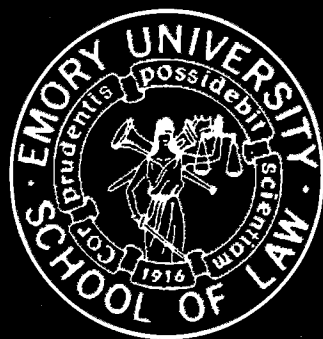


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IN THE STEPS OF GRATIAN:  
WRITING THE HISTORY OF  
CANON LAW IN THE 1990S

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## IN THE STEPS OF GRATIAN: WRITING THE HISTORY OF CANON LAW IN THE 1990S

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- Medieval Canon Law.* By James A. Brundage. London/New York: Longman, 1995. Pp. xii, 260. \$25.50.
- Église et cité: Histoire du droit canonique.* By Jean Gaudemet. Paris: Cerf, 1994. Pp. x, 740. 300 French Francs.
- The Spirit of the Classical Canon Law.* By R.H. Helmholz. Athens, Georgia: University of Georgia Press, 1996. Pp. xiv, 514. \$60.00.
- Canons and Canonists in Context.* By John T. Noonan. Goldbach: Keip, 1997. Pp. xv, 400. 150 German Marks.

### INTRODUCTION

Modern Western law owes a profound debt to the canon law of the Middle Ages.<sup>1</sup> The Western Legal Tradition originated in the Papal Revolution of the late eleventh century—a revolution led by Pope Gregory VII that renounced secular control of ecclesiastical institutions and established the Roman Catholic Church as an independent legal authority in the West.<sup>2</sup> The legal institutions, called canon laws, that the Church established in the twelfth through sixteenth centuries are amply reflected in many contemporary legal institutions and practices. It is now recognized, for instance, that modern constitutional law owes much to theories of representation, consent, and rights first developed by medieval canonists.<sup>3</sup> International law owes much to the medieval

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<sup>1</sup> See especially HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983).

<sup>2</sup> See *id.* at 1-45 and 88-119.

<sup>3</sup> See BRIAN TIERNEY, *FOUNDATIONS OF THE CONCILIAR THEORY: THE CONTRIBUTION OF THE MEDIEVAL CANONISTS FROM GRATIAN TO THE GREAT SCHISM* (enlarged new ed. 1998); BRIAN TIERNEY, *RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT, 1150-1650* (1982); cf. BRIAN TIERNEY, *CHURCH LAW AND CONSTITUTIONAL THOUGHT IN THE MIDDLE AGES* (1979).

On the medieval origins of modern conceptions of rights, see BRIAN TIERNEY, *THE IDEA OF NATURAL*

debate over the proper relationship of the papacy to the secular powers of Europe and of the proper relationship of both Church and State to the larger non-Christian world—whether that be Muslim North Africa and the Middle East, Mongol Asia, or the native Indian tribes of Spanish America.<sup>4</sup> Modern marriage and family law has been decisively shaped by the medieval conception of marriage as a sacrament, by the creation of an intricate body of marriage law, and by the enforcement of that law in church courts.<sup>5</sup> Modern commercial-law concepts of obligation, usury, interest, and pledges of faith and collateral are grounded in medieval canon laws,<sup>6</sup> as are modern notions of the right of the poor to a basic level of subsistence and support.<sup>7</sup> Similarly, a host of civil and criminal procedural rules—from the requirement of written procedures, to hearsay rules, to the privilege against self-incrimination—have long canon-law roots.<sup>8</sup>

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RIGHTS: STUDIES ON NATURAL RIGHT, NATURAL LAW, AND CHURCH LAW, 1150-1625 (1997); Charles J. Reid, Jr., *The Medieval Origins of the Western Natural Rights Tradition: The Achievement of Brian Tierney*, 83 CORNELL L. REV. 437 (1998); Charles J. Reid, Jr., *Thirteenth-Century Canon Law and Rights: The Word *ius* and Its Range of Subjective Meanings*, 30 STUDIA CANONICA 295 (1996); Charles J. Reid, Jr., *The Canonistic Contribution to the Western Natural-Rights Tradition: An Historical Investigation*, 33 B.C. L. REV. 37 (1991). On the development of the interaction between sovereignty and rights, see KENNETH PENNINGTON, *THE PRINCE AND THE LAW, 1200-1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION* (1993); Brian Tierney, *Religious Rights: An Historical Perspective*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES 17 (John Witte, Jr. & Johan Van der Vyver eds., 1996).

<sup>4</sup> See JAMES MULDOON, *CANON LAW, THE EXPANSION OF EUROPE, AND WORLD ORDER* (1998); see also THEODOR MERON, *HENRY'S WARS AND SHAKESPEARE'S LAWS: PERSPECTIVES ON THE LAW OF WAR IN THE LATER MIDDLE AGES* (1993); JAMES MULDOON, *POPES, LAWYERS AND INFIDELS: THE CHURCH AND THE NON-CHRISTIAN WORLD, 1250-1550* (1979); FREDERICK H. RUSSELL, *THE JUST WAR IN THE MIDDLE AGES* (1975).

<sup>5</sup> See JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* (1987); RICHARD H. HELMHOLZ, *MARRIAGE LITIGATION IN MEDIEVAL ENGLAND* (1974); JOHN T. NOONAN, JR., *POWER TO DISSOLVE: LAWYERS AND MARRIAGES IN THE COURTS OF THE ROMAN CURIA* (1972); JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* 16-41 (1997).

<sup>6</sup> See JOHN W. BALDWIN, *MEDIEVAL THEORIES OF THE JUST PRICE* (1959); JOHN T. NOONAN, JR., *THE SCHOLASTIC ANALYSIS OF USURY* (1957); Terence P. McLaughlin, *The Teaching of the Canonists on Usury, Part I*, 1 MEDIEVAL STUDIES 82 (1939); Terence P. McLaughlin, *The Teaching of the Canonists on Usury, Part II*, 2 MEDIEVAL STUDIES 1 (1940).

<sup>7</sup> See GILLES COUVREUR, *LES PAUVRES, ONT-ILS DES DROITS?* (1961); BRIAN TIERNEY, *MEDIEVAL POOR LAW: A SKETCH OF CANONICAL THEORY AND ITS APPLICATION IN ENGLAND* (1959).

<sup>8</sup> See, e.g., RICHARD H. HELMHOLZ ET AL., *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* (1997); Richard H. Helmholz, *The Early History of the Grand Jury and the Canon Law*, 50 U. CHI. L. REV. 613 (1983); Richard H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European *Ius Commune**, 65 N.Y.U. L. REV. 962 (1990); Frank R. Heitmann, *The Establishment of a Rule Against Hearsay in Romano-Canonical Procedure*, 36 VA. J. INT'L L. 1 (1995); Frank R. Heitmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481 (1994).

In the last fifty years, specialists have brought to life and light several hundred freshly edited medieval canon law texts, opening a window on the wide-ranging concerns of canonistic jurisprudence.<sup>9</sup> The inspiration for much of this scholarship has been the singular example and guidance of Stephan Kuttner, whose career spanned over sixty years and included professorships at several leading European and American universities.<sup>10</sup> More recently, translations of significant portions of leading canonistic texts have appeared, making these texts available to a general reading public.<sup>11</sup>

At the same time, a large body of scholarly literature interpreting these texts has been disseminated to a larger public, including American legal scholars and judges. For example, feminist legal scholars have looked to scholarship on medieval law to buttress claims about the historic treatment of women.<sup>12</sup> Scholars of modern poor law have considered the treatment accorded the "deserving" poor under medieval canon law.<sup>13</sup> Constitutional and human-rights scholars have taken notice of the importance of the medieval sources of modern views of individual and group rights and of notions of privilege, immunity, exemption, and entitlement.<sup>14</sup> Important recent scholar-

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<sup>9</sup> See Knut Wolfgang Nörr, *Die kanonistische Literatur*, in I HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN PRIVATRECHTSGESCHICHTE 365 (Helmut Coing ed., 1973). See also the bibliographic sections of the BULLETIN OF MEDIEVAL CANON LAW.

<sup>10</sup> See Obituary of Stephan Kuttner, N.Y. TIMES, Aug. 16, 1996, at A30. Kuttner's leading works include: STEPHAN KUTTNER, GRATIAN AND THE SCHOOLS OF LAW, 1140-1234 (1983); STEPHAN KUTTNER, HARMONY FROM DISSONANCE: AN INTERPRETATION OF MEDIEVAL CANON LAW (1960); STEPHAN KUTTNER, THE HISTORY OF IDEAS AND DOCTRINES OF CANON LAW IN THE MIDDLE AGES (2d ed. 1992); STEPHAN KUTTNER, KANONISTISCHE SCHULDLEHRE VON GRATIAN BIS AUF DIE DEKRETALEN GREGORS IX (1935); STEPHAN KUTTNER, REPERTORIUM DER KANONISTIK (1140-1234): PRODRONUS CORPORIS GLOSSARUM (1937); STEPHAN KUTTNER, STUDIES IN THE HISTORY OF MEDIEVAL CANON LAW (1990).

<sup>11</sup> See GRATIAN, THE TREATISE ON LAWS WITH THE ORDINARY GLOSS (Augustine Thompson, O.P. & James R. Gordley trs., 1993); PREFACES TO CANON LAW BOOKS IN LATIN CHRISTIANITY: SELECTED TRANSLATIONS, 500-1245 (Robert Somerville & Bruce C. Brasington trs., 1998).

<sup>12</sup> Some recent studies that make important use of canon law include: Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374 (1993); Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135 (1990). Cf. Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 HOW. L.J. 173 (1992) (arguing that modern American law continues to make use of medieval understandings of marriage in rejecting the right of homosexual marriage).

<sup>13</sup> See Larry Cata Backer, *Medieval Poor Law in Twentieth-Century America: Looking Back Toward a General Theory of Modern American Poor Relief*, 44 CASE W. RES. L. REV. 871 (1995); William P. Quigley, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Non-Working Poor*, 30 AKRON L. REV. 73 (1996). Cf. David J. Gerber, *Prometheus Born: The High Middle Ages and the Relationship Between Law and Economic Conduct*, 38 ST. LOUIS U. L.J. 673 (1994) (reviewing connections between modern and late medieval economic thought).

<sup>14</sup> See, e.g., John B. Attanasio, *Everyman's Constitutional Law: A Theory of the Power of Judicial Re-*

ship in trusts and equity has drawn deep connections between modern legal doctrines and canon-law antecedents.<sup>15</sup> Even American judicial opinions have begun to cite recent scholarship on medieval canon law, on matters ranging from the religious origins of Western law,<sup>16</sup> to the historic relationship of canon law and the grand jury,<sup>17</sup> to the role of canon law in the enforcement of support orders in bastardy proceedings in medieval England.<sup>18</sup>

The system of canon law that lies at the heart of these developments, while rooted in early Christian and patristic sources, first took definitive shape in the twelfth and thirteenth centuries. For the first time in this period, the Roman Catholic Church was able to lay successful claim to a vast jurisdiction over both spiritual and temporal matters.<sup>19</sup> The Church claimed exclusive personal jurisdiction over clerics and monks, over heretics and Jews, over transient persons like pilgrims and students, crusaders, sailors and foreign merchants, and over such *personae miserabiles* as widows, orphans, and the poor. It also claimed subject-matter jurisdiction over patronage, benefices, and tithes; clerical ordination, appointment to ecclesiastical office, and discipline; marriage, annulment, and family relations; wills, testaments, and intestacy; oaths and pledges of faith; and a host of moral offenses against God, neighbor, and

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view, 72 GEO. L.J. 1665 (1984); David Hollenbach, *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 SAN DIEGO L. REV. 877 (1993); David M. Smolin, *Church, State, and International Human Rights: A Theological Appraisal*, 73 NOTRE DAME L. REV. 1515 (1998); John Witte, Jr., *Law, Religion, and Human Rights*, 28 COLUM. HUM. RTS. L. REV. 1 (1996).

<sup>15</sup> See Shael Herman, *Utilitas Ecclesiae: The Canonical Conception of the Trust*, 70 TUL. L. REV. 2239 (1996); Jack Moser, *The Secularization of Equity: Ancient Religious Origins, Feudal Christian Influences, and Medieval Authoritarian Impacts on the Evolution of Legal Equitable Remedies*, 26 CAP. U. L. REV. 483 (1997).

<sup>16</sup> See, e.g., *McClure v. Sports & Health Club*, 370 N.W.2d 844, 859-60 (Minn. 1985) (Peterson, J., dissenting) (relying on Harold Berman's research on religious foundations of Western law to criticize majority opinion).

<sup>17</sup> See *State v. Doliner*, 475 A.2d 552, 556 (N.J. 1984) (citing Richard Helmholz's study of canonistic origins of grand jury proceedings); *Hennigan v. State*, 746 P.2d 360, 378 (Wyo. 1987) (Urbigkit, J., dissenting) (also citing Helmholz on the grand jury).

<sup>18</sup> See, e.g., *C.C. v. A.B.*, 550 N.E.2d 365, 368 n.3 (Mass. 1990) (citing Richard Helmholz's findings on responsibility of ecclesiastical courts for child support in bastardy proceedings). Cf. Richard H. Helmholz, *Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law*, 63 VA. L. REV. 431 (1977). Some courts, although citing to recent findings in the area of medieval canon law, nevertheless misunderstand the significance of these findings. Thus the court in *In re J.W.T.*, 872 S.W.2d 189 (Tex. 1994), failed to understand the division between ecclesiastical and secular jurisdictions when referring to Helmholz's study of child support in bastardy proceedings.

