resemblance between most of the canons attributed to Innocent’s councils at Clermont, Reims, Pisa and the Lateran,” which can make attributions to a particular council difficult.²⁷ At the very least, we should be cautious, therefore, about attributing some or all of these canons to the Second Lateran Council. If they are not Lateran II canons but drawn from other councils over which Innocent II presided during his pontificate, it would resolve a number of dating issues that have plagued the study of Gratian’s teaching career and his life. However, much more work has to be done on this problem before we could come to a firmer conclusion—if a firm conclusion will be possible. A preliminary edition of the canons attributed to Innocent II in the early Gratian manuscripts must be constructed from the best Vulgate manuscripts and then the results compared to Martin Brett’s edition. This task is already well underway.

There is an intriguing rubric in a very early Italian Vulgate manuscript—Florence, Biblioteca Laurenziana Plut. 1 sin. 1—that casts doubt on one text’s having been taken directly from a text of Lateran II. The rubric to C.17 q.4 c.29, that might be an edited version of Lateran II’s c.15, reads: “Item ex lib’ Innocentii pape ii.”²⁸ I have not found another early Vulgate manuscript with that rubric. Without a stronger textual tradition, I would be reluctant to conjecture what it means. Literally, the text asserts that this canon can be found in a book of Innocent II’s legislation. It does not attribute the canon to Lateran II. As I have already made clear, however, no other rubric to the canons identifies the canons as being from Lateran II. Did Gratian know a manuscript with a collection of Innocent’s legislation and take all his Innocentian canons from it? It is a tempting hypothesis but for now goes beyond the evidence.

canon is part of Gratian’s dictum and is not separated from it. My edition of the canons has provided more evidence for the conclusion that Gratian took these canons of Pope Innocent II from non-Lateran II sources. See *supra* note 12.

26. See Larson, *supra* note 9, at 27–34.

27. Email from Martin Brett, to Author (Jan. 14, 2014) (on file with author).

28. DECRETUM, *supra* note 7 (Fs fol. 205rb).

I have postponed a discussion of the St. Gall Stiftsbibliothek 673 until now. I wanted to present the evidence for Gratian's long teaching career in Bologna from the pre-Vulgate manuscripts of which Gratian's authorship is not questioned. Scholarly opinion is unanimous that Gratian compiled the collections preserved in the pre-Vulgate manuscripts that we have discussed to this point.²⁹

If the St. Gall text could be proven to be a version of a stage that preceded the text of the Admont, Barcelona, Florence, and Paris manuscripts, there could be little question that Gratian taught in Bologna for a long time. No scholar questions the fact that if St. Gall was an abbreviation, it is an abbreviation of pre-Vulgate *Decretum*, not the Vulgate text. I have written previously that if an abbreviator shortened Gratian's text from those manuscripts he was almost impossibly clever. He left no undisputable fingerprints. The very few places where one may argue about whether he nodded off while doing his cutting are debatable.

John Noonan and many other scholars have recognized for a very long time that Gratian's *causae* (cases) are wonderful teaching tools and were Gratian's stroke of genius.³⁰ If it were a version of an UrGratian, the St. Gall manuscript would be proof that Gratian began to teach using cases and developed a Socratic case law teaching methodology. He was the Christopher Columbus Langdell of the twelfth century. There is no question that his *Decretum* became a very popular text because of the *causae*. Its immediate acceptance as a "liber legalis" (textbook) that took its place alongside Justinian's Roman law codification in the schools all over Europe was not because the first part of the *Decretum*, the distinctions, offered exciting and compellingly teachable material. It was his *causae* that won Gratian his unique place in the history of canon law. Before the discovery of the St. Gall manuscript, one could have conjectured that he had begun teaching with the *causae*. In this context, one cannot be too surprised that St. Gall exists.

The St. Gall manuscript is not, however, a pristine UrGratian. From *Causa* 27–36, the text of the manuscript received significant interpolations and editing by unknown hands, probably not by Gratian's. Nonetheless, *Causa prima* to *Causa* 23 (*causae* 24–26 are missing) must have corresponded fairly closely to an UrGratian (remembering, however, that there is some evidence that stages preceded the St. Gall text as well).³¹ The

29. See WINROTH, *supra* note 3, at 175–96.

30. See, e.g., Noonan, *Catholic Law School*, *supra* note 1, at 1201 (“[Gratian showed that t]he study of law was, at least in part, the study of hypotheticals, with the power of hypotheticals to select and isolate significant legal issues and the weakness of hypotheticals that they lack the rich concreteness, the true mindbinding complexity, of real cases. The hypotheticals were the basis for questions that opened up substantial areas of law in a penetrating way. The questions also turned out to be convenient pegs on which to hang a variety of authorities.”).

31. Melodie Harris Eichbauer's careful study of the rubrics in the St. Gall manuscript demonstrates that they were not the work of an abbreviator and that additional *causae* were probably added over time to the book. See generally Melodie

additions of Roman law *authenticae* in the margins and glosses indicate that the manuscript was used in the classroom at a significant law school (Bologna?) and not one on the periphery.³² The *authenticae* would not have been known to teachers of canon law outside Italy in the 1130s. Just as Rolandus—a commentator on the *Decretum* in the 1150s—had, it seems, only used the *causae* to teach his students, so too did the early Gratian.³³

Where was the St. Gall manuscript produced and used? Scholars who have examined the illuminated initials have concluded that they were done in Central or Northeastern Italy in the second half of the twelfth century. The script is certainly older than that. I would date it to the middle of the twelfth century at the latest. Its provenance is Italian. The combination of its carefully prepared script and its elaborate—and quite beautiful—illuminations is proof that it was the product of a sophisticated scriptorium in Northern Italy.³⁴

Only one piece of evidence seriously calls into doubt St. Gall's being derived from an UrGratian.³⁵ *Causa 2* in St. Gall and *Causa 1* in all the other recensions of Gratian's text dealt with the issue of simony. The case he presented was complicated to say the least. I will give it in each of the versions beginning with St. Gall:

A certain man gave his son to a monastery and, as demanded by the abbot, rendered a payment of ten pounds. The son was ignorant of this because of his age. The boy matured. He quickly became a priest. The suffragan bishops selected him to become a fellow bishop on his merits. Finally, his father interceded with his consent and prayers to his election and also gave money to a

Harris Eichbauer, *St. Gall Stiftsbibliothek 673 and the Early Redactions of Gratian's Decretum*, 27 BULL. MEDIEVAL CANON L. 105 (2007).

32. See Pennington, *Big Bang*, *supra* note 5, at 63–66; see also José Miguel Viejo-Ximénez, *Las Novellae de la Tradición Canónica Occidental y del Decreto de Graciano*, in *NOVELLAE CONSTITUTIONES: L'ULTIMA LEGISLAZIONE DI GIUSTINIANO TRA ORIENTE E OCCIDENTE, DA TRIBONIANO A SAVIGNY: ATTI DEL CONVEGNO INTERNAZIONALE, TERAMO, 30–31 OTTOBRE 2009* 207 (Luca Loschiavo, Giovanna Mancini & Cristina Vano eds., 2011).

