

THE MAKING OF  
GRATIAN'S *DECRETUM*

ANDERS WINROTH



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## Chapter 1

### GRATIAN AND THE *DECRETUM*

Gratian is the only lawyer authoritatively known to be in Paradise. Not that he is lonely there, surrounded as he is by theologians and philosophers, Albertus Magnus on one side and Peter Lombard on the other. How did Gratian earn this favored place? Given the scarcity of lawyers in heaven, one may justly query whether it really was his lawyerly qualifications that made Gratian deserve Paradise. After all, he was an expert on canon law, the law of the Church, which exists on the borders between law and theology. Dante, who reported on the inhabitants of the Afterworld, seems to acknowledge the ambiguity inherent in Gratian's vocation by praising his mastery of "both courts," i.e., the exterior, public court of justice and the interior, sacramental court of the confessional (*Paradiso* x 103–105). Perhaps it was as a theologian, not as a lawyer, that Gratian was admitted, and perhaps this is why he smiled, as Dante tells us he did. Or perhaps Dante thought of Gratian primarily as a pre-eminent teacher, since he awarded him a place between two other teachers. Albertus was the teacher of Thomas Aquinas, who was Dante's guide in this particular circle of Paradise. Medieval intellectuals knew also Gratian and the Lombard as eminent teachers through the textbooks which they had written and which were used in the basic teaching of canon law and theology throughout the middle ages and beyond. Thomas had early in his career lectured on Peter Lombard's *Sentences* and he often quoted from Gratian's *Decretum* in his works.

The pairing of Gratian and the Lombard is in fact common both in modern scholarly literature and in medieval writings. One of the more fanciful examples is the widespread medieval story that they were brothers, or even twins.<sup>1</sup> Credence is not given to this myth, and with good reason, but the pairing itself recognizes an important fact. Gratian and

<sup>1</sup> Joseph de Ghellinck, *Le mouvement théologique du XIIe siècle*, 2nd edn., Museum Lessianum: Section historique 10 (Bruges 1948), 285.

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the Lombard were not twin brothers, but the twin pillars on which medieval education in theoretical and practical theology built. They had, each in his discipline, produced the first successful compendium, comprehensively summarizing the learning of that discipline using the scholastic methods that were newly fashionable in their time, the middle of the twelfth century. The continuing usefulness of their works is attested to by the hundreds of medieval and early-modern commentaries that have survived. Gratian's *Decretum* was in fact a valid law book, the oldest and most voluminous part of the so-called *Corpus iuris canonici*, in Catholic ecclesiastical courts until 1917.

It is obvious that books which were used so much for so long would have been greatly influential. Gratian's *Decretum* was one of the cornerstones of canon law. Its definitions of concepts and terminology as well as its actual solutions to legal problems have in many cases been definitive and survive in the most recent compilation of the law of the Catholic Church, the *Codex iuris canonici* of 1983. But the influence of Gratian's *Decretum* is not restricted to the law of the Catholic Church. During the middle ages, canon law regulated areas that would today be thought of as thoroughly secular, such as business, warfare, and marriage. Together with Roman law, canon law formed a coherent and autonomous legal system, the so-called *ius commune* (European Common Law). This system was the only legal system that was studied at the universities, and during the middle ages (and in some countries also much later) it was in fact used in local judicial practice and in producing local law codes.<sup>2</sup> This influence is still felt in modern legislation, for example in the rules concerning a third party's acquisition in good faith of stolen property. In such cases, modern law tends to follow either Gratian in strongly protecting the rights of the original possessor or Roman law in protecting acquisitions made in good faith.<sup>3</sup>

Against the background of the significance of Gratian's *Decretum*, it comes as something of a surprise that practically nothing is known about Gratian and not much more about how he created the *Decretum*. Scholarship during the second half of the twentieth century attempted to clarify Gratian's reasons for writing the *Decretum* and to explore the political and other sympathies that he demonstrated in this, but these

<sup>2</sup> Historians have tended to undervalue the contribution of European Common Law to local practice and legislation, see Manlio Bellomo, *The Common Legal Past of Europe, 1000–1800*, Studies in Medieval and Early Modern Canon Law 4 (Washington, D.C. 1995) and Kenneth Pennington, "Learned law, droit savant, gelehrtes Recht: the tyranny of a concept," *Rivista internazionale di diritto comune* 5 (1994), 197–209; reprinted with corrections in *Syracuse Journal of International Law and Commerce* 20 (1994), 205–215.

<sup>3</sup> James Gordley and Ugo A. Mattei, "Protecting possession," *The American Journal of Comparative Law* 44 (1996), 293–334.

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attempts were misguided and unconvincing. On the contrary, an important article showed convincingly that the received account for Gratian’s biography is a myth constructed by scholars over the centuries and that almost nothing remains when it has been carefully examined.<sup>4</sup> At the same time, many scholars, particularly legal historians, religious historians, and social historians, do research on the basis of Gratian’s *Decretum* from different viewpoints. The publication of such research is often accompanied by a reservation that the results are uncertain since the circumstances surrounding the creation of their source text are so poorly known.

This book will, I believe, remove the need for most such reservations. A fresh consideration of the most important among the medieval manuscripts of Gratian’s *Decretum* reveals that the creation of this work was an even more complicated process than has been imagined. The text that scholars have read, studied, and discussed for generations represents in fact an elaboration of a considerably shorter text. This original *Decretum* is not a hypothetical construction but actually a text which survives and can be read in medieval manuscripts. It has, thus, become possible to study Gratian’s original book.

The discovery that Gratian’s *Decretum* is not one book but two has manifold implications. To begin with, it has become easier to read and interpret the *Decretum*. Many have complained that Gratian’s discussion is rambling and that it fulfils but poorly the promise of the work’s original title (see below) to harmonize the contradictions of canon law. In comparison, Peter Lombard’s slightly later *Sentences* seem better organized and better argued. The first version (or, as I call it, the first recension) is more succinct and to the point than the text previously known (the second recension). This makes it less confusing for the reader, who will be able to distinguish between Gratian’s original argument and the later additions of the second recension.

In the first recension, the nature of Gratian’s project and his contribution to early scholastic methods is clearer. The ratio of commentary to quoted text is higher, making the first recension a more analytical and less discursive work than the second recension. Not every contradiction is resolved even in the first recension, but it becomes easier to understand why the *Decretum* was adopted as the primary text book of canon law. Gratian deserved a place next to Peter Lombard in Paradise.

The first recension is not only shorter and more succinct, it is also different from the second recension in many other respects, which allows

<sup>4</sup> John T. Noonan, “Gratian slept here: the changing identity of the father of the systematic study of canon law,” *Traditio* 35 (1979), 145–172.



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the scholar to trace the surprisingly rapid legal and intellectual development during the interval between the two recensions. The first recension contains remarkably little Roman law and technical language. This reopens and redefines the long-standing debate about the role of Roman law in the *Decretum*. A comparison between the two recensions raises important new questions about the legal renaissance of the twelfth century, some of which will be addressed in this book. I shall argue that the lack of Roman law in the early version is not an expression of Gratian's distrust of or disgust for secular law. It simply shows that Gratian was not particularly well oriented in Roman law. This is in fact to be expected, since the teaching of Roman law was not as far advanced in his time as the foundation myth of the Roman law school in Bologna claims. I shall also suggest that the differences between the two recensions are so great that it becomes difficult to think of them as the products of a single author.