<sup>19</sup> On the medieval concept of jurisdiction, see BERMAN, *supra* note 1, at 21-23, 260-62; TIERNEY, *RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT*, *supra* note 3, at 30-39; Udo Wolter, *Amt und Officium in mittelalterlichen Quellen vom 13. bis 15. Jahrhundert. Ein begriffsgeschichtliche Untersuchung*, 78 ZEITSCHRIFT DER SAVIGNY STIFTUNG (Kan. Abt.) 246 (1988).

self—blasphemy, heresy, sacrilege, iconoclasm, Sabbath-breaking, sorcery, witchcraft, defamation, homosexuality, sodomy, prostitution, concubinage, abortion, infanticide, and other offenses. The Church repeated its claims of spiritual jurisdiction in numerous concordats and decretal letters from the twelfth century onward; it relied upon a network of ecclesiastical tribunals established in virtually every diocese in the Christian West to enforce these claims.

The Church also claimed temporal jurisdiction over subjects and persons that fell within the competence of civil authorities. In the first instance, the Church asserted jurisdiction *ratione peccati*—“by reason of sin”—to lay claim to the right to judge seemingly secular matters, such as breach of contract, which was subsumed under the category of promise-breaking. The Church also asserted temporal jurisdiction through prorogation or choice-of-law provisions in contracts or treaties, which allowed parties to agree to litigate their civil disputes in accordance with canon law. Through removal procedures invoked unilaterally by one party, or occasionally by a civil judge, cases could be transferred from a civil court to a church court if the civil relief or procedures available were adjudged unfair or unfit.<sup>20</sup>

These jurisdictional claims rendered the Church both legislator and judge. From the twelfth century onward, the ecclesiastical authorities issued a steady stream of papal decretals and bulls, conciliar decrees and edicts, that prevailed throughout Christendom. These legislative pronouncements circulated singly and in heavily glossed editions of the books that would later comprise the *Corpus iuris canonici*.<sup>21</sup> Local church prelates, councils, and synods supplemented the general law of the Church, and confessional manuals provided further guidance in the ways of Christian living.<sup>22</sup> Commentaries upon the

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<sup>20</sup> See especially WINFRIED TRUSEN, ANFÄNGE DES GELEHRTEN RECHTS IN DEUTSCHLAND. EIN BEITRAG ZUR GESCHICHTE DER FRÜHREZEPTION 63-65 (1962).

<sup>21</sup> On the development of the *Corpus iuris canonici* (so named for the first time in 1671), see Knut Wolfgang Nörr, *Die Entwicklung des Corpus iuris canonici*, in 1 HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN PRIVATRECHTSGESCHICHTE 835-846 (Helmut Coing ed., 1973); Hans Erich Troje, *Die Literatur des gemeinen Rechts unter dem Einfluss des Humanismus*, in *id.*, vol. 2/1, 615, 664-667.

<sup>22</sup> For lists of confessional manuals, see LUDWIG HAIN, REPORTORIUM BIBLIOGRAPHICUM IN QUO LIBRI OMNES AB ARTE TYPOGRAPHICA INVENTA USQUE AD ANNUM MD TYPIS EXPRESSI ORDINE ALPHABETICO VEL SIMPLICITER ENUMERANTUR VEL ADCURATUS RECENSENTUR, 4 vols. (1948); PIERRE MICHAUD-QUANTIN, SOMES DE CASUISTIQUE ET MANUELS DE CONFESION AU MOYEN ÂGE, XII-XVI SIÈCLES (1962). For their importance as legal documents, see RODERICH VON STINTZING, GESCHICHTE DER POPULÄREN LITERATUR DES RÖMISCH-KANONISCHEN RECHT IN DEUTSCHLAND AM ENDE DES FÜNFZEHNEN UND IM ANFANG DES SECHSZEHNEN JAHRHUNDERTS 487-89 (1867); THOMAS N. TENTLER, SIN AND CONFESSION ON THE EVE OF THE REFORMATION 28-30 (1977).

law, produced by university professors, explored issues of legal theory and sought to identify and resolve apparent inconsistencies in the law.

Church courts adjudicated cases in accordance with the substantive and procedural rules of the canon law. Many cases were heard first in the court of the archdeaconry, often called the consistory court, presided over by the archdeacon or the provisory judge. Through a variety of delegations and *ad hoc* agreements, however, minor spiritual and temporal disputes often came to be heard by rural deans, parish priests, or monastic superiors. Major disputes involving the annulment of putative marriages, heresy, or crimes committed by or against clergy were generally heard by the consistory court of the bishop, presided over by the bishop himself or by his principal judicial officer, called the *officialis* or "official."<sup>23</sup> Periodically, the pope or the local bishop might delegate itinerant ecclesiastical judges, usually called *inquisitores*, "inquisitors," with original jurisdiction over discrete questions that would otherwise lie within the competence of the consistory courts. Binding the system together was a system of papal legates, who represented the pope among the secular rulers and who also possessed a variety of powers that could be exercised in the name of the supreme pontiff.<sup>24</sup> Although all Christians possessed the right of interlocutory appeal to Rome at any stage of litigation, the typical course of appeal was first to the consistory court of the archdeacon, then to the courts of audience of the bishop and archbishop, and finally to the papal court. Cases raising particularly serious or novel questions of canon law could, at any stage, be referred to distinguished canonists or law faculties, called "assessors," whose learned opinions ("*consilia*") on the questions were influential, and occasionally even binding in the Church courts.<sup>25</sup>

By the fifteenth century, the Church came to predicate its jurisdictional claims on three separate grounds. First, the Church claimed authority over the

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<sup>23</sup> The classic study of this office remains PAUL FOURNIER, *LES OFFICIALITÉS AU MOYEN ÂGE* (photo. reprint 1984) (1880).

<sup>24</sup> See JANE E. SAYERS, *PAPAL JUDGES DELEGATE IN THE PROVINCE OF CANTERBURY, 1198-1254: A STUDY IN ECCLESIASTICAL JURISDICTION AND ADMINISTRATION* (1971); Robert C. Figueira, *The Classification of Medieval Legates in the Liber Extra*, 21 *ARCHIVUM HISTORIAE PONTIFICIAE* 210 (1983); Robert C. Figueira, *Legatus Apostolicae Sedis: The Pope's Alter Ego According to Thirteenth-Century Canon Law*, 27 *STUDI MEDIEVALI* 527 (3d ser. 1985); Robert C. Figueira, *Papal Reserved Powers and Limitations on Legatine Authority*, in *POPES, TEACHERS AND CANON LAW IN THE MIDDLE AGES* 191 (James Ross Sweeney & Stanley A. Chodorow eds., 1989).

<sup>25</sup> See R.H. HELMHOLZ, *THE SPIRIT OF THE CLASSICAL CANON LAW* 88-144, 339-93 (1996); Rudolf Weigand, *Zur mittelalterlichen kirchlichen Ehegerichtsbarkeit: rechtsvergleichende Untersuchung*, 67 *ZEITSCHRIFT DER SAVIGNY—STIFTUNG FÜR RECHTSGESCHICHTE* (Kan. Abt.) 218 (1981).

seven liturgical sacraments—baptism, confirmation, eucharist, penance, marriage, ordination, and extreme unction. These liturgical sacraments, unlike other sacred symbols and rituals, were considered to be both “signs” and “causes” of God’s grace, which Christ had instituted for the sanctification of His Church.<sup>26</sup> If properly administered, sacraments transformed the souls of their participants and conferred sanctifying grace upon the Christian community. The administration of such solemn ceremonies could not turn simply on the predilections of parish priests or the preferences of individual believers. Christ had vested authority over the sacraments in St. Peter and, through apostolic succession, in the papal and other ruling officers of the Church. The pope and his prelates thus had authority to promulgate and enforce canon law rules (literally, to “speak the law”—*ius dicere*) that would govern sacramental participation and procedure.<sup>27</sup>

The Church had exercised this jurisdiction, this law-making power, over the sacraments with considerable alacrity in the centuries following the Papal Revolution. By the sixteenth century, each of the sacraments had drawn to itself numerous canon-law rules. Certain sacraments undergirded whole systems of law that prevailed throughout much of Christendom. The sacrament of marriage supported an intricate canon law of marriage, sexual discipline, annulment, and family relations. The sacrament of penance supported, directly, an elaborate canon law of crimes and civil wrongs and, indirectly, a canon law of contracts, oaths, charity, and inheritance. The sacrament of ordination became the foundation for a refined canon law of professional and corporate rights and duties of the clergy. The sacrament of baptism (and confirmation) provided at least a partial foundation for a constitutional law of natural rights and duties of Christian believers.<sup>28</sup>

Second, the Church predicated its jurisdictional claims on Christ’s famous delegation to the Apostle Peter: “I will give you the keys of the kingdom of heaven, and whatever you bind on earth shall be bound in heaven, and whatever you loose on earth shall be loosed in heaven.”<sup>29</sup> According to conventional canonical lore, Christ had conferred on St. Peter two keys—a key of knowledge to discern God’s word and will and a key of power to implement

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<sup>26</sup> PETRUS LOMBARDI QUATUOR LIBRI SENTENTIARUM (ca. 1150), bk. 4, dist. 1.2. See also JOSEPH MARTOS, *DOORS TO THE SACRED: A HISTORICAL INTRODUCTION TO SACRAMENTS IN THE CATHOLIC CHURCH* 65-96 (1981).

<sup>27</sup> See generally LEX ET SACRAMENTUM IM MITTELALTER (Paul Wilpert ed., 1969).

<sup>28</sup> See generally BERMAN, *supra* note 1, at 165-254.

<sup>29</sup> *Matthew* 16:19 (RSV).



and enforce that word and will throughout the Church. St. Peter had used these keys to help define the doctrine and discipline of the apostolic church. Through apostolic succession, the pope and his prelates had inherited these keys to define the doctrine and discipline of the contemporary Church. This inheritance, the canonists maintained, conferred on the pope and his prelates a legal power, a power to make and enforce laws.<sup>30</sup> "In deciding cases the authority of the Roman pontiffs prevails," wrote the twelfth-century canonist Huguccio, "for . . . not only knowledge but also power is needed . . . power, that is jurisdiction."<sup>31</sup>

This argument of the keys readily supported the Church's claims to subject-matter jurisdiction over core spiritual matters of doctrine and liturgy—the purpose and timing, and the form and function of the mass, baptism, the eucharist, confession, and the like. The key of knowledge, after all, gave the pope and his prelates access to the mysteries of divine revelation, which by use of the key of power, they communicated to all believers through the canon law. The argument of the keys, however, could be easily extended. Even the most mundane of human affairs have spiritual and moral dimensions. Resolution of a boundary line dispute between neighbors implicates the commandment to love one's neighbor. Unaccountable failure to pay one's civil taxes or feudal dues is a breach of the spiritual duty to honor those in authority. Reproducing or reading a censored book is a sin. A 1435 declaration by the Archbishop of Mainz illustrates the full extent of these claims: By the power of the keys, the Archbishop claimed "jurisdiction over all and individual cases, criminal and civil, spiritual and temporal, beneficial and profane . . . and [over] all matters [involving] prelates, chapters, assemblies, corporations, universities, as well as individual persons, clerics and laymen, of whatever status and grade, dignity and preeminence, by reason of orders or condition."<sup>32</sup>

Third, the Church predicated its jurisdictional claims on the belief that the canon law was the true source of Christian equity.<sup>33</sup> Canon law, in the words

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<sup>30</sup> See BRIAN TIERNEY, *ORIGINS OF PAPAL INFALLIBILITY, 1150-1350*, at 39-41 (1972); Thomas Aquinas, *Summa Theologiae*, III (Supp.) qq. 17-18.

<sup>31</sup> TIERNEY, *RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT*, *supra* note 3, at 32 (quoting Huguccio).

<sup>32</sup> Quoted by GEORG MAY, *DIE GEISTLICHE GERICHTSBARKEIT DES ERZBISHOFS VON MAINZ IM THÜRINGEN DES SPÄTEN MITTELALTERS* 111 (1950).

<sup>33</sup> See generally NORBERT HORN, *AEQUITAS IN DEN LEHREN DES BALDUS* (1968); EUGEN WOHLHAUPTER, *AEQUITAS CANONICA. EINE STUDIE AUS DEM KANONISCHEN RECHT* (1931); Pier Giovanni Caron, *Aequitas et interpretatio dans la doctrine canonique aux XIII et XIV siècles*, 4 *MONUMENTA IURIS CANONICI series C*, 131 (1971).

of the early sixteenth-century jurist Nicolaus Everardus, was rooted in "the teachings of the Bible, the Church Fathers, and the seven ecumenical councils, and inspired by the Holy Spirit." Civil law, by contrast, was of "pagan origin," and inspired by "secular reason." Canon law was thus perforce superior in authority and sanctity. Civil law was perforce "secondary, subordinate, and subsidiary."<sup>34</sup>

The canon law was considered not only a Christian law but also an equitable law. Late medieval canonists referred to it variously as "the mother of exceptions," "the epitome of the law of love," and "the mother of justice."<sup>35</sup> As "the mother of exceptions," canon law was flexible, reasonable, and fair, capable either of bending the rigor of a rule in an individual case through dispensations and injunctions, or punctiliously insisting on the letter of an agreement through orders of specific performance or reformation of documents.<sup>36</sup> Canon law thereby "smoothed the hard and coarse edges of strict Roman (*i.e.*, civil) law," in Everardus's words.<sup>37</sup> As the "epitome of love," canon law afforded special care for the disadvantaged—widows, orphans, the poor, the handicapped, abused wives, neglected children, maltreated servants, and the like. It provided them with standing to press claims in Church courts, competence to testify against their superiors without their permission, methods to gain succor and shelter from abuse and want, and opportunities to pursue pious and protected careers in the cloister. As the "mother of justice," canon law provided a method whereby the individual believer could reconcile himself or herself at once to God and to neighbor. "Herein lies the essence of canonical equity," Eugen Wohlhaupter maintains, and perhaps the principal reason why litigants would tend to be drawn to Church courts over civil courts.<sup>38</sup> Church courts treated both the legality and the morality of the conflicts before them. Their remedies enabled litigants to become "righteous" and "just" not only in their relationships with opposing parties and the rest of the community, but also in their relationship with God.