33. See Rolandus [de Bologna] (Papst Alexander III. [Magister Rolandus, Rorlando Bandinelli *male*]), *DIE SUMMA MAGISTRI ROLANDI, NACHMALS PAPSTES ALEXANDER III., NEBST EINEM ANHANGE; INCERTI AUCTORIS QAESTIONES* (1874), reprinted in *SUMMA MAGISTRI ROLANDI, MIT ANHANG INCERTI AUCTORIS QAESTIONES* (Friedrich Thaner ed., 1962) (1874 edition is flawed); see also Kenneth Pennington & Wolfgang P. Müller, *The Decretists: The Italian School*, in *THE HISTORY OF MEDIEVAL CANON LAW IN THE CLASSICAL PERIOD, 1140–1234: FROM GRATIAN TO THE DECRETALS OF POPE GREGORY IX 131–35* (Wilfried Hartmann & Kenneth Pennington eds., 2008).

34. See Marina Bernasconi Reusser, *Considerazioni Sulla Datazione e Attribuzione del Decretum Gratiani Cod. Sang. 673: Un Manoscritto di Origine Italiana in Terra Nordalpina*, in *SCHAUKASTEN STIFTSBIBLIOTHEK ST. GALLER: ABSCHIEDSGABE FÜR STIFTSBIBLIOTHEKAR ERNST TREMP 142–47* (Franziska Schnoor, Karl Schmuki & Silvia Frigg eds., 2013).

35. See Eichbauer, *supra* note 3, at 1113–14 (summarizing various arguments on both sides of issue very well with detailed bibliographical references).

member of the archbishop's household; he was consecrated bishop without knowing of his father's consent and of his gifts of money. As time passed he ordained some clerics for free and others for money. Consequently, he was accused and convicted [of simony]. He suffered the judgment that condemned him.³⁶

The other pre-Vulgate and Vulgate versions presented a more nuanced and detailed story:

A certain man had a son whom he gave to a very wealthy monastery. The abbot and the brothers demanded ten pounds to take his son. His son, because of his age, did not know about the money. The boy grew and with the passing of time and with a succession of offices, he came of age and was ordained a priest. Finally, he was elected bishop by the suffragan bishops because of his talents. His father gave his consent and prayers to his election and also gave money to a member of the archbishop's household; he was consecrated bishop without knowing of his father's consent and of his gifts of money. In the passing of time, he ordained several priests for money and to others he gave the sacerdotal benediction for free. Finally, he was accused and convicted [of simony] at the archiepiscopal court. He accepted his judgment of damnation.³⁷

A comparison of the two texts makes it difficult to imagine that the pre-Vulgate text in St. Gall is an abbreviation of the pre-Vulgate text in the other manuscripts. The pre-Vulgate hypothetical incorporated specific

36. *DECRETUM*, St. Gall, Stiftsbibliothek 673, 28–29 [hereinafter *DECRETUM*, St. Gall] (“Obtulit quidam filium suum cenobio qui exactione abbatis motus x. libras monasterio soluit. Ipso tamen filio propter etatem hoc ignorante. Creuit puer. De hinc ad sacerdotium conuolauit. Suffragantibus meritis in episcopum est assumptus. Tandem obsequio ac precibus paternis intercedentibus pecuniam quoque ex consiliariis archiepiscopi cuidam data consecratur electus, oblate pecunie paterni obsequi penitus ignarus. Ac per hoc tempore procedente quosdam gratis, non nullos etiam per pecuniam ordinauit; qui tandem accusatus et conuictus, contrariam sibi sententiam reportauit.”).

37. See *DECRETUM*, *supra* note 7 (Paris, Bibliothèque Nationale de France nov. acq. lat. 1761, fol. 83vb–84ra and Paris, Munich, Staatsbibliothek Clm 13004, fol. 97ra: “Quidam habens filium obtulit eum ditissimo cenobio exactus (ab *add.* Me) abbate et fratribus x. libras soluit ut filius susciperetur (reciperetur Me), ipso tamen beneficio etatis hoc ignorante. Creuit puer et per incrementa temporum et officiorum ad virilem etatem et sacerdotii gradum peruenit. Exinde suffragantibus meritis in episcopum eligitur, interveniente obsequio et paternis precibus data quoque pecunia cuidam ex consiliariis archiepiscopi consecratur iste in antistitem nescius paterni obsequii et oblate pecunie. Procedente vero tempore nonnullos per pecuniam ordinauit, quibusdam uero gratis benedictionem sacerdotalem dedit, tandem apud metropolitanum suum accusatus et conuictus sententiam in se damnationis accepit.”) An edition of this version of Gratian's *Decretum* is being prepared under the leadership of Anders Winroth. For its progress, see *Decretum Gratiani: First Recension*, <https://sites.google.com/a/yale.edu/decretumgratiani/home> (last visited Aug. 17, 2014).

facts into the case that are left out or remain ambiguous in St. Gall. The pre-Vulgate's monastery was wealthy. It practiced simony in spite of its wealth. After his ordination, the boy received other clerical offices on his merits, one presumes, and not simoniacally. In contrast, the St. Gall case suggests that the boy became a priest inappropriately quickly (*convolare* = to fly). The description of the court's decision in St. Gall (*contraria sententia*) could be interpreted to imply that the bishop lived with a decision that was not in accord with his own views of his actions. In the other pre-Vulgate hypothetical, the bishop accepts his fate. These differences do not suggest an abbreviator to me. They suggest a reworking by Gratian.

Gratian then listed seven questions that he wished to consider, which are almost the same in all the versions of the text. Number six was the question whose text created a problem of interpretation: "Sixth [question] Whether those who were ordained by him in the past without knowledge of his simony must be deposed?"³⁸ There was only one text in the entire corpus of canon law that could answer that question: two canons that Pope Urban II had promulgated at the Council of Piacenza in 1095. To answer Question Six, Gratian presented the two Piacenza canons as one canon in the St. Gall manuscript.³⁹ The logical place for the canon was in Question Six. That is exactly where it is in the St. Gall manuscript:

If those, he said, who were ordained by simoniacs but not simoniacally can be proven that when they were ordained to have not known the [bishops] were simoniacs, then they will be considered as Catholics in the Church, and we will sustain those ordinations mercifully, if their laudable lives endorse them. Who, however, knowingly is consecrated by simoniacs, rather one would say execrated, we declare that their consecration is completely invalid.⁴⁰

38. DECRETUM, St. Gall, *supra* note 36, at p.29 ("Sexta: An illi qui ab eo iam symoniaco igoranter sunt ordinati abici debeant."). The later versions add "aut non" to the end of the question.

39. See ROBERT SOMERVILLE, POPE URBAN II'S COUNCIL OF PIACENZA: MARCH 1-7, 1095 91-92, 104-11 (2011) (printing edition of canons and discussing canons with information about canonical collections that included these texts).