This book has six chapters. The first provides the historiographical background and a consideration of the printed editions and manuscripts that I have used. Chapters 2 and 3 constitute two test cases, in which I closely examine two selected sections in the *Decretum* (C. 24 and C. 11, q. 3, respectively). Chapter 4 will pull together the threads from the previous two chapters and demonstrate that the evidence presented there conclusively proves the existence of the first recension. I shall also consider some basic issues which now require re-evaluation, such as the place and date of the composition of each recension. The important problem of the incorporation of Roman law into the second recension of the *Decretum* is treated in chapter 5, where I also explore the development of Roman law teaching in Gratian's time. The authorship of the *Decretum* was already a vexed question before the discovery of the first recension. Some scholars believed that Gratian was responsible for the entire *Decretum*, while others preferred to think that his work was supplemented by others. The problem is even more acute after the discovery of the first recension. In chapter 6, I shall study the arguments for and against Gratian's authorship of both recensions.

In conclusion, I shall discuss the broader implications of this study. The realization that the received text of Gratian's *Decretum* is an uneasy composite of incongruous parts will, in the first place, change the ways in which scholars read this fundamental law book. To assist them, the Appendix lists the contents of the first recension. Even more importantly, this study has repercussions for our understanding of the intellectual and legal history of the twelfth century and opens up new possibilities for what promises to be fruitful further research in these areas.

## Gratian and the “*Decretum*”

### THE *CONCORDIA DISCORDANTIUM CANONUM*

The work usually known as Gratian’s *Decretum* was originally entitled the *Concordia discordantium canonum* (“The Harmony of Discordant Canons”).<sup>5</sup> This title illustrates the aims and methods of its author, who attempted to resolve the contradictions among the canons which were included in the work. The legislative texts with which he worked spanned the period from the early, pre-Constantine Church to the council celebrated in 1139 by Pope Innocent II, in addition to biblical quotations. The texts included papal decretals, conciliar canons, fragments from writings of the Church Fathers, and pieces of secular legislation. Gratian discussed the canons and contradictions among them in his commentaries, the so-called *dicta Gratiani*, which are interspersed among the canons.

The overall structure of the *Decretum* as presently known may appear peculiar and mystifying to modern scholars, particularly those who are used to the strictly logical structure of later scholastic texts. It consists of three parts. The first is divided into 101 *distinctiones*, which concern the sources of law, the ecclesiastical hierarchy, and the discipline of the clergy. The second part consists of thirty-six *causae*, each divided into *questiones*. This part discusses among many other things simony, judicial procedure, religious orders, heretics, and marriage. The third *questio* in *Causa* 33 is much longer than Gratian’s *questiones* normally are. Its subject is penance and it is usually referred to as the *de penitentia*. This *questio* contains seven *distinctiones*. The third part consists of five *distinctiones*, is usually termed the *de consecratione*, and treats the remaining sacraments.<sup>6</sup>

### GRATIAN

In 1979, John T. Noonan published an article which questioned the historical accuracy of the received opinion about Gratian’s biography.

<sup>5</sup> Friedrich Heyer, “Der Titel der Kanonensammlung Gratians,” *ZRG KA* 2 (1912), 336–342. See also below, chapter 6.

<sup>6</sup> When citing a text in the first part, I refer to *distinctio* and *canon*: “D. 1, c. 1.” For the second part, I refer to *causa*, *questio*, and *canon*: “C. 1, q. 1, c. 1.” The third part (the *de consecratione*) and C. 33, q. 3 (the *de penitentia*) are cited with an abbreviation for the name of the treatise, *distinctio* and *canon*: “de. cons. D. 1, c. 1” and “de pen. D. 1, c. 1,” respectively. Gratian’s *dicta* are cited as “C. 1, q. 1, d. a. c. 1” (*dictum ante . . .*) or “D. 1, d. p. c. 1” (*dictum post . . .*). The *dicta* introducing each *causa* are cited as “C. 1, d. init.” At the head of each longer quotation from the *Decretum* or of each colation of variant readings, I indicate the relevant section in the *Decretum* with an abbreviated reference: “1.1.1” = C. 1, q. 1, c. 1. My citations consistently follow the divisions of the standard edition, Emil Friedberg, ed., *Corpus iuris canonici*, 1, *Decretum magistri Gratiani* (Leipzig 1879). When I refer to a line in Friedberg’s edition, I number the line from the beginning of the text of the relevant canon or *dictum*, leaving the lines occupied by rubrics and inscriptions uncounted.

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Until then, most scholars claimed that Gratian had been a Camaldolese monk who taught canon law, probably at the monastery of Saints Felix and Nabor in Bologna.<sup>7</sup> Noonan showed how layer after layer of Gratian's biography had piled up through the centuries. There is only one contemporary document which mentions a Gratian who might be identical with the author of the *Decretum*. When the papal legate Cardinal Goizo in 1143 judged a case in Venice, he consulted with three *prudentes: magister Walfredus, Gratianus, and Moysis*. The first and the third are usually identified with Bolognese lawyers, which makes it likely that the second expert was the author of the *Decretum*.<sup>8</sup> Very little else can be known with certainty about Gratian except that he wrote the *Decretum*. Even his religious status is open to question. The author of the *Summa Parisiensis*, a commentary on the *Decretum* probably written shortly before 1170, claims that Gratian was a monk.<sup>9</sup> Since Gratian treats questions of monasticism thoroughly in *Causae* 16 to 20, and in a manner that benefits monks, several modern scholars have remained convinced that he in fact was a monk, Noonan's doubts notwithstanding.<sup>10</sup> However, there is reason to query whether the author of *Summa Parisiensis*, who was commenting on passages which he thought beneficial to monks, communicated correct information or simply attempted to discredit Gratian's objectivity. Complicating the situation are statements that Gratian was a bishop. In a chronicle composed about 1180, the abbot of Mont Saint Michel, Robert of Torigny, claims that Gratian was bishop of Chiusi.<sup>11</sup> That Gratian was a bishop is also maintained by a gloss which appears in manuscripts from

<sup>7</sup> Noonan, "Gratian slept here." An uncritical summary of the traditional view is found in Carlo Mesini, "Postille sulla biografia del 'Magister Gratianus' padre del diritto canonico," *Apollinaris* 54 (1981), 509–537.

<sup>8</sup> Paul Kehr, *Regesta pontificum Romanorum: Italia pontificia* (Berlin 1906–1975), v 60. Cf. Stephan Kuttner, "The father of the science of canon law," *The Jurist* 1 (1941), 2, and Noonan, "Gratian slept here," 171.

<sup>9</sup> *Summa parisiensis* ad C. 2, q. 7, d. p. c. 52 et C. 16, q. 1, c. 61, in Terence McLaughlin, ed., *Summa Parisiensis on the "Decretum Gratiani"* (Toronto 1952), 115 and 181. For the date, about which there has been some controversy, see Kenneth Pennington, "Medieval canonists: a bibliographical listing," to appear in Kenneth Pennington and Wilfried Hartmann, eds., *History of Medieval Canon Law* (Washington, D.C. 1999–) x, provisionally available on the web at <http://www.maxwell.syr.edu/MAXPAGES/faculty/penningk/biobibl.htm>.

<sup>10</sup> Most importantly Peter Landau, "Gratian," in *Theologische Realenzyklopädie* xiv (Berlin 1985), 124, Peter Landau, "Quellen und Bedeutung des gratianischen Dekrets," *Studia et documenta historiae et iuris* 52 (1986), 220, Stephan Kuttner, "Gratien," in *Dictionnaire d'histoire et de géographie ecclésiastiques* xxi (Paris 1986), 1236, and Stephan Kuttner, "Research on Gratian: acta and agenda," in *Proceedings of the Seventh International Congress of Medieval Canon Law*, MIC Subs. 8 (Vatican City 1988), 6; reprinted in Stephan Kuttner, *Studies in the History of Medieval Canon Law*, Collected Studies CS 325 (Aldershot 1990), no. v.

