Gérard Fransen, “The Religious Aspect of Law,” trans. W.L. North, from the French “L’Aspect religieux du droit,” in *Chiesa, diritto, e ordinamento della ‘Societas christiana’ nei secoli XI e XII: Atti della nona Settimana di studio, Mendola 1983,* Miscellanea del Centro di studi medioevali 11, Milan 1986, 159–170.

“When canon law,” writes Gabriel LeBras, “gained its autonomy in the twelfth century, it remained for a time the ally of theology; in the thirteenth century, however, it diverged from it, not in order to render itself clearly more spiritual but to become increasingly civil and almost secular. Many wish for its religious character to be restored to it.”[1]

For my part, I would undoubtedly be less severe for the thirteenth century than for the sixteenth. Furthermore, I think it necessary, when speaking of canon law, to distinguish between the “sources”, that is to say the conciliar or papal interventions—of different natures—and the science of canon law, that is, the syntheses, whether good or bad, elaborated by canonists of every level of ability, the great and the mediocre, and the finally the idea that contemporaries make of canon law itself.

I am speaking of “canon law”. I have long believed that the term was recent, that is, after the Council of Trent. It is not: we find it in the *Summa Viridunensis* from the 1170s, in a *Questio* (Klosterneuberg/Sion) from the 1220s, and from the pen of Humbert of Romans who, in the second half of the thirteenth century, explains to his Dominican brothers how it is fitting to preach to students “on canon law”.[2]

The chronological limits set forth by the organizers of this *Settimana* are very poorly suited to canonists. It would be necessary to discuss all the canonical collections which Fournier and LeBras discuss,[3] to arrive [p. 160] at Gratian and his commentators only to stop at the first decretalists. If the first period does not offer too many problems—in reality, canon “law” is latent and the canonist has no advantage over the historian—the second, Gratian, and above all the third, the decretals, are going to require the distinction between the base text—the text which

[1] Gabriel Le Bras, “Les Écritures dans la codification des Décrétales,” in *Mélanges Tisserant* I, Studi e Testi 231, Città del Vaticano 1964, 245–254 at 254. Cf. Stephan Kuttner, *The History of Ideas and Doctrines of Canon Law in the Middle Ages*, Variorum Reprints, London 1981, Retractationes 1, p.1 (p. 14 n. 29).
[2] Verdun, Bibliotheque Municipale 35 = Ghent, Université 1429; *Questiones Klosterneuburg* 1048, quest.68 =Sion, Chapitre 28; Humbert of Romans, *De eruditione praedicatorum*, Bk. 2, c. 69: *ad studentes in iure canonico,*” in Margerin de la Bigne, *Maxima Bibliotheca veterum Patrum et antiquorum scriptorum ecclesiasticorumo* v. 25, Lyon 1677, 490.
[3] Paul Fournier and Gabriel Le Bras, *Histoire des collections canoniques en Occident depuis les fausses décrétales jusqu’au Décret de Gratien*, 2 volumes, Paris, 1931–1932.

is being commented upon—and its nature, and what the canonists say and think about it, canonical doctrine properly speaking.

In addition, canonical collections (up to and including Gratian) and collections of decretals are very different genres of literature. Collections normally form a whole, resulting from a selection of texts performed by the authors of the collection, sometimes supplemented by the users. It is an instrument which *prepares* the decision. The collections of decretals are, *in the first instance*, collections of decisions, of jurisprudence: the texts which are read there do not form, in principle at least, as fully realized a synthesis as that of the collections. Yet they are equally collections which prepare judicial or administrative decisions. It is worth remarking that the first works on the collections of decretals, after the Glosses, are the *Summae* that allow a systematic exposition of the material and thus fill in the lacunae.[4]

Our discussion must therefore be divided into three parts: first, ancient law, that of the collections prior to the Gregorian period and that the beginning of the twelfth century; then, Gratian and his *Decretum*, and finally the papal decretals and their collections. In these last two parts we will also have to take account of the presence, next to texts which we call "normative" in the absence of something better, of reflections on canonical knowledge properly speaking.