40. DECRETUM, St. Gall, *supra* note 36, at p.41b. The text is slightly different from the pre-Vulgate and Vulgate, which are closer to the conciliar canons (C.1 q.1 c.108): "Si qui, inquit, a symoniacis non symoniace ordinantur, siquidem probari potuerint se, cum ordinaretur, nescisse eos symoniacos esse, et tunc pro catholicis habebantur in ecclesia, talium ordinationes misericorditer sustinemus, si tamen eos laudabilis uita commendat. [Qui uero scienter se a symoniacis consecrari immo execrari permiserint, eorum consecrationem omnino irritam esse decernimus.]" Urban II, Council of Piacenza, c.3 and [c.4]: *Collectio X partium*, fol. 76r, where the chapters are separated. *Collectio 3 librorum* 2.8.11 in medio. 9L 3.5.1. The additional "inquit" is found in other Urban texts. It is one other small bit of textual evidence that Sg cannot be an abbreviation. For a discussion of references to the pope in the third person, see ROBERT SOMERVILLE, POPE URBAN II, THE COLLECTIO BRITANNICA, AND THE COUNCIL OF MELFI (1089) CB 8, 11, 17, 28, 44 (1996). Most importantly, Gratian included another canon attributed to Urban, *Duae sunt*, that also uses "inquit" in its incipit, which I have discussed. See Kenneth

In the transition from the St. Gall *Decretum* to the manuscripts in Florence, Paris, Barcelona, and Admont, Gratian added fifteen canons to Question One between c.90 and c.113. One of those canons was a decretal of Pope Nicholas II, in which the pope distinguished between several types of simoniacal ordinations: simoniacs ordained simoniacally by simoniacs, simoniacs ordained by non-simoniacs, and simoniacs ordained by simoniacs but not simoniacally. Nicholas did not, however, cover all the possible permutations, the most important being the legal issue of ignorance. Gratian had already applied the principle of ignorance to marriage law in St. Gall *Causa* 26 (=29).

As he considered Nicholas's decretal, Gratian must have thought, "what about the cleric, as in my hypothetical, who was ignorant that the prelate was simoniacal? Or a cleric, as in my hypothetical, who did not know that someone was paying for his ordination?" He must have also considered the issue that his raising the question of ignorance in Question One, and not leaving it for Question Six, disturbed the organization that he had created for *Causa* One. In Question One, his question had been: "Is it a sin to buy spiritual things?"⁴¹ In spite of whatever reservations he may have had, Gratian moved Urban's conciliar canon from Question Six to Question One and placed it after Nicholas's decretal. As Gratian remarked in the dictum he wrote before the canon:

But these clerics [i.e. Nicholas's last category] must be understood as being those who are ordained by simoniacal prelates, whom they did not know were simoniacal. The decretal makes these simoniacs, but not guilty of a crime, yet [having] an ordination of a simoniac. Concerning these clerics Pope Urban stated [in his canon].⁴²

Moving a canon is unique in the textual tradition of the *Decretum*. *Causa* One Question One is the only place in the *Decretum* in any of its versions where Gratian moved a text significantly. We may think with some justification that he could have placed Nicholas's decretal in Question Six. Question One was already ungainly long. His moving Urban's canons did not improve his argument or the organization of *Causa* One. Nevertheless, he moved Urban's text. Gratian then reworked his introductory dictum to Question Six in his later versions of the *Decretum* to read: "What indeed ought to be done concerning those who unknowing are ordained by simoniacs, which is asked in the sixth question, is found above in the

Pennington, *Gratian, Causa 19, and the Birth of Canonical Jurisprudence*, in 4 "PANTA REI": STUDI DEDICATI A MANLIO BELLOMO 344 (Orazio Condorelli ed., 2004).

41. See *DECRETUM*, *supra* note 7, at C.1 d.a.c.1 ("Hic primum queritur an sit peccatum emere spiritualia?").

42. See *id.* C.1 q.1 d.a.c.108 ("Sed hoc intelligendum est de his qui ordinantur a simoniacis, quos ignorabant esse symoniacos. Hos facit simoniacos non reatus criminis, sed ordinatio symoniaci. De quibus Urbanus papa ait.").

chapter of Urban that begins: ‘Si qui a simoniacis non simoniace ordinati sunt.’”⁴³

Previously in the St. Gall manuscript, Gratian had introduced the Piacenza canons with a dictum, and it is this dictum that has created problems of interpretation and the conviction of some that St. Gall is an abbreviation:

Quid autem de his fieri debeat qui ignoranter a symoniacis ordinati sunt, quod quidem sexto loco quesitum est supra in capitulo Urbani dictum est quod, quia forte ibi quantum ad negotium pertinebat integre poni non fuit necessarium, in presenti ad evidentiam in medium adducamus.⁴⁴

In translation:

What moreover ought to be done with those clerics who unknowingly are ordained by simoniacs, which is asked in the sixth question, [can be found] in the chapter of Urban that has been cited above, but indeed, because it was not necessary to place the entire text there as far as it pertained to the issue, I bring it forward here.

Winroth and others have interpreted Gratian’s dictum at the beginning of Question Six as being proof of St. Gall’s being an abbreviation.⁴⁵ They assume that the abbreviator fell asleep and forgot that he had omitted Pope Nicholas’s canon and also that he had eliminated Urban’s canons immediately after Nicholas’s. With that assumption, Winroth is quite right that the reference is puzzling and, if he had interpreted the passage correctly, could be a solid proof that St. Gall is an abbreviation. However, the compiler of the St. Gall text was quite wide awake. What Winroth overlooked was that Gratian had, in fact, cited Urban’s canon “supra” in Question Four of St. Gall and in all the subsequent versions of the *Decretum*. That is the place Gratian referred to in his dictum before Question Six in St. Gall. He was not citing a now non-existent text in the first question. He alerted his readers that he could have put Urban’s canon in Question Four but did not. In his dictum in Question Four, he had written: “Again, if someone is excused from having been ordained unknowingly by a simoniac, just as he can be excused who is ordained simoniacally but unknow-

43. See *id.* C.1 q.6 d.a.c.1 (Paris BNF nov. acq. lat. 1761, fol. 102va; Florence, B.N. Con. Sopp. A.1.402, fol. 25rb) (“Quid^a uero^b de his fieri debeat qui ignoranter a simoniacis ordinati sunt^c, quod sexto loco quesitum est supra^d in capitulo uidelicet Urbani quod sic incipit, Si qui^e a simoniacis non simoniace ordinati sunt requiratur. ^a Quod^{ac} Fd ^b igitur^{ac}, autem^{bc} Fd ^c nunc autem *add.* Fd^{ac} ^d quod—supra *om.* Fd^{ac} ^e quis^{pc} Fd”).