<sup>11</sup> Richard Howlett, ed., *The Chronicles of the Reigns of Stephen, Henry II, and Richard I*, iv, *The Chronicle of Robert of Torigni*, Memorials of Great Britain and Ireland during the Middle Ages ["Roll Series"] 82 (London 1889), 118.

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the third quarter of the twelfth century.<sup>12</sup> In its oldest form, this gloss does not mention the *de consecratione* in its enumeration of the parts of the *Decretum*. The present book aims to show that the original version of the *Decretum* did not contain the *de consecratione*, which suggests that the gloss is very early and should be paid more attention than is usually the case. Unfortunately, it is impossible to check whether Robert of Torigny was correct in stating that Gratian was bishop of Chiusi, since extremely little is known about any bishops of Chiusi in the twelfth century.<sup>13</sup>

The evidence is, in other words, contradictory. To conclude that Gratian was both monk and bishop is not very satisfying and in any case methodologically questionable. Particularly striking is that what twelfth-century information there is derives from French sources, while the masters active in Bologna remain silent. Also, the oldest manuscripts of the *Decretum* do not even name its author (see chapter 6). This and the confusion about whether he was a monk or a bishop suggest that the canonists of the second half of the twelfth century, at least in Bologna, simply did not know who Gratian was, or that they did not care to investigate. They were, however, from the very beginning agreed about calling him *magister*, which suggests that he taught canon law. That this label was attached to his name could, however, be interpreted also in other ways. He could have been simply “the master of the *Decretum*” (which is the meaning the word has when Paucapalea refers to Gratian in the preface to his *summa*<sup>14</sup>), a judge, or even an abbot.<sup>15</sup> R. W. Southern has recently argued that Gratian in fact was a lawyer and not an academic teacher of law.<sup>16</sup> However, the form of the *Decretum* itself seems to contradict Southern’s suggestion. The thirty-six fictitious cases that provide the layout of the second part are not, as Southern calls them, “imaginary law-suits” or imaginary legal cases, as might be inferred from the term *causa*:

C. 32, d. init.

Since he did not have a wife, a man joined a prostitute to himself in marriage. She was infertile and the daughter of a serf and the granddaughter of a freeman.

<sup>12</sup> The gloss was edited on the basis of all known manuscripts in Rudolf Weigand, “Frühe Kanonisten und ihre Karriere in der Kirche,” *ZRG KA* 76 (1990), 135–155.

<sup>13</sup> Noonan, “Gratian slept here,” 153–154, Kehr, *Italia pontificia*, III 230, and Ferdinando Ughelli, *Italia sacra sive de episcopis Italiae . . . opus singulare* (Venice 1717–1722), III 631.

<sup>14</sup> Paucapalea, *Summa über das “Decretum Gratiani,”* ed. Johann Friedrich von Schulte (Giessen 1890), 3.

<sup>15</sup> Doubts were raised by Noonan, “Gratian slept here,” 169–170, and also by Peter Classen, who was prevented by his untimely death from substantiating them, see Kuttner, “Research on Gratian,” 7. For the possible meanings of *magister*, see also Johannes Fried, *Die Entstehung des Juristenstandes im 12. Jahrhundert*, *Forschungen zur neueren Privatrechtsgeschichte* 21 (Cologne 1974), 9–24, Franz Blatt, *Novum glossarium mediae latinitatis*, M–N (Copenhagen 1959–1969), 22–29, and J. F. Niermeyer, *Mediae latinitatis lexicon minus* (Leiden 1976), 625.

<sup>16</sup> Southern, *Scholastic Humanism and the Unification of Europe*, I: *Foundations* (Oxford 1995), 303–305.

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Although the father wanted to give her to another, the grandfather joined her to this man, for the reason of incontinence only. Thereafter, the man, led by regret, began to attempt to conceive children with his own maid. Afterwards, when he had been convicted of adultery and punished, he asked a man to take his wife by violence, so that he would be able to divorce her. When this had been done, he married an infidel woman, but on the condition that she converted to the Christian religion. Now it is first asked if it is licit to take a prostitute as a wife? Second, if she who is taken [as a wife] for the reason of incontinence is to be called "wife"? Third, whose judgement would she follow, the free grandfather or the servile father? Fourth, if he is allowed to conceive children with a maid while his wife is alive? Fifth, if she who suffers violence is proven to have lost her virtue? Sixth, if an adulterous man can divorce his adulterous wife? Seventh, if a man may marry another while his divorced wife is alive? Eighth, if a Christian man may take in marriage an infidel under the aforementioned condition?<sup>17</sup>

This is not the description of a case in which all these questions had to be answered before judgement could be passed. Instead, it bears the hallmarks of a teacher who designs his examples in such a way that, however bizarre, they raise exactly those legal issues which he wants to discuss. Besides, every teacher knows the value of striking examples that stay in the memories of his students. Even as severe a critic as Noonan yields this point.<sup>18</sup>

Short of the unlikely event that some hitherto unnoticed source will throw light on Gratian's biography, the text of the *Decretum* is our most reliable source for knowing its author. Here, much work remains to be done. To mention only one detail, the rather sweeping assertions that Gratian favored monks deserve to be studied and substantiated in greater detail,<sup>19</sup> and to be contrasted with other twelfth-century canonical works. Such studies are, however, hampered by the fact that it is not entirely clear exactly what the text of Gratian's *Decretum* comprises.

<sup>17</sup> Friedberg, ed. *Decretum*, 1115: "Quidam, cum non haberet uxorem, quandam meretricem sibi coniugio copulavit, que erat sterilis, neptis ingenui, filia originarii; quam cum pater uellet alii tradere, auus huic eam copulavit, causa solius incontinentiæ. Deinde hic, penitentiæ ductus, ex ancilla propria filios sibi querere cepit. Postea de adulterio conuictus et punitus quandam rogavit, ut ei uxorem suam opprimeret, ut sic eam dimittere posset, quo facto quandam infidelem sibi copulavit, ea tamen conditione, ut ad Christianam religionem transiret. Hic primum queritur, an licite meretrix ducatur in uxorem? Secundo, an ea, que causa incontinentiæ ducitur, sit coniux appellanda? Tercio, cuius arbitrium aliqua sequatur, an liberi aui, an originarii patris? Quarto, si uiuente uxore liceat alicui ex ancilla filios querere? Quinto, si ea, que uim patitur, pudicitiam amittere conprobetur? Sexto, si adulter adulteram possit dimittere? Septimo, si uiuente dimissa aliam possit accipere? Octauo, si infidelem sub premissa conditione licet alicui fidelium in coniugem ducere?" <sup>18</sup> Noonan, "Gratian slept here," 169.

<sup>19</sup> Rudolf Weigand recently pointed to some details in D. 63, d. p. c. 34, where Gratian gives his interpretation a slant favorable to monks, see Rudolf Weigand, "Das kirchliche Wahlrecht im Dekret Gratians," in *Wirkungen europäischer Rechtskultur: Festschrift für Karl Kroeschell zum 70. Geburtstag*, ed. Gerhard Köbler and Hermann Niehlsen (Munich 1997), 1344.

