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LEARNED LAW, DROIT SAVANT, GELEHRTES RECHT: THE TYRANNY OF A CONCEPT

Kenneth Pennington

Twenty-five years ago, a paper delivered to an audience of historians treating doctrines of the *Ius commune* often evoked a stylized ritual between speaker and audience. Hard-headed historians squirmed and wiggled in their seats until the last syllable of doctrine passed the lips of the speaker. As soon as the chair of the session permitted questions, their hands shot up to ask the inevitable, pragmatic, down-to-earth question: ‘Yes, yes. All that you have told us is quite interesting and perhaps even correct. But what does this theory of the learned law have to do with the practice of the courts, lawyers, and litigants?’ The speaker would then in turn squirm and wiggle a bit, while confessing that enough work had not yet been done to answer that question with complete certainty. Whatever the speaker added to that admission was immaterial because the questioner had already fallen into self-satisfied surety. Learned law mattered little, or not at all, in the practical forum.

In some respects, this ritual has changed. Legal historians have shown again and again how the jurisprudence of the *Ius commune* pierced the lowest levels of the judicial system. Richard Helmholz and Charles Donahue have demonstrated that the doctrines of marriage, procedural, and family law were, for the most part, followed in English courts;¹ Manlio Bellomo has pointed out that the doctrines of the *Ius commune* guided the practice of Italian courts, penetrated the doctrine and the language of the *ius proprium*, and that the *Ius commune* was ‘the sun, the *iura propria* are the planets.’²

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Bellomo’s metaphor is apt. The *Ius commune*—Roman, canon, and feudal law—was taught in the universities of Europe between the eleventh and sixteenth centuries. Although only canon and feudal law had practical application in the courts of Europe, the jurists wrote commentaries on all three laws and fashioned a jurisprudence of great sophistication. Over the centuries, their teaching, writing, disputing, and questioning created an array of norms that became the common coin of European law. These norms were adopted, adapted, and assimilated into every European legal system. No legal system ‘received’ these norms formally, but every jurist who had been trained in the law schools was shaped by them.

Historians of all stripes have embraced the Muse of the *Ius commune*, but while acknowledging her importance for understanding the structure of society they have often betrayed her. Social historians record the number of weights on her scales, but do not see justice through her eyes. Political historians ask her to explain the pragmatic politics of princes, but never learn her principles. Legal historians have been transfixed by the intricate detail of her jurisprudence, but do not recognize her pervasive influence.

I would like to make several points in this essay. First, the historians of national legal systems are still, by and large, balkanized. They study, explain, and trace the history of their legal systems with only a cursory nod in the direction of the *Ius commune*. Second, within the *Ius commune*, some historians still approach a topic as if its various parts can be studied in isolation. A Romanist will study a doctrine of Roman law as if canon and feudal law had only tangential influence on the development of the thought of the civilians.

This balkanization of the *Ius commune* itself is endorsed by the titles of the journals in the field. There is a Bulletin of Medieval Canon Law, a Revue de droit canonique, Revista española de derecho canónico, three Zeitschriften der Savigny-Stiftung für Rechtsgeschichte, Kanonis tische, Romanistische, and Germanistische Abteilungen. As Manlio Bellomo has observed, these titles help to convey the idea to readers and scholars working in these fields that each law has a separate history, independent of the other.3

3. *Id.* at 92. And scholars still write monographs on doctrines in canon law or Roman law without looking at the *Ius commune* as a whole piece of cloth. A recent example of this type of scholarship is Hans Peter Glockner, *Cognitionis poenam nemo patitur: Zu den Anfängen Versuchslehre in der Jurisprudentz. der Glossatoren in Ius commune*, Sonderhefte, Studien zur europäischen Rechtsgeschichte 42 (Frankfurt am Main 1989) who concentrates almost exclusively on the civilians.
Our textbooks reflect the same categories. Theodore Plucknett's *History of the Common Law* devotes a chapter to Roman law and its influence on English law and a chapter to canon law. When he discusses the influence of each on English law, he separates Roman law's influence from canon law's by a number of pages and by a sure conviction that each can be treated in isolation. Maitland, in contrast, did not separate these two key ingredients of the *Ius commune* from each other in his *History of English Law*. He did not know the terminology that we use today, but he wrote as if he did. Even Maitland, however, did not completely understand the relationship of the *Ius commune* and secular legal systems. At the end of his chapter on Roman and canon law, he writes:

Our English law shows itself strong enough to assimilate foreign ideas and convert them to its own use. Of any wholesale 'reception' of Roman law there is no danger.... From time to time the more learned among them [king's justices] will try to attain a foreign, an Italian, standard of accuracy and elegance; they will borrow terms and definitions, they will occasionally borrow rules; *but there must be no dictation from without* [my emphasis]. The imperial laws as such have no rights in England; the canon law has its proper province and should know its place.