44. DECRETUM, St. Gall, *supra* note 36, at p.41 C.1 q.6 d.a.c.1.

45. See Anders Winroth, *Recent Work on the Making of Gratian’s Decretum*, 26 BULL. MEDIEVAL CANON L. 1, 20–21 (2006).

ingly.”⁴⁶ In the later versions of the *Decretum*, Gratian clarified that the dictum referred to Urban’s canon that was now placed in Question One with an inserted added phrase: “Again, if someone is excused from having been ordained unknowingly by a simoniac, as seen above in Urban’s canon [in q.1 c.108], he can also be excused who is ordained simoniacally but unknowingly.”⁴⁷ Once Gratian’s dictum before Question Six in the St. Gall manuscript is understood to refer to his dictum in Question Four, the use of this passage as being a proof that St. Gall is an abbreviation cannot be sustained. An abbreviator did not nod; Gratian was practicing a methodology he used in all the versions of his *Decretum*: referring to canons in other parts of his work with their first few words or, as here, with a short reference to a canon’s content.

The other arguments for and against St. Gall’s being an abbreviation rest upon small textual variants that cannot come close to being a full proof. A number of scholars, including me, have made textual arguments taken from Gratian’s dicta in St. Gall. Some are more persuasive than others. None of them makes a full proof for either opinion.⁴⁸ As I have stated above, I believe that the textual anomalies in St. Gall in *Causae* 27–36 of Gratian’s text cannot be used as evidence of an abbreviation because I believe the text is a redaction with interpolations.⁴⁹ A significant piece of evidence for my conviction about St. Gall’s being an early pre-Vulgate version of Gratian’s *Decretum* and not an abbreviation are the four *authenticae* that are added to the margins of the manuscript. Two of them Gratian included into the text of the *Decretum* in later recensions. Two of them he did not. Gratian did not add them to the margins of St. Gall; someone else did. Whoever added these *authenticae* to St. Gall knew Roman law very well and was using the manuscript to teach canon law in a center where others must have been teaching Roman law. Such a person, I have argued, would not have been teaching with an abbreviation.⁵⁰

46. *DECRETUM*, St. Gall, *supra* note 36, at p.38 C.1 q.4 d.p.c.10 (“Item si excusatur qui a symoniaco ordinatur ignoranter et utique iste excusari potest qui per ignorantiam symoniace ordinatur.”).

47. *DECRETUM*, *supra* note 7, C.1 q.4 d.p.c.10 (P fol. 100va, Fd fol. 24v) (“Item si excusatur qui ignoranter a simoniaco ordinatur, ut supra in capitulo Urbani legitur, et iste excusandus est qui per ignorantiam symoniace ordinatur.”).

48. *Causa* 29 (Sg 26) has a particularly interesting set of textual variants that suggest that St. Gall is not an abbreviation. See José Miguel Viejo-Ximénez, *Non omnis error consensum euacuat: La C. 26 de los Exserpta de Sankt Gallen (Sg)*, in *IUSTITIA ET IUDICIUM: STUDI DI DIRITTO MATRIMONIALE E PROCESSUALE CANONICO IN ONORE DI ANTONI STANKIEWICZ* 617, 630–31 (Janusz Kowal & Joaquín Llobell eds., 2010) (especially his conclusion at 630–31).

49. One of the texts is a canon of Pope Innocent II, commonly attributed to Lateran II. It is the only Innocent II text in the *Decretum* that is attributed to a council held in Rome. If it is not a Lateran II canon, then it would be possible that St. Gall is Gratian’s work.

50. See Pennington, *Big Bang*, *supra* note 5, at 64; Pennington, *Roman Law Jurisprudence*, *supra* note 5, at 35–53.

There are other arguments for St. Gall's being an abbreviation. Anders Winroth noticed, as many other scholars have, that Gratian cited the Bible frequently in his dicta. He chose canons with many biblical citations as well. Winroth drew attention to the fact that Gratian cited the Pseudo-Paul Pastoral Epistles to Timothy and Titus when he analyzed clerical discipline in Distinctions 25–49. That Gratian would have turned to these epistles was inevitable. Any medieval author who discussed clerical behavior and norms of rectitude would have thought immediately of the Pastoral Epistles. The canons Gratian compiled for those distinctions cited them many times more than Gratian did. Winroth concludes his discussion about Gratian's use of the Pastoral Epistles with the statement:

Gratian's use of St. Paul for his organization is, incidentally, a well-nigh irrefutable argument against the idea that the text of the Decretum known from the infamous manuscript St. Gall, Stiftsbibliothek 673 would be the earliest version of Gratian's work. This manuscript makes a hash of that organization, cutting most references to the Epistle to Timothy, while allowing a few to stand, orphaned and barely intelligible.⁵¹

Like black truffles, irrefutable arguments are hard to find in scholarly debates. There are two very good reasons for thinking that Winroth's conclusions can be questioned. The first objection is that the Pseudo-Pauline Epistles do not provide an "organization" or an "organizing principle" for Gratian's distinctions in the ordinary sense of those terms. He does not follow the Epistles exactly as they discussed clerical discipline line by line or chapter by chapter. He skips around in the Epistles, quoting them and taking whichever ideas he found useful for the issues he was discussing. He also cited other texts in the Pauline Epistles in his analysis of clerical rectitude. If there is no organization or organizing principle in his use of the Pastoral Epistles, it cannot be violated.

The second objection, and much more weighty, is that comparing the Distinctions to *Causa prima* in St. Gall is to compare two different literary genres. In *Causa prima*, Gratian created a hypothetical, asked a series of questions, and presented texts that pertained to his case. He presented a hypothetical in which a student had a concubine, a subdeacon had a wife, and after this sorry amorous history became a priest and then a bishop. In St. Gall, Gratian did not focus on "what are the virtues a cleric should have?" In the Distinctions, he did. When he refashioned that material, the wingspan of his subject matter was much wider. In *Causa prima* of St. Gall, Gratian explored clerical sexual norms and how they might affect a prelate's status; in the later distinctions that grew out of *Causa prima*, he dealt with a much broader set of issues touching on clerical discipline and

51. Anders Winroth, *Where Gratian Slept: The Life and Death of the Father of Canon Law*, 99 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE, KANONISTISCHE ABTEILUNG 105, 110 (2013) (footnote omitted).

what characteristics a good cleric should possess. The difference is not trivial. It is an entirely different project. To compare the two is to compare *tuber melanosporum* (black truffles) to *agaricus bisporus* (button mushrooms). To combine the two is not good gastronomy or scholarly methodology. Timothy and Titus have not much to say about clerical sexual behavior covered in *Causa prima* of St. Gall; they have a lot to say about the topics covered in the Distinctions.