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### THE TEXT AND THE EDITIONS OF THE *DECRETUM*

Despite the fundamental importance of Gratian’s *Decretum* in the middle ages and beyond, it was never formally promulgated by the Church. It was, nonetheless, one of the texts which were subject to philological attention following the Council of Trent. A commission, commonly known as the *Correctores Romani*, was appointed in 1566 for the purpose of correcting and emending the *Corpus iuris canonici* (including the *Decretum* of Gratian, the *Liber extra* of Gregory IX, the *Liber sextus* of Boniface VIII, the *Clementinae* promulgated by John XXII, and the *Extravagantes*). The *Correctores*’ efforts resulted in the so-called *editio Romana* published in 1582. Its impact on all later editions of the *Decretum* is so great that some acquaintance with the methods and aims of the *Correctores* is indispensable. For the scholar interested in Gratian’s text, the most important drawback of the *editio Romana* is that the *Correctores* were less concerned with reproducing what Gratian actually wrote than with restoring the original text of his material sources. They would retrieve for each canon what seemed to be the most accurate text of the papal decree, conciliar decision, or patristic authority that Gratian was quoting, and then “correct” his text. As the most recent editor of the *Decretum* pointed out, the aims of the *Correctores* were “not to restore the *Decretum* as Gratian composed it, but as he ought to have composed it.”<sup>20</sup>

The *editio Romana* was reprinted numerous times. The first editor after 1582 to go back to the manuscript tradition of Gratian was Just Henning Böhmer (Halle 1747), who, being a Protestant, did not feel bound by the official edition of the Catholic Church. The four manuscripts he used were late and unreliable, but he produced a better text than had earlier been available. The next editor, Emil Ludwig Richter (Leipzig 1839), returned to the *editio Romana*. However, he made and published collations of pre-1582 editions of the *Decretum*, of the editions of Gratian’s material sources which were available at the time, and of other canonical collections. The most recent editor of the *Decretum*, Emil Friedberg,

<sup>20</sup> “Vides non id in animo habuisse correctores Romanos, ut restitueretur decretum, quale a Gratiano compositum esset, sed quale a Gratiano componi debuisset.” Friedberg, ed., *Decretum*, lxxviii. Columns lxxvii–xc give a convenient overview of the *Correctores*’ activities including the texts of relevant sixteenth-century papal letters. The methods of the *Correctores* have serious implications for the usefulness of the recent translation into English of *distinctiones* 1–20, which unfortunately is based on the *editio Romana*: Gratian, *The Treatise on Laws (Decretum DD. 1–20)*, trans. Augustine Thompson and James Gordley, *Studies in Medieval and Early Modern Canon Law* 2 (Washington 1993). Katherine Christensen’s statement in the introduction to this translation, p. xx, that “the Roman edition . . . remains the edition of choice for serious work on the *Decretum*” is incorrect. See also Rudolf Weigand’s review of this translation, in *Theologische Revue* 92 (1996), 152–155.

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used eight manuscripts for his edition (Leipzig 1879), and made substantial use of Richter's collations. The text he presented was based on the manuscripts, and the divergences from the *editio Romana* are signaled in a separate apparatus. A large and not always easily interpreted critical apparatus gives accounts of variant readings, sources, and parallels in other canonical collections.

Friedberg's edition remains an impressive monument to the great industry of an editor working alone,<sup>21</sup> but its shortcomings are, after more than a century of research, well known. Aside from formal inadequacies and a few purely typographical deficiencies,<sup>22</sup> one of the two fundamental problems is that Friedberg's manuscript basis is narrow, although in this he is typical of the editor of his time, understandably so given conditions of travel and technology.<sup>23</sup> Before re-editing C. 24, q. 1, Titus Lenherr studied the value of several old manuscripts and the edition of Friedberg by comparing their text of the canons that Gratian took from the canonical collection *Polycarpus* with a critical edition of this collection (available in typescript at the Monumenta Germaniae Historica in Munich).<sup>24</sup> Through this procedure, he determined which manuscripts of the *Decretum* have the highest number of readings in common with the *Polycarpus* and he assumed that these would best represent Gratian's text. He concluded that the two Cologne manuscripts (Ka and Kb<sup>25</sup>) which Friedberg used as the basis for

<sup>21</sup> Cf. Friedberg, ed., *Decretum*, CI.

<sup>22</sup> Every reader of Friedberg's edition is familiar with the eye-strain required to sort out the apparatus. In 1948 Stephan Kuttner pointed out that Friedberg's reports of the readings of manuscripts and sources are often ambiguous or even misleading and that his listing of other canonical collections' use of the same canons in many cases is inadequate, Stephan Kuttner, "De Gratiani opere noviter edendo," *Apollinaris* 21 (1948), 118–128. Titus Lenherr's research confirms that Friedberg does not always accurately report readings of his manuscripts, see Titus Lenherr, "Arbeiten mit Gratians Dekret," *AKKR* 151 (1982), 140–166.

<sup>23</sup> The least incomplete listing of *Decretum* manuscripts is found in Anthony Melnikas, *The Corpus of the Miniatures in the Manuscripts of "Decretum Gratiani,"* *Studia Gratiana* 18 (Rome 1975), 1261–1267, where 495 manuscripts are listed, unfortunately without date and origin. This listing is little more than an excerpt from Stephan Kuttner, *Repertorium der Kanonistik (1140–1234): Prodrömus Corporis glossarum* 1, *Studi e testi* 71 (Vatican City 1937) and fails to register many manuscripts mentioned in the literature since 1937. Cf. Carl Nordenfalk's review of Melnikas' work, in *Zeitschrift für Kunstgeschichte* 43 (1980), 318–337, and Hubert Mordek's review, in *ZRG KA* 72 (1986), 403–411 (with corrections and a list of fifty-nine additional manuscripts). For the oldest manuscripts, these works are superseded by Rudolf Weigand, *Die Glossen zum "Dekret" Gratians: Studien zu den frühen Glossen und Glossenkompositionen,* *Studia Gratiana* 26–27 (Rome 1991). I am preparing a new listing of *Decretum* manuscripts for the forthcoming Pennington and Hartmann, eds., *History of Medieval Canon Law* x.

<sup>24</sup> Lenherr, "Arbeiten," and Titus Lenherr, *Die Exkommunikations- und Depositionsgewalt der Häretiker bei Gratian und den Dekretisten bis zur "Glossa Ordinaria" des Johannes Teutonicus* (hereafter *Exkommunikationsgewalt*), *Münchener theologische Studien*, III, *Kanonistische Abteilung* 42 (Munich 1987), 12–17.

<sup>25</sup> In citing manuscripts of the *Decretum*, I use the *sigla* employed by Rudolf Weigand in various publications (fullest listing in Weigand, *Glossen zum "Dekret,"* xxi–xxiv). All the *sigla* I mention are listed in the *Conspectus siglorum* of the present book.

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his edition represent an eccentric branch of the tradition. This branch is characterized by substitution of individual words and frequent transpositions of the word order. Among the twenty-one manuscripts thus examined he found a Munich manuscript (Mk) to contain the "best" text, i.e., the text which most closely corresponds to Gratian's source.

Within the limits imposed by his narrow manuscript basis, Friedberg's editorial skills were considerable. His sense of Latin style and of the content of the texts often allowed him to find the best reading where his basic manuscripts failed him. His edition of C. 24, q. 1 is, therefore, sometimes superior to that of Lenherr, who consistently follows a single manuscript. A striking example, indicated by Rudolf Weigand, is the beginning of C. 24, q. 1, c. 4, which in Lenherr's edition (p. 20) reads "Audiuimus quod hereticus Rauennas dictus archiepiscopus . . ." ["We have heard that the heretic who is called archbishop of Ravenna . . ."]. In Friedberg's edition (col. 967), the word *hereticus* is replaced by the correct *Henricus*, which is found in most *Decretum* manuscripts and in Gratian's source. The basic manuscripts of both Lenherr (Mk) and Friedberg (Ka) have *hereticus*, but Friedberg's sounder editorial methods allowed him to overcome this weakness.<sup>26</sup>

### THE QUEST FOR THE ORIGINAL *DECRETUM*

The second major problem facing a scholar using Friedberg's edition is a consequence not so much of the shortcomings of the edition itself as of advances in scholarship on Gratian during the twentieth century. The edition presents the *Decretum* as a unified product of one author. The name *Gratianus*, for example, appears at the beginning of every *dictum* and every major division of the work, which is not the case in the manuscripts. Many old manuscripts do not contain Gratian's name at all except as added by later hands (see chapter 6). The genesis of the *Decretum* and the authorship of its different parts have attracted much scholarly attention over the last half century.<sup>27</sup>

(i) It has long been known that more than 150 canons present in the late medieval vulgate text were added by the masters of Bologna at various times after the work was completed. Already some medieval manuscripts label these *paleae*. They are also distinguished by their

<sup>26</sup> For criticism of this aspect of Lenherr's edition of C. 24, q. 1, see Rudolf Weigand's review of *Exkommunikationsgewalt*, by Lenherr, in *AKKR* 156 (1987), 649, and Rudolf Weigand, "Zur künftigen Edition des *Dekretes* Gratians," *ZRG KA* 83 (1997), 35-36.