A final remark to conclude. When we are trying to discern the thought, intentions, and tendencies of a person, it is clearly necessary to take account of all the texts that come from that person's pen and, notably, for the popes, not to neglect the *arengae* in which their thought is often expressed. This investigation, however, becomes difficult because the canonists of the thirteenth century very often broke up the decretals and omitted the part in which the pope expounded upon the principles that justified his solution. Even the scissors of S. Raymond de Peñafort, the compiler of the decretals of Gregory IX, did not spare these explanatory texts.

Furthermore, if one wishes to examine the influence of canonical texts on contemporary thought and on institutions, it is necessary to take into account the diffusion of texts: their geographical and chronological availability. [**p. 161**] It is beyond question that, in twelfth-century Italy, Burchard of Worms was more important than the collection of Deusdedit. This is also true for the collections of decretals: the choices made by the author of the collection and its diffusions are of principal importance when one tries to evaluate the practical influence of the

[4] Thus the *Summae* of Damasus, Ambrose, Bernard of Pavia, and later those of John of Petesella, Geoffrey de Trano, and Hostiensis. These are the *Summae titulorum* which do not comment upon each decretal but offer a synthesis of an entire title.

decisions and motivations which inspired them (this for the decretals) and the range of suggestions presented to the judges in the course of resolving a case (this for canonical collections).

Let us emphasize what we are going to say: canonical collections are not collections of laws. They contain, certainly, some laws (thus, the decrees of the councils), but there are above all collections of exemplary texts in which judges and pastors look for directives to resolve cases submitted to them. Collections of decretals are collections of judgments (resulting from appeals or calls for aid) emanating from the Apostolic See. They are not law Codes and they only have the value of jurisprudence, even if, like those of Honorius III or Innocent III, they are declared "authoritative".[5] We must wait for 1298 and the *Liber Sextus* to have to do with a collection of laws properly so-called ... which, we note, conforms to the evolution of the law of the State.

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What is the religious impact of canonical collections? What is striking in the oldest—from *Anselmo dedicata* to Burchard of Worms—is that we find collections first and foremost dedicated to pastoral care, to its reform, and to its reconstruction. Burchard explains it in this way: canonical judgments and penitential discipline are in disarray: it is necessary to give priests some sure guides, based on texts which have authority.[6] Furthermore—and this is significant even if it is not verified in the reality of the *Decretum*—the sources on which he claims to have drawn are, first of all, Scripture, then the ancient councils. We also note the presence of an *Ordo* for the reconciliation of the excommunicated, an *Ordo* for the annointing of the sick, another for the reconciliation of penitents, and, in numerous manuscripts, an *Ordo synodi*. The twentieth book is dedicated to final ends. **[p. 162]** Many books are dedicated to the sacraments. The success of the *Decretum* (close to one hundred manuscripts of it survive!) shows how much it addressed the needs and tendancies, not only of the century in which it was redacted but also the following century.[7]

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[5] On the sense of this term, see K. Pennington, "The Making of a decretal collection. The genesis of *Compilatio tertia*," in *Proceedings of the Fifth International Congress of Medieval Canon Law* (Monumenta Iuris Canonici, Ser. C, Subsidia 6), Città del Vaticano 1980, 67–92 (see 77–78), and below n. 23.

[6] *PL* 140, cols. 499–502: *Nihil addidi de meo nisi laborem, sed ex divinis testimoniis ea quae in eo inveneris magno sudore collegi. Et ut essent quae comportaveram auctoritativa, summo studio elaboravi.*

[7] G. Fransen, "Le *Décret* de Burchard de Worms. Valeur du texte de l'edition. Essai de classement des manuscrits," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Kanon. Abt. 63 (1977): 1–19 and the literature cited on p. 1. See also: Horst Fuhrmann, *Einfluss und Verbreitung der Pseudoisidorischen Fälschungen*, Schriften der MGH 24),

Someone has asked me for a concrete example: in three manuscripts—one from Vienne (Isère), one from Puy, and one from the abbey of Romans (now in Montpellier) there has been added to the usual text of Burchard on the anointing of the sick a very detailed profession of faith on the Trinity, which is an extract from a sermon by Alcuin. Why—and only in these three very localized manuscripts—was there this need (it is before catharism) for a profession of faith in the Trinity on one's death bed? To what does this request correspond? No historians that I have asked have been able to give me an answer. There you see what kinds of questions the detailed examination of a collection can suggest.[8]