Finally, Winroth's conclusion sidesteps another question about St. Gall that I raised ten years ago: if St. Gall is an abbreviation, why did the abbreviator ignore the *Tractatus de legibus* D.1–20 and Distinctions 80–101? Or why did the abbreviator cut out *Causae* 24–26 and 28? If the abbreviator went to the trouble of transforming the Distinctions 27–79 into *Causa prima*, and if he was using the text to teach, chopping out the *Tractatus de legibus* is strange. A good reason for deleting certain *causae* is also difficult to find. It is an old principle of humanistic scholarship that the easiest and simplest explanation for textual changes is usually the most compelling. To my mind, when Gratian decided that the issue of clerical marriage and sexual behavior had been resolved by conciliar legislation of Lateran I and Innocent II's councils, especially Pisa in 1135, he set to work dismantling *Causa prima*.⁵² He quite logically put together his distinctions on clerical discipline before his first *Causa*.⁵³ To imagine an abbreviator taking the Distinctions between 27 and 79, omitting half the canons, and creating a coherent *causa* is to my mind not only a much *difficilior* task, but also raises the question: why did he do it? If one argues that the abbreviator created *Causa prima*, one ought to give reasons why he thought there was a need for that *Causa*. Was there any longer a need for a *causa* with the issues of *Causa prima*? Gratian certainly did not think so when he finished the Vulgate *Decretum*. No *causa* of the Vulgate focuses on the problems Gratian broached in *Causa prima*.

In the end, what can we conclude from the manuscript evidence that remains from the early versions of Gratian's *Decretum*? He taught many years in Bologna and had many students. Some of them began to gloss and comment on his *magnum opus*.⁵⁴ The glossators began their work very early. The primitive set of glosses contained in all the early manuscripts of the *Decretum*, pre-Vulgate and Vulgate, with its citations to Burchard of Worms' *Decretum* and to the *Lombarda*, is undoubtedly of Italian origin.⁵⁵

52. Lateran II c.7 has been cited as the definitive statement on clerical marriage, but it repeats the prohibition that Innocent II promulgated at Pisa in 1135, c.4 or c.1. See Robert Somerville, *The Council of Pisa, 1135: A Re-Examination of the Evidence for the Canons*, 45 *SPECULUM* 98, 103–06 (1970) (showing canon as it appears in different manuscripts).

53. See Pennington, *supra* note 40, at 351–53.

54. Winroth's latest conjecture is that Gratian may have taught for only one or two years. See Winroth, *supra* note 51, at 125–26.

55. This is not to say that this earliest set of glosses was a coherent and uniform text. The manuscripts prove that without a doubt.

Nonetheless, they circulated in the margins of Gratian's text following it wherever it went.

John T. Noonan wrote his conclusion without the benefit of what we know today about Master Gratian. It is still a pretty good biographical summary: Gratian "revealed himself to be a teacher with theological knowledge and interests and a lawyer's point of view. He worked in Bologna in the 1130s and 1140s."⁵⁶ I would tweak his conclusion only with "also the 1120s." In my reading of the *causae* and thinking about the changes he made in the different versions of his book, I have been impressed by how Gratian developed and expanded his analysis of the problems posed by the hypotheticals he created. One could conclude, as I have, that he could not have done that work and thought through so many different legal issues in a few years of teaching.

"Horror vacui" is a metaphor that applies to almost any field of study. If we do not know what we wish we could know, we search for evidence to fill in the void of our ignorance. Noonan proved quite persuasively that the "horror vacui" created a rich tapestry of illusory knowledge about Gratian during the twelfth and thirteenth centuries. Twenty-first century scholars have taken up the search to know more about Gratian. It is a worthy quest. Anders Winroth has endorsed two medieval conjectures that have been recently put forward by other scholars: that Gratian was a bishop of Chiusi and that he participated in a Venetian court case in 1143. Both of these conjectures would mean that Gratian lived until circa 1145. Winroth has done more to revive and invigorate the study of Gratian's *Decretum* than anyone else in the last 200 years. Not surprisingly, he cares about Gratian and thinks often about this man who did so much to launch European jurisprudence. Although I may not agree with all of his conclusions or conjectures about Gratian, I must emphasize that Winroth's work has opened new vistas and perspectives for thinking about Gratian the teacher, the jurist, and the man. A few disagreements do not undermine or diminish his achievement.

Winroth has been convinced by an argument, first advanced by Francesco Reali, that Gratian became the bishop of Chiusi at the end of his life. Medieval authors also thought Gratian had been the bishop of Chiusi.⁵⁷ Reali noticed that a necrology of the Cathedral Chapter of Siena contained a notice that a Gratian from Chiusi, who was also a bishop, had died sometime in the middle of the twelfth century.⁵⁸ Reali made the assumption that this Gratian was not only from Chiusi but also had been bishop of Chiusi. Winroth has embraced Reali's discovery and used it as evidence of Gratian's fate in the 1140s. There is, in fact, as Noonan had already noted, very early evidence for Gratian's having been a bishop. Rudolf Weigand

56. Noonan, *Gratian Slept Here*, *supra* note 1, at 172.

57. See Larson, *supra* note 9, at 54–55.

58. See Francesco Reali, *Magister Gratianus e le origini del diritto civile Europeo*, in *GRAZIANO DA CHIUSI E LA SUA OPERA: ALLE ORIGINI DEL DIRITTO COMUNE EUROPEO* 98–101 (F. Reali ed., 2009).

printed an introductory gloss or prologue that precedes eight *Decretum* manuscripts.⁵⁹ In three of them, the text states that Gratian divided the *Decretum* into two parts, i.e., that the last part on sacraments, *De consecratione*, was not yet part of the *Decretum*; the other five manuscripts change the two parts to three.⁶⁰ All five manuscripts that contain “three parts” are later copies of the *Decretum*. The reading of the three manuscript witnesses for this passage is certain evidence that the gloss was written very shortly after the Vulgate version of the *Decretum* left Gratian’s desk in Bologna without the third part, *De consecratione*.⁶¹

The scribe of possibly the oldest of these three manuscripts, Paris, Bibliothèque nationale de France lat. 3884-I, entered the text on the folio preceding the beginning of the *Decretum*.⁶² We cannot know with certainty whether this short prologue was an attempt to introduce the *Decretum* to readers or an introduction to the primitive set of glosses in the margins of the manuscript or both:

In the name of our Lord Jesus Christ.

The first part of the *Decretum* begins with a discussion of written and non-written law. It treats the authority of law, the election of clerics and their dispensation.

*The Concord of discordant canons. In the beginning a treatment of the ius of constitutions and of nature.*⁶³

The Concord of Discordant Canons which Bishop Gratian organized into two parts. The first part contains 101 Distinctions, although Distinction 49 (48) seems incomplete.

59. See Rudolf Weigand, *Frühe Kanonisten und ihre Karriere in der Kirche*, 76 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE, KANONISTISCHE ABTEILUNG 135, 152–53 (1990).

60. See Winroth, *supra* note 51, at 115–16 (“Perhaps this means that this glossator wrote before the second recension with its three parts circulated, in which case it would be very early testimony, say from the 1140s, more or less contemporary with Gratian.”). He did not, however, take the passage as solid evidence because he mistakenly thought only one manuscript had the “duas” reading. Further, because he believes that Pf is the only witness, he states that “[o]ne Parisian law teacher told his students that Gratian was a bishop.” *Id.* at 115. From our discussion, it should be clear that the text is not the product of one French canonist.

