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**Handbook of European History 1400–1600**

**Late Middle Ages, Renaissance and Reformation**

**Volume II: Visions, Programs and Outcomes**

Edited by

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VISIONS OF ORDER IN THE CANONISTS 
AND CIVILIANS

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1. Definition of the Subject

Like the other chapters in this book, this one focuses attention on Europe in space and the period from about 1400 to 1600 in time. Unlike them, it is limited to visions of order held by canonists and civilians. What precisely does or does not qualify as a vision of order may be difficult to say in specific cases, but this much is certain: visions of order are mental phenomena. They consist of thoughts about the proper way of arranging things. Who precisely does or does not qualify as a canonist or civilian is also difficult to say sometimes, but here again something is certain: canonists and civilians were living human beings. More specifically, they were people who had mastered a certain body of legal knowledge and relied upon that knowledge to lead a certain kind of life. Jurists, for short.

The following chapter is devoted to a certain type of ideas held by a certain kind of people. That raises an obvious question: what is the reason for putting people and ideas together in this way? It is assuredly not that all canonists and civilians had the same vision of order. The plural in the title of the chapter is quite intentional: canonists and civilians had many different visions of order, and sometimes they proved to be difficult, if not impossible, to reconcile. The more closely you look, the more finely differentiated varieties become discernible until the subject threatens to disintegrate in a burst of caleidoscopic multiplicity.

Conversely, few if any of these visions were the exclusive property of canonists and civilians. They were shared by theologians, humanists, and many other people. Seeing that canonists and civilians disagreed with each other over the most basic issues, how could it have been otherwise? Perhaps more important, the ideas of canonists and civilians were shared in a limited but significant sense by everybody who had to obey canon and civil law—and during our period the number of people who did happens to have grown at an unprecedented rate.

In short, canonists and civilians did not all have the same ideas
about order, and the ideas they did have were not theirs alone. Hence there is nothing in the record to which one could point with confidence and say, look, there are the visions of order in the canonists and civilians. To the contrary, the more precisely you try to identify the meaning of the words in the title of this chapter, the more likely you are going to narrow your focus to a point where there is nothing left to see, or broaden it to a scope where it includes everything. That is embarrassing.

A better reason for putting ideas and people together in this way consists of what we nowadays believe has to be done in order to understand the past. Once upon a time (or so it is believed) historians divided the people of the past into a small group that had ideas and a large group that merely lived. Historians interested in ideas paid no attention to the people that merely lived, and not enough to the people who had ideas. What mattered were the ideas alone. Historians interested in people meanwhile paid no attention to ideas and only very little to the tiny minority of people who called themselves civilians and canonists. What mattered was how the majority of people lived, especially how they worked, ate, and reproduced.

Those times are changing—slowly, perhaps, and not to the same degree in France, Italy, Germany, England, the United States, and other places, but changing nonetheless. Social historians have proved to the satisfaction of most observers that people whose income stems from rents, for example, will for that reason sometimes think and act quite differently from people whose income stems from wages. Hence intellectual historians have tried to learn more about the social setting in which ideas took shape. But it is a fact as well that sometimes people think and act in certain ways for no other apparent reason than what they believe to be true and right—or fun. Hence social historians have begun to look more closely at what people thought. Those efforts have paid off handsomely. We now know more about the reasons why people thought what they did than we ever have before, and there is a burgeoning literature on what might be called the intellectual history of ordinary people, a huge, fascinating, and previously almost totally uncolonized territory. Historians seem to be tentatively moving to a consensus that what people thought and how they lived is one subject, not two.

That helps to understand the growth of interest in the history of law. Law and history used to be kept at arm's length. They were studied and practiced in different institutions by different people with different methodologies and different goals. Law seemed technical, forbidding, and ahistorical to historians. History seemed shiftless and devoid of legal substance to jurists. "Today," however, as Franz Wieacker said some time ago, "the walls between the various national schools of law, between romanists, germanists, and canonists, indeed, even those between social, cultural, and legal historians have been more thoroughly taken apart than at any time since the beginnings of modern historical research in the nineteenth century." And with good reason. There are not many other places where ideas have such immediate and obvious effects on life as they do in law, nor are there many more imposing bodies of evidence from which to learn about life in the past.

In a small way the title of this chapter thus reflects a trend in contemporary historical thought. Unfortunately it reflects as well that a trend does not amount to a solution. We have already reached a point where excitement over the insights to be learned from neighboring disciplines is giving way to the recognition that our neighbors are struggling with the same problems, except that they call the problems by different names. It is good that we are abandoning the sterile kind of dualism that divides the world into ideas and things and then wonders which is more basic than the other. But in so doing we have also lost two mutually exclusive and, perhaps for that reason, successful definitions of what history was about. Now what? How exactly are we to understand the relationship between ideas and life? Is it enough to compile a list of things certain people usually considered to have been canonists and civilians happen to have said about principles of order in early modern times? Is this chapter about anything besides a trend in contemporary historical thought? Does it perhaps have no subject whatsoever?

Readers who have taken the title as a promise that they will be reading about something rather than nothing will not, I hope, be disappointed. But they should also consider themselves to have been warned that the subject is elusive. Questions like the ones just raised are difficult to answer without reconsidering the categorical division of the world into thinking things and material things of which the most familiar spokesman is René Descartes (1596-1650). There are reasons to believe that such a reconsideration may be underway. But if so, it is far from complete. Notwithstanding the enthusiasm with which alternatives are being advanced in any number of contemporary intellectual experiments, our notions of what is and what is not a subject worthy of investigation—of what does and does not constitute a decent explana-
tion—continue to rely on the Cartesian metaphysical inheritance, and it makes little difference whether they do so with or without acknowledgment. Under those circumstances it is best to proceed with caution, jump to no conclusions, and keep basic questions clearly in view. In the present context these questions are: what, if anything, united canonists and civilians? What divided them? And do their ideas about order follow any patterns?