<sup>34</sup> NICOLAUS EVERARDUS, *LOCI ARGUMENTORUM LEGALES* (Argentorati, 1603), locus 130.

<sup>35</sup> Respectively X 1.29.13; quote from Innocent III, in *DE CLARIS ARCHIGYNASII BONONIENSIS PROFESSORBUS A SAECULO XI USQUE AD SAECULUM XIV* 434 (2d ed. 1888); C.35 q.1 c.16.

<sup>36</sup> See, e.g., HOSTIENSIS, *SUMMA AUREA* (Lyons 1586) lib. 5, tit. "De dispensationibus," n.1, fol. 436.

<sup>37</sup> Quoted in L.J. VAN APELDOORN, *NICOLAAS EVERAERTS (1462-1532) EN HET RECHT VAN ZIJN TIJD* 12 (1935).

<sup>38</sup> See WOHLHAUPTER, *supra* note 33, at 16-17. See further, Stölzel, 1: 386-88; MAY, *supra* note 32, at 158-60; Justus Hashagen, *Zur Charakteristik der geistlichen Gerichtsbarkeit, vornehmlich im späteren Mittelalter*, 6 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE* (Kan. Abt.) 206-292, at 215-17 (1916).

This canon law of the High and Late Middle Ages, is the subject of several important new works of synthesis. James Brundage's *Medieval Canon Law* takes an expansive view of the history of canon law, exploring its development from earliest Christian times through its restatement at the Council of Trent (1545-1564).<sup>39</sup> Jean Gaudemet's *Église et cité* views canon law even more broadly, from the time of Christ to the Second Vatican Council (1962-65).<sup>40</sup> John Noonan has drawn together into a single volume a number of path-breaking studies covering this same period.<sup>41</sup> Richard Helmholz explores the "spirit" of the classical canon law of the twelfth to sixteenth centuries.<sup>42</sup>

James Brundage, Jean Gaudemet, John Noonan, and Richard Helmholz are among the very best historians of the canon law at work today. Building on more than two centuries of specialty scholarship, their writings have brought to brilliant light and life the intricacies and enduring value of the canon law—not only for the Western Church, but also for the Western state.<sup>43</sup> The four vol-

<sup>39</sup> See JAMES A. BRUNDAGE, *MEDIAEVAL CANON LAW* (1995).

<sup>40</sup> See JEAN GAUDEMET, *ÉGLISE ET CITÉ: HISTOIRE DE DROIT CANONIQUE* (1994).

<sup>41</sup> See JOHN T. NOONAN, JR., *CANONS AND CANONISTS IN CONTEXT* (1997).

<sup>42</sup> See HELMHOLZ, *supra* note 25.

<sup>43</sup> Brundage's principal works include: JAMES A. BRUNDAGE, *THE CRUSADES, HOLY WAR, AND CANON LAW* (1991); *HANDBOOK OF MEDIEVAL SEXUALITY* (Vern L. Bullough & James A. Brundage eds., 1996); JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* (1987); JAMES A. BRUNDAGE, *MEDIAEVAL CANON LAW AND THE CRUSADER* (1969); JAMES A. BRUNDAGE, RICHARD LION HEART (1974); JAMES A. BRUNDAGE, *SEX, LAW, AND MARRIAGE IN THE MIDDLE AGES* (1993); VERN L. BULLOUGH & JAMES A. BRUNDAGE, *SEXUAL PRACTICES AND THE MEDIAEVAL CHURCH* (1982).

Gaudemet's principal works include: JEAN GAUDEMET, *L'ÉGLISE DANS L'EMPIRE ROMAIN (IV<sup>e</sup>-VI<sup>e</sup> SIÈCLES)* (1958); JEAN GAUDEMET, *ÉGLISE ET SOCIÉTÉ EN OCCIDENT AU MOYEN ÂGE* (1984); JEAN GAUDEMET, *LES ÉLECTIONS DANS L'ÉGLISE LATINE DES ORIGINES AU XVII<sup>e</sup> SIÈCLE* (1979); JEAN GAUDEMET, *LA FORMATION DU DROIT CANONIQUE MÉDIEVAL* (1980); JEAN GAUDEMET, *LA FORMATION DU DROIT SÉCULIER ET DU DROIT DE L'ÉGLISE AUX IV<sup>e</sup> ET VI<sup>e</sup> SIÈCLES* (2d ed. 1979); JEAN GAUDEMET, *LE GOUVERNEMENT DE L'ÉGLISE À L'ÉPOQUE CLASSIQUE: II LE GOUVERNEMENT LOCAL* (1979); JEAN GAUDEMET, *LE MARIAGE EN OCCIDENT: LES MOURS ET LE DROIT* (1987); JEAN GAUDEMET, *LA SOCIÉTÉ ECCLÉSIASTIQUE DANS L'OCCIDENT MÉDIEVAL* (1980); JEAN GAUDEMET, *LES SOURCES DU DROIT DE L'ÉGLISE EN OCCIDENT DU III<sup>e</sup> AU VII<sup>e</sup> SIÈCLE* (1985).

Noonan's principal works on the history of canon law include: JOHN T. NOONAN, JR., *BRIBES 137-310* (1984); JOHN T. NOONAN, JR., *CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGICALS AND CANONISTS* (enlarged ed. 1986); *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* (John T. Noonan ed., 1970); NOONAN, *POWER TO DISSOLVE*, *supra* note 5; NOONAN, *SCHOLASTIC ANALYSIS OF USURY*, *supra* note 6.

Helmholz's principal works include: *CANON LAW IN PROTESTANT LANDS* (Richard H. Helmholz ed., 1990); RICHARD H. HELMHOLZ, *CANON LAW AND ENGLISH COMMON LAW* (1983); HELMHOLZ, *MARRIAGE LITIGATION IN MEDIAEVAL ENGLAND*, *supra* note 5; RICHARD H. HELMHOLZ ET AL., *NOTARIES PUBLIC IN ENGLAND SINCE THE REFORMATION* (1991); RICHARD H. HELMHOLZ, *ROMAN CANON LAW IN REFORMATION ENGLAND* (1992); *ITENERA FIDUCIAE: TRUST AND TRUEHAND IN HISTORICAL PERSPECTIVE* (Richard H. Helmholz & Reinhard Zimmermann eds. and contrs., 1998); *THE PRIVILEGE AGAINST SELF-INCRIMINATION:*

umes here under review put on display the trademarks of their scholarship—an unrivalled command of the sources, an enviable deftness of pen, and a rare sagacity of interpretive judgment.

### I. JAMES BRUNDAGE AND MEDIEVAL CANON LAW

While his work is entitled *Medieval Canon Law*, Brundage undertakes to cover a great deal more in this important handbook—indeed, “to sketch the broad outlines of the development of the canon law of the Western church from its beginnings to the end of the Middle Ages.”<sup>44</sup>

The beginnings, of course, lie in the Bible and in the earliest canons of the budding Christian Church. Jesus Christ, the founder of Christianity, was himself ambivalent about the law, asserting that it had no salvific value, and declaring that He had come as the law’s fulfillment.<sup>45</sup> This tension is even more pronounced in the letters of St. Paul.<sup>46</sup> Even so, the early Christian community found it necessary nearly from the outset to lay down certain basic principles of proper moral conduct and rules for clerical and lay life.<sup>47</sup> The *Didache* (ca. 120), the *Shepherd* of Hermas, and the *Apostolic Tradition* (ca. 200) ascribed to Hippolytus were among the first restatements of principles and rules found in the Christian tradition, and Brundage properly places these works at the beginning of the canon-law tradition.

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ITS ORIGIN AND DEVELOPMENT (Richard H. Helmholz ed., 1997); SELECT CASES ON DEFAMATION TO 1600 (Richard H. Helmholz ed., 1985).

<sup>44</sup> See BRUNDAGE, *supra* note 39, at ix.

<sup>45</sup> This tension remains a constant feature in the history of canon law from the very beginning. Stephan Kuttner explains:

Time and again in history there have been schools of thought which denied that Law has an essential function in the life of the Church. In various ways theologians old and new have constructed a fundamental contrast between the Church built on Love and the Church built on Law; between a Church informed by the Holy Spirit and a Church governed by the rule of authority as expressed in a juridical order. We find this thought voiced as early as the third century in Tertullian when he sets the “Church of the Spirit” (*ecclesia spiritus*) over against the “Church of the Bishops” (*ecclesia episcoporum*). We find it in the beliefs of the medieval Catharists and in the prophecies of Abbot Joachim of Fiore on the coming age of the Holy Spirit where there will be no need for hierarchy, ecclesiastical authority, and canon law. Later medieval reforming movements, esoteric or popular, that turned away from Rome nearly always appealed to a sentiment of antinomianism in the name of the Gospel: the “true Gospel” versus man-made law.

Stephan Kuttner, *Reflections on Gospel and Law in the History of the Church*, in LIBER AMICORUM MONSEIGNEUR ONCLIN 199, 201 (J. Lindemans & H. Demeester eds., 1976).

<sup>46</sup> See Joseph A. Fitzmyer, *Saint Paul and the Law*, 27 THE JURIST 18 (1967).

<sup>47</sup> See BRUNDAGE, *supra* note 39, at 6.

Christianity, in these early days, existed at the margins of society and was the target of repeated persecutions by Roman emperors from Nero (54-68) to Diocletian (284-305). The persecutions ended, however, with the accession of Constantine to the imperial throne in 311. The Edict of Milan, agreed to by Constantine and the eastern emperor Licinius in 313,<sup>48</sup> granted tolerance to Christians and all other peaceable religious living in the empire. By the end of the fourth century, the Christian movement had succeeded in obtaining for itself a preferred legal status within the Roman state. Indeed, in the course of these developments, "the church became virtually an organ of imperial government, enriched by privileges, favours, and public funds, but also used as an arm of imperial administration."<sup>49</sup>

This transformation of status had a large impact on the development of canon law. The Church took on a far more hierarchical structure in the course of the fourth century, with bishops now charged with the responsibility for administrative districts known as dioceses, and the lower clergy responsible for the pastoral care of smaller communities of faith, eventually called parishes.<sup>50</sup> The bishop was charged with law-making and disciplinary responsibilities for his territory, and was in turn subjected to the authority of metropolitans (the modern archbishop) and the five great Patriarchs of the Church, who sat in Alexandria, Antioch, Constantinople, Jerusalem, and Rome.<sup>51</sup> Brundage asserts:

These fourth-century structural developments established long-term patterns of thought and action that not only endured throughout the Middle Ages, but have also lasted into modern times. The new organizational scheme inevitably gave increased scope and prominence to church law. Such a complex system of hierarchical authority and responsibility virtually demanded elaborate regulations to define the powers and obligations of officials at each level of the structure.<sup>52</sup>

Brundage moves from this beginning to discuss the nature and function of canon law in the fifth through eleventh centuries. Roman imperial governance collapsed in the West near the end of the fifth century, and its authority was supplanted by a variety of kingdoms organized by the Germanic peoples who

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<sup>48</sup> On the details of this agreement, see JOHN HOLLAND SMITH, *CONSTANTINE THE GREAT*, 121-25 (1971).

<sup>49</sup> See BRUNDAGE, *supra* note 39, at 7-8.

<sup>50</sup> *Id.* at 8-9.

<sup>51</sup> *Id.* at 9.

<sup>52</sup> *Id.* at 9-10.

had been emigrating into the Roman Empire for some time.<sup>53</sup> The new Germanic rulers were less inclined than the fourth-century Romans to confer privileges on the Church, and “some regions, notably Ostrogothic Italy and Visigothic Spain, experienced episodes of sharp hostility between the Germanic monarchs and the catholic hierarchy.”<sup>54</sup> Even so, the rulers of all of the Germanic kingdoms eventually converted to Catholic Christianity, came to view themselves, to one extent or another, as protectors of the Church, and also came to employ members of the Christian clergy in administrative positions within their realms.<sup>55</sup>

Brundage identifies three engines driving the development of the canon law at this early stage. The first was Benedictine monasticism, which originated in the sixth-century spiritual movement of St. Benedict of Nursia (d. ca. 547).<sup>56</sup> Benedict stressed that his followers should observe a rule that balanced time for prayer, work, and study carried out within a community sworn to obedience and stability—a life-long commitment to the same monastery.<sup>57</sup> By the eighth and ninth centuries, Benedictine monasteries had become quite imposing ecclesiastical establishments, possessed of large landholdings and endowed by wealthy patrons. The need to regulate and discipline these institutions, Brundage notes, was a major focus of the law in these early days.<sup>58</sup>

A second major source of law in the early middle ages lies in the development of a new form of confession that began among the Irish in the sixth and seventh centuries. The early Church had, of course, recognized the possibility that Christians might sin and have need of forgiveness, but they conceived of penance as a rare event performed publicly, before the assembled faith community.<sup>59</sup> This “Mediterranean” style of penance was challenged in the sixth and seventh century by an “Irish” style, which emphasized regular private confession and private acts of penance.<sup>60</sup> Priests and others who heard confession

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<sup>53</sup> *Id.* at 19-21. Important surveys of these developments include J.M. WALLACE HADRILL, *THE BARBARIAN WEST, 400-1000* (1952); E.A. THOMPSON, *ROMANS AND BARBARIANS: THE DECLINE OF THE WESTERN EMPIRE* (1982).