From the perspective of the late twentieth century, these concluding thoughts on the influence of the *Ius commune* seem quaint and patriotic—even if they were Maitland's. He imagines that there was no danger of a wholesale reception of Roman law; but there was no danger of that anywhere in Europe. The *Ius commune* provided an intellectual model, not a tool of conquest. Englishmen, Maitland assures his readers, sure of their Englishness, would brook no dictation from without. However, the *Ius commune* ruled nowhere by force. English jurists filled their libraries with the books of the *Ius commune* that remain in England until the present day. They took what was useful to them; they left what was not. English jurists voted with their feet, although they may not have been as swift afoot as others who were closer to the great centers of learning. The point is that every European legal system had the same relationship to the *Ius commune*; England was not a solitary, insular, and precocious exception.

6. *Id.* at 135.
Finally, to come to the title of this paper, the first two points may in many ways be summed up briefly; even the terms that we use to describe the *Ius commune* convey the idea that the law taught in the schools of Europe from the eleventh to the sixteenth century is academic law, Juristenrecht, fit only for professors and other bookish types. Doughty lawyer types not only did not know it, they scorned it. They would not submit to its dictates. Consequently, legal historians feel free to ignore the *Ius commune* when they study the history of the law of their nation state.

Almost everyone who has trolled the waters of legal history during the past twenty-five years, including myself, has not taken the *Ius commune* fully into account when one should have. Within the past twenty-five or so years legal historians have become aware of the linkages between the two major components of the *Ius commune*, Roman law and canon law, and in turn, the great influence that the *Ius commune* exercised over other legal systems in Europe. What I would like to demonstrate in the following remarks is how preconceptions and language can affect interpretation.

One of the foremost interpreters of medieval English law today is S.F.C. Milsom. In 1968 he wrote an introductory essay for a reissuance of Pollock and Maitland’s *History of English Law*. Milsom’s essay covers fifty pages. His conclusions are pertinent:

This essay has suggested, not that Maitland misheard, but that sometimes he misunderstood... It is the framework of their discussion that is in issue, their factual and intellectual situation... If Maitland set his watch by any one source, it was by Bracton. But Bracton’s Roman learning, good or bad, may have been chiefly important as vicarious experience enabling him to see with eyes not representative of his own time... What Bracton did was to describe the common law, but from a view-point that its practitioners did not share. What the practitioners started from was *Brevia Placitata*. This is to suppose a difference between Bracton and the practitioner more fundamental than the mere knowledge of some Roman rules... It is also to attribute to book learning in legal matters a force greater than that seen by Bracton himself... greater than that seen by Maitland himself when he spoke of the toughness of taught law. It is not a matter of knowledge... it is a question of the terms in which a lawyer thinks. I believe that in some respects Maitland, working as it were backwards from Bracton, supposes too great a degree of general sophistication.7

7. *Id.* at lxxii-lxxiii.
Let me gloss Milsom's text. 'Maitland set his watch by Bracton.' Maitland was too captivated by Bracton's learning. 'Bracton's Roman learning <was> a vicarious experience enabling him to see with eyes not representative of his own time.' Milsom's sentences are sometimes not easy, and this one is challenging. It might mean Bracton's study of the *Ius commune* transformed him into a 'learned lawyer' who viewed English law from the school room. Consequently, he could not see the rough and tumble of thirteenth-century English law through his bookish spectacles. I am open to other interpretations. In part, I rest my interpretation on Milsom's next sentence: 'What Bracton did was to describe the common law, but from a viewpoint that its practitioners did not share.'

Let us reflect awhile on that sentence. Bracton was learned, a professional type. He could not understand the law as a simple practitioner understands the law. Therefore, he misunderstood thirteenth-century English law. He thus misled Maitland.

In the end, Milsom's assertion is unprovable, and I shall not debate it, only highlight its assumptions. However, we can examine his presuppositions. Bracton knew too much law, he described English law using the sophisticated terminology of the *Ius commune*, and therefore misled himself, misled Maitland, and left everyone else in England lying stupefied before him.

One might be skeptical of such a hypothesis on its own terms. If Samuel Thorne's theories about Bracton are correct, Milsom should, perhaps, rethink his Bracton. If there had been an Ur-Bracton, and if a number of hands participated in revising the work we call Bracton over a long period of time, then Bracton was far from being a solitary figure. The number of manuscripts of Bracton's treatise are further evidence that Bracton's knowledge was neither unique, nor unappreciated by English jurists during the thirteenth and fourteenth centuries.