2. Canonists and Civilians: The Common Ground

One thing obviously did unite canonists and civilians: all of them had gone to university and studied law. That may not seem like much but it is something. It meant, first of all, that they had to have an opportunity to go to university. Most of their contemporaries did not: no woman did, and the vast majority of men did not because they happened to work on a rural estate in one or another form of serfitude and knew not how to read or write and were not free to leave. Few jurists came from the village. Most came from the city. And all were men.

In the second place these men had to have a motive to study law. Most of those who had the opportunity did not have the motive. Members of the nobility, for example, had little reason to go to university to study anything at all. As time passed there was a growing number of exceptions. But in principle the study of law was most attractive to men who would have liked to have been noble, not for those who were—especially since a doctorate in law did in fact entitle you to consider yourself as having joined the ranks of the nobility. Something similar can be said about men in the highest levels of urban society. Their wealth was of a different sort from that of the nobility, but its presence, or the prospect of enjoying it, and the responsibilities associated with either made an academic career unattractive to bankers, long-distance merchants, great entrepreneurs, and their sons. On the whole the study of law was not for men who had a fortune but for those who wanted one.

The typical jurist, in other words, was one of a small group of literate ambitious men who lived in cities and owed their standing in society to their mastery of a very special kind of knowledge. Having relied on his talents to rise to the top, he was likely to prefer merit to birth as a basic criterion of social order. To that extent he favored liberty and equality over hierarchy. Having relied on knowledge to rise to the top, he was likely to oppose custom on the grounds of reason, and unlikely to have much sympathy for, or understanding of, the uneducated, whether they had a title of nobility or not. To that extent he may be considered a reformer and a progressive. And since he lacked any power of his own, he had little choice but to ally himself with those among the powerful who were most likely to draw on his knowledge in return for a salary, which is to say kings, princes, and urban governments attempting to establish control over, and extract taxes from, their subjects—whether they had a title of nobility or not. To that extent he may be considered an instinctive supporter of the state.

It should go without saying that these few words capture only very little and nothing without exception. But there may not be much more that can be said about late medieval and early modern jurists in general. If there is, we do not know it. The evidence is fragmentary and complex. Even simple questions like how many students studied law at a given university, precisely what they studied, and what they went on to do thereafter, are impossible to answer until technical problems of great difficulty have been solved, and often remain impossible to answer even then. The state of our knowledge is best described as a great darkness interrupted by bursts of brightness in a few widely separated spots where the evidence is plentiful and someone has spent years studying it. Under those circumstances the little that has just been said is already too much.

There was, however, one other thing to unite canonists and civilians: their allegiance to a definite and relatively small number of books collected in two sets that have since the sixteenth century been called Corpus Iuris Civilis and Corpus Iuris Canonici, the body of civil and canon law, respectively. The jurists believed that these books contained “reason in writing,” as they sometimes put it. More specifically, they believed that these books were sanctioned by God’s universal representatives, pope and emperor, and contained universally valid answers to questions of right and wrong.

This had two main consequences, both of which are fundamental for an understanding of their notions of order. First, no jurist worth his salt was willing to give, or allow others to give, answers to questions of right and wrong that could not be found in, derived from, or reconciled with, the texts of the civil and canon law. All jurists were pledged to a definite method. The method did not always work. It depended on the skill of individual jurists and often resulted in contradic-
tory answers. But it was an enormously powerful tool to sanction certain views of right and wrong and reject others.

Second, the jurists were bound to the doctrines and concepts contained in the body of canon and civil law. Many of these were in dispute and they are too numerous even to adumbrate in outline. But three may be singled out for mention because they are basic and conveniently gathered at the very beginning of the Corpus Iuris Civilis and the Corpus Iuris Canonici. First, law was divided into two basic types: natural law and human law. The former was universal and directly founded on reason. The latter was limited to specific communities and founded on reason only in a qualified sense. Second, according to natural law human beings were free and equal. And third, law was distinguished from custom: law was written and formally promulgated, custom was not. The precise meaning of any one of these terms was never settled (and always different from its meaning in modern times). But one thing was settled: if anyone was going to determine the meaning correctly, it would be properly trained jurists.

This tended to put the jurists at odds with two other types of men: those who preferred to answer questions of right and wrong by referring to other books and those who preferred to refer to no books at all—or at least not to books written in Latin. Theologians did the former, followers of custom the latter. Theologians worried that jurists would exceed the limits of their authority and forget that the most important questions of right and wrong were answered by the Bible, also a collection of books and in some ways overlapping with Roman and canon law, but containing writings of a different sort that were thought to have been directly revealed by God himself. Their worries were only increased by the opening words of the Digest according to which jurists are deservedly called priests, because we cultivate justice and profess knowledge of the good and the equitable, separating what is equitable from what is iniquitous, discriminating between the licit and the illicit, desiring to produce good conduct not merely through fear of punishment but also through the promise of rewards, teaching, if I am not mistaken, true, not feigned, philosophy. Followers of custom, meanwhile, were dismayed to learn that experts in Roman and canon law, far from practicing the good and the equitable, were quick to brush aside conventions they did not know, reject cases that had not been brought according to the proper procedure, and ignore wrongs for which they found no admissible evidence.

Theologians and followers of custom shared a suspicion that the jurists' allegiance to civil and canon law was dishonest because it sometimes appeared to fly in the face of the will of God or the obvious facts of the case. On occasion, as during the reformation, that suspicion could fuel powerful alliances and undermine the jurists' self-confidence. But in the long run it always proved to be weaker than the ties by which those who had received a professional education were joined to each other and divided from those who had not.