With the programmatic Gregorian collections (which did not replace Burchard), patristic writings (here one thinks about the *Diversorum patrum sententiae*[9]) infiltrate and assume a greater and greater role in the collections. Was it an effort towards practice or reinforcement of a religious character? The one and the other, without a doubt, but not separately. This increasing recourse to the Fathers in Italy (see the works of G. Motta) as well as in France (with Ivo of Chartres) still has not been adequately examined. Without question the Eucharistic controversy and that concerning predestination were in part responsible for this, but the phenomenon is much larger and comes to pose (must we say it again?) the problem of the hierarchy of sources. It is well-known how Ivo of Chartres, in a preface that will have great success, distinguishes between "movable" canons—those subject to dispensation—and "immovable" canons, not because of the authority from which they came but according to their intrinsic value... and at the end of this preface, the emphasis is clearly placed, not on discipline but on charity.[10]

[p. 165] Let us return to the content of the canonical collections. After the Council of Trent, the decrees *de reformatione*, meaning canon law, are clearly separated from decrees concerning doctrine. But it was not this way at the beginning, even in the councils. As far as collections, Horst Fuhrmann, in his excellent book on the decretals of Pseudo-Isidore, advises the

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3 vols., Stuttgart 1972–1972, 453–455 note 81, and Hubert Mordek, "Handschriftenforschungen in Italien I: Zur Uberlieferung des Dekrets Burchards von Worms," *Quellen und Forschungen aus italienischen Archiven und Bibliotheken* 51 (1972): 626–651.

[8] G. Fransen, "Le manuscrit de Burchard de Worms conservé à la Bibliothèque municipale de Montpellier," in *Mélanges Roger Aubenas*, Recueil de Mémoires et Travaux publiés par la Société d'Histoire du droit et des institutions des anciens Pays de droit écrit 9, Montpellier 1934, 310–311.

[9] This is the title not only of that famous *Collection in 74 Titles*, the critical edition of which John Gilchrist has guaranteed (M.I.C., Ser. B, vol. 1, Città del Vaticano 1973).

[10] *PL* 161, cols. 47–60; cf. col. 50A, 58B: *Quod tamen iam monuimus, iterum monenmus, ut si quis quod legerit de sanctionibus sive dispensationibus ecclesiasticis, ad charitatem, quae est plenitudo legis referat, non errabit, non peccabit; et quando aliqua probabili ratione a summo rigore declinabit, charitas excusabit; si tamen nihil contra Evangelium, nihil contra Apostolos usurpaverit..*

uninitiated that they will find in these texts something far different than pure law: in fact, they will encounter an entire summary of the life of the Church: sacraments, liturgy, hagiography, hierarchical organization, as well as procedure.[11] This whole complex is far from a dry collection of abstract laws and very close to a manual of pastoral care.

It is necessary here to emphasize the parallelism between the *auctoritates* invoked by the theologians of early scholasticism (Ivo of Chatres himself is included here) and those which the canonists are using. At present, it is difficult to study this subject in depth. On the one hand, this is because the publications of the "sentences" have very often been limited to reproducing the "sentences" themselves without indicating the sources of which they claim to offer a synthesis. On the other, because theologians have been much less concerned than canonists with the precision of the texts that they cite, as Father N. Häring has shown.[12]

I refer you therefore to the all too rare specialists and pass to the following chapter, yet not without noting in passing a canon which nicely sums up this religious character of the law. It comes from a very early period, from the ancient Irish collection, which can be traced down to the *Decretum* of Gratian. Attributed by the *Hibernensis* to Pope Innocent I, it is taken up by Burchard of Worms (III.128), by Deusdedit (I. 109), and by Bonizo (*Liber de Vita Christiana* IV.131), then it is found in *Decretum* of Ivo of Chartres, the *Caesaraugustana* (2.2), and the *Polycarp* (7.2.4) before Gratian includes it in his *Decretum* (D.20, c. 3). This canon indicates to someone who wishes to judge a case the sources which he should consult in order to find the good solution of his case. Here is the text:

> In cases for which one does not find evidence to bind or absolve in the books of the Old Testament, the four Gospels or the writings of the Apostles, it is necessary to have recourse to the writings which the Greeks call *hagiographa*. If one does not find the answer there, then one consults the catholic historians and the writings of the doctors. [If this still does not suffice, one will examine the canons of the Apostolic See], and finally the examples of the Saints. If, after this investigation, one is still undecided, one should gather together the elders of the province and consult them.