<sup>54</sup> BRUNDAGE, *supra* note 39, at 19.

<sup>55</sup> *See id.* at 20-21.

<sup>56</sup> Our knowledge of the sources of St. Benedict's life is summarized in C.H. LAWRENCE, *MEDIAEVAL MONASTICISM: FORMS OF RELIGIOUS LIFE IN WESTERN EUROPE IN THE MIDDLE AGES 17-20* (1984).

<sup>57</sup> *Id.* at 23-35.

<sup>58</sup> BRUNDAGE, *supra* note 39, at 21-22.

<sup>59</sup> *See* BERNARD POSCHMANN, *PENANCE AND THE ANOINTING OF THE SICK 84-103* (F. Courtney tr., 1964).

<sup>60</sup> *See* LADISLAS M. ÖRSY, *THE EVOLVING CHURCH AND THE SACRAMENT OF PENANCE 31-46* (1978).

required guidance in determining what acts were sinful and the sorts of satisfaction that might be expected of penitents; the faithful needed direction on what acts required confessing. These penitential texts became a vital source of canon law rules. Beginning with the sixth-century penitential of Finnian of Clonard, a large number of works were published with the purpose of setting forth such guidance to confessors and penitents alike.<sup>61</sup>

Because priests throughout Western Christendom consulted these manuals and relied upon them for guidance in dealing with the sinners who confessed to them, the penitentials became in effect new sources of law, although few of their authors held high offices in the ecclesiastical hierarchy and were seldom vested with formal legislative power.<sup>62</sup>

A third engine driving legal development throughout the early middle ages was the recurrent need to maintain order within the hierarchical Church. In a time of periodic social and political disintegration, the Church represented one of the most enduring forms of stability in Western Europe. At times, strong political leaders, such as Charlemagne, commissioned the compilation of up-to-date editions of the law.<sup>63</sup> At other times, especially during the periodic political collapses Western Europe experienced during these centuries, leading churchmen were forced to acquiesce "to the whims and desires of soldiers, adventurers, and thugs—which in essence describes what the general run of early feudal knights and nobles really were."<sup>64</sup>

Despite these imposing obstacles, a number of leading churchmen, such as Abbo of Fleury (ca. 940-1004), Regino of Prüm (840-915), and Burchard of Worms (fl. 1000-1025), produced important collections of law.<sup>65</sup> Also, beginning in the tenth century, a church reform movement centered at the Abbey of Cluny, gathered strength.<sup>66</sup> By the mid-eleventh century, this movement captured the papacy. It sparked a revolution that ultimately established the Church as the first modern state.<sup>67</sup>

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<sup>61</sup> The leading collection of penitentials remains LUDWIG BIELER, *THE IRISH PENITENTIALS* (1963).

<sup>62</sup> See BRUNDAGE, *supra* note 39, at 26.

<sup>63</sup> *Id.* at 27.

<sup>64</sup> *Id.* at 34.

<sup>65</sup> On Abbo, see PREFACES TO CANON LAW BOOKS, *supra* note 11, at 71-72, 97-98; on Regino, see *id.* at 69-70, 92-94; and on Burchard, see *id.* at 72-75, 99-104.

<sup>66</sup> See BERMAN, *supra* note 1, at 88-94.

<sup>67</sup> *Id.* at 113-15 (identifying ways in which Church resembled and differed from structure of modern state).

The heart of Brundage's book deals with the Church's precocious development of canon law from 1140 and 1375. By the early twelfth century, the University of Bologna, in northern Italy, had become the center of an emerging academic legal culture. The Roman law books of Justinian had been recently rediscovered and university-trained lawyers began to examine these works systematically for the first time in half a millenium.<sup>68</sup> It was in this vibrant intellectual context of the twelfth century that a new law book, on a scale not previously seen, attempted to organize the law of the Church in accord with the dialectical method then being worked out in the schools of philosophy by the likes of Peter Abelard.<sup>69</sup> This was the famous *Concordance of Discordant Canons* (conventionally known as *Decretum*) (ca. 1141 or 1142) assembled by the shadowy figure known as Gratian.

Brundage notes that Gratian's work had an almost immeasurably deep impact on the development of canon law. It was heavily glossed by commentators, called "decretists," who explored its implications, sought to resolve apparent contradictions, and proposed solutions for apparent gaps in the text. Some of the leading decretists produced works of profound importance for the history of Western law, even though their names are scarcely known today except among specialists.<sup>70</sup> Brundage also makes pertinent observations about the teaching methods of the canonists. They emphasized dialectical reasoning, but "[m]edieval law schools also required their students to perform considerable feats of concentration and memory. Students memorized as a matter of course enormous numbers of laws and had to be able to recall them readily and in proper order, since the lectures they heard bristled with references and citations."<sup>71</sup>

Brundage devotes four chapters to the major issues of substantive and procedural canon law. A chapter on "Canon Law and Private Life" considers

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<sup>68</sup> For an overview of these developments, see Kenneth Pennington, *Medieval Law, in MEDIEVAL STUDIES: AN INTRODUCTION* 333 (James M. Powell ed., 1992).

<sup>69</sup> See BERMAN, *supra* note 1, at 120-164. Cf. *infra* notes 161-74, 194-207 and accompanying text (discussing Gratian in detail).

<sup>70</sup> One of the most undeservedly obscure figures is Huguccio of Pisa, who played an important role in developing basic constitutional principles that continue to influence legal thought today, such as the doctrine that an errant ruler might be removed from office for serious abuses of power. See BRIAN TIERNEY, *FOUNDATIONS OF THE CONCILIAR THEORY, supra* note 3, *passim*. Cf. WOLFGANG P. MÜLLER, *HUGUCCIO: THE LIFE, WORKS, AND THOUGHT OF A TWELFTH-CENTURY JURIST* (1994).

<sup>71</sup> See BRUNDAGE, *supra* note 39, at 52. In recent studies, Brundage has begun to consider the emergence of canon law as the first legal profession. A summary of his findings is contained in James A. Brundage, *The Rise of Professional Canonists and the Development of the Ius Commune*, 112 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE* 26 (Kan. Abt.) (1995).



issues of marriage and sexuality as well as the law of commerce and finance.<sup>72</sup> Brundage is especially effective in dispelling the perennial myth that the canon lawyers were opposed to commercial activities:

[M]edieval canonists, especially from the thirteenth century onward, became increasingly vocal champions of the social values of private property and the accumulation of wealth. Although it is still popularly believed, and often taught, that modern capitalistic veneration of private property and individual rights dates only from the seventeenth and eighteenth centuries, scholarly studies in recent years have demonstrated that many notions about property rights put forward by writers in the Age of Enlightenment . . . had been anticipated centuries earlier by medieval jurists, both civilian and canonist.<sup>73</sup>

A chapter on "Canon Law and Public Life," for its part, considers issues of constitutional law.<sup>74</sup> The medieval church was conceived of as a dense network of corporations, membership in which conferred a variety of rights, privileges, powers, and responsibilities. The head of a medieval canonistic corporation—whether he be abbot, bishop, or even the pope—represented the corporation, derived his authority from a properly conducted election, and was obliged to consult with and even obtain the consent of affected members prior to taking certain actions. Brundage considers in some detail the intricacies of corporation law and its implications for constitutional law.<sup>75</sup> He also considers the development of a law of taxation<sup>76</sup> and the canonists' efforts to restrain the war-making authority of the secular states.<sup>77</sup>

A chapter on "Canonical Courts and Procedures" tells the story of the emergence of a canonistic judicial system throughout Western Europe.<sup>78</sup> Brundage discusses developments at the diocesan level, and reviews in some detail the emergence of a system for hearing appeals at the papal court,

<sup>72</sup> BRUNDAGE, *supra* note 39, at 70-97.

<sup>73</sup> *Id.* at 79-80. See also John F. McGovern, *Private Property and Individual Rights in the Commentaries of the Jurists, A.D. 1200-1550*, in *IN IURE VERITAS: STUDIES IN CANON LAW IN MEMORY OF SCHAFER WILLIAMS* 131 (Steven B. Bowman & Blanche E. Cody eds., 1991); John F. McGovern, *The Rise of New Economic Attitudes—Economic Humanism, Economic Nationalism—During the Later Middle Ages and the Renaissance*, 26 *TRADITIO* 217 (1970); John F. McGovern, *The Rise of New Economic Attitudes in Canon and Civil Law, A.D. 1200-1550*, 32 *THE JURIST* 39 (1972).

<sup>74</sup> See BRUNDAGE, *supra* note 39, at 98-119. On medieval distinctions between "public" and "private," see especially H. MÜLLEJANS, *PUBLICUS UND PRIVATUS IM RÖMISCHEN UND IM ÄLTEREN KANONISCHEN RECHT* (1961).

<sup>75</sup> BRUNDAGE, *supra* note 39, at 98-110.

<sup>76</sup> *Id.* at 113-15.

<sup>77</sup> *Id.* at 118-19.

<sup>78</sup> *Id.* at 120-53.

including the creation of the Roman *Rota*, the *Audientia litterarum contradictarum*, and the *Signatura iustitiae*.<sup>79</sup> For those litigants unable to bring their cases to Rome, appeal lay as well to the court of the papal judges delegate, who exercised papal judicial power vicariously in all the principal states and territories of Europe.<sup>80</sup> This chapter is also invaluable for its description of canonical procedure<sup>81</sup> and the picture it gives of a functioning canon-law bar at the consistory court of Ely, in England.<sup>82</sup>

The chapter on "Canonical Jurisprudence" closes Brundage's treatment of the twelfth through fourteenth centuries.<sup>83</sup> Brundage begins with Gratian's treatment of the sources of law,<sup>84</sup> reviews debates over natural justice and canonical equity,<sup>85</sup> and then addresses basic principles of canon law, such as its adoption of the Roman-law presumption that ignorance of the law is no excuse for not obeying it.<sup>86</sup> He then takes up more specific questions, such as the development of the "constant man" standard for judging invalidating force and fear in matrimonial causes,<sup>87</sup> the debates over the rights of infidels and Jews,<sup>88</sup> and the efforts to apply the canon law to these non-Christian peoples.<sup>89</sup> The chapter is an especially crisp and lucid introduction to the major philosophical issues that drove legal development during these two hundred years.

Brundage's final chapter, "Canon Law and Western Societies," brings the story of medieval canon law up to the sixteenth century. He notes that the "apparent insensitivity of late medieval popes and their advisers to moral and ethical issues, and their obsession with worldly techniques rather than spiritual goals, owed quite a lot to the predominance of canonical practitioners at the curia."<sup>90</sup> But while Martin Luther and the other sixteenth-century reformers

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<sup>79</sup> *Id.* at 125-26.

<sup>80</sup> *Id.* at 127-28.

<sup>81</sup> *Id.* at 128-34.

<sup>82</sup> *Id.* at 134-38.

<sup>83</sup> *Id.* at 154-74.

<sup>84</sup> *Id.* at 154.

<sup>85</sup> *Id.* at 154-58. An important source book is RUDOLF WEIGAND, *DIE NATURRECHTSLEHRE DER LEGISTEN UND DEKRETISTEN VON IRNERIUS BIS ACCURSIUS UND VON GRATIAN BIS JOHANNES TEUTONICUS* (1967).

<sup>86</sup> See BRUNDAGE, *supra*, note 39, at 161-62. An important new study of the relationship of Roman law and canon law is ALBERT GAUTHIER, *ROMAN LAW AND ITS CONTRIBUTION TO THE DEVELOPMENT OF CANON LAW* (1996).

<sup>87</sup> See BRUNDAGE, *supra* note 39, at 166-68.

<sup>88</sup> *Id.* at 162-64.

<sup>89</sup> *Id.* See also WALTER PAKTER, *MEDIAEVAL CANON LAW AND THE JEWS* (1988).

<sup>90</sup> See BRUNDAGE, *supra* note 39, at 180.

declared war upon the canon law, they were only partly able to uproot it. And in turn the canon law "experienced renewed growth and importance in those parts of Europe that retained their allegiance to the Roman church."<sup>91</sup> Indeed, not only can modern Church lawyers trace their profession back to the systematization of Gratian and his successors, but the canon law itself has continued to exert influence on the larger Western legal tradition in such areas as marriage and divorce, wills and estates, and in other areas up to our own day. "The speculations and insights of medieval canonists," Brundage declares, "remain enshrined both within the common law tradition of the English-speaking world and within the civil law heritage of Continental Europeans."<sup>92</sup>

While Brundage's book is compact—260 pages—its learning is massive. Brundage tells a complex story deftly and lucidly, and provides ample bibliography for further reference. He also provides readers with an invaluable pair of appendices, the first explaining for a general audience the citation system used by historians of medieval canon law, the second providing short, thumbnail biographies of leading canonists. Brundage's work should become essential reading for all lawyers and scholars who wish to know more about this important aspect of legal history.

## II. JEAN GAUDEMET AND THE CHURCH AND THE CITY<sup>93</sup>

Gaudemet's formidable 750 page *Église et cité* attempts an even more comprehensive review of the history of canon law over two millennia. As his organizing principle, Gaudemet selects the relationship between the sacred and the secular, the Church and the city, in Western Christianity. This is a story, he stresses, that features both collaboration and conflict, from the time of Jesus to the time of Pope John Paul II.

Under his organizing principle, Gaudemet poses two sets of questions:

How has the Church defined itself and conducted its relations with the secular powers?<sup>94</sup>

<sup>91</sup> *Id.* at 182.