3. CANONISTS AND CIVILIANS: THE CONTRASTS AND DIVERGENCES

Canon law and civil law were two separate bodies of texts. One was rooted in the church, the other in the Roman Empire. Each had its own characteristic doctrines, and sometimes they conflicted with each other. Canon lawyers, for example, regularly identified natural law with divine law. Roman lawyers were less willing to do so. The most obvious division among canonists and civilians thus was the division of canonists from civilians. It was turned into law in 1219 when Pope Honorius III (r. 1216-27) prohibited priests and members of religious orders from studying civil law. To a certain extent it also coincided with a geographic boundary. In Italy and southern France, where knowledge of Roman law was most extensive, jurists were often laymen. In the rest of Europe, where canon law played a more important role, they were almost invariably clerics. It was only in the period considered in this essay that university-trained jurists who did not belong to the clergy began to outnumber those who did even in northern Europe.

Important though it is, however, the division of canonists from civilians must not be exaggerated, as happens all too easily when modern observers forget how deeply the church was rooted in the Roman Empire. For the most part and in the long run relations between canon and civil law were far more peaceful than the decision of Honorius III might suggest. Canon law not only borrowed texts and principles directly from Roman law but also drew on Roman law in indirect ways. In the absence of Roman law canon law would have been incomplete and, in parts, unintelligible. Hence many clerics did study civil law, especially those in lower orders whom the prohibition of Honorius III did not affect because they did not (yet) exercise the care of souls or belong to a religious order." The church lives by Roman law" was a fa-
miliar and entirely appropriate maxim. Roman law, meanwhile, was not enough for any lawyer worth his salt in an age when marriages and testaments—perhaps the two most important instruments for the massive transfer of property known to the world—fell under the jurisdiction of the church. Hence it became increasingly common for jurists to study both kinds of law, call themselves “doctor of both laws [doctor utriusque iuris],” and look down upon colleagues who knew only one kind of law. Fundamentally, the relationship between canonists and civilians was one of complementarism, not contradiction. No one else managed to pay more balanced respect to texts coming from classical antiquity and what is sometimes called the Judeo-Christian tradition.

Different levels of training and different careers made for more important lines of demarcation. In the first place many of the people who knew something about Roman and canon law did not really qualify as canonists or civilians strictly speaking. This includes scribes and notaries who had studied the art of writing letters (ars dictaminis) or the art of authenticating documents by entering them in a public register (ars notariatus). Scribes and notaries had to know at least parts of the law and they far outnumbered fully trained jurists. More than anyone else they helped to spread knowledge of Roman and canon law in everyday use. But they ranked far below doctors of law. There were also distinguished individuals like Lorenzo Valla (1407-57), the son of a doctor of both laws who is justly regarded as one of the most important figures in early modern legal thought, but who never received a formal legal education. And we ought not to forget people who did study law for a while, but dropped out in disgust, like Ulrich von Hutten (1488-1523).

In the second place some doctors and licentiates of law cannot be considered civilians or canonists except in a purely formal sense because they devoted their careers to rather different pursuits, like Leon Battista Alberti (1404-72), Johann Reuchlin (1454/5-1522), Andreas Karlstadt (1480-1541), and John Calvin (1509-64), all of whom are serviceable examples of professionally trained lawyers not generally known for their legal expertise.

In the third place canonists and civilians in the full sense of the word went on to use their knowledge in very different ways. A few of the most popular ways are worth specifying. One was to become a professor of law. Another was to work in the courts of the church. But above all university-trained jurists were ever more often employed in government, first in the church, then in the state. Their particular com-
conciliarians continued to maintain their cause throughout the early modern period and, in the view of some, had the last word in the Glorious Revolution of 1688 and in the writings of John Locke (1632-1704). The second issue dividing canonists and civilians concerned the question how to resolve differences over the meaning of canon and especially Roman law. Many jurists believed that the best way to proceed was to build on the interpretations that had been worked out by the so-called glossators and commentators since the eleventh century. Typically they stayed close to the texts of individual laws and dealt with them in the order in which they appeared in the Corpus Iuris Civilis. They are often called Bartolists, after Bartolus of Sassoferrato (1313/14-57), one of the most influential jurists of the later middle ages, and their method “scholastic” or “the Italian manner” (mos italicus) because it had been perfected in Italian schools of law and continued to flourish there, but by no means only there, until well into the early modern period. The others believed that it was necessary to make a fresh start because the older interpretations were written in atrocious Latin, founded on corrupt versions of the texts, and marred not only by logical inconsistencies but also ignorance of history. Typically they spent much effort on philology and grammar in order to reconstruct the original text of the ancient laws and expose what they considered to be the errors of the Bartolists. They also liked to interpret the law by devising broad conceptual schemes that seemed more rational than a text-bound approach. They are usually called legal humanists and their method “the French manner” (mos gallicus) because their most famous practitioners taught at French universities like Orléans, Toulouse, and above all Bourges. Legal humanists captured a great deal of attention because of the novelty of their discoveries, the elegance of their style, and the trenchancy of their analysis. Bartolists, however, were by no means ready to concede and continued to predominate in less conspicuous but no less important places, both because of the sheer weight of tradition and their unparalleled ability to settle specific legal difficulties in specific settings, including the setting where it often mattered the most, namely, in court.

The third issue was, of course, the Reformation. The main question with which the Reformation confronted canonists and civilians was this: could the doctrine of salvation by faith alone be reconciled with canon and Roman law, or could it not? Many jurists thought that it could not. They recoiled in horror from ideas that threatened not only to deprive them of their professional existence but also to throw the entire world into turmoil. They went on to defend the law by editing new and improved versions of the basic texts and glosses, collecting the best existing legal scholarship, and rethinking their positions from the bottom up. Two of their efforts are worth mentioning: the first authoritative edition of the Corpus Iuris Canonici and the so-called Tractatus Universi Iuris, down to the present day the most comprehensive single collection of the best that roman-canonical jurisprudence had to offer. Others, meanwhile, were convinced that Roman and canon law could very well be reconciled with salvation by faith alone if only they were correctly distinguished from divine and natural law properly speaking and recognized as products of human action and historical circumstance. They, too, had their brilliant successes, among which we may mention the investigations into the history of law by French Huguenots, an edition of the Corpus Iuris Civilis with a new set of glosses by Dionysius Gothofredus (1549-1622), the proliferation of ecclesiastical legislation in Protestant territories, and the veritable explosion of public law in the Holy Roman Empire just after the end of our period.