[p. 164] The Bible, even if it is rarely mentioned in the collections, remains therefore the first decisive point of appeal. And this is true for the Old as well as for the New Testament. It

[11] H. Fuhrmann, *Einfluss und Verbreitung...* (cf. note 7), 55–57, 178–181.
[12] Nikolas Häring, "The *Sententiae Magistri A* (Vat. Ms. lat. 4361) and the School of Laon," *Mediaeval Studies* 17 (1955), 1–45 at 36.

would of course be necessary to examine the transformations that this canonical text underwent over the course of a journey of more than five hundred years. We note that Gratian (1140) who found the place given to the "canons of the Apostolic See" too subordinated, omitted mention of them.[13] The ordinary Gloss on the *Decretum* (1215) reintroduced them, assigning to them a place of honor: in the Gloss, the writings of the Apostles become the writings of the Popes. It says: "Apostolorum: idest Apostolicorum." A sign of the times!

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The *Decretum* of Gratian, as one knows, opens with the assertion of the preeminence of natural law over all other laws. Now, according to Gratian, natural law is contained "*in lege et evangelio*", that is to say, in the Old and New Testament. We should also recall here a schema often found in the works of all the canonists (and theologians): the world, they say, is ruled by natural law; then there comes Mosaic law, then the law of the Gospels. In the thirteenth century, one will add that the misfortunes of the times and the malice of men have made the *lex canonica* necessary which comes to be added to the other three. Other sub-divisions are also introduced.[14]

If we examine the *dicta* of Gratian, witness of his thought, we can say that they reflect his theological education and that they are largely attributable to the commentaries on Scripture assembled in the *Glossa Ordinaria*, the last word of the discipline of theology. Without question, the kind of exegesis practiced there troubles us: we would be tempted to see in it merely edifying digressions or rhetorical flourishes. In fact, for Gratian and his contemporaries, as Charles Munier has noted, "Holy Scripture, in all its parts, are rules of faith and conduct. They were persuaded that the Lord had deposited all the secrets, all the lessons, that he intended for humanity until the end of time."[15]

There is, however, an objection. Distinction 20 closes the treatise on sources of law. Now, in the *dicta*, Gratian has the authority of the popes, who exercise *potestas*, precede that of

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[13] It is the text placed in brackets. The Latin text in G. Fransen, *Les collections canoniques*, Typologie des sources du moyen âge occidental 10, Turnhout 1973, 8 note 1.

[14] Guillelmus Durandus, *Speculum Iuris,* pars 4 tit. 1 de libellorum conceptione: *cum lex Evangelica non uideretur sufficere ad emergentium decisiones causarum humana iura inuenta sunt ut per ea hominum coerceatur audacia..."* (pr. n. 1).

[15] Charles Munier, "A propos des textes patristiques du *Décret* de Gratien," in *Proceedings of the Third International Congress of Medieval Canon Law* (MIC Ser. C, 4), Città del Vaticano 1971, 43–50 at 49.

the *expositores sacrae scripturae* who possess only knowledge.[16]**[p. 165]** Is this not to subordinate theology to law, religion to law?

This objection calls for three remarks. The first is of a technical nature: according to Beryl Smalley, the term *expositor* designates not a person but an apparatus of glosses on Scripture.[17] The second is of a canonical nature: at issue here, properly speaking, is not the authority of Scripture as such. Gratian states only that, to judge a case, to condemn or absolve, to end a dispute, it is not enough to have knowledge but "*potestas*" (we would say: jurisdiction) is also needed. Are we really dealing here with a classification of sources of law? I don't think so.[18] The third remark is derived from the context: the last (and third) canon of this distinction is none other than what we cited above and which, we repeat, mentions Scripture *first* among the texts to consult to find a solution to a case, to permit the judgment of a cause. I would add that this place of Scripture remains unchanged in the commentaries of the Decretists which nonetheless succeeded, over fifty years, to shift the Fathers of the Church down to the penultimate rank, as Charles Munier showed in his thesis.[19] And the first *Questiones disputatae* respects this hierarchy of argumentation.[20]

In brief, if Gratian valorizes the legislative activity of the Roman Pontiff, he does not do it to the detriment of Scripture, which, to the contrary, limits ineluctably the field reserved for positive law.