<sup>92</sup> *Id.* at 188.

<sup>93</sup> Several paragraphs of the discussion of Gaudemet are adapted from Charles J. Reid, Jr., Book Review, Jean Gaudemet, *Église et cité*, 56 THE JURIST 938 (1995).

<sup>94</sup> See GAUDEMET, *supra* note 40, at vi ("Comment l'Église s'est-elle définie et quelles relations a-t-elle entretenue avec les pouvoirs séculiers?").

Why law? What is its object and what are its ends? How was it formed? How has it varied over time?<sup>95</sup>

The volume is divided into four major sections. Section One, "A New Religion in the Empire" ("Une religion nouvelle dans l'Empire"), commences with a description of the Jewish community of Palestine at the time of Jesus Christ. Christianity in its origin, Gaudemet emphasizes, must be understood as the lived response of the Jewish followers of Jesus; indeed, the spread of the Christian faith in its first generation tracks the Jewish Diaspora of the Mediterranean basin.<sup>96</sup> He notes the first mention of the Christian movement in a non-Christian source—the Roman historian Suetonius's statement that a certain "Chrestos" caused great agitation in the Jewish community in Rome during the reign of the Emperor Claudius.<sup>97</sup> A proselytizing faith opposed by the rabbinic establishment, Christianity did not long remain primarily a Jewish movement. As early as the Council of Jerusalem (49), it was already on its way to becoming centered in the larger gentile world. It was at this time, in this great first century transition, that the Greek word *ekklesia* ("church") first came to be applied to the new faith community; it is in this application that Gaudemet sees "the entry of the [Christian] community into the world of the law."<sup>98</sup>

Gaudemet notes that in the first three centuries the church grew steadily, despite periodic, and sometimes savage, persecution.<sup>99</sup> It was in this context that Church law first took root and began to flourish. Gaudemet notes the distinction that Rudolf Sohm drew between the three stages of development of Christian law—(1) the "Ur-Christianity" of the earliest believers; (2) the law of the "old Catholic Church" of the years 100-1200; and (3) the juridicized law of the "new Catholic Church" of 1200 to present.<sup>100</sup> Gaudemet, however, rejects

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<sup>95</sup> See *id.*

Il faudra évoquer la constitution terrestre de cette Église, en dire les organes, leur mission, les relations qu'ils entretiennent entre eux dans la double perspective hiérarchique et communautaire. Et parce qu'il s'agit d'une communauté religieuse, insérée dans le Monde, nous aurons à décrire les aspects majeurs de sa vie religieuse et de ses interventions dans la vie sociale.

*Id.*

<sup>96</sup> *Id.* at 7.

<sup>97</sup> *Id.* at 9.

<sup>98</sup> *Id.* ("Son adoption marque l'entrée de la communauté dans le monde du droit.")

<sup>99</sup> *Id.* at 20-23. Cf. JACQUES MOREAU, *LA PERSÉCUTION DU CHRISTIANISME DANS L'EMPIRE ROMAIN* (1956) (documenting in detail persecution of Christians in Roman Empire).

<sup>100</sup> *Id.* at 35. Cf. RUDOLF SOHM, *KIRCHENRECHT*, Bd. I, *DIE GESCHICHTLICHEN GRUNDLAGEN* 1, 700 (1892). Sohm maintained that stage one, in particular, reflected the authentic vision and spirit of Christianity.

such grand schematizing. Political scientists and sociologists have shown that every society presupposes an order which in turn presupposes law. The open question is not whether to have law in the Church, but what form and nature ought the Church's law to take.<sup>101</sup>

Gaudemet copiously traces the development of Church law from the first articulations of the "Way of Life" and the "Way of Death" of the *Didache* (ca. 120) through the legal and political writings of the great fifth-century popes.<sup>102</sup> He provides an important review of the leading legal texts of the time, including letters, such as those of Clement, Ignatius, and Barnabas; the early "canonical-liturgical" writings, such as the *Didascalia Apostolorum* (ca. 230) and the *Apostolic Tradition* of Hippolytus; and the efforts of popes such as Innocent I and his fifth-century successors to promulgate general rules of conduct for the Church.

Gaudemet's account is more than a recitation of these basic facts of the history of canon law. He also treats in depth the organizational form of the Church. For instance, he engages in a thorough review of the development of the lay/clerical distinction. From earliest times, baptism served to incorporate believers into the Church, although even the earliest Christian documents acknowledge that differences in charism, talents, and functions can be found among believers and that believers should exercise those responsibilities best suited to their abilities.<sup>103</sup> The Greek word "*laos*," which is the root of the modern "laity," is first found in the First Letter of Clement (96) and signifies the people of the Church.<sup>104</sup> Gradually, the word came to be used to signify the ordinary, as opposed to the sacred.<sup>105</sup> By the fourth and fifth centuries, Church councils spoke with greater specificity about the distinction between laypersons and clerics. The word "cleric," Gaudemet notes, is of much later invention, dating probably to the mid- or late-fourth century.<sup>106</sup> The development of a liturgy and theology of orders, by which clerics come to be set apart from the laity, dates to the fourth century, when church councils and theologians began to teach that the major orders of the episcopate, priesthood,

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<sup>101</sup> See GAUDEMET, *supra* note 40, at 35-36.

<sup>102</sup> *Id.* at 35-139. On the early period, see also WAYNE A. MEEKS, *THE MORAL WORLD OF THE FIRST CHRISTIANS* (1986).

<sup>103</sup> See GAUDEMET, *supra* note 40, at 70. Cf. *1 Corinthians* 12:1-11 (Paul's admonition that there are many gifts, but one Spirit).

<sup>104</sup> GAUDEMET, *supra* note 40, at 60.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 70-71.

and diaconate carried an indelible character which set apart those exercising these functions in the Church.<sup>107</sup>

The thoroughness and detail illustrated in Gaudemet's discussion of the lay/clerical distinction is reflected throughout the work. His work is an invaluable guide to the state of the question on many aspects of the history of canon law.

Section two of the volume treats canon law in the early middle ages. In 476, the last Roman Emperor, the aptly-named Romulus Augustulus, abdicated his throne in favor of the Germanic king Odoacer, thus bringing to a formal close Roman political authority in the West. The old Roman Empire was now divided into three parts. In the East, imperial power endured, in what came to be called the Byzantine Empire, while missionaries were sent north, to proselytize among the Slavic peoples of what is modern-day Ukraine and Russia. In the West, new Germanic peoples began to settle large parts of the old Roman Empire and were gradually converted to Christianity. In North Africa, however, which had nourished many of the best Christian theologians—Clement of Alexandria, Cyprian of Carthage, Augustine of Hippo—the very survival of the Christian faith was soon threatened with the rise and triumph of a new proselytizing faith called Islam. Gaudemet focuses his story on developments in the West.<sup>108</sup>

The political situation of the West from roughly 476 to 1050, Gaudemet writes, featured instability, flux, and localism. Merovingian, Carolingian, and Ottonian dynasties all laid universal claim to rule the West, but Visigoths, Ostrogoths, Burgundians, Allemans, Angles, Saxons, Lombards, and Celts, among others, also created distinctive political structures. Moreover, Muslims, Magyars, and Vikings took turns wreaking devastation upon portions of the West. Any story of the relationship of the sacred and the secular in canon law must take account of the turbulence of these five centuries, which Gaudemet does masterfully.

Gaudemet tells several stories about this era. The first involves the relationship of the secular powers to the sacred. Many lay leaders attempted to exploit these chaotic conditions to extend their control over the Church's

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<sup>107</sup> *Id.* at 72-74. Cf. ALEXANDRE FAIVRE, *THE EMERGENCE OF THE LAITY IN THE EARLY CHURCH* (David Smith tr., 1990) (detailed account of one aspect of history Gaudemet reviews).

<sup>108</sup> See GAUDEMET, *supra* note 40, at 143-49.

goods and offices,<sup>109</sup> while churchmen, in turn, assumed traditionally secular responsibilities.<sup>110</sup> At times, especially at the zenith of the Carolingian and Ottonian empires in the ninth and tenth centuries, one finds a close collaboration between church and state. Indeed, a kind of cesaropapism recurs in the writings of some Carolingian churchmen, such as Alcuin, who argued that the emperor was the guardian of the church and was divinely empowered to appoint bishops and abbots.<sup>111</sup>

Gaudemet's second story about the early middle ages relates to the growth of the law. Local church councils in Spain, Italy, England, and the Frankish kingdom of central Europe promulgated law for regional churches. Gaudemet stresses that church councils were both religious ceremonies, conducted in accord with elaborate liturgical rules, and political acts that frequently involved the local ruling class.<sup>112</sup> Clovis convoked the first Council of Orléans (511), and Charlemagne, after 774, and his successors, convoked local councils in Frankish territory.<sup>113</sup> Rome, for its part, filled a lower profile. Local councils often made reference to Roman authority and sometimes even appealed to Rome, but, given primitive transportation, access to Rome was difficult and the autonomy of the local church was correspondingly greater.<sup>114</sup> But despite these problems, a number of important lawbooks were produced.<sup>115</sup>

The third part of Gaudemet's account of the early middle ages deals with the inner life of the church. He discusses the judicial powers of bishops,<sup>116</sup> the recruitment of clergy,<sup>117</sup> the election of bishops,<sup>118</sup> and the life of the rural church, among other matters.<sup>119</sup> This was a period of intense contact and competition between an earlier non-Christian Germanic culture and Christian

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<sup>109</sup> *Id.* at 154-74.

<sup>110</sup> At different times and places, the German bishops of the tenth and eleventh centuries served as guardians of the frontier, as civil servants, as soldiers and builders, and as economic administrators. See E.N. JOHNSON, *THE SECULAR ACTIVITIES OF THE GERMAN EPISCOPATE 919-1024* (1932).

<sup>111</sup> See GAUDEMET, *supra* note 40, at 172-73.

<sup>112</sup> *Id.* at 226-27.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 227.

<sup>115</sup> *Id.* at 178-90. Cf. PREFACES TO CANON LAW BOOKS, *supra* note 11, at 59-104 (analyzing these works in further detail).

<sup>116</sup> See GAUDEMET, *supra* note 40, at 190-95.

<sup>117</sup> *Id.* at 199-201.

<sup>118</sup> *Id.* at 210-13.

<sup>119</sup> *Id.* at 228-40.

patterns of belief shaped in the Mediterranean basin under Roman rule.<sup>120</sup> Gaudemet is sensitive to this mix of cultures in his treatment of the rich sacramental life of the Church, particularly baptism,<sup>121</sup> penance,<sup>122</sup> the rite of last anointing,<sup>123</sup> and the burial of the dead,<sup>124</sup> as well as the efforts (often unsuccessful) to enforce Christian norms of marital and sexual behavior.<sup>125</sup>

By the middle of the eleventh century, however, dramatic changes were in the offing. Ambitious monarchs, such as William of Normandy, were seeking to expand their rule, while the ecclesiastical reform movement associated with the Abbey of Cluny was gaining an ample following. Gaudemet opens the third section of his work, "Medieval Splendor" ("*La splendeur médiévale*"), with an analysis of "the struggle for the liberty of the Church."<sup>126</sup> Gaudemet prefers to see this period as a "reform" rather than a "revolution," but he recognizes the sharp and bloody conflicts that attended this transformation of the Church's constitutional structure.<sup>127</sup> This transformation commenced with the mid-eleventh-century papacy's opposition to the practice of laymen investing bishops with the insignia of office, and came to a close with the Concordat of Worms (1122).<sup>128</sup>

Gaudemet properly calls the world that emerged from this struggle one of splendor. The era of 1050 to 1517 witnessed the consolidation of the Church's position in the world. Gaudemet organizes his discussion into seven chapters. "*Quod solus papa . . .*" is concerned with the growth and development of the ideology of papal power in the twelfth to fourteenth centuries.<sup>129</sup> It begins with the expansive vision of the papal office found in Gregory VII's *Dictatus papae* (ca. 1075) and continues by reviewing the significance of the new legal vocabulary used to justify papal authority. Gaudemet closely parses terms such as papal *plenitudo potestatis* ("fullness of power"),<sup>130</sup> as well as some of the more extravagant claims advanced on behalf of papal power over secular

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<sup>120</sup> See generally JAMES C. RUSSELL, *THE GERMANICIZATION OF EARLY MEDIEVAL CHRISTIANITY: A SOCIOHISTORICAL APPROACH TO RELIGIOUS TRANSFORMATION* (1994).

<sup>121</sup> See GAUDEMET, *supra* note 40, at 259-61.

<sup>122</sup> *Id.* at 261-64.

<sup>123</sup> *Id.* at 265-66.

<sup>124</sup> *Id.* at 266-68.

<sup>125</sup> *Id.* at 273-77.

<sup>126</sup> *Id.* at 283.

<sup>127</sup> *Id.* at 285.

<sup>128</sup> See BERMAN, *supra* note 1, at 94-113.

<sup>129</sup> See GAUDEMET, *supra* note 40, at 299-373.