61. See Eichbauer, *supra* note 3, at 1112–13.

62. The other two manuscripts containing the earliest version of this gloss, according to Weigand, are Gent, Bibliotheek der Rijksuniversiteit 55, and Trier, Stadtbibliothek 906 (1141). See 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* 59 (Wilfried Hartmann & Kenneth Pennington eds., 2008).

63. The Italicized text is in a rubricated style of capital letters and is a common rubric at the beginning of the early *Decretum* with small variations, e.g., Biberach, Spitalarchiv B.3515, fol. 10r; Köln, Dombibliothek 127, fol. 9r; Mainz, Stadtbibliothek II.204, fol. 2r; Salzburg, Stiftsbibliothek a.xi.9, fol. 11r.

The second part contains 36 *causae* and you must note that several canons are edited⁶⁴ and are arranged in various *causae* so that if indeed you wish to see the entire canon, [you can find it] in another place; you may not presume to fill them in or to continue as if this was the result of scribal error. Similarly even when you find other translations of Greek councils, you should consider those reliable which are inserted into this work. You should not presume to mix similar chapters or change a series of translations.⁶⁵

The text is not without its intriguing ambiguities. The first line is a standard introduction to a medieval work, but not, as far as I know, to Gratian. Weigand did not include this line of text in his edition. If it does occur in the other manuscripts, that would be a stronger piece of evidence that it is part of a prologue introducing the glosses, not to Gratian's text. The second sentence is a summary of the subject matter of Distinctions 1–101. That too might be part of the prologue to the glosses. The italicized text is taken from a different tradition that one finds at the beginning of quite a few twelfth century Gratian manuscripts. The scribe must have had two different texts in front of him and combined them. The remainder, that I have taken from the Paris manuscript and which Weigand calls the early version, called the readers' attention to three textual matters. The first is that Distinction 49 (or 48) is not complete. The second is a warning that the reader should not be concerned if other texts, presumably in other collections, were different. Gratian had edited them to suit his purpose. Finally, the Greek councils that Gratian inserted into the *Decretum* should be respected. Gratian, he implied, made good choices.

64. Shortening and editing canons and decretals, the omitted parts they called "intercisiones" became standard editorial practices of the canonists from Gratian to Raymond de Peñafort. See Kenneth Pennington, *The French Recension of Compilatio tertia*, 5 BULL. MEDIEVAL CANON L. 53, 60–63 (1975) (giving examples).

65. fol. 15v: Written in red ink, rubric style:

In nomine domini nostri Ihesu Christi. Prima pars incipit de iure scripto et non scripto et quod cui preponatur et legum auctoritatibus et clericorum electione siue dispensatione.

Concordia discordantium canonum. Ac primum de iure constitutionis et nature.

Concordantia discordantium canonum iuxta determinationem Gratiani episcopi que in duas partes divisa. Prima pars constat centum et una distinctione, licet xl.^{ma}ix.^{na} (Trier has 48) incompetens uideatur. Secunda uero causis xxx.vi. ubi notandum est nonnulla esse intercisita capitula atque ita digesta prout diuersis causis uisum est expidiri (sic) que quidem cum alibi repperiris integra supplere his seu continuare tanquam id scriptoris uicio contigisset. Similiter etiam cum alias grecorum conciliorum translationes inueneris, eas sufficere tibi credens de qua huic operi sunt sumpta congruentia capitula miscere uel uariare translationum seriem non presumas.

Another early manuscript, Heiligenkreuz, Stiftsbibliothek 44, fol. 8v, began with the text "In nomine—siue dispensatione [in a slightly garbled form]" but omits the rest.

I lean towards thinking the text is a prologue to the primitive and sparse but significant glosses in Paris, BNF 3884-I and II. Weigand had studied manuscripts with these glosses for years and called them part of the “First Composition” of glosses when he worked out his categorization of early glosses to Gratian.⁶⁶ He did not mention in his work that this layer of glosses, which is found in almost all the early glossed Gratian manuscripts, including the pre-Vulgate Barcelona and Admont manuscripts, included many references to canons in Burchard of Worms’s *Decretum* and to texts in the *Lombarda*.⁶⁷ No other pre-Gratian canonical collection received as much attention from the early canonists in the margins of *Decretum* manuscripts as Burchard of Worms’s *Decretum*. Their function has not yet been studied. Were they to supplement, support, or contradict Gratian’s choices of sources? Some were later incorporated into the Vulgate *Decretum* as “paleae.” The citations to Burchard disappear from the margins after circa 1200. The citations to Lombard law are not as frequent.⁶⁸ Citations to the *Lombarda* are not common in Italian Roman law manuscripts and have not been noticed before in canonistic texts.⁶⁹ Weigand had already concluded that the “First Composition” was very early, not later than 1150, perhaps earlier. Its presence is a good test for the date of a manuscript. No canonist would have needed or wanted these glosses after circa 1150. This layer of glosses also can provide evidence of its origins: Italy. Although Paris, BNF 3884-I and II are written and illuminated in Northern France, it is difficult to think of many reasons why a Northern French jurist would be interested in Lombard law. These allegations to the *Lombarda* would have been of interest and use to canonists in Northern and Southern Italy and make it likely that the First Composition

66. See RUDOLF WEIGAND, *DIE GLOSSEN ZUM ‘DEKRET’ Gratians: Studien zu den frühen Glossen und Glossekompositionem* 26–27 (1991); Weigand, *supra* note 62, at 55–97 (providing compact version of his magnum opus in English).

67. All the early manuscripts of the Vulgate with glosses, listed in *supra* note 7, contain Burchard and *Lombarda* citations. The form of citation is, e.g., Pf, fol. 45v: B. xix. Si quis [clericus] uexatus (Burchard 19.93) in the margin opposite D.33 c.3. In this case, the canon in Burchard dictated ten years penance for clerics who were possessed by demons. If they were freed from demons, they could resume their clerical duties. Gratian’s text stipulated one year of freedom from demons. Sometimes the scribes confused the B with D. D.33 c.3 occurs only in the Vulgate *Decretum*.

68. Cited as Lombar. or Lom. de decimis, l.iii. (*Lombarda* 3.3.3) in Pf fol. 195r in the margin opposite C.12 q.2 c.26, which is only in the Vulgate *Decretum*. The text in the *Decretum* instructs bishops how they should divide tithes; the c.3 in the *Lombarda* is a general admonition to do so, which is followed by c.4 with more detailed instructions. The *Lombarda* citations are primarily found in the *causae*.