The fourth and final issue was the question whether or not supreme authority in the state was to be given to the people or to their sovereign ruler. This was in many ways a replay of the debate between conciliarians and papalists. It resulted from a schism between two confessions and pitted temporal constitutionalists against temporal absolutists, just as a schism between different papal obediences had pitted ecclesiastical constitutionalists against ecclesiastical absolutists. It involved similar arguments and it often drew on the same sources. It had also been in the air since the high middle ages, but it was not fully joined until the very end of our period, and it was most effectively joined in France. On the one hand it was argued that rulers were servants of the common good and subject to the laws. Hence the people had a right to resist and depose rulers who violated the law—and if not the people as such, then at least the magistrates who represented the people in general assemblies. Among the most important authors taking this point of view was François Hotman (1524-90), who had studied Roman law in Orléans. On the other hand it was argued that public order was impossible to preserve unless rulers had the right to put an end to public controversies without possibility of resistance or appeal. Such rulers were not above divine and natural law, but they were above, or absolute from, human law. Among the most important
defenders of that position was Jean Bodin (1529/30-96), who had studied Roman law in Toulouse. This sketch of the main issues dividing canonists and civilians is both rough and incomplete, but it is enough to make a point and raise a question. The point is that wherever and whenever fundamental issues of order were debated in early modern times, canonists and civilians can be found on both sides of the debate. Moreover, the stand a jurist took on any one of these issues did not determine his stand on any of the others. Supporters of papal supremacy sometimes maintained and sometimes denied that people had a right to resist their sovereign rulers. So did the followers of Luther and practitioners of the mos gallicus. Supporters of absolute monarchy sometimes supported Luther and sometimes the pope. So did theorists of resistance and practitioners of the mos italicus. No stereo-type stands up to scrutiny, especially not the one according to which experts in Roman law were born supporters of absolute monarchy, experts in canon law born allies of the papacy, and both sworn enemies of Luther. The question is whether canonists and civilians took their positions according to chance or some discernible pattern.

4. LEGALITY AND LEGITIMACY

In order to deal with this question it may be useful to make a distinction. Law consists of rules that tell you how to behave. These rules are not necessarily good and they can be broken. Hence people using laws have two entirely different ways of doing wrong (or right): they can do wrong (right) by breaking a rule that is good (bad), but they can also do wrong (right) by following a rule that is bad (good).

This is a source of endless confusion. In order to keep matters straight, theorists of law distinguish between legality and legitimacy. Legality has to do with conduct. Conduct is legal if it agrees with the rules and illegal if it does not. Legitimacy has to do with the rules. The rules are legitimate if they deserve to be followed, and illegitimate if they deserve to be changed or broken. Conduct is lawful in the full sense of the word only if it comprises both elements: it must follow the law and the law must be legitimate.

The question is, of course: who decides what is legitimate and how? It is a simple question. But the answer is necessarily uncertain. It could be certain if, and only if, it could be given according to some rules. But rules are precisely what the question is about. Since the legitimacy of every rule can reasonably be questioned the answer cannot be founded on any rule without begging the question. This is not obvious so long as any rules remain that have not yet been questioned. But once they are, the distinction between legality and legitimacy breaks down and questions about conduct turn out to be impossible to keep apart from questions about rules. In the end there remains no surer way to answer questions of right and wrong than to do the best one can and wait and see whether or not others will agree.

Some people believe that the trouble with legitimacy is unique to modern western societies governed by complex bodies of written law under conditions of capitalist production. That seems unlikely. Questions about conduct can be distinguished from questions about rules of conduct wherever and whenever people rely on rules that can be broken, regardless of whether these rules are customary, legal, moral, ethical, religious, written, unwritten, natural, or unnatural. Distinctions like those between the letter and the spirit of the law, natural and human law, custom and abuse, nomos and physis, and perhaps even the distinction between right and wrong itself suggest that the trouble with legitimacy is as old as the inclination, or ability, of people to break rules. To that extent small societies of hunters and gathers following customs transmitted by word of mouth or imitation are exactly like large industrial societies governed by written codes of law.

At the same time writing down the rules does have important consequences. Above all it makes them easier to identify. That has definite advantages. If you want to know whether an alleged but unwritten rule does in fact exist, you have no option but to ask as many people as you can whether or not they have heard of the rule in question and hope they are willing and able to answer. If they are not, you have little choice but to wash your hands of the question or perhaps impose a rule of your own devising. In either case it will be difficult to tell whether the dispute is about rules or about conduct and force is likely to be used not only when undisputed rules call for some wrong to be avenged or punished (or prevented), but also when the rules are in dispute and it is not at all clear whether any wrong has even been committed. That can make for real injustice.

Not so with written law. If you want to know whether an alleged law does in fact exist, you need ask no one. You merely need to look it up. Most of the time that is enough. If it is not, because the law in
question is doubtful, obscure, or poorly suited to the circumstances of
the case, you may have to do some careful thinking until you arrive at a
satisfactory answer, but you will have no good reason to use force until
the question about the law has been settled. When law is written down
questions of legality are easier to distinguish from questions of legiti-
macy. That increases the chances that force will be used to make con-
duct conform to the rules, but not to settle questions about the rules.
Written law thus makes the use of force more predictable and helps to
avoid the kind of injustice that occurs when someone is punished for
breaking a rule unawares or in good faith.