<sup>27</sup> Surveys of this historiography are Jacqueline Rambaud, "Le legs de l'ancien droit: Gratien," in *L'âge classique 1140-1378*, by Gabriel Le Bras, Charles Lefebvre, and Jacqueline Rambaud, *Histoire du droit et des institutions de l'Eglise en Occident* 7 (Paris 1965), 47-129, Noonan, "Gratian slept here," and Kuttner, "Research on Gratian."



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absence from some manuscripts and their varying location when present. Some of the *paleae* are, however, not additions by the school, but canons which had been cancelled in the schools, because they also appear elsewhere in the *Decretum*.<sup>28</sup>

(ii) One of the most significant advances in modern scholarship on Gratian's *Decretum* took place during enforced leisure at a Swiss military internment camp during the Second World War. The Polish historian Adam Vetulani, using little more than the critical apparatus of Friedberg's edition, postulated that over forty segments containing Roman law are also later additions, since they are not present in all manuscripts and their place in Gratian's argument is often awkward. This is true, however, only for the civilian chapters taken directly from Justinian's *Digest* and *Code*. The original compilation seems to have contained Roman law statements taken from earlier canonical collections.<sup>29</sup>

(iii) The third part of the *Decretum*, the *de consecratione*, abandons the dialectical method used in parts I and II and does not contain any *dicta*. Irregularities in the manuscript transmission of this section as well as indications in an early prefatory note to the *Decretum* that the work contained two parts suggested to Jacqueline Rambaud that it was not an original element of Gratian's composition.<sup>30</sup>

<sup>28</sup> Rudolf Weigand, "Versuch einer neuen, differenzierten Liste der Paleae und Dubletten im Dekret Gratians," in *Life, Law and Letters: Historical Studies in Honour of Antonio García y García*, *Studia Gratiana* 28–29 (Rome 1998), 883–899, Rambaud, "Le legs," 109, and Titus Lenherr, "Fehlende 'Paleae' als Zeichen eines überlieferungsgeschichtlich jüngeren Datums von Dekret-Handschriften," *AKKR* 151 (1982), 495–507. See also Walter Ullmann, "The paleae in Cambridge manuscripts of the *Decretum*," *Studia Gratiana* 1 (1953), 161–216; reprinted in Walter Ullmann, *Jurisprudence in the Middle Ages*, *Collected Studies CS* 120 (London 1980), no. IV, Hartmut Zapp, "Paleae-Listen des 14. und 15. Jahrhunderts," *ZRG KA* 59 (1973), 83–111, and Rudolf Weigand, "Fälschungen als Paleae im Dekret Gratians," in *Fälschungen im Mittelalter*, MGH *Schriften*, 33: 2 (Hanover 1988), 301–318.

<sup>29</sup> Adam Vetulani, "Gratien et le droit romain," *Revue historique de droit français et étranger*, ser. 4, 24/25 (1946/1947), 11–48; reprinted in Adam Vetulani, *Sur Gratien et les décrétales: Recueil d'études*, *Collected Studies CS* 308 (Aldershot 1990), no. III, and Adam Vetulani, "Encore un mot sur le droit romain dans le Décret de Gratien," *Apollinaris* 21 (1948), 129–134; reprinted in Vetulani, *Sur Gratien et les décrétales*, no. IV. This line of inquiry has also been pursued by Stephan Kuttner, "New studies on the Roman law in Gratian's *Decretum*," *Seminar* 11 (1953), 12–50; reprinted in Stephan Kuttner, *Gratian and the Schools of Law, 1140–1234*, *Collected Studies CS* 185 (London 1983), no. IV, Stephan Kuttner, "Additional notes on the Roman law in Gratian," *Seminar* 12 (1954), 68–74; reprinted in Kuttner, *Gratian and the Schools of Law*, no. V, Rambaud, "Le legs," 119–128, Jean Gaudemet, "Das römische Recht im Dekret Gratians," *Österreichisches Archiv für Kirchenrecht* 12 (1961), 177–191; reprinted in Jean Gaudemet, *La formation du droit canonique médiéval*, *Collected Studies CS* 111 (London 1980), no. IX.

<sup>30</sup> Jacqueline Rambaud-Buhot, "L'étude des manuscrits du Décret de Gratien conservés en France," *Studia Gratiana* 1 (1950), 129–130, and Rambaud, "Le legs," 90–99. The prefatory note which she mentions has since been edited in Rudolf Weigand, "Frühe Kanonisten," 152–155. An argument for Gratian's authorship of the *de consecratione* (ultimately unconvincing despite many valid points) is made in John Van Engen, "Observations on *De consecratione*," in *Proceedings of the Sixth International Congress of Medieval Canon Law*, MIC Subs. 7 (Vatican City 1985), 309–320.

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(iv) The *de penitentia* (C. 33, q. 3) is a disproportionately long *questio* and its subject matter, penance, has little in common with the surrounding *Causae* 27 to 36, which treat marriage law. These facts have been taken to indicate that at least parts of the *de penitentia* were added after the completion of the *Decretum*. In 1914, Joseph de Ghellinck pointed out that the seventeenth-century theologian Stephan Bochenthaler had claimed that the *de penitentia* was not the work of Gratian but of his contemporary Ernest of Zwiefalten. It is unknown what basis, if any, Bochenthaler had for this assertion, which obviously could have served a polemical purpose and may not have been made in good faith. In 1952, Jacqueline Rambaud drew attention to some irregularities in the manuscript transmission of *de penitentia* and questioned whether the treatise was originally a part of Gratian’s work. This issue was investigated by Karol Wojtyła (since 1978 Pope John Paul II), who suggested that distinctions 2 to 4 were not a part of Gratian’s original composition. In 1965, Rambaud largely agreed with Wojtyła’s results.<sup>31</sup>

(v) Finally, Gérard Fransen has observed that most canons from the Second Lateran Council, held in 1139, fit their context in the *Decretum* awkwardly. He assumed, therefore, that the *Decretum* was more or less finished when the Lateran canons reached the author.<sup>32</sup> In addition, Vetulani has suggested that the canons of the First Lateran Council of 1123 may likewise be later additions.<sup>33</sup>

When I survey this historiography, the contributions of Adam Vetulani and Jacqueline Rambaud stand out. While the latter’s research and writings focused on examinations of manuscripts of the *Decretum*, the former used the evidence thus assembled as building blocks in a bold and imaginative interpretation of Gratian’s work. Vetulani saw the original paucity of Roman law texts in the *Decretum* as an expression of Gratian’s political objectives. Gratian rejected secular law because he was a supporter of Pope Paschal II (1099–1118), who attempted to solve the Investiture Contest by completely separating the Church from the secular sphere. Such a political orientation does not tally with a work supposedly written around 1140, and this explains Vetulani’s insistence on putting the original composition of the *Decretum* earlier in the twelfth century. He

<sup>31</sup> Ghellinck, *Le mouvement théologique*, 512–513, Rambaud-Buhot, “L’étude des manuscrits,” 130–131, Wojtyła, “Le traité *De penitentia* de Gratien dans l’abrégé de Gdańsk Mar. F. 75,” *Studia Gratiana* 7 (Rome 1959), 355–390, and Rambaud, “Le legs,” 82–90.