69. See *Glosse preaccursiane alle Istituzioni: Strato Azzoniano Libro primo and Libro secondo* (Severino Caprioli, Victor Crescenzi, Giovanni Diurni, Paolo Mari & Piergiorgio Peruzzi eds., *Fonti per la Storia d’Italia* 107 and *Antiquitates* 14; Roma: Nella Sede dell’Istituto, 1984–2004) (where not a single gloss to the *Lombarda* is recorded); see also Pennington, *Roman Law Jurisprudence*, *supra* note 5, at 35–53; Kenneth Pennington, *The Constitutions of King Roger II of Sicily in Vat. lat. 8782*, in 21 *RIVISTA INTERNAZIONALE DI DIRITTO COMUNE* 35 (2010).

had its origins in the Italian schools.⁷⁰ The presence of the First Composition gloss that graces the margins of the Barcelona and Admont manuscripts is good evidence that the pre-Vulgate *Decretum* circulated long enough for someone to have composed a gloss for it. If the pre-Vulgate manuscripts had had a very short shelf life, no one would have bothered.

There is one more puzzle in Paris, BNF lat. 3884-I. Carlos Larrainzar discovered that the front flyleaf was a folio from a pre-Vulgate version of Gratian's *Decretum*.⁷¹ Jacqueline Rambaud had long been convinced of the manuscript's significance, and Larrainzar's discovery raises intriguing if unanswerable questions. The manuscript was produced in an important center. No expense was spared on its production. The text was divided into two volumes and provided with magnificent illuminations. One might presume that when the Vulgate text arrived, the owners of the pre-Vulgate text decided to trash their old text and use the manuscript(s) for more mundane purposes, like flyleaves. If one could localize this manuscript and trace other manuscripts produced at the center, one might find more flyleaves of pre-Vulgate Gratians. One might guess that Paris, BNF 3884-I was produced in a major center in Northern Europe for the study of canon law and that the center had close ties to Bologna. Art historians have connected its illuminations to Paris or perhaps Sens. An important center in Paris would make sense.

What does this information mean for Gratian's biography? First, the glosses in Barcelona, Admont, Paris, BNF 3884-I and II, and other manuscripts were not written in Northern Europe but in Italy. This very early Italian glossator(s) of Gratian's text who was writing close to 1140 thought that Gratian was a bishop. For obvious reasons, he would have been in a position to know. The *Decretum* in its earlier forms was an immediate success all over Christian Europe. The oldest three manuscripts of the eight that contained the "prologue" discussed above identify Gratian as the compiler. Other manuscripts do as well.⁷² It is not accurate to say that Gratian

70. Weigand did not venture an opinion on the origins of these glosses. See Weigand, *supra* note 62.

71. See WINROTH, *supra* note 3, at 32.

72. See, e.g., DECRETUM, *supra* note 7, Clm 13004, fol. 30r ("Hoc opus inscribitur de Concordia discordantium canonum quod a quodam Gratiano compositum in libros xxxvii. est distinctum.") This particular manuscript has long been recognized as an early witness. The author of this introduction did not know "De consecratione": "Primus liber continet divisiones, diffinitiones, necnon et differentias legum tam secularium quam ecclesiarum et quomodo uel a quibus uel quando sint institute de electione quoque seu ordinatione clericorum. Secundus continet de scienter seu ignoranter a symoniacis ordinatis et de ordinationibus que per pecuniam fiunt." Admont, Stiftsbibliothek, fol. 8r has the same text. Carlos Larrainzar has discussed and edited the complete text. See Carlos Larrainzar, *Notas sobre las introducciones In prima parte agitur y Hoc opus inscribitur*, in *MEDIEVAL CHURCH LAW AND THE ORIGINS OF THE WESTERN LEGAL TRADITION: A TRIBUTE TO KENNETH PENNINGTON* 134–53 (Wolfgang P. Müller & Mary E. Sommar eds., 2006). These two manuscripts cannot be dated later than 1145–1150. If Gratian were unknown, it is puzzling how he might have been discovered to be the compiler of the *Decretum*.

was unknown or that the glossators did not mention his name. As Noonan illustrated in great detail, twelfth century authors thought they knew many details about him.⁷³ But was he bishop of Chiusi, as Reali and now Winroth would like to believe?⁷⁴

The passage about Gratian in the Siena necrology was written after an entry, but on the same line as a notice of a certain Anselm. Anselm's death is not dated. It reads: "Obit Anselmus subdiaconus et canonicus Sancti Martini Lucensis." At the end of Anselm's entry a later scribe added: "et Gratianus Clusinus episcopus." Reali and Winroth date both hands to the twelfth century, and I think they are right.⁷⁵ Nonetheless, there are problems with their attribution. If one adheres to the rules of Latin syntax, the text reads: "Gratian of Chiusi, bishop." "Clusinus" cannot normally be applied to "Gratianus" and "episcopus" at the same time. If one can assume the scribe knew his Latin well, one can interpret the text as stating that Gratian from Chiusi was a bishop.⁷⁶ Winroth asserts that it is Magister Gratian because the name is not common.⁷⁷ That is not the case. He overlooked the fact that in the same necrology that has a modest number of names, there is another Gratian who is memorialized.⁷⁸

The final problem with this entry in the Sienese necrology is that if this is the Gratian who compiled one of the most famous textbooks of the twelfth century and who taught canon law at Bologna for a long time, can

73. See, e.g., Johannes Faventinus's rubric to *Summa*, circa 1171, Klosterneuburg, Stiftsbibliothek fol. Ira ("Incipit prefatio in Decreta magistri G[ratiani] a, a magistri Jo[hannes] Faventino canonice ac dilucide edita ex duabus summis Ruffini et Stephani utili artificiosoque excepta"); *id.* fol. 1vb ("Circa liber autem quem pre manibus gestamus hec attendenda sunt, scilicet que sit materia Gratiani in hoc opera, que ipsius intentio, que utilitas que causa operis, que distinctio libri, quis modus tractandi, quis titulus.")

74. See Reali, *supra* note 58, at 96–97; Winroth, *supra* note 51, at 115–24.

75. See RACCOLTA DEGLI STORICI ITALIANI DAL CINQUECENTO AL MILLECINQUECENTO ORDINATA DA L.A. MURATORI 22 (Giosué Carducci, Vittorio Fiorini & Pietro Fedele eds., 1931) [hereinafter RACCOLTA DEGLI STORICI ITALIANI].

76. I do not completely exclude the possibility that the scribe did intend to write that Gratianus was from Chiusi and was bishop of Chiusi. Professor Anne Duggan has pointed out to me that Pope Gregory VII referred to another bishop of Chiusi, Lanfrancus, with the same syntactical phrase "confrater noster Lanfrancus Clusinus episcopus." DAS REGISTER GREGORS VII, in MONUMENTA GERMANIAE HISTORICA, EPISTOLAE SELECTAE 2.1 187, lines 13–14 (Erich Caspar ed., 1990); see also Noonan, *Gratian Slept Here*, *supra* note 1, at 153–54 (noting that circa 1162–1184 Robert de Torigny named Gratian a bishop of Chiusi). Professor Duggan told me that the information was in a later correction to Avranches, Bibliothèque municipale 159, though possibly made during Robert's lifetime. In any case, Robert's evidence is distant in time. Robert also thought Gratian was active circa 1130. Noonan thought that chronology was wrong. In this Essay I argue Robert's date is correct.