These are the advantages people have in mind when they call the ju-
rists' method rational. But written law has disadvantages, too. One is
that written laws can exist without being known because the books in
which they are written can exist without being read. For most of re-
corded history most people could not read books, and even nowadays
most of the people who can read books do not read books of law.
Hence it is not only possible but likely that most of the people living in
a society governed by written laws do not know those laws—especially
if the laws happen to be written in a foreign language, as was the case
with Roman and canon law in the middle ages. That is a source of con-
siderable doubt about the legitimacy of the law.

The other disadvantage is that written law is harder in some ways to
change than custom. This is not only because old laws stay on the
books forever unless someone takes the trouble to remove them. It is
also because written laws are more easily turned into a foundation for
coherent logical systems. And it is above all because people who un-
derstand coherent logical systems tend to identify with them. The
more coherent the system, the more difficult it will become for them to
change the law without threatening the system, and the more they are
invested in the system, the more likely the law will lag behind social re-
alities. That is a second source of considerable doubt about the legiti-
macy of the law.

These doubts can reinforce each other. There is nothing like a thor-
oughly developed legal system to pinpoint the need for change. But
what if the law itself needs to be changed? Who can change a thor-
oughly developed legal system peacefully? Not the people, because
they do not know what it is, and not the jurists, because their existence
depends on it. Under such circumstances violence may seem, not an at-
tractive, but the only option. If written law is preferable to custom in
that it prevents the unpredictable use of force most of the time, it can
also make the unpredictable use of force inevitable some of the time
and thus lead into a crisis of legitimacy more intractable than anything
imaginable under custom.

5. HISTORY OF THE SUBJECT

Precisely such a crisis occurred in late medieval and early modern Eu-
ropes. It began roughly when the defeat of Emperor Frederick II
(r. 1220-50) proved that the emperor was powerless to rule the world.
That raised the question: which law is good? In the past the jurists had
answered: the law is good if God approves of it, and God approves of
the laws written in the Corpus Iuris Civilis and the Corpus Iuris
Canonici. Now that answer was no longer quite acceptable. When
about fifty years later Pope Boniface VIII (r. 1294-1303) was, for all in-
ten ts and purposes, assassinated by the lieutenants of the king of
France and the papacy forced to take up residence in Avignon, it be-
came even less acceptable. The crisis ended when a new answer found
general agreement. That answer was: the law is good if it is approved
by a sovereign ruler—and it is to be hoped, but impossible to know, if
God approves of it as well. The history of visions of order among
 canonists and civilians from 1400 to 1600 consists largely of the an-
swers that were given in between.

One of the earliest answers was also one of the most brilliant, even
in the very long run of European legal history. It was given in Italy,
which is no accident, because Italy was the place where the profes-
sional study of law had been invented and where the authority of pope
and emperor had been most strikingly undermined. Its author was
Bartolus of Sassoferrato. Bartolus pointed out that the refusal of the
Italian cities to obey the emperor did not violate the authority of Ro-
man law in and of itself because the authority of Roman law was uni-
versal whereas the authority of the Italian cities was not. The laws
made by cities were as valid as the laws of the emperor, except that
they were valid only for the city concerned whereas the laws of the em-
peror were valid for the world as a whole, but only for the world as a
whole and not necessarily for any particular place. The laws of the cit-
ies and Roman law thus ranged on different planes of legal reality. The
well-known formula for this solution was that the emperor was dominus
mundi (“lord of the world”) and Princeps with a capital P—and
Bartolus insisted that anyone who denied the emperor’s right to
rule the world as a whole was in danger of heresy—while cities became “princes unto themselves [sibi princeps, with a small p].” The same solution helped to account for kings and princes who denied the emperor the right to interfere in the affairs of their realms, like those of France or England.23

Bartolus thus rescued the legitimacy of Roman law by distinguishing universally valid law from locally valid law. But the distinction had a cost, and the cost was the possibility of tyranny. So long as Roman law was thought to apply to each and every place in the world, tyrants were easy to identify: they violated the law. But if local governments were allowed to make their own laws, tyrants were harder to recognize. What if a tyrant seized control of a local government and started making bad law? How could you tell the difference between the laws of a tyrant and the laws of a legitimate government? There was a very real possibility that following the law might actually be wrong—and it is worth reading the opening pages of Bartolus' tract on tyranny for an expression of the stomach-turning horror which that possibility provoked.24

Bartolus responded with a legal theory of tyranny that was squarely founded on the distinction between legality and legitimacy. Tyranny came in two forms: tyranny by title and tyranny by conduct. Tyrants by title were both illegitimate and illegal because they acquired and exercised their power in evident violation of the law. That was the easy case. Tyrants by conduct were illegitimate in fact, but appeared to conform to the standards of legality. That was the hard case. But Bartolus was convinced that even tyranny by conduct could be proved and controlled by legal means that included a prominent role for pope and emperor in their capacity as chief guardians of universal law. There is no space to analyze his reasoning, fascinating though it is, in any more detail. The point to keep in mind is this: Bartolus identified tyranny as the main danger to the legitimacy of law and, as his very choice of the term tyranny suggests, tried to solve it by relying on existing law. That established the terms of the debate.

Those terms were confirmed by the conciliar movement. When the papacy tried to escape from French tutelage and returned to Rome, the result was the great schism (1378-1417) between two and eventually three popes. Everyone knew there could be only one legitimate pope, but no one knew which one it was. If anything ever raised the spectre of tyranny in medieval times, that did. The conciliarists banished the spectre by elaborating a theory of conciliar government that was squarely founded on existing canon law. They argued that on matters concerning the universal church the pope was obliged to obey a general council. If he did not, he could be legally deposed in spite of the papacy's basic exemption from human judgment. With the active support of the emperor they put their views into practice in a series of councils that met during the first half of the fifteenth century. The conciliar movement may thus be interpreted as an attempt to do for the church and canon law what Bartolus had done for the Italian cities and Roman law: restore legitimacy by relying on existing law.

