

DRAFT

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R.H. Helmholz, The Spirit of the Classical Canon Law.
Athens/London, University of Georgia Press, 1996. xiv + 514 pp.

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In the preface to his Spirit of the Classical Canon Law,
R.H. Helmholz writes:

I make no claims of originality for the book. I have not uncovered new manuscript material. I have not hit upon a new way of understanding the subject's history. Indeed, what follows could be done by any legal historian with any ability to make use of the resources of the ius commune (p. xiv).

This is the only palpable misstatement in this exquisite work of scholarship. Few legal historians can do what Professor Helmholz has done for the past three decades in uncovering and presenting the riches of the medieval canon law tradition, particularly as they appear in the English archives.¹ No legal historian has done what Helmholz does in this book: present a learned, lithe, and lively account of the communis opinio of medieval canonists throughout Western Christendom on a range of intriguing legal topics.

Helmholz's main concern in this volume is not to recount the sources and evolution of the "classical canon law" (by which he means the law of the twelfth through sixteenth centuries). He treats these themes efficiently and effectively in a brief opening chapter and directs the reader to the ample and fuller studies already at hand. Helmholz's main concern and unique contribution in this volume is, as he says, "to learn by doing" (p. 31): to trace and tease out of the multiple texts of the classical canon law the common lore and law (the "communis opinio") on a number of discrete topics. One can almost picture Helmholz returning for several years to a very large table in

¹ Helmholz's principal monographs include: Canon Law and English Common Law (1983); Marriage Litigation in Medieval England (1974); Notaries Public in England Since the Reformation (1991); Roman Canon Law in Reformation England (1992). See also Canon Law in Protestant Lands (R.H. Helmholz ed., 1990); Itenera Fiducia: Trust and Truehand in Historical Perspective (R.H. Helmholz & Reinhard Zimmermann eds. and contrs., 1998); The Privilege Against Self-Incrimination: Its Origin and Development (R.H. Helmholz ed., 1997); Select Cases on Defamation to 1600 (Richard H. Helmholz ed., 1985).

the archives with a whole battery of legal texts before him. Among these texts are the main sources that were later woven into the classical canon law: the Bible, the Corpus iuris civilis of Emperor Justinian (527-565), the early Christian canons, the Church Fathers' commentaries and sermons, and some of the eighth through tenth century canonical collections.² Closer to hand are the five books of the Corpus iuris canonici as well as the multiple decrees of the Council of Trent.³ Also closer to hand are nearly 150 of the leading, multi-volume legal treatises and collections of judicial and juridical opinions that lie at the core of the classical canon law.⁴

Rather than simply describing or analyzing these multiple texts seriatim, Helmholz reads them almost as a modern inquisitor who wants to know what his ancient brethren generally thought and taught about discrete legal questions: Are popes, bishops and abbots elected or appointed to their positions? May a slave or serf be ordained as a cleric in the Church, and if so what does the Church do about the claims of his master? How do Church courts give restitution or equitable remedies in discrete cases of breach of contract, defamation of character, or commission of another private offense? How does a party gain prescriptive interests in the property of another? What kinds of special substantive and procedural protections and rights are and should be afforded to the poor, widows, orphans, and other personae miserabiles? How and why does the canon law protect freedom of contract, freedom of will, and freedom of conscience? What does it mean for a party to be subject to double jeopardy? When may someone invoke the privilege against self-incrimination or the benefit of clergy? How do jurists resolve questions of the relationship of church and state, and of conflicts between canon and civil laws? One-by-one, Helmholz puts the sources and texts of the classical canon law in the dock for close examination in search of answers to these kinds of questions.

These are not questions that Helmholz has created out of whole cloth. They were among the hard and perennial questions

² See R.H. Helmholz, The Spirit of the Classical Canon Law (1996), 491-92 (indexing biblical citations), 20-22 (discussing Bible as a source of classical canon law). See also *id.* at 493 (indexing citations of Roman law), 17-20 (discussing Roman law as a source of classical canon law).

³See *id.* at 493-99 (indexing citations to canon law), 6-20 (discussing evolution of canon law).

⁴See *id.* at 483-90 (listing these sources), 22-31 (discussing these sources).

that occupied canonists and other jurists throughout the twelfth through sixteenth centuries. Collecting the answers to these questions in a single volume gives the reader a vivid and unique sense of the breadth and depth of the classical canon law. Some of these questions were peculiar to medieval times and have no modern parallels. A number of them are at the heart of our private, constitutional, and criminal law still today.