Before leaving the twelfth century and Gratian, we must regret that the editors of the works of the first Decretists (namely, Schulte and Singer) did not consider it relevant to edit what one then called the *Historiae* contained in the commentaries that they were editing. These *Historiae* are a succinct summary of the biblical events to which Gratian alludes in his *dicta*. They are not without importance because, almost a century later, Bartholomeus of Brescia—this impenitent but undoubtedly very interested author—assembled a collection of them, that survives in many manuscripts.[21]

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[16] Charles Munier, *Les sources patristiques du droit de l'Eglise du VIIIe au XIIIe siècle*, Mulhouse 1957, 183–187.
[17] Beryl Smalley, *The Study of the Bible in the Middle Ages*, Notre Dame, IN 1964, 63: "In the eleventh and early twelfth centuries, the commentator of Scripture normally used one of these *apparatus* which he called an *expositor*."
[18] Here is the text of Gratian (D. 20, pr. §1 fin.): *Cum... absolutio uel condempnatio non scientiam tantum sed etiam potestatem presidentium desiderat, apparet quod diuinarum scripturarum tractatores...in causis diffiniendis secundum post (pontifices) locum merentur*.
[19] Charles Munier, *Les sources*...(note 16), 189, 190, 193, and 200 note 77.
[20] G. Fransen, *Les* Questiones disputatae *des juristes* (Typologie des sources de moyen âge occidental, 44–45), Turnhout 1985, 200.
[21] A. Van Hove, *Prologomena*, 2nd edition, Malines–Rome 1945, 441 note 425.

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[p. 166] The study of the *Decretum*, which attained a milestone with the great commentary (around 1190) of Huguccio, was going to be followed by the study of the papal decretals and their collections. Universities devoted themselves to this beginning in the last decade of the twelfth century but, if one can believe the excellent works of Peter Landau, they were preceded, in France and England, by certain cathedral schools.[22] Some have spoken, in this context, of the invasion of canon law by the juridical techniques and principles issued from Roman law and have seen in this the characteristic of the law of the decretals, especially after 1200. Did the religious values represented, among others, by recourse to Scripture suffer seriously because of this?

But what are the decretals? Are they laws? Very rarely. Most often, as Stephan Kuttner has shown, they are judgments, responses by the central authority to questions (on judicial or administrative matters) posed by lower proceedings. The collections of decretals, even those declared "authoritative" remain collections of jurisprudence and do not become, for all that, legal texts, although they have been considered such in the sixteenth century and even in the thirteenth. But why this appeal to Roman authority? Centralization? It does not seem like it. The cases to be resolved by the recently instituted offices could not be resolved by the old texts gathered together by Gratian. Also, the problems were new and bore on matters that of a quality more juridical than religious: benefices, procedure, competence, landed property. Furthermore, it was not always easy to obtain regard regarding matters for judgment respect for the decision of the judge, something to which the *ordines iusticiarii* bear witness.[23] It was therefore necessary, on the one hand, to seek out arguments within the usual texts (which was done by recourse to Roman law) and, on the other hand, to render the new decision uncontestable. It is in this way that the habit arises in the second half of the twelfth century of having recourse to the Pope, just as aldermen have recourse to their *chef de sens* in cases of uncertainty.

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[22] Peter Landau, "Die Enstehung der systematischen Dekretsammlungen und die europaische Kanonistik des 12. Jahrhunderts," in *In Memoriam Josef Juncker. Zeitschrift der Savigny-Stiftung. Kanonistische Abt.* 65 (1979): 120–148.

[23] On the *ordines*, see Linda Fowler-Magerl, Ordo iudiciorum uel ordo iusticiarius. *Begriff und Literaturgattung*, Ius Commune, Sonderheft 19, Frankfurt am Main 1984.

Nonetheless, despite the intrusion of the technique and principles of Roman law, Gabriel Le Bras has enumerated two hundred citations from Scripture in **[p. 167]** the decretals of Innocent III.[24] Of course, he was the student in theology of Peter Corbeil, but perhaps also, as Knut Nδrr has remarked, he realized that his decretals would be assembled into collections and therefore he formulated his decisions in a more general way that did his predecessors.[25] Whatever the reason was, the recourse to Scripture is still there and not as empty ornamentation.