<sup>130</sup> *Id.* at 321-23. Cf. Robert L. Benson, *Plenitudo potestatis: Evolution of a Formula from Gregory IV to Gratian*, 14 *STUDIA GRATIANA* 195 (COLLECTANEA STEPHAN KUTTNER) (1967).



authority.<sup>131</sup> He closes by reviewing the creation of the first permanent papal courts, particularly the *Rota*.<sup>132</sup>

The second chapter, "The Reign of Decretals," considers the growth of the *Corpus iuris canonici* and the flourishing of legal learning in the twelfth and thirteenth centuries.<sup>133</sup> Gaudemet also reviews the principal sources of legislation: papal decretal letters,<sup>134</sup> conciliar legislation,<sup>135</sup> the statutes of synods,<sup>136</sup> and the continuing importance of custom as a source of law.<sup>137</sup>

The third chapter, "Local Communities" includes discussions of the selection of the episcopate,<sup>138</sup> the exercise of episcopal power,<sup>139</sup> the condition of the local church,<sup>140</sup> and the juridical status of patriarchs, primates, and metropolitans.<sup>141</sup> Gaudemet closes with a discussion of "the other Christian churches," particularly those like the Maronite and the Coptic Rites with a long history of communion with Rome.<sup>142</sup>

The fourth chapter, "Men and Means," addresses the growth and juridicization of the clergy, the interaction of royal and ecclesiastical rights, and the organization and competence of ecclesiastical courts.<sup>143</sup> Included here as well is a treatment of the emergence of clerical celibacy as a universal discipline of the Western Church,<sup>144</sup> the *privilegium fori*, by which clerics accused of crimes

<sup>131</sup> Thus the *Summa parisiensis* (ca. 1160) is quoted as declaring that "the pope is the true emperor and the emperor is his vicar." GAUDEMET *supra* note 40, at 323. Gaudemet also reviews the simultaneous emergence of a "constitutionalist" vocabulary that had the effect of placing a check on unrestrained papal power. Thus, for instance, the canonists taught that the pope lacked the authority to alter the "general state of the Church." *Id.* at 324. Cf. John Hackett, *State of the Church: A Concept of the Medieval Canonists*, 23 THE JURIST 259 (1963).

<sup>132</sup> GAUDEMET, *supra* note 40, at 373. The term "*Rota*," meaning "wheel," or "turn," is first applied to the papal court in the fourteenth century, although the court itself was established in the mid-thirteenth century. *Id.*

<sup>133</sup> *Id.* at 375-407.

<sup>134</sup> *Id.* at 379-80.

<sup>135</sup> *Id.* at 381-83.

<sup>136</sup> *Id.* at 383-86.

<sup>137</sup> *Id.* at 386-88.

<sup>138</sup> *Id.* at 415-22. This was, Gaudemet states, "the age of elections." *Id.* at 415. For a detailed discussion of election law, focused on the development of the right to vote, see Charles I. Reid, Jr., *Roots of a Democratic Church Polity in the History of Canon Law: The Case of Elections in the Church*, in PROCEEDINGS OF THE CANON LAW SOCIETY OF AMERICA (forthcoming).

<sup>139</sup> See GAUDEMET, *supra* note 40, at 423-25.

<sup>140</sup> *Id.* at 439-57.

<sup>141</sup> *Id.* at 458-64.

<sup>142</sup> *Id.* at 465-67.

<sup>143</sup> *Id.* at 470-525.

<sup>144</sup> *Id.* at 491-93.

might be tried in ecclesiastical rather than secular courts,<sup>145</sup> and the prohibition on clerics hearing capital cases, carrying arms, or practicing medicine.<sup>146</sup>

Chapter five, "The Church and Knowledge," analyzes the growth of the universities.<sup>147</sup> The University of Bologna, featuring the first law faculty in the West, was a private and lay creation, not a faculty that was superadded onto a cathedral school or municipal institution.<sup>148</sup> He goes on to discuss the founding of the University of Paris<sup>149</sup> and the dissemination of university-based education throughout the West.<sup>150</sup>

The sixth chapter, "The Church and Social Life," addresses such matters as religious feasts, pilgrimages, family life, and the sacraments.<sup>151</sup> The seventh chapter, "The Church and Politics," analyzes papal efforts to repress heresy<sup>152</sup> and to sponsor crusades,<sup>153</sup> as well as the peace and the truce of God,<sup>154</sup> and attempts by twelfth and thirteenth-century popes to restrict violence among the Christian princes of the West.<sup>155</sup> The chapter also reviews the Avignon papacy, the Great Schism and the conciliar movement, and closes with the growing cry for reform heard at the end of the fifteenth century from the likes of Savonarola.<sup>156</sup>

The fourth and final section of this volume, "Modern Times (16th-20th Centuries)," is the briefest in the book. It begins with the "crisis" of the Protestant Reformation and the reaffirmation of papal authority at the Council of Trent.<sup>157</sup> An important section discusses in some detail the sixteenth-century emergence of bureaucratic government through the creation of various "congregations," including the secretariat of state, the Congregation of the

<sup>145</sup> *Id.* at 493-97.

<sup>146</sup> *Id.* at 498-501.

<sup>147</sup> *Id.* at 527-39.

<sup>148</sup> *Id.* at 536.

<sup>149</sup> *Id.* at 535.

<sup>150</sup> *Id.* at 536-537. Cf. HASTINGS RASHDALL, *THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES*, 3 vols. (1936) (basic reference guide to history of medieval universities); J.A. CLARENCE SMITH, *MEDIEVAL LAW TEACHERS AND WRITERS: CIVILIAN AND CANONIST* (1975) (providing important background information on leading lawyers and on legal education).

<sup>151</sup> See GAUDEMET, *supra* note 40, at 541-70.

<sup>152</sup> *Id.* at 574-76.

<sup>153</sup> *Id.* at 576-80.

<sup>154</sup> *Id.* at 581-82.

<sup>155</sup> *Id.* at 582-84.

<sup>156</sup> *Id.* at 587-610.

<sup>157</sup> *Id.* at 625-28. Cf. JEAN DELUMEAU, *CATHOLICISM BETWEEN LUTHER AND VOLTAIRE: A NEW VIEW OF THE COUNTER-REFORMATION 1-59* (1977) (evaluating Trent as a "reforming" council).

Inquisition, the Congregation of the Index, and the Congregation of the Council, which were charged with the interpretation and enforcement of the new decrees of the Council of Trent.<sup>158</sup> Gaudemet treats at length the relations between the papacy and the principal European states, including concordat arrangements.<sup>159</sup> A section on the defense of the Church's tradition, "*Défendre les acquis*," explores the relationship of the Church with the larger secular world over the last four hundred years, as well as efforts to maintain discipline and doctrine within the Church.<sup>160</sup> Only cursory attention is given to developments in twentieth-century canon law, such as the promulgation of the Codes of 1917 and 1983.

Gaudemet concludes his work on a hopeful note. The Church's mission remains universal, and the history of its law consists of the juxtaposition of immutable principles and more ephemeral rules. By maintaining a visible presence in international organizations, the Church has ensured that "the dialogue between the Church and the City" continues.<sup>161</sup>

It is a long journey from the rural Syrian provenance of a work like the *Didache* to the international evangelizing of Pope John Paul II. It is a journey only a few dare attempt, and even fewer complete. Jean Gaudemet is one of those few. His encyclopedic account of two millenia of Church life and law is destined for the ages. One hopes that it is soon translated into English.

### III. JOHN NOONAN'S CONTEXTUALIZING OF CANONS AND CANONISTS

John Noonan's *Canons and Canonists in Context*, is a collection of seventeen studies, written from the 1960s to the 1980s. The collection is divided into four sections that include (1) a series of biographical studies of leading

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<sup>158</sup> GAUDEMET, *supra* note 40, at 632-35. Cf. DELUMEAU, *supra* note 157, at 30-31 (listing and analyzing functions of fifteen Roman Congregations established in sixteenth century for governance of the newly bureaucratized Church).

<sup>159</sup> See GAUDEMET *supra* note 40, at 674-96.

<sup>160</sup> *Id.* at 639-69.

<sup>161</sup> *Id.* at 697-98. Gaudemet concludes expansively:

Universelle par sa Mission, l'Église n'est pas étrangère aux institutions, qui, en divers domaines, associent les États pour garantir la paix. Le Saint-Siège est présent dans des organismes internationaux et le Pontife romain n'a pas dédaigné la tribune des Nations unies. L'Église catholique reconnaît les autres familles chrétiennes et, plus largement, les autres religions. Faut-il rappeler qu'à des papes, qui 'prisonniers du Vatican' refusaient d'en sortir, succède un Pontife qui, en 15 ans, a 60 fois porté à travers le monde le bâton du Pasteur?

*Id.* at 698.

twelfth-century canonists; (2) studies of Roman Catholic marriage law from the sixth to twentieth centuries; (3) "The Integrity of the Process;" and (4) "the Contemporary Situation." It is most edifying to have these specialty essays gathered into a single volume.

Noonan has contributed substantially to our knowledge of three leading twelfth-century canonists: Gratian, who compiled the *Decretum* around 1140, and two early commentators on the *Decretum*, Rolandus and Paucapalea. Gratian, the father of the scientific study of canon law, has long been an object of curiosity. Because very little is known about Gratian with any degree of certainty, he has, alas, been the subject of ample myth and legend. Masterfully employing contemporary forensic techniques, Noonan considers exactly what can be stated about Gratian with any degree of confidence.<sup>162</sup> Noonan concedes that virtually all that is known about Gratian is hearsay.<sup>163</sup> However, hearsay evidence can be admissible in a court of historical inquiry, provided it is closely cross-examined.<sup>164</sup> Accordingly, Noonan examines the foundations of the hearsay evidence and rejects as unreliable the old assertions that Gratian was a monk of the Camoldolese Order or that he was a bishop.<sup>165</sup> Noonan subjects claims regarding the place of Gratian's birth and the date of composition to similar analysis and finds that virtually no part of the Gratian legend withstands close scrutiny.<sup>166</sup> Noonan even tests the proposition that Gratian may not have authored the *Decretum*, but concludes that while the work must have been a collaborative enterprise that benefitted from a variety of contributions, even after its initial publication, Gratian himself must have "composed and commented upon a substantial portion" of this fundamental work.<sup>167</sup>

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<sup>162</sup> See *Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law*, 35 *TRADITION* 145 (1979), reprinted in NOONAN, *supra* note 41, at 3-30.

<sup>163</sup> See NOONAN, *supra* note 41, at 3-5.

<sup>164</sup> See *id.*

<sup>165</sup> See *id.* at 5-13.

<sup>166</sup> See *id.* at 13-20. Indeed, Noonan is willing to credit only a single report, by a Cardinal Goizo, who sat as papal legate at San Marco in Venice on litigation between a monastery and a bishop. In 1143 Cardinal Goizo reported consulting as an expert a certain Gratian, who may have been the man responsible for the *Decretum*. See *id.* at 29.

<sup>167</sup> *Id.* at 30. In an earlier article, *Was Gratian Approved at Ferentino?*, 6 *BULL. MEDIEVAL CANON L.* 15 (1976), reprinted in NOONAN, *supra* note 41, at 31-43, Noonan challenges the standard view that Gratian's *Decretum* prevailed as the foundational text of law within the Church by its own weight and brilliance and that it consequently never received official approval by a pope. Noonan ingeniously argues, based on word play in John of Salisbury and on the circumstances surrounding John's early reliance on "Gratian," that Pope Eugene III must have conferred on Gratian's text some form of official status in the late 1140s or early 1150s. This view has been criticized by Peter Classen, *Das Decretum Gratiani wurde nicht in Ferentino approbiert*, 8 *BULL. MEDIEVAL CANON L.* 38 (1978). In a postscript to *Canons and Canonists*, Noonan takes note of Classen's work but does not himself respond. *Id.* at 383.

In his essay, *Who Was Rolandus?* Noonan takes on another long-lived legend of medieval canon law.<sup>168</sup> Pope Alexander III (1159-1181), *né* Rolandus Bandinelli, reigned from 1159 to 1181 and was among the first popes to issue large numbers of decretal letters which were critical to the early development of the canon law. When in the early nineteenth century a commentary on Gratian was discovered bearing the name "Rolandus," it soon came to be assumed that this Rolandus was the same figure who was subsequently elected Pope.<sup>169</sup> A small theological treatise entitled the *Sentences* was discovered near the close of the nineteenth century and was also ascribed to the supposed canonist-pope for much the same reason.<sup>170</sup>

Noonan, however, challenges the basis of this association. First, it was simply supposed, without direct evidence, that the pope and the canonist must have been the same individual since they bore the same name.<sup>171</sup> Internal evidence suggesting that the pope held the same views as the canonist on matters such as marriage law and tithes was also adduced.<sup>172</sup> Engaging in masterful detective work, Noonan finds that at least two and as many as four men named Rolandus were active in Bologna academic and legal circles in the 1150s and could conceivably have been the author of the treatise.<sup>173</sup> Furthermore, the internal evidence adduced to establish the link was simply insufficient to bear the weight placed upon it.<sup>174</sup> Also, the theology of the *Sentences* ascribed to Rolandus was radically at odds with some of the theological positions announced by Pope Alexander III.<sup>175</sup> Taken as a whole, the essay is a *tour de force* of painstaking historical investigation.

In *The True Paucapalea?*, the last of the biographical works in the collection, Noonan continues his virtuosic display of detective work.<sup>176</sup> *Paucapalea* is in many respects as shadowy as Gratian but also nearly as significant. We

<sup>168</sup> See John T. Noonan, Jr., *Who Was Rolandus?*, in *LAW, CHURCH, AND SOCIETY: ESSAYS IN HONOR OF STEPHEN KUTTNER* 21 (Kenneth Pennington & Robert Somerville eds., 1977).

<sup>169</sup> The text appears as *SUMMA MAGISTRI ROLANDI* (Friedrich Thaner ed., 1962) (1874). The discovery was made by Johann Wilhelm Bickell in 1827. The identification of the author of the *Summa* as the future pope was first proposed by Friedrich Maassen in 1859. See NOONAN, *supra* note 41, at 45.

<sup>170</sup> See A.M. GIETL, *DIE SENTENZEN ROLANDIS NACHMALS PAPSTES ALEXANDER III* (1891).