<sup>32</sup> Adam Vetulani, “Nouvelles vues sur le *Décret* de Gratien,” in *La Pologne au Xe Congrès international des sciences historiques à Rome* (Warsaw 1955), 96; reprinted in Vetulani, *Sur Gratien et les décrétales*, no. v, Gérard Fransen, “La date du *Décret* de Gratien,” *Revue d’histoire ecclésiastique* 51 (1956), 529, Rambaud, “Le legs,” 57–58, and Titus Lenherr, “Die Summarien zu den Texten des 2. Laterankonzils von 1139 in Gratians *Dekret*,” *AKKR* 150 (1981), 528–551.

<sup>33</sup> Vetulani, “Nouvelles vues,” 96.

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suggested that Gratian had begun his work by 1105, which is the year mentioned in a form letter in C. 2, q. 6, d. p. c. 31, and finished it before the Concordat of Worms of 1122. Vetulani attempted to undergird this argument with evidence garnered from an abbreviation of the *Decretum* in a manuscript in Gdańsk. Later research has revealed that this abbreviation is not as old as he thought and that his conclusions were often misguided. His reliance on this manuscript was an unfortunate effect of the political division of Europe during most of the second half of the twentieth century, which prevented him from frequent international travel for manuscript study. Vetulani's contribution is remarkable considering the personal circumstances under which he was forced to work.

Vetulani's interpretation of Gratian's work quickly became the target of criticism and is now generally rejected,<sup>34</sup> except for his basic work on the Roman law material in the *Decretum*, which is universally accepted. Gérard Fransen's observation that the canons of the Second Lateran Council were late additions to the text is also widely considered correct. The arguments of Rambaud, Vetulani, and Wojtyła that Gratian did not write most or any of the two treatises *de penitentia* and *de consecratione* have had a mixed reception. Some scholars accept them with reservations while others remain highly sceptical.<sup>35</sup> For a less important text, such problems may be thought minor, but any attempt at understanding the fundamental transformation of law that took place in the twelfth century is severely handicapped by the insecurity about what Gratian's work really contained. Indeed, in his article from 1988 about the "acta and agenda" of *Decretum* scholarship, Stephan Kuttner puts this problem first in his list of issues that need to be addressed:

1. The making of the *Concordia discordantium canonum*, its plan and structure: was it drafted and completed in one grandiose thrust, or did the original version go through successive redactions?<sup>36</sup>

Kuttner goes on to point out that this problem must be solved before the text can be accurately dated and the purpose of the book discussed in the context of historical developments (whether religious, political, intellectual, or legal). The signs that the *Decretum* outgrew Gratian's original plan and was revised are clearly visible in the text. The evidence for what Kuttner in a happy turn of phrase called "untidy seams"<sup>37</sup> extends well beyond the limits of the two treatises *de penitentia* and *de consecratione*, the Roman law material, and the canons of the Second Lateran Council.

<sup>34</sup> Among his earliest critics were Fransen, "La date du *Décret*," and René Metz, "A propos des travaux de M. Adam Vetulani," *RDC* 7 (1957), 62–85.

<sup>35</sup> For two authoritative but diverging recent accounts, see Landau, "Gratian," and Kuttner, "Gratian." <sup>36</sup> Kuttner, "Research on Gratian," 10. <sup>37</sup> *Ibid.* 13.

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One may think of such passages as C. 1, q. 5, d. p. c. 2, where Gratian appears to refer to the two preceding canons in the singular (*hac auctoritate*) and C. 24, q. 3, c. 5, where the rubric *de eodem* (“about the same thing”) makes little sense if it is taken to refer back to c. 4.

Recent scholarly advances make this the right time for a renewed consideration of the problems surrounding the composition of the *Decretum*. First, the manuscript transmission of the *Decretum* is infinitely better known now than ten years ago, thanks to Rudolf Weigand’s research on the early decretists.<sup>38</sup> In order to study glosses pre-dating the *Glossa ordinaria* of 1215, Weigand examined and described practically every extant *Decretum* manuscript (more than 150) from the twelfth and the first half of the thirteenth century. His research greatly facilitates the selection of manuscripts to be used in a study of the text of the *Decretum*.

Second, recent scholarship has made important advances concerning Gratian’s formal (i.e., immediate) sources. Because several centuries of scholarship concentrated on the material (i.e., original) sources,<sup>39</sup> the formal sources were traditionally given short shrift. Editors from the *Correctores Romani* to Friedberg habitually noted occurrences of Gratian’s texts in other collections but without indicating from which of them he had extracted his text. While earlier scholars usually expected Gratian to have used a large number of sources, including papal registers, patristic manuscripts, and the Pseudo-Isidorian decretals, twentieth-century scholarship has more and more come to realize that he mainly used relatively few recent compilations. An important breakthrough came in 1984, when Peter Landau pointed out that a handful of sources account for most of the canons in the *Decretum*.<sup>40</sup> These sources are, in the first place, the following five collections.

(i) Anselm of Lucca’s canonical collection, originally compiled around 1083. It is preserved in several recensions. Peter Landau has investigated the relationship between them and concluded that Gratian used a manuscript of recension A’.<sup>41</sup> For the text of this collection, I used Friedrich

<sup>38</sup> In addition to dozens of articles, the major result of this research is Weigand, *Glossen zum “Dekret.”*

<sup>39</sup> This kind of research culminated in the four volumes of Carlo Sebastiano Berardi, *Gratiani canones genuini ab apocryphis discreti* (Venice 1783).

<sup>40</sup> Peter Landau, “Neue Forschungen zu vorgratianischen Kanonensammlungen und den Quellen des gratianischen *Dekrets*,” *Ius commune* 11 (1984), 1–29 and Landau, “Quellen und Bedeutung,” Landau most recently summarized his work on Gratian’s sources in Peter Landau, “Gratians Arbeitsplan,” in *Iuri canonico promovendo: Festschrift für Heribert Schmitz zum 65. Geburtstag* (Regensburg 1994), 691–707.

<sup>41</sup> Peter Landau, “Die Rezension C der Sammlung des Anselm von Lucca,” *BMCL* 16 (1986), 17–54, and Peter Landau, “Erweiterte Fassungen der Kanonensammlung des Anselm von Lucca aus dem 12. Jahrhundert,” in *Sant’Anselmo, Mantova e la lotta per le investiture: Atti del Convegno Internazionale di Studi*, ed. Paolo Golinelli (Bologna 1987), 323–338.

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Thaner's incomplete edition (*Ans.*), supplemented by the twelfth-century manuscript Graz, Universitätsbibliothek 351 (*Ans.G*), which belongs to recension A.<sup>42</sup>

(ii) The Pseudo-Ivonian *Collectio Tripartita*, usually thought to have been completed around 1095. Martin Brett has questioned this date and pointed out that the work could have been produced later. He also made a cogent case against attributing the collection to Ivo of Chartres, as is usually done.<sup>43</sup> This collection has never been printed. With Martin Brett's kind permission, I have used his transcription of BN France lat. 3858B, including his collations with other manuscripts (*Trip.*).