The reason is that canonical science, at the moment when it separated itself from theology, did not turn into a closed vessel. Let us once again cite Gabriel Le Bras: “We shall not cease to repeat that the study of the methods of exposition and interpretation must be carried out simultaneously in the context of Romanists, theologians, and canonists.”[26] Canonists are increasingly going to use Roman law to resolve the new problems posed to them and to express certain realities of the church, just as theologians, in the same period, are going to make use of Aristotelian philosophy to expound upon and think about the revealed truth. On the one side as on the other there is the development of what one has called “scholasticism”.

But here again it is necessary to see clearly and indicate the transitions.

If the canonist expresses himself in a language borrowed from Roman law, he marks it with the note characteristic of his discipline. There is not a simple transposition of concepts or technique but rather adaptation by approximation, that is, by explicit correction. We highlight, in the encounter with Roman law, the value of simple, informal agreements; the need for good faith in command; the prohibition of usury; the derogations brought to bear on the formal character of speech: all this proceeds, in the end, from religious considerations and is based on Scripture. Likewise, when Alexander III seeks to diminish the impact of degrees of consanguinity on the validity of marriage, he invokes the *ratio peccati* and asks the consent, and not just the advice, of the council.[27] As far as the consummation of marriage which will later be considered as a fact without anything else, at the end of the twelfth century it does not prevent the woman from

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[24] G. Le Bras, “Les Écritures dans la Codifications des Décrétales,” (see n.1), 246–247.

[25] Knut Wolfgang Knδrr, “Päpstliche Dekretalen und rδmisch-kanonischer Zivilprozess,” in *Studien zur europäischen Rechtsgeschichte*, Frankfurt am Main 1972, 53–65.

[26] See G. Le Bras, “Commentaires bibliques et Droit canon. Matthieu au Corpus Iuris Canonici,” in *Mélanges Chenu* (Bibl. Thomiste 27), Paris 1967, 325–344 at 342.

[27] G. Fransen, “L’Ecclésiologie des conciles médiévaux,” in *Le Concile et les Conciles*, Chevetogne 1960, 125–141 at 132.

entering the religious life, if it was obtained by force.[28] The reasons invoked are religious reasons and not the "common good". Canonists and theologians recognized each other: Stephen of Tournai and the *Summa Coloniensis* refer to Peter Lombard as "Magnus Doctor Petrus" while others cite **[p. 168]** Peter Comestor or Peter the Chanter. As for Peter Lombard himself, he often takes up the authorities themselves from Gratian. There you have it for theology.

With regard to Roman law, we note the existence, from 1250 on, of collections of *differentiae* in which are listed the points on which canon law and secular law diverge.[29] And when one examines the famous "romano-canonical" procedure, one sees that the share of canon law is, in the end, much larger than that of Roman law, the latter providing the structure, the former modifying considerably numerous points.

It is therefore incorrect to speak in a nuanced way of the rise of the technique and concepts of Roman law, at least to the detriment of the religious content of canon law. It is not without interest to note that, in the thirteenth century, the majority of canonists are men of the Church but that the medicants, who are going to modify ecclesiology in order to defend and guarantee their privileges, offer up during this period—unless I am mistaken—only one canonist of worth: Raymond de Peñafort, the man with scissors who cut numerous decretals from their justificatory section and who, furthermore, was a professor at Bologna before entering the Order of Preachers.

At the beginning of the fourteenth century, with the *Liber Sextus* of Boniface VIII, and on the model of what is happening in the law of the State, legislation moves ahead of jurisprudence and becomes the principal source of law. The judge's function was to apply the law.[30] This law, which formerly emanated from councils is issued increasingly by the authority of the pope which thus becomes, at least in appearance, the sole source of law. As for the School, it has been secularised as much in its masters as in its technique...yet Johannes Andreas, in his *Additiones* to the *Speculum Iuris* of William Durandus, gives himself as a first task to identify biblical

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[28] Referenced here are quest. 26 of the collection FULDA D 7 and quest. 28 (p. 476) of the collection of Sion, Chapter 28.

[29] J. Portemer, *Recherches sur les* Differentiae juris civilis et canonici *au temps du droit classique de l'Eglise*, Paris, 1946; Yves M. –J. Congar, "Un témoignage des désaccords entre Canonistes et Théologiens," in *Etudesdu droit et d'histoire canonique dédiées à Gabriel le Bras*, Paris 1965, 861–884.