The views of Bartolus and the conciliarists amount to something of a European prototype for dealing with tyranny by legal means. They remained influential far into the early modern period and have in some ways never been overtaken. But they had a serious weakness: they presupposed the very law that was in doubt. The weakness was quickly exposed by Jean Petit's (d. 1411) advocacy of tyrannicide and John Hus' (c. 1370-1415) attack on the hierarchical church, to choose two examples from the conciliar movement. The fathers at the council of Constance (1414-18) condemned the former and executed the latter. That was consistent with their understanding of the law. But the consistency was lost on people who wondered why the fathers were allowed to attack the papacy whereas John Hus was not. When the council of Basel (1431-49) turned on an undisputed pope, even supporters of the conciliar cause began to think that general councils displaced, but did not solve, the problem of tyranny.

At this point the terms laid down by Bartolus and the conciliarists were exhausted. Yet there was no plausible alternative. The period following the demise of the conciliar movement is therefore best characterized as an ambiguous mixture of veiled tyranny, official legality, and an intensive search of the records for better terms. Tyranny was everywhere suspected, but nowhere talked about—except as regards the Turks, whose conquest of Constantinople in 1453 confirmed the fear of tyranny while helpfully distracting attention from tyranny at home. Reform was everywhere demanded, and yet expressions of popular piety reached unprecedented heights while papal, imperial, and princely courts presided over spectacular achievements in patronage. Meanwhile the jurists began to look more carefully at ancient sources of the law and to experiment with new interpretations. But far from establishing common ground they undermined the law still further by fueling new debates and demonstrating that some of the most famous parts of law, including the Donation of Constantine and the Pseudo-Isidorian decretales, were outright forgeries.
The ambiguities were not resolved until Niccolò Machiavelli (1469-1527) and Martin Luther (1483-1546) proposed alternatives to law. Machiavelli and Luther could hardly have been more different from each other. One was an Italian diplomat and humanist, the other a German monk and theologian. One sought legitimacy from the mastery of politics and time, the other from faith in the eternal word of Christ. But they were united on one point: both rejected law as a source of legitimacy. Both thought that law and tyranny went happily together. Both insisted that the gap between legitimacy and legality—faith and works in Luther’s terms, how we ought to live and how we do live in Machiavelli’s—was utterly unbridgeable. And both defined virtue in ways that flew in the face of law as it was understood by jurists. Machiavelli and Luther made it possible to call someone prince whom Bartolus called tyrant, and Antichrist whom the established church called pope.

In point of principle the solutions offered by Luther and Machiavelli were equally plausible—and equally capable of throwing societies founded on law into upheaval. That may explain why some contemporaries lumped them together and why they continue to be controversial nowadays. Their view that virtue is incommensurate with rules was heresy then and still is heresy today—one measure of the extent to which the jurists have managed to hold their own. But in point of practice there was an important difference: Luther spoke to everyone; that made him dangerous. Machiavelli spoke to princes and humanists; that made him safe, which may explain why he did not acquire the reputation of having justified every conceivable form of immorality until after Luther’s views had inspired popular uprisings that put the fear of God into established governments. Fear of God and people forced princes to realize that they could not do without law, converted them to anti-machiavellianism, and helped to save the jurists from danger of extinction.

The solution the jurists adopted in the end was as ingenious as it was simple. Since Bartolus they had been wondering how to restore legitimacy to the law without begging the question. But begging the question had turned out to be inevitable except at the cost of uncontrolled violence. That left but one choice: question-begging must be turned into a point of principle. The principle was stated by Jean Bodin, one of the greatest civilians of the later sixteenth century. Bodin agreed with Luther and Machiavelli that the gap between legality and legitimacy could not be bridged by any of the means so far considered. But he refused to trust in faith or politics. Like Bartolus he placed his trust in law. But unlike Bartolus he thought that rulers had to have absolute control over the law. The word for that control was sovereignty. Sovereign was he who made the law, and law was what the sovereign said it was. Sovereignty was “the absolute and perpetual power of a commonwealth,” and its validity as unconditional as that of a tautology.25

Sovereignty changed the terms of the debate for good and made law legitimate again. What was left was to elaborate the consequences. The boundaries between natural, divine, and human law needed to be redrawn. The content of each kind of law needed to be identified. Natural and divine law could no longer be considered enforceable unless a sovereign decided otherwise. The history of human laws needed to be investigated. Sovereigns had to decide which parts of Roman and canon law they would accept and why. New laws needed to be developed in order to regulate relations between sovereigns—a task most expeditiously completed by Hugo Grotius (1583-1643), a doctor of both laws with a degree from Orléans and, next to Bodin, perhaps the most important thinker to put an end to the debate about the legitimacy of the law. In short, the period to follow saw a profusion of legislation and writings on all kinds of law and legal questions. Many of these, like those on canon law and those from Spain, are poorly understood. But none of them went back on principles that were effectively summed up by Jean-Jacques Rousseau (1712-78):

What is good and in conformity with order is such by the very nature of things and independently of human agreements. All justice comes from God, who alone is its source; and if only we knew how to receive it from that exalted fountain, we should need neither government nor laws. There is undoubtedly a universal justice which springs from reason alone, but if that justice is to be acknowledged as such it must be reciprocal. Humanly speaking, the laws of natural justice, lacking any natural sanction, are unavailing among men.26

Sovereignty had advantages. It defined an institution whose legitimacy remained intact even where the law was in dispute. It thus settled the violence that had erupted all over Europe. But it did so by transforming the distinction between tyrants and legitimate rulers from a matter of law into a matter of conscience. At a time of political, religious, and military turmoil that was a plausible concession. But after four hundred years of experience with sovereignty, in a century that has
strained conscience beyond the breaking point, it may be worth giving Luther and Machiavelli a second hearing.