<sup>171</sup> See NOONAN, *supra* note 41, at 45-46.

<sup>172</sup> See *id.* at 47-56.

<sup>173</sup> See *id.* at 64-65.

<sup>174</sup> See *id.* at 54-56.

<sup>175</sup> See *id.* at 59-62.

<sup>176</sup> See John T. Noonan, Jr., *The True Paucapalea?*, in *THE CRITICAL STUDY OF SACRED TEXTS* 179 (Wendy Doniger O'Flaherty ed., 1979), reprinted in NOONAN, *supra* note 41, at 73. Noonan's findings are summarized in John T. Noonan, Jr., *Paucapalea*, in 9 *DICTIONARY OF THE MIDDLE AGES* 466 (1982).

are told by twelfth-century sources that Paucapalea was a "*discipulus Gratiani*," that he played a role in editing the *distinctiones* of Part I and Part III of the *Decretum*, and that he inserted at least fifteen canons into Gratian's text.<sup>177</sup> In Noonan's words, Paucapalea was "present at the Creation, or at least in the last stages of the Creation."<sup>178</sup> Unquestionably, Paucapalea must have been "a canonist of sufficient intellectual ability to leave his mark on the greatest canonical work ever composed."<sup>179</sup>

Noonan sets for himself the resolution of a problem in the knowledge we have of Paucapalea. In 1890, Johann Friedrich von Schulte edited a text known as the *Summa, Quoniam in omnibus* and ascribed it to Paucapalea.<sup>180</sup> This text, however, is relatively "skimpy and spotty. . . . It lacks evidence of intellectual power. It is hard to believe that the man who fashioned [it] could have left an impression on the [*Decretum*]."<sup>181</sup> Noonan, however, does not wish to conclude that the true Paucapalea could have produced such a document. Consequently, he considers whether Schulte made a mistake in his ascription of the *Summa, Quoniam in omnibus*, and whether the true Paucapalea's work might be identified in a different twelfth-century manuscript. He selects for consideration the *Summa, Sicut vetus testamentum*, an unpublished manuscript found in Florence by Stephan Kuttner in 1938<sup>182</sup> and dated to 1146 and 1150.<sup>183</sup> A close consideration of this text leads Noonan to conclude that its author very likely was the Paucapalea who assisted Gratian in his labor.

The second section consists of ten studies in the history of Christian marriage law. Four articles deserve extended mention. *Novel 22*, originally published in 1968,<sup>184</sup> is a detailed study of Justinian's reform of the Roman law of divorce. By the time Justinian acceded to the imperial throne in 527, the Eastern empire had become thoroughly Christianized. The former Western empire, now parceled out among competing Germanic kings, was also in the process of Christianizing, but the ruling classes of a number of regions, Ostrogothic Italy, for instance, were dominated by Arians, a dissident movement that rejected the

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<sup>177</sup> NOONAN, *supra* note 41, at 83-84.

<sup>178</sup> *Id.* at 84.

<sup>179</sup> *Id.*

<sup>180</sup> See PAUCAPALEA, *SUMMA ÜBER DAS DECRETUM GRATIANI* (Johann Friedrich von Schulte ed., 1965) (1890).

<sup>181</sup> See NOONAN, *supra* note 41, at 84.

<sup>182</sup> *Id.* at 73.

<sup>183</sup> *Id.* at 77.

<sup>184</sup> See John T. Noonan, Jr., *Novel 22*, in *THE BOND OF MARRIAGE* 41 (William W. Bassett ed., 1968).

divinity of Christ.<sup>185</sup> A succession of Christian emperors, both East and West, including Constantine,<sup>186</sup> Honorius,<sup>187</sup> and Theodosius II,<sup>188</sup> promulgated laws that permitted divorce under some circumstances. In 535, Justinian consolidated and continued this tradition in his comprehensive restatement of Roman law known as *Novel 22*.<sup>189</sup> Justinian's legislation begins by considering how marriages come into being and how, once they have been formed, they might come to an end. Mutual marital affection makes marriage, Justinian observed. Because it is affection that makes a marriage, a marital union lacking affection may be dissolved, "for, of those things which occur among men, whatever is bound is soluble."<sup>190</sup>

Justinian identified four ways by which marriage could be dissolved: "(1) by the consent of both, (2) for rational ground which is called 'good grace,' *bona gratia*, (3) without cause and (4) with rational cause, which is not *bona gratia*."<sup>191</sup> Justinian says nothing further on the subject of divorce by mutual consent, leaving that to the parties themselves. But he did attempt to distinguish acceptable from unacceptable grounds for contested divorce:

Acceptable causes included inability to have sexual relations, capture or disappearance of one party during battle, adultery, homicide, grave-robbery, political conspiracy, sorcery, aiding and abetting bandits, attending the theater, dining, or bathing with other men, or spending the night away from home without permission of the husband, and activities that endangered the life of the spouse.<sup>192</sup>

Women, as well as men, had the right to seek divorce, although the grounds available to women were narrower.<sup>193</sup>

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<sup>185</sup> See JOHN MOORHEAD, *THEODERIC IN ITALY* 89-96 (1992) (discussing competition between Arians and Catholics).

<sup>186</sup> See NOONAN, *supra* note 41, at 118-20. Cf. JUDITH EVANS GRUBB, *LAW AND FAMILY IN LATE ANTIQUITY: THE EMPEROR CONSTANTINE'S MARRIAGE LEGISLATION* 203-60 (1995) (discussing Constantine's policy on divorce).

<sup>187</sup> See NOONAN, *supra* note 41, at 121-24.

<sup>188</sup> See *id.* at 124-28.

<sup>189</sup> See *id.* at 133.

<sup>190</sup> *Id.* (quoting *Novel 22.3*).

<sup>191</sup> *Id.* at 135 (summarizing *Novel 22.4*).

<sup>192</sup> See BRUNDAGE, *supra* note 5, at 115. Noonan notes that Justinian, in later legislation, steadily restricted the possibility of divorce, particularly consensual divorce. See NOONAN, *supra* note 40, at 141-47.

<sup>193</sup> See BRUNDAGE, *supra* note 5, at 116-17. Brundage notes that a subsequent reform of divorce law by Justinian, known as *Novel 117*, permitted women the right to divorce where there was evidence that the husband had committed adultery. *Id.* at 116.

Noonan proceeds from this treatment of *Novel 22* to his more controversial premise. Such Christian theologians as St. Ambrose, St. Augustine, and St. Jerome had been arguing as early as the fourth century that Christian marriage was indissoluble. Justinian was a Christian. How could these legal and theological views be reconciled? Noonan resolves the dilemma: "Christians in good faith could believe that marriage was dissoluble or indissoluble without anyone's calling his opponent a heretic. The calm acceptance of dissolubility by the law shows that at this time, [the mid-fourth to the mid-sixth centuries], no definitive Christian position had been established on remarriage and divorce."<sup>194</sup>

The chapter entitled "Power to Choose" addresses one of the most original legal developments of the twelfth century—the proclamation by Gratian of the essential freedom of the parties to contract marriage.<sup>195</sup> Jewish law, Noonan notes, "required freedom from extra-family coercion, but not freedom from family control."<sup>196</sup> Roman law had made a similar presupposition:

The *Digest* granted that a daughter had license to object if her father selected a spouse who was of unworthy character or base and that a son could object without specific reason. But as the classic text *Si patre cogente*, put it, "If, at a father's compulsion, a son marries a wife he would not marry if he were able to follow his own decision, he has nonetheless contracted marriage; it is not contracted between the unwilling, [but] he appears to have preferred it." If a father made his son obey, the marriage stood.<sup>197</sup>

Strong Christian authority also favored a role for parents in the marriages of their children. A number of Gratian's sources, including texts attributed to St. Augustine, St. Ambrose, and Pope Leo the Great, favored a legally recognized role for parents in the selection of their children's spouses.<sup>198</sup> The sources opposed to this tradition were of relatively weak authority: "an analogy in St. Paul," a pseudo-Ambrosian text, "a remote text of [Pope] Nicholas I, and two decisions of a modern pope [Urban II]," none of which fit Gratian's needs exactly.<sup>199</sup>

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<sup>194</sup> NOONAN, *supra* note 41, at 163.

<sup>195</sup> See John T. Noonan, Jr., *Power to Choose*, 4 *VIATOR* 419 (1973), reprinted in NOONAN, *supra* note 41, at 173.

<sup>196</sup> NOONAN, *supra* note 41, at 179.

<sup>197</sup> *Id.* at 180.

<sup>198</sup> See *id.* at 176-78.

<sup>199</sup> *Id.* at 178.



Gratian, however, proved superior to his sources, “triumphing over [their] disharmony.”<sup>200</sup> He had a strong vision of Christian marriage as a way of life brought about through mutual exchange of “consent informed with that special quality that Gratian, drawing on Roman law, denominated ‘marital affection,’ an emotion-colored assent to the other as husband and wife.”<sup>201</sup> Marriage, Gratian maintained, could come about only as the result of the uncoerced will of the parties. He “recognized the place of individualistic, unsocial decision-making in the choice of spouses.”<sup>202</sup>

Noonan traces Gratian’s commitment to the freedom of the spouses to the Gregorian reformers’ claim to the sole authority to decide upon the validity of marriage.<sup>203</sup> “The individual was given power as the social structure of the world was subordinated to the Church.”<sup>204</sup> The power to choose was enjoyed equally by men and women, even though “[i]t did nothing to liberate a son or daughter from psychological or social pressure.”<sup>205</sup>

Consent by two parties to form a marriage was legally recognized until the early sixteenth century as effectuating a life-long and indissoluble union even in the absence of witnesses and even without the participation of the Church. This was an unruly state of affairs that would give rise to one of the great social problems of the later middle ages—the problem of clandestine marriage.<sup>206</sup> In the sixteenth century, Protestant and Catholic reformers alike placed restrictions on this power,<sup>207</sup> although it survived in England as “common-law marriage.”<sup>208</sup> It is a testament to the primacy the medieval canon lawyers placed on unfettered free consent that a practice like clandestine marriage endured for four hundred years, even in the face of grave social disruption.

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<sup>200</sup> *Id.* A strong subtext of Noonan’s account is the admiration he shows for Gratian as a legal genius capable of shaping recalcitrant sources to arrive at an outcome deeply respectful of the freedom and dignity of the human person.

<sup>201</sup> *Id.* at 179.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 181.

<sup>204</sup> *Id.* at 183.

<sup>205</sup> *Id.* at 187.

<sup>206</sup> See BRUNDAGE, *supra* note 5, at 440-43, 496-501.

<sup>207</sup> The Protestant reformers reintroduced parental consent, particularly in marriages among those who had not yet reached the age of majority. See WITTE, *supra* note 5, at 57-60, 83-85, 112-16, 142-44. Catholics at the Council of Trent retained Gratian’s teaching that the essence of marriage was the free consent of the parties to a marriage, but introduced the requirement that a marriage, to be valid, had to take place before a priest and two witnesses. See BRUNDAGE, *supra* note 5, at 563-64.

<sup>208</sup> On the survival of clandestine marriage in England, see R.B. OUTHWAITE, *CLANDESTINE MARRIAGE IN ENGLAND 1500-1850* (1995); on the development of the doctrine of “common-law” marriage, see OTTO E. KOEGEL, *COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES* (1922).

In "Marital Affection in the Canonists," Noonan explores the importance of marital love ("*maritalis affectio*") to canonistic doctrines of marriage formation in the twelfth and thirteenth centuries.<sup>209</sup> In classical Roman law, Noonan writes, the term signified "'a durable, continuing will' to be married, a settled state; so that if the affection disappeared the marriage itself ceased."<sup>210</sup> By the fifth century, "affection has an emotional tone; it means liking, inclination, fondness for."<sup>211</sup> But "[b]eyond the emotion-infused intent to take the other as spouse nothing can be dogmatically attributed to affection."<sup>212</sup>

In the twelfth century, Gratian revived the term *maritalis affectio* and made it an important part of the Church's teaching on marriage. Marriages entered into "without dowry or priestly blessing" were valid "where the spouses 'contemning all those solemnities couple themselves to one another as spouses with affection alone.'"<sup>213</sup> Marriages between free and slave were valid as well, Gratian asserted, where they were made "*ex affectu*," from affection.<sup>214</sup> Indeed, in exploring what it was that made the virginal union of Mary and Joseph a marriage, Gratian pointed to the concept of marital affection: "Marital affection was what Joseph came with to Mary."<sup>215</sup>

Marital affection was given further meaning and content in the decretal letters of the great twelfth and thirteenth-century popes. Pope Alexander III, for example, stressed that marital affection was "an active disposition which the spouses had a duty to cultivate."<sup>216</sup> Marital affection was not identical to sexual intercourse, but rather carried with it the notion of "active love."<sup>217</sup> When Pope Alexander III wrote to the Archbishop of Canterbury on the problem of leprous spouses abandoned by their healthy partners, he

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<sup>209</sup> See John T. Noonan, Jr., *Marital Affection in the Canonists*, 12 *STUDIA GRATIANA* 481 (COLLECTANEA STEPHAN KUTTNER) (1967), reprinted in NOONAN, *supra* note 41, at 207.

<sup>210</sup> NOONAN, *supra* note 41, at 211.

<sup>211</sup> *Id.* at 213-14.

<sup>212</sup> *Id.* at 215.

<sup>213</sup> *Id.* at 217 (quoting C.28 q.1 d.p.c. 17).