(iii) Ivo of Chartres' *Panormia*, usually dated to around 1095, but Martin Brett has questioned this dating, suggesting that the work could have been compiled at any point before Ivo's death in 1115.<sup>44</sup> I used the unreliable edition in Migne's *Patrologia Latina* (PL 161.1038–1343; *Pan.m*) supplemented by medieval manuscripts. This edition is a reprint ultimately based on the edition of 1557 by Melchior Vosmedian, who often changed the text so that it would correspond to a printed copy of Gratian's *Decretum*. In addition, Migne's (or his editor's) own editorial tampering with this text is even more detrimental than usual.<sup>45</sup>

(iv) Gregory of St. Grisogono's *Polycarpus*, which was completed after 1111. This collection has never been printed, although preparations for an edition have been made at the Monumenta Germaniae Historica, Munich, by Carl Erdmann, Uwe Horst, and Horst Fuhrmann. The latter kindly permitted me to use their draft edition (*Polyc.m*). I also used the twelfth-century manuscript BN, lat. 3881 (*Polyc.P*). Uwe Horst's book about the Polycarpus contains useful concordances and indices.<sup>46</sup>

<sup>42</sup> Anselm of Lucca, *Anselmi episcopi Lucensis collectio canonum una cum collectione minore*, ed. Friedrich Thaner (Innsbruck 1906–1915). A transcription of the thirteenth (last) book on the basis of two manuscripts is found in Edith Pasztór, "Lotta per le investiture e 'ius belli': la posizione di Anselmo di Lucca," in *Sant'Anselmo, Mantova e la lotta per le investiture: Atti del Convegno Internazionale di Studi*, ed. Paolo Golinelli (Bologna 1987), 403–421 (*Ans.p*). For Anselm's collection see now Kathleen G. Cushing, *Papacy and Law in the Gregorian Revolution: The Canonistic Work of Anselm of Lucca*, Oxford Historical Monographs (Oxford 1998).

<sup>43</sup> Martin Brett, "Urban II and the collections attributed to Ivo of Chartres," in *Proceedings of the Eighth International Congress of Medieval Canon Law*, MIC Subs. 9 (Vatican City 1992), 27–46.

<sup>44</sup> *Ibid.*, 46.

<sup>45</sup> Peter Landau, "Die Rubriken und Inskriptionen von Ivos *Panormie*: Die Ausgabe Sebastian Brants im Vergleich zur Löwener Edition des Melchior de Vosmedian und der Ausgabe von Migne," *BMCL* 12 (1982), 31–49, Jacqueline Rambaud-Buhot, "Les sommaires de la *Panormie* et l'édition de Melchior de Vosmedian," *Traditio* 23 (1967), 534–536. The manuscripts I used are listed in the *Conspectus siglorum*.

<sup>46</sup> Uwe Horst, *Die Kanonensammlung "Polycarpus" des Gregor von S. Grisogono: Quellen und Tendenzen*, MGH Hilfsmittel 5 (Munich 1980). For a critical appreciation of Horst's work, see John Gilchrist, "The *Polycarpus*," *ZRG KA* 68 (1982), 441–452.

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(v) The *Collection in Three Books* (3L). Several recensions of this collection were compiled between 1111 and 1140. It has never been printed, and I used the twelfth-century manuscript BAV, Vat., lat. 3881 (3LV).<sup>47</sup>

Gratian also used other sources for specific sections of the *Decretum*. For the so-called *Treatise on Laws* (particularly for distinctions 1 to 9), he drew on Isidore of Seville’s *Etymologiae*.<sup>48</sup> Important especially for C. 1 is Alger of Liège’s *Liber de misericordia et iustitia*.<sup>49</sup> In the theologically oriented sections of the *Decretum*, particularly in the *de penitentia* and the *de consecratione*, many texts derive from the *Sententiae magistri A* and perhaps also from Peter Abelard’s *Sic et non*.<sup>50</sup> While these sources contributed the great majority of the texts in the *Decretum*, a comparatively small number of canons remains unaccounted for. It appears that at least one source of some significance still remains to be discovered, which does not preclude Gratian having used some further sources only once or twice.<sup>51</sup>

Third, Titus Lenherr demonstrated in 1987 that it is possible to study Gratian’s work in detail by combining evidence about his formal sources with a close reading of the text based on a fresh collation of selected

<sup>47</sup> A number of cases in which Gratian used this collection as his source are indicated in Erickson, “The *Collection in Three Books* and Gratian’s *Decretum*,” *BMCL* 2 (1972), 67–75. Some of the titles are analyzed in Paul Fournier, “Une collection canonique italienne du commencement du XIIe siècle,” *Annales de l’enseignement supérieur de Grenoble* 6 (1894), 343–438. See also Giuseppe Motta, “Osservazioni intorno alla *Collezione Canonica in tre libri* (MSS C 135 Archivio Capitolare di Pistoia e Vat., lat. 3831),” in *Proceedings of the Fifth International Congress of Medieval Canon Law*, MIC Subs. 4 (Vatican City 1980), 51–65.

<sup>48</sup> Landau, “Neue Forschungen,” 28, and Landau, “Quellen und Bedeutung,” 227.

<sup>49</sup> Edition in Robert Kretzschmar, *Alger von Liëtichs Traktat “De misericordia et iustitia”: Ein Kanonistischer Konkordanzversuch aus der Zeit des Investiturstreits*, Quellen und Forschungen zum Recht im Mittelalter 2 (Sigmaringen 1985), 187–375. Kretzschmar suggests a dating before 1101 but admits that the treatise might have been written later.

<sup>50</sup> Stephan Kuttner, “Zur Frage der theologischen Vorlagen Gratians,” *ZRG KA* 23 (1934), 243–268; reprinted in Kuttner, *Gratian and the Schools of Law*, no. III, and Peter Landau, “Gratian und die *Sententiae Magistri A*,” in *Aus Archiven und Bibliotheken: Festschrift für Raymund Kottje zum 65. Geburtstag*, Freiburger Beiträge zur mittelalterlichen Geschichte: Studien und Texte 3 (Frankfurt am Main 1992), 311–326.

<sup>51</sup> Peter Landau is currently investigating these issues. In a series of articles, he is exploring the possibility that Gratian made occasional use of some sources. He has shown that Gratian in three cases (all in the first recension) corrected the texts of other sources with the help of the collection of Dionysius Exiguus, see Peter Landau, “Gratian und Dionysius Exiguus: Ein Beitrag zur Kanonistischen Interpolationenkritik,” in *De iure canonico Medii Aevi: Festschrift für Rudolf Weigand*, Studia Gratiana 27 (Rome 1996), 271–283. There is no evidence that Gratian used the register of Gregory I at first hand, as Landau showed in “Das Register Papst Gregorius I. im *Decretum Gratiani*,” in *Mittelalterliche Texte: Überlieferung–Befunde–Deutungen*, ed. Rudolf Schieffer, MGH Schriften 42 (Hanover 1996), 125–140. He did, however, occasionally use the *Decretum* of Burchard of Worms, see Landau, “Burchard de Worms et Gratien: pour l’étude des sources directes du *Décret* de Gratien,” *RDC* 48.2 (1998). For Gratian’s possible use of Gregory I’s *Register* and of Burchard’s *Decretum*, see also Rudolf Weigand, “Mittelalterliche Texte: Gregor I., Burchard und Gratian,” *ZRG KA* 84 (1998), 330–344. Additionally, Rudolf Weigand has pointed out that Gratian once (in D. 63, d. p. c. 34) refers to the *Breviatio canonum* of Fulgentius Ferrandus, see Weigand, “Kirchliche Wahlrecht,” 1343.

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manuscripts.<sup>52</sup> The result was an understanding of how Gratian compiled a *questio*, C. 24, q. 1, and in which order the different components of the text were inserted. Lenherr's analysis was based on the reasonable premise that Gratian did not use all of his sources at the same time; some sources would have been used in the beginning of his work and some later. His analysis proved this premise correct (and my investigations support it). Lenherr found that the formulation of the question at issue in C. 24, q. 1 is based solely on the three canons in this *questio* which derive from Ivo's *Panormia*. The discussion in the *dicta* draws on these and on canons which Gratian extracted from the *Polycarpus*. The canons coming from 3L and the *Collectio Tripartita* do not seem to be reflected in the *dicta*. On the basis of these observations, Lenherr concluded that the *questio* grew around a kernel of the three *Panormia* canons, to which were first added the texts from the *Polycarpus* and then the canons deriving from 3L and the *Tripartita*.