Helmholz, however, is no fan of "Whiggism" -- a present-minded reading of these medieval texts. Nor is he patient with what he once aptly called "winner's history" -- the historian's preoccupation only with past ideas and institutions that have present parallels.⁵ While he translates, distills, and arranges the material with sensitivity to the uninitiated modern reader, he tells the story in and on medieval terms. Where readers need a social and intellectual context to appreciate, say, the power of excommunication or the meaning of the oath to the mind of a thirteenth-century Christian, Helmholz provides it. Where readers need to be warned against too easy a conflation of medieval and modern concepts of concepts like restitution and prescription, Helmholz provides that, too.

Much of this volume is a pristine distillation of what Helmholz has found through this method of "learning by doing": of reading the sources and texts of the classical canon law to discern the common lore and law of the day. The thirteen chapters take up, respectively, the canon law of elections; the complex rules of clerical ordination; the pervasive remedy of restitution; the generous protections of the poor and needy; the heavy use of oaths and vows; the law of property and economy (particularly the issue of prescriptive interests); the canon law of baptism and other Christian sacraments; the protections of freedoms of choice and consent in marriage and other contracts; the crime of blasphemy; the protection against double jeopardy; the laws of papal privileges and other "sovereign immunities"; the law of excommunication and religious discipline; and the multiple and discrete forms and forums of cooperation and conflict between church and state, pope and emperor, and canon and civil law.

Helmholz generally opens each chapter with Gratian's Decretum (ca. 1140), the first book and foundational text of the of the Corpus iuris canonici. He first looks backward to some of the biblical, patristic, and Roman law sources that Gratian

⁵Id. at xii-xiv, 398-99. See also Helmholz, Canon Law and English Common Law, supra note 1, at 15.

collected and synthesized, pointing out where appropriate some of the lacunae and lapses in this medieval masterwork. Helmholz then looks forward to show how Gratian's collation and concordance of earlier sources was applied, elaborated, and reformed in the next four centuries of papal and conciliar legislation, through juridical glosses, commentaries, and opinions, and in the relevant cases litigated in the Church courts.

While the medieval texts show ample diversity and division of opinion, especially along geographical lines, Helmholz demonstrates the considerable consensus of the day not only among medieval canonists, but also between many canonists and civilians.

This legal world [of the high Middle Ages] gave rise to a communis opinio on most questions of law. It was a relatively small and scholastic world, in the sense that the ius commune was dominated by law professors, not by judges. . . . They knew one another's work and referred to it constantly. In that discussion, room was often made for criticism and disagreement. One opinion might be "more common" than another. Commentators might deviate from this communis opinio if they had good reason to do so. However, there came to be a widely shared understanding among these men about most matters (p. 23).

This conclusion will surprise many readers, particularly those who remember from their college history courses the great battles of pope and emperor, bishop and prince, church and state, and spiritual sword and temporal sword in the High Middle Ages. But, without exaggerating the concordance of the medieval legal mind on all questions, Helmholz adduces ample evidence to support this conclusion.

Helmholz also demonstrates the sophistication and ambition of the medieval canon law. Helmholz writes of the medieval canonists: "Whether one looks at their ability in mastering the relevant authorities, their proficiency in reasoning by analogy, their skill in analyzing precedents, their talent in drawing legal distinctions, or their energy in working through large bodies of law, the canonists seem scarcely inferior to modern lawyers. In some ways, they were probably better" (p. 397). Medieval canon law was also remarkably wide-ranging in the number of issues it addressed. It was not merely a collection of rules to mediate disputes. "It provided guidance to right conduct, as well as punishing evil conduct and settling disputes. Its purpose was to lead men to the good" (pp. 397-

398). Its legal methods and measures could be hard and brittle, sometimes even harsh and brutal, as Helmholz readily documents (although doubtless not to the full satisfaction of modern deconstructionists). But, whatever its faults, the classical canon law was as sophisticated, subtle, and supple a legal system as the Roman law that preceded it, and the common law that followed it.

Any reader looking for a sophisticated self-guided tour of the medieval canon law and a perennially useful reference guide to discrete canon law questions will find this book invaluable.

Any professor looking for a sturdy textbook on canon law for use in college, seminary, law school, or graduate school courses should turn with alacrity to this brilliant volume.