Three separate processes can be distinguished in this account. The first is the gradual replacement of custom by written law. The second is the shift in control over written law from pope and emperor to sovereign nation states. And the third is the elaboration of different national traditions of law and attitudes to law.

The first of these three processes began long before the period here under consideration, in the eleventh century, and culminated long after in the great codifications of the nineteenth and twentieth centuries. It spread from Italy, where the connection to ancient Roman law was strongest, to the rest of Europe and, more recently, the world. It was led by clerics in medieval, and laymen in modern, times. It went through different phases at different speeds. But it has not been reversed for close to a thousand years.

The second process coincides more closely with the period under consideration. It is in fact one of the reasons to regard the period as a unit. It was fueled by doubts about the legitimacy of Roman and canon law and the two universal institutions claiming responsibility for that law. Because it undermined those institutions it could be, and was, mistaken as a reversal in favor of the good old law so heartily desired by ordinary people. But because it shifted the responsibility for law from universal institutions to the sovereign rulers of territorial states, it actually increased the authority of written law still further.

The third process may explain why the conciliarists met in southwestern Germany, why an Italian wrote the Prince, why the Reformation began in Saxony, and why a lawyer from Angers invented sovereignty. But it is not nearly as well understood as the other two. There are some trenchant analyses of nations and nationalism from the perspective of the social sciences. They suggest that nation states are made by literate elites. Since jurists figure prominently among those elites, the different experiences of jurists in countries completely, half, or barely familiar with written law may well explain some of the differences between Italy, France, and Germany—not to mention England, the only European country with a class of professional jurists trained outside the universities. But most historians either presuppose that nations have existed since the origins of time or else dismiss them as un-

worthy of attention. Most national histories thus reproduce more than explain the differences between the nations. From hindsight these processes are relatively easy to distinguish. In historical reality, however, they are inseparably connected. That accounts for the complexity of the subject, confusing both contemporaries and historians. Luther, to take a case that illustrates the source of the confusion clearly, went out of his way to prove that he was utterly uninterested in conduct. What interested him was faith. To use the terms of this essay: he was interested in what made the law legitimate, not in legality. But since there was no general agreement on what made law legitimate—not even agreement on the distinction between legitimacy and legality itself—it was impossible to say whether his views undermined or strengthened existing law or conduct. For the same reason it was impossible to say whether the views of Bartolus, the conciliarists, Machiavelli, and Bodin undermined or strengthened existing law or conduct—and it is possible to say from hindsight only on the assumption that today’s ideas about the law will not be overturned tomorrow. That helps to understand why German peasants thought they could rely on Luther to support their rebellion against the princes. But it also helps to understand why Luther condemned the peasants with as much conviction as he declared to be concerned with nothing but the faith.

The history of visions of order among the canonists and civilians from 1400 to 1600 is thus best described as part of a protracted struggle to win agreement on the benefits of written law. Precisely how that agreement could be won depended entirely on circumstance. Hence jurists could be found on both sides of every debate. At the same time a single thread of historical and intellectual continuity leads from the early days of the discovery and study of the Digest in Bologna to today’s disputes about the law. That thread consists of the reasonably constant loss of control on the part of local communities and individuals to centrally organized bureaucracies increasingly staffed by jurists administering written law. The battles pitting papalists against conciliarists, Bartolists against legal humanists, catholics against protestants, and champions of popular sovereignty against absolute monarchy thus are somewhat misleading. They obscure the success the literate have consistently enjoyed over the illiterate. Whether or not that is about to end, and the progress of written law about to be reversed by “decodification” in favor of local, customary, and oral arrangements, it seems reasonable to consider, but too early to decide.
NOTES