#### GOALS AND METHODS OF THIS BOOK

My work was originally conceived of as a study of Gratian's methods: his use of sources, his construction of (scholastic) arguments, his creation of a coherent system of law. In contemplating the stages in the composition of the *Decretum*, first explored by Lenherr, I became increasingly convinced that there were two separate main stages and that the result of the first of these is preserved in three manuscripts, now in libraries in Admont, Barcelona, and Florence (Aa Bc Fd). These manuscripts contain a text of the *Decretum* which is considerably shorter than the normal text – approximately half of the canons are left out – and their text has therefore been thought of as one of the many twelfth-century abbreviations of the *Decretum*. My work, therefore, focused on proving that the text of the three manuscripts is in fact an earlier version of Gratian's *Decretum*, a first recension. To that end, I made a detailed textual study of two selected sections of the text, C. 24 and C. 11, q. 3. A summary of this study is found in chapters 2 and 3. This study proved conclusively the existence of a first recension of Gratian's *Decretum* in the three manuscripts Aa Bc Fd, and I accounted for these findings at the Tenth International Congress of Medieval Canon Law in Syracuse, New York, in August of 1996 and at the defense of my doctoral dissertation at Columbia University four weeks later. Ironically, in the intervening period I discovered a fourth manuscript of the first recension, now in Paris (P). In July 1998, Professor Carlos Larrainzar informed me that he

<sup>52</sup> Lenherr, *Exkommunikationsgewalt*. Cf. Rudolf Weigand's review of this work.

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had found a single-leaf fragment of a fifth manuscript containing the first recension (Pfr). It is likely that further research, especially among manuscript fragments, will unearth further manuscripts of the first recension. Each such discovery will be important, since all of the manuscripts so far discovered suffer from some form of deficiency: Aa is interpolated while Bc Fd P and Pfr are incomplete.

Since my defense, my work has concentrated on exploring the consequences the discovery of the first recension has for our understanding of Gratian's *Decretum* and the development of twelfth-century legal thinking and teaching. The results of these investigations are found in the last two chapters of this book, arguing for a novel understanding of the foundation of the law school in Bologna and for distinguishing two different authors of the two recensions of the *Decretum*. In selecting the sections of the *Decretum* to study closely, I chose C. 24, since Lenherr here provided a beginning with his analysis of q. 1, and C. 11, q. 3, because this *questio* has thematic similarities with C. 24. Both these sections treat formal aspects of excommunication: in which situations must a sentence of excommunication be obeyed? (C. 11, q. 3); is a sentence of excommunication given by a heretic valid? (C. 24, q. 1); is it possible to excommunicate a dead person? (C. 24, q. 2); may the members of a sinner's household be excommunicated even if they have not sinned? (C. 24, q. 3). These four *questiones* contain 188 canons in the second recension, which correspond to a little over 5 percent of its more than 3,800 canons. Although the selection may seem small compared to the enormous size of the *Decretum*, it is substantial enough to allow conclusive evidence to be assembled.

In the close readings of these two sections, I study the structure of Gratian's arguments and attempt to find out where he took each canon from. I first look at Gratian's "case description" in the beginning of the *causa* and then at the questions which he derived from this "case." For each *questio*, I trace how Gratian develops the answer to his question. The purpose is to prove that all the texts he needed to answer the questions were present in the first recension, and that the argument in the first recension is coherent and complete. Such a proof is a strong argument for the thesis that the text contained in the four manuscripts Aa Bc Fd P in fact constitutes a first recension of Gratian's *Decretum*.

Chapters 2 and 3 not only aim at showing the inner consistency of the first recension but attempt also to determine the source from which each of the canons was extracted. The (relative) consistency with which the two recensions used different sources is another strong argument for my thesis. This consistency proves that the shorter version of the *Decretum* found in the four manuscripts is not an abbreviation, since an abbreviator would have



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no practical possibility of excising only those texts deriving from a few particular sources. The treatment of each *questio* in chapters 2 and 3 is prefaced by a table which lists the occurrences of the canons in the collections known to be among Gratian's sources, with columns devoted, first, to Gratian's *Decretum*, and then to the *Panormia*, the *Collectio Tripartita*, the *Polycarpus*, the *Collection in Three Books*, Anselm of Lucca's collection, and, finally, Ivo of Chartres' *Decretum*. Although Ivo's *Decretum* is not, as far as is known, one of Gratian's formal sources, I have nonetheless included it, because it is one of the largest magazines of texts in the period immediately preceding Gratian's. A final column provides, in a few cases, additional information. The tables were drawn up on the basis of the information found in Friedberg's edition, and in the standard finding tools.<sup>53</sup>

After the tables, each canon is analyzed in order to determine which of the possible sources Gratian in fact used. My methods are based on the criteria which Stephan Kuttner outlined in 1948. John Erickson, Peter Landau, and Titus Lenherr have later employed and refined his methods.<sup>54</sup> Their criteria for establishing sources may be summarized as follows:

- (i) Two or more canons are found in close sequence or juxtaposition only in Gratian and an earlier collection.
- (ii) A canon's inscription (most frequently a misattribution) is common only to Gratian and an earlier collection.

<sup>53</sup> I have used the following: the concordances for the canons in the *Polycarpus* in Horst, *Polycarpus* and for Pseudo-Isidorian canons in Horst Fuhrmann, *Einfluß und Verbreitung der pseudo-isidorischen Fälschungen von ihrem Auftauchen bis in die neuere Zeit*, MGH Schriften 24 (Munich 1972–1974). Canons with incipits A–G were searched in M. Fornasari, *Initia canonum a primaevis collectionibus usque ad "Decretum Gratiani"*, Monumenta Italiae ecclesiastica, Subsidia 1 (Florence 1972), which is based on a broad survey of printed collections. For canons which also appear in the *Sentences* of Peter Lombard, I used the source apparatus in [Peter Lombard,] *Magistri Petri Lombardi Sententiae in IV libris distributae*, Spicilegium Bonaventurianum 4–5 (Grottaferrata 1971–1981). A nineteenth-century work containing still useful, albeit sometimes unreliable, tables of canons in Gratian and pre-Gratian collections is Augustin Theiner, *Disquisitiones criticae in praecipuas canonum et decretalium collectiones* (Rome 1836). Martin Brett of Cambridge University kindly made available to me his *incipit* indices to Anselm of Lucca's collection, the *Collectio Tripartita*, and the *Collectio Britannica*. Since the *Collection in Three Books* was one of Gratian's most important sources and I could not find any available index to it, I compiled a provisional *incipit* index to Vatican City, BAV, Vat., lat. 3831. This index is available on the internet at <http://pantheon.yale.edu/~haw6/canonlaw/3l.htm>. Electronic media have recently begun to provide a convenient and flexible means for retrieving information of this kind. I have made extensive use of the *Cetedoc Library of Christian Latin Texts: CLCLT* (Turnholt 1981–) and the *Patrologia Latina Full Text Database* (Alexandria, Va. 1992–) which contains the text of the *PL* editions of, e.g., Burchard's and Ivo's collections. Linda Fowler-Magerl, *Kanones: A Selection of Canon Law Collections Compiled Outside Italy between 1000 and 1140* (Piesenkofen 1998) was available to me only at a late stage of my work.

<sup>54</sup> Kuttner, "De Gratiani opere," 125–127, Erickson, "Three Books," 72–73, Landau, "Neue Forschungen," 14–15, Landau, "Quellen und Bedeutung," 220–221, and Lenherr, *Exkommunikationsgewalt*, 61.