<sup>214</sup> *Id.* at 217-18. Noonan stresses the revolutionary significance of Gratian's teaching, especially in light of the legal regime bequeathed to the twelfth century by the Roman law:

Barriers to Christian freedom had been set by laws of the Empire, arguably still in force, which prohibited slaves from marrying at all and cruelly punished free women attempting to marry their slaves. The New Testament supported freedom. Conjugal affection now became the means by which a canonical formula was reached, legally overcoming the Roman legal barriers.

*Id.* at 218.

<sup>215</sup> *Id.* at 222.

<sup>216</sup> *Id.* at 227.

<sup>217</sup> *Id.* at 229.

encouraged the Archbishop "to exhort, not compel, the spouses (whether husband or wife) to follow their sick consorts and to 'minister to them with conjugal affection.'"<sup>218</sup> Innocent enlarged the meaning, imputing marital affection even to the marriages of polygamous pagans.<sup>219</sup> Noonan concludes:

The content of marital affection was . . . not designated by the three goods of marriage [fidelity, permanence, and procreation], although they could be understood as exemplifying it. . . . The wisest writers contented themselves with treating marital affection as intention to take a spouse as a spouse. By the very use of the term "affection" a loving state of mind was required.<sup>220</sup>

Noonan's research on the use of this term in medieval canon law carries significance for contemporary canonical practice, in the controversy whether to assign juridic weight to the idea of marriage as a *consortium totius vitae*.<sup>221</sup>

In "The Steady Man: Process and Policy in the Courts of the Roman Curia," Noonan explores the interaction of compulsion and free will in the making of marriage.<sup>222</sup> His vehicle for this analysis was the seventeenth-century marriage litigation of Charles, Duke of Lorraine and his putative spouse, Béatrice. The study is a penetrating analysis of the legal rules at stake that also succeeds in presenting a rich *tableau* of the actual case. We become acquainted with Charles's first wife, Nicole, whom he wished to repudiate, Béatrice, his putative second spouse, and the advocates, judges, and popes who took an interest in the case at its various stages. The article marks a shift in methodology for Noonan: unlike some of his earlier studies, which have as their focus the development of rules and doctrine, Noonan is here concerned with the interaction of persons and the law. The intense focus on the particular, the historically specific, and the contextual found in this article has become a hallmark of his subsequent historical writing.<sup>223</sup>

<sup>218</sup> *Id.* at 229.

<sup>219</sup> *Id.* at 232-33.

<sup>220</sup> *Id.* at 235.

<sup>221</sup> *See id.*

<sup>222</sup> See John T. Noonan, Jr., *The Steady Man: Process and Policy in the Courts of the Roman Curia*, 58 CAL. L. REV. 628 (1970), reprinted in NOONAN, *supra* note 41, at 253. The "steady man" of the title is a translation of the *constans vir* of medieval canon law: the standard, comparable to the "reasonable person" of modern tort law, by which force and fear cases were judged. *Id.* at 278-79.

<sup>223</sup> See M. Cathleen Kaveny, *Listening for the Future in the Voices of the Past: John T. Noonan, Jr., on Love and Power in Human History*, 11 J.L. & RELIGION 203, 206 (1994/95).

The remaining two sections of Noonan's collection are far more abbreviated. The section entitled "The Integrity of the Process" contains two articles, one treating bribery in John of Salisbury, and the other concerned with "Public Judgment in the Church." The final section, "The Contemporary Situation," com-

These chapters, and several others in this collection, reveal the depth of Noonan's contribution not only to the history of canon law, but also to its contemporary practice. Noonan has participated in some important recent controversies within the Roman Catholic Church, such as the debates over contraception and abortion. His historical investigations thus bring with them the urgency of one who has passionate convictions over the present direction and development of canon law. Both aspects of Noonan's scholarship—his fidelity to exacting historical standards, and his concern that the Church follow a moderate reform path—are amply on display in this important volume.

#### IV. R.H. HELMHOLZ AND THE CLASSICAL CANON LAW

In the preface to his *The 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*.<sup>224</sup>

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. No legal historian has done what Helmholz accomplishes 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 an opening chapter on the sources and literature of the canon law, and directs the reader to the ample and fuller studies already at hand, including some of the writings of Brundage and Noonan reviewed herein.

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prises one article, "Canon Law in the United States," which reviews the state of canon-law reform five years after the close of the Second Vatican Council.

<sup>224</sup> HELMHOLZ, *supra* note 25, at xiv.

Helmholz's main concern and unique contribution in this volume is, as he says "to learn by doing":<sup>225</sup> 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 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 thereon, and some of the eighth through tenth century canonical collections.<sup>226</sup> Closer to hand are the great texts of the *Corpus iuris canonici* from Gratian's *Decretum* onward, as well as the multiple decrees of the Council of Trent.<sup>227</sup> 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.<sup>228</sup>

Rather than simply describing or analyzing these multiple texts seriatim, as is conventional, 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 land or personalty 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.

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<sup>225</sup> *Id.* at 31.

<sup>226</sup> *See id.* at 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).

<sup>227</sup> *See id.* at 493-99 (indexing citations to canon law), 6-20 (discussing evolution of canon law).

<sup>228</sup> *See id.* at 483-90 (listing these sources), 22-31 (discussing these sources).

These are not questions that Helmholz has created out of whole cloth. They were among the hard and perennial questions 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.<sup>229</sup> 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.<sup>230</sup> 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, for instance, the power of excommunication or the meaning of the oath to the mind of a thirteenth-century Christian, Helmholz provides it.<sup>231</sup> Where readers need to be warned against too easy a conflation of medieval and modern concepts of restitution or prescription, Helmholz also provides that.<sup>232</sup>

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.

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<sup>229</sup> *Id.* at xiii.

<sup>230</sup> *Id.* at xii-xiv, 398-99. See also HELMHOLZ, CANON LAW AND ENGLISH COMMON LAW, *supra* note 43, at 15.

<sup>231</sup> See *id.* at 145-73, 366-93.

<sup>232</sup> *Id.* at 88-115, 174-99.

Helmholz generally opens each chapter with Gratian's *Decretum*. He first looks backward to some of the biblical, patristic, and Roman law sources that Gratian 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 occasional case 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.<sup>233</sup>

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.

The canon law of marriage provides a good example of Helmholz's provocative method of learning canon law by doing canon law.

The history of matrimonial law has been so strongly marked by the law of the church that some of its present-day features are scarcely intelligible without an acquaintance with the subject's past. This is particularly true for those who live in countries that have taken over the English common law. English law adhered to the classic canon law's definition of valid marriage as a contract entered into by words

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<sup>233</sup> *Id.* at 23.

of present consent, even after the Catholic Church had itself abandoned it.<sup>234</sup>

At classical canon law, marriage was viewed as a bilateral contract between husband and wife, and was subject to the general canon law principles of contracts and other obligations (such as oath and vows). One such general principle was freedom of contract, and this applied equally to marriage. Gratian's *Decretum* and other early canonical texts stated this repeatedly: "Marriages should be free." "No one is to be compelled to marry." "Matrimony should be freely contracted."<sup>235</sup> Helmholz demonstrates that these maxims were commonplaces in the twelfth and thirteenth centuries. Thus, marriage contracts entered into by force, fear, or fraud, or through inducement of parents, masters, or feudal or manorial lords were not binding. A second general principle of the canon law of contracts was that consensual agreements, entered into with or without formalities, were legally binding. Absent proof of mistake or frustration, or some other condition that would render the contract unjust or unreasonable, either party could petition a court to enforce its terms. This general principle also applied to marriage contracts. Both husband and wife had an equal right to sue in court for enforcement even of a naked promise ("*nudum pactum*") of marriage, for discharge of an essential and licit condition to marriage, or for vindication of their conjugal rights to the body of their spouse.<sup>236</sup> Both these general principles of contract as applied to marriage will be familiar to modern readers: they are at the heart of contemporary American marriage laws.

But marriage was more than a mere contract at medieval canon law, as Helmholz demonstrates, and in this the medieval and the modern understandings of marriage differ dramatically. On the one hand, medieval canonists recognized that marriage is a natural association, created by God to enable man and woman to be fruitful and multiply and to raise children in the service and love of God. Since the fall into sin, marriage has also become a remedy for lust, a channel to direct one's natural passion to the service of the community and the church. On the other hand, marriage, when properly contracted between Christians, rises to the dignity of a sacrament. The temporal union of body, soul, and mind within the marital estate symbolizes the eternal union

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<sup>234</sup> *Id.* at 229.

<sup>235</sup> Respectively, X 4.1.29; C.31 q.2 c.1; and HELMHOLZ, *supra* note 25 (quoting Hostiensis, *Summa aurea*).

<sup>236</sup> *See id.* at 238-41. *See also id.* at 28, 71, 94, 106, 111, 170; WITTE, *supra* note 5, at 2-36; Charles J. Reid, *The Canonistic Contribution to the Western Rights Tradition*, 33 B.C. L. REV. 37, 73-91 (1991).



between Christ and His Church. Participation in this sacrament confers sanctifying grace upon the couple and the community. Couples can perform this sacrament in private, provided they are capable of marriage and comply with rules for marriage formation.<sup>237</sup>

This theological teaching placed marriage and the family squarely within the social hierarchy of the Church. The Church claimed exclusive jurisdiction over its formation, maintenance, and dissolution. It exercised this jurisdiction both through the penitential rules of the internal forum and through the canon law rules of the external forum.<sup>238</sup>

However, the Church did not regard the family as its most exalted estate. Though a sacrament and a sound way of Christian living, marriage and family life were not considered to be spiritually edifying. Marriage was a remedy for sin, not a recipe for righteousness. Marriage was considered subordinate to celibacy, propagation less virtuous than contemplation. Clerics, monastics, and other servants of the Church were to forego marriage as a condition for ecclesiastical service. Those who could not remain celibate were not worthy of the church's holy orders and offices.<sup>239</sup>

Upon this conceptual foundation, the medieval Catholic Church built a comprehensive canon law of sexuality, marriage, and family life that was enforced by an hierarchy of Church courts throughout Christendom. Until the sixteenth century, the Church's canon law of marriage was the law of the West. A civil law of marriage, where it existed, was supplemental and subordinate. Consistent with the contractual perspective, the canon law ensured voluntary unions by dissolving marriages formed through mistake, duress, fraud, or coercion. It granted husband and wife equal rights to enforce conjugal debts that had been voluntarily assumed, and emphasized the importance of mutual love among the couple and their children. Consistent with the naturalist perspective on marriage, the canon law punished contraception, abortion, infanticide, and child abuse as violations of the created marital functions of propagation and child-rearing. It proscribed unnatural relations, such as incest and polygamy, and unnatural acts such as bestiality and buggery. Consistent with the sacramental perspective, the Church protected the sanctity and sanctifying purpose of marriage by declaring valid marital bonds to be indissoluble, and by dissolving invalid unions between Christians and non-Christians or

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<sup>237</sup> HELMHOLZ, *supra* note 25, at 9, 166, 241, 301.

<sup>238</sup> *See id.* at 116, 141.

<sup>239</sup> *See id.* at 62-65, 168, 243-51.

between parties related by various legal, spiritual, blood, or familial ties. It supported celibacy by dissolving unconsummated vows to marriage if one party made a vow to chastity, and by punishing clerics or monastics who contracted marriage.<sup>240</sup>

As this single example of marriage illustrates, the medieval canon law was remarkably sophisticated. 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.<sup>241</sup>

Medieval canon law was also remarkably ambitious. 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."<sup>242</sup> 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. These qualities come to vivid expression in Helmholz's brilliant new book.

#### CONCLUSION

A reader of this review, and more importantly of the four books under review, might be tempted to dismiss all this medieval legalism as little more than an intricate treasure trove of arcania and antiquaria—of interest perhaps to a few specialists with a hearty appetite for library dust, perhaps even to a few Catholic insiders who are eager and tenacious enough to trace the long roots and routes of their own religious tradition.

These four volumes are much more than that. The reader does not need to be either a medievalist or a Catholic to enter into and appreciate the

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<sup>240</sup> See *id.* at 100, 240-43.

<sup>241</sup> *Id.* at 397.

<sup>242</sup> *Id.* at 397-98.

sophisticated legal world that these four volumes reveal. The reader does not even need to be a lawyer or an historian. The Brundage and Helmholtz volumes, in particular, provide more than ample signposts and hand-holds for any literate modernist to take a fascinating, self-guided legal tour. All four volumes are filled with all manner of exquisite details that will edify and repeatedly surprise readers from any number of disciplines.

Beyond their inherent value, these four volumes also signal and serve several new salutary trends in scholarship. They reflect at once the new interest in law among general historians, the new interest in history among general lawyers, and the new interest in religion among general legal historians. More particularly, these volumes are powerful examples of the new interdisciplinary genre of law and religion. In the past three decades, it has become increasingly recognized in the Western academy that law has a religious dimension, that religion has a legal dimension, and that legal and religious ideas, institutions, and methods have and still do interact in a variety of ways.<sup>243</sup>

One forum where these interactions of law and religion are most poignantly pronounced is in the internal religious systems of law that Christianity, Judaism, and Islam have developed—the Catholic canon law, the Jewish Halacha, and the Muslim Shari'a. All three of these are sophisticated collections of private, public, and criminal law and procedure—each more than a millennium old, and collectively binding more than two billion people around the world. These religious legal systems have had, and continue to have a monumental influence on the lives and institutions of the faithful within these three traditions. They also have had, and sometimes still do have, a pronounced influence on the secular legal systems around them. The four volumes here under review tell in erudite and accessible terms the important medieval part of this story with respect to the Catholic canon-law tradition. They have mainstreamed medieval legalism in a manner that deserves both emulation and respect, from insiders and outsiders alike.

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<sup>243</sup> See HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* (1993); HAROLD J. BERMAN, *THE INTERACTION OF LAW AND RELIGION* (1974).