77. See Winroth, *supra* note 51, at 124 ("The name is unusual enough, however, that we may conclude that it is likely . . .").

78. See RACCOLTA DEGLI STORICI ITALIANI, *supra* note 75, at 17 ("Obit presbyter Gratianus prius plebanus de Folliano et post canonicus Senensis honestus clericus et bene litteratus, anno Domini MCC."). We will meet two more Gratians in the Venetian sources below.

we believe that he would have been given such a modest entry? It is much more modest than Anselm's and many others in the necrology. Would the Sienese scribe have given him no title, no descriptive adjectives, and no clues that he was a person of European wide fame? In the end, after reviewing the evidence, I think John T. Noonan would have concluded that, yes, Gratian was probably a bishop. When was he bishop? Difficult to say. Was he the bishop of Chiusi? The evidence, I think he would say, is inconclusive.

Another Gratian appears in a Venetian court case that was held in 1143. The case concerned tithes, a subject on which Master Gratian had more than a little expertise. The case has been in print for several centuries. Noonan thought it possible that this Gratian could be Master Gratian, but he thought it was only possible, "even plausible," but not certain. Recently, Gundula Grebner uncovered more evidence that would confirm Gratian's presence in a Venetian courtroom and change Noonan's plausible to certain.⁷⁹ Winroth accepts Grebner's argument. The issues of the case are only sparsely given, except that it concerned monks holding the rights to tithes. Grebner points out that Gratian dealt with that issue in his *Decretum* at C.16 q.7. The judicial sentence was rendered with the concurrence of "consilio Patriarce Aquilejensis et episcopi Ferrariensis et magistri Walfredi et Graciani et Moysis et aliorum prudentum" (with the counsel of the Patriarch of Aquilea, the bishop of Ferrara, Master Walfredus, Gratian, Moses, and other prudent men).⁸⁰ Again, the question: can this be Master Gratian, the Father of Canon Law, the compiler, by this time, of a famous book? The hesitations are some of the same as they were for the necrology in Siena. Walfredus, the Roman lawyer, is given the title "magister." Gratian is not. Gratian would have been, in 1143, at the end of his life, having taught canon law at Bologna for almost twenty-five years. Would he not have received at least some recognition of his contributions to Bolognese legal culture? I think so. Furthermore, there is another Gratian whom Noonan, Grebner, and Winroth did not know in the Venetian court records who participated in a case in 1150.⁸¹ In spite of having a cognomen in 1150, he may be the same Gratian who heard the 1143 proceedings—or another Gratian. In any case, as in 1143, he heard the case with a master but is not given that title. It is also another piece of evidence that every Gratian is not Gratian.

79. See Gundula Grebner, *Lay Patronate in Bologna in the First Half of the 12th Century: Regular Canons, Notaries, and the Decretum*, in *EUROPA UND SEINE REGIONEN: 2000 JAHRE RECHTSGESCHICHTE* 107–22 (Andreas Bauer & Karl H.L. Welker eds., 2007).

80. See FLAMINIO CORNARO, *I ECCLESIAE VENETAE ANTIQVVS MONVMENTIS NUMC ETIAM PRIMV EDITIS ILLUSTRATAE AC IN DECADES DISRIBVTAE* 378 (1749) (entry dated Aug. 31, 1143).

81. See *Gratianus Contarenus et Magister Lanfrancus de Brissia*, in *CODICE DIPLOMATICO PADOVANO DALL'ANNO 1101 ALLA PACE DI COSTANZA (25 GIUGNO 1183)* (Andrea Gloria ed., 1879). Gloria prints the 1143 case on page 313, number 419.

The man in Venice is someone who has, perhaps, training in canon law, but he is very likely not the Father of Canon Law. Noonan is right: after you strip away the myth and dubious evidence, Gratian is a shadowy figure. I think that Noonan would agree that Gratian was probably a bishop—but where, and more importantly, when? Was he a bishop-elect at the end of his life? He could not have been a bishop and teaching and compiling his textbook while he was in Bologna.

As we have seen, speculation without any or much evidence has dominated the debate about Gratian for the past ten years. I would like to exercise my right to speculate about Gratian too. If all my guesses and uncertainties in this Essay about Gratian's work and life were to be confirmed as fact, this is the story we might have (remembering that I label these remarks a conjectural novella): Gratian began teaching circa 1125–1130 using a text that looked something like the St. Gall manuscript. He expanded his text circa 1133–1135. He added circa 1500 canons, including some canons from Innocent II's conciliar legislation prior to Lateran II. They derived from Innocent's other councils or letters. He became bishop of (pick a city, maybe Chiusi). Around 1135, Italian canonists (maybe even Gratian himself?) provided a primitive set of glosses to his text that circulated in the earliest manuscripts. He composed a final part of the *Decretum* on sacraments, *De consecratione*, circa 1140. This additional text is very unsophisticated in comparison to the rest of his work and very old-fashioned: it contains just one dictum and 405 texts. If Gratian compiled it, he could have done it quickly and without much thought or effort. Does this story fit the possible facts? Yes. Is it true? As I hope this Essay suggests, some of these conjectures are more plausible than others. Let's wait and see whether the scholarly world of Gratian's followers reaches a consensus. It may take time.

Gratian would move from the shadows to the brilliant and shadowless light of day only in the fourteenth century when Dante put him in *Paradiso* Canto 10, 97–103:

Questi che m'è a destra più vicino, frate e maestro fummi, ed
esso Alberto è di Cologna, e io Thomas d'Aquino.

Quell'altro fiammeggiare esce del riso di Grazian, che l'uno e
l'altro foro aiutò sì che piace in paradiso.

Those who are to my right were my brother and master, Albert
from Cologne and I Thomas Aquinas.

That other person with the light shining from his smile, is Gra-
tian, whose contributions to the secular and the ecclesiastical
courts has pleased Paradise.⁸²

82. DANTE ALIGHIERI, *PARADISO*, Canto 10: 97–103. Francesco Calasso followed Ruffini and Brandelione in their conviction that Dante meant the internal and external forum in this passage. See FRANCESCO CALASSO, *MEDIO EVO DEL DIRITTO VOL. 1: LE FONTI* 396 (Giuffrè ed., 1954). Dante's son, Pietro Alighieri, thought his father meant the secular and ecclesiastical courts. Gratian did not just

Dante knew nothing about Gratian's life. He did know that Gratian composed a book known to every educated person in Europe. He knew it was a book that every student of law studied and that it influenced the development of ecclesiastical and secular jurisprudence. Dante imagined that Gratian sat in heaven with Albertus Magnus and Thomas Aquinas at his side. He may have also known that Albertus and Thomas both used Gratian's *Decretum* in their great *summae*. Do we have to know more about Gratian than Dante knew? Maybe not.

deal with ecclesiastical courts in his *Decretum*. I follow Pietro and thank Orazio Condorelli for this bibliographical information.