[30] Sten Gagnér, *Studien zur Ideengeschichte der Gesetzgebung* (Studia Iuridica Upsalensia 1), Stockholm, 1960.

citations.[31] And contrary to what some might think, they are rather numerous in this *Summa* of procedural law.

How does canon law appear at the end of the Middle Ages? It has been formed, in terms of technique, under the aegis of Roman law even in correcting it *because* the questions which were posed to bishops could no longer be answered by the ancient canons. It was necessary to innovate and to find solutions suitable to problems very much like those which the law of the State resolved. The tool that Roman law offered was accepted and integrated. And **[p. 169]** it is in this way that canon *law* began.

But this habit of thinking in juridical terms about the parts of the ecclesiastical discipline that required them was gradually extended to other purely religious areas, such as the sacraments, areas that did not support or supported badly such a transfer, despite the correctives that one applied or forgot to apply, corresponding to the demands of the religious character of the material to manage.

It is this invasion of the notion of "law" and of the technique proper to Roman law, which started from a defined but very important area at the end of the twelfth century, that explains, along with the character itself of the *decretales*—judicial or at least authoritative statements—the juridicization of canonical knowledge, with the accent placed on the juridical rather than the religious.

But I do not believe that this phenomenon was able to work efficaciously in the thirteenth century. In fact, if canonists cite texts from Roman law, it is more for their *ratio*, for the reasons that inspire the solution, than for the solution itself. They knew how to limit their borrowings: if Hostiensis depends on Azo via Geoffrey of Trani, it is above all for the parts that are common to the two laws: fear, error, fraud, and certain points of procedure. Otherwise, in the thirteenth century, canonists are men of the Church and have received serious theological education, just like Alexander III and Innocent III.[32] Was the opposite true? Did the theologians know the law? Although the mendicants are skilled enough at the second council of Lyon to avoid the storm which threatens them and to assure the survival of only some Orders, no one of the seven commentaries on the council which are written between 1274 and 1298 has a mendicant as its

[31] Joannes Andreae, *Additiones in Speculum Iuris*, Pr. : *Primo enim quotas omnes Bibliorum et morales mihi notas, quas autor omisit, dare curabo.*" [Now then, first I shall take care to give all the quotations from the Bible and moral books known to me, which the author omitted.]
[32] K. Pennington, "The legal education of Pope Innocent III," *Bulletin of Medieval Canon Law* 4 (1974): 70–77.

author.[33] And in the dispute between the seculars and the regulars, it is not canon law that will be the principle of resolution but the philosophy of Aristotle introduced by the theologians.[34]

It is only when people become canonists as a career that theological education is separated from canonical education, when technique and abstract reasoning supercede life and supernatural reality, that the religious character of canon law is erased. But if the thirteenth century gradually prepared an evolution which is more clearly draw in the fourteenth, I think that the sixteenth century is even more responsible for a situation **[p. 170]** that we deplore. Canon law after Trent—insistent at all costs for apologetic reasons on a "true" juridicity as real as that of the law of the State ("*ubi societas, ibi ius")*, and molded by voluntarism—arrived at the true juridical nominalism from which we suffer today.[35] The present reflection on the nature of canon law will undoubtedly help us render to it its true place: an instrument of guidance and reflection in the service of pastoral care.

[3333] M. Bertram, "Zur wissenschaftlichen Bearbeitung der Konstitutionem Gregors X.," *Quellen und Forschungen aus italienischen Archiven und Bibliotheken* 53 (1973): 459–467. This abundance should be compared with restrained place for canon law in *1274. Mutations et continuités* (Colloques intern. du CMRS 558), Paris 1977, which gives the leading role to the mendicants.

[34] Y. Congar, "Aspects écclésiologiques de la querelle entre mendiants et séculiers dans la seconde moitié du XIII siècle et le début du XIVe," *Archives d'histoire doctrinale et littéraire du Moyen Age* 36 (1961): 35–158.

[35] G. Fransen, "L'application du Concile de Trente et les débuts d;un nominalisme juridique, in *L'Annee canoniqe*; and also Fransen, "La valeur de la jurisprudence en droit canonique," *Ius canonicum* 15 (1975): 111–112.