4. Among the brightest spots are the studies of Suzanne and Sven Stelling-Michaud (1955) on Swiss students of law at the University of Bologna and their subsequent careers; Coing (1964); Richard Kagan's Students and Society in Early Modern Spain (Baltimore, 1974); Kagan (1981), and the quantitative analyses of Ranieri (1983). They supply numbers that, although never as hard as they look, at least suggest orders of magnitude. For example: in the sixteenth century the University of Padua had 20 salaried, that is, full professors of law; most German universities had no more than 4, 5, or 6 professors of law, half teaching Roman, half, canon law; in 1394 there were 256 bachelors and 368 scholars of law registered at the University of Orléans; in the second half of the fifteenth century an average of about 1,000 students are estimated to have been studying law in Germany at any given time. Coing (1984), 61, 66-67. The supreme court of the Holy Roman Empire tried about 9,900 cases during the first fifty-five years of its existence from 1495 to 1550, and almost twice as many, 19,300, during the next fifty years from 1550 to 1600. Ranieri (1983), vol. 1:135-37. One may add Carlo Cipolla's estimate that there were 5 physicians, 20 lawyers, and 250 notaries per 10,000 inhabitants in the city of Milan in 1288, and 5 physicians, 7 lawyers, and 26 notaries per 10,000 inhabitants in the city of Verona in 1545. Carlo M. Cipolla, Before the Industrial Revolution: European Society and Economy, 1000-1700, 2d ed. (New York, 1980), 83.
5. The Corpus Iuris Civilis was issued by Emperor Justinian in the sixth century and consisted of four books: the Institutes, the Digest, the Code, and the Novels. The Corpus Iuris Canonicum consisted of four books that were issued over a period of time from 1140 to 1317: the Decretum of Gratian (about 1140), the Liber Extra of Pope Gregory IX (1234), the Liber Sextus of Pope Boniface VIII (1298), and the Clementinæ of Pope Clem-
ent V (1317). The medieval version of the Corpus Iuris Civilis also contained certain constitutions of medieval emperors, and the Corpus Iuris Canonicum a number of so-called extravagants that were not reliably identified until the early modern period. For basic information with further bibliography, see Roger E. Reynolds, "Law, Canon: To Gratian," in Dictionary of the Middle Ages, ed. Joseph R. Strayer (New York, 1982-89), vol. 7:395-413; Stanley Chodorow, "Law, Canon: After Gratian," in ibid., vol. 7:413-17; and Charles Donahue Jr., "Law, Civil-Corpus Iuris, Revival and Spread," in ibid., vol. 7:418-25.
6. Digest 1.1.1.
8. Among the thirty-three popes who ruled from 1400 to 1600 fifteen had studied law, eleven were doctors of law, and four had at one time been priests. This includes the four popes who are sometimes referred to as anti-popes and is based on information taken from entries under individual popes' names in the New Catholic Encyclopedia, 18 vols. (New York, 1967-89).
12. Mario Astuti, Mos italicus e mos gallicus nei dialogi "De iuris interpretibus" di Alberico Gentili (Bologna, 1937).
14. Decretum Gratiani emendatum et notationibus illustratum, una cum glossis (Rome, 1582); Decretales D. Gregorii Papae IX suae integritati una cum glossis restitutae (Rome, 1584); and Tractatus universi iuris, duce, E auspice Gregorio XIII. Pontificis Maximo in unum congressi, 18 vols. in 25 (Venice, 1584-86). Both of these efforts came to fruition under the leadership of Pope Gregory XIII (1572-85), a doctor of both laws who had taught at the University of Bologna from 1531 to 1539 and counted future cardinals like Reginald Pole (1500-58) and Alessandro Farnese (1520-89) among his students. New Catholic Encyclopedia, vol. 6:779-81.
18. One of the last bastions of stereotype has just been conquered by Gelderen (1992), 273, concluding for the importance of Roman law to the Calvinist leaders of the Dutch revolt against Philip II.
19. The point of the distinction is not affected by the different terms that can be used to make it. Plausible alternatives to legitimacy include authority, validity, equity, morality, and justice.

21. Attempts are sometimes made to remove the uncertainty by distinguishing between two kinds of rules: rules that tell you how to behave and rules that tell you how to distinguish legitimate rules from illegitimate rules. For a modern example, see Herbert Lionel Adolphus Hart, *The Concept of Law* (Oxford, 1961). But that distinction breaks down as well because, although there may be two kinds of rules, there is only one kind of people and they have to apply both kinds of rules.


23. Interpreters of Bartolus are sharply divided on this crucial issue. See, e.g., Marcel David, "Le Contenu de l’hégémonie impériale dans la doctrine de Bartole," in *Bartolo da Sassoferato: Studi e documenti per il VI centenario* (Milan, 1962), vol. 2:199-216 (to whom I owe the point about *Princps* with a capital P); Keen (1965), 105-26; Skinner (1978), vol. 1:9-

10. My own interpretation is based on a close reading of Bartolus’ commentary on *Digest* 6.1.1 in Bartolus of Sassoferrato, *Opera*, 12 vols. (Venice, 1570-71), vol. 1:172 recto col. b, s.v. *per hanc actionem*, nrs. 1-2, and on *Digest* 49.15.24 in Bartolus, *Opera*, vol. 6:228 recto col. a, s.v. *hostes* nrs. 3-7, along with the cross-references given there.


25. "For although one can receive law from someone else, it is as impossible by nature to give one’s self a law as it is to command one’s self to do something that depends on one’s own will. As the law says, *Nulla obligatio consistere potest, quae a voluntate promittitennis statum capiat*—which is a rational necessity and clearly demonstrates that a king cannot be subject to the laws." Jean Bodin, *On Sovereignty: Four Chapters from Six Books of the Commonwealth*, book 1, chapter 8, ed. and trans. Julian H. Franklin (Cambridge, 1992), 12-13. Hence Bodin rejected the Aristotelian distinction between good and bad governments, considered tyrants to be sovereigns, described sovereignty as an unconditional gift, distinguished categorically between contracts (which are binding on the sovereign) and laws (which are not), and drew the stunning conclusion that "it is a kind of legal absurdity to say that it is in the power of the prince to act dishonestly, since his power should always be measured by the standard of justice." Ibid., pp. 1-2, 6-8, 13-13, 39.


29. See, for example, his statement in the letter he sent to Pope Leo X in 1520: "There is no dispute about conduct between me and anyone else, only about the word of truth." Martin Luther, "Epistola Lutheriana ad Leonem decimum summum pontificem," in *WA* (Weimar, 1883- ), vol. 7:43. The word translated as "conduct" is *mores*, a term uniting conduct with rules of conduct in a way that Luther’s distinction was designed to explore.

BIBLIOGRAPHY

The purpose of the bibliography is to give readers unfamiliar with the field a means of orientation. It is divided into three sections. The section entitled "reference" lists bibliographies, handbooks, surveys, dictionaries, basic texts of canon and civil law, and the like. The section entitled "perspectives" is meant for readers seeking frames of reference. The section entitled "studies" lists works that have made a major contribution to our understanding of the field, or represent a particular approach to it particularly clearly, or both. In order to include as many different authors as possible I have with rare exceptions mentioned no more than one title per author per section. Since lack of space made it impossible to include a balanced selection of works written by the individual canons and civils themselves—not to mention philosophers or theologians with ideas about law—I have mentioned no such works at all. I have similarly excluded reference works limited to specific national traditions. For guidance to such works readers will have to rely on the tools listed in the reference section.

Reference

Perspectives

Studies
Kantorowicz, Ernst. The King's Two Bodies: A Study in Mediaeval Political Theology. Princeton, 1957.
Lagarde, Georges de. La naissance de l'esprit laique au déclin du Moyen Age. 3d ed. 5 vols. Louvain, 1956-70.