To return to Milsom. He argues that the difference between Bracton and the practitioner was more fundamental than mere knowledge of some Roman rules—historians attribute book learning in legal matters a force greater than that seen by Bracton himself. It is, Milsom proclaims, a question of the terms in which a lawyer thinks. I'm sure that Milsom thinks of himself as pragmatic and hard-headed. No wooly ideas will deflect him from piercing to the root of medieval English law. Practitioners, not ideas, shaped English law from Bracton on. Legal institutions, Milson believes, are built from the bottom up, and if we look

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at the superstructure of ideas, we shall lose ourselves in a fog of phantas-
magoria. From this viewpoint, the *Ius commune* could not have had
connections to English law because the sturdy practitioner of English
law, Master Necessity, echoed the famous legal maxim of the *Ius com-
mune*, necessity knows no law.

A year later when Milsom published his *Historical Foundations of the Common Law*, he divided the thirteenth century into two parts. The
age of Bracton and post Bracton. Actions became the domain of the
narrators or counters in the thirteenth century. According to Milsom,
they had no legal learning and could only recite formal statements of
claim for their clients. The counters produced *Brevia Placitata* at the
same time that Bracton produced his work. To use Milsom’s words:

The former was to prove fruitful, the latter sterile... just as the writs in
*Brevia Placitata* show counters looking upward to learn the administra-
tive and jurisdictional elements, so Bracton’s book shows the adminis-
trator looking downward at what was happening in court... Like the
best civil servants of a later age, Bracton and his kind had, as it were,
read the greats.

I may or may not have correctly and fairly characterized Milsom’s view
of the evolution of English law, but his last sentence is telling. He
clearly thinks that learned law, the *Ius commune*, is an intellectual con-
struct that has no real significance in the development of English legal
institutions. The *Ius commune* is book learning, a vicarious experience,
knowledge that was like reading the greats.

Is that true? To believe that any of these definitions of the *Ius commune* is true would mean believing that the law schools of Europe
taught English students the principles, the nuts and bolts of Roman and
canon law, only because those students wanted to study the greats of
law. They brought hundreds of legal manuscripts to England, had more
copied, merely to have the greats of law on their shelves. If this is true,
it is one of the most bizarre stories in the history of law.

Historians of later English law often write their histories as if Milsom
is right. And that is lamentable. One example will illustrate my
point. Norman Doe recently discussed consent, equity, natural and posi-
tive law, and justice in fifteenth century English law. He plunges into
the Year Books and statutes with almost no attention to the *Ius com-
mune*, and his assumptions, that he shares with Milsom, have led him

10. Norman Doe, *Fundamental Authority in Late Medieval English Law* (Cam-
astray. In chapter three he finds a contradiction in the legislative doctrine of Fortescue:

For, at the same time as saying ‘law is that which is consented to by king and people,’ and ‘bad rules are still laws’, Fortescue also says ‘law is that which is authorised by divinely created natural law,’ and ‘bad rules, if they offend natural law, are not laws at all’.11

Doe argues that Fortescue is not consistent. But, he writes in another place, his ‘outlook tallies with those of his predecessors and contemporaries:’ Augustine, John of Salisbury, and Gratian.12 If he had even glanced at the Ius commune, he would have found that Fortescue’s doctrine did not contradict itself, but only reflected legal platitudes of the fifteenth-century Ius commune. Foretscue did not draw is legislative theory from Augustine, John of Salisbury, or Gratian (a strange triumvirate for a historian of late medieval law to draw upon in any case). All three would have been baffled by the idea that bad law could be valid law. But more importantly and to the point, putting Fortescue’s thought in context by comparing it to this troika is simply betraying Fortescue.

A jurist of the Ius commune would have expressed Fortescue’s notion of law by saying that ‘law should be consented to by the prince and by the people.’ Even unjust or bad laws are valid because the source of law is in the will of the prince. They had a maxim to express the idea: ‘pro ratione voluntas.’ The jurists had decided in the first half of the thirteenth century that the will of the prince was the key element that defined the validity of positive law. Therefore, if a statute of positive law was ‘bad,’ that is unreasonable or unjust, it was still valid law. They wrote: ‘If, however, a law violates a principle of natural or divine law, that law is invalid.’ Fortescue did not claim that all positive law emanated from natural law, only that some positive law was derived from natural law. Every jurist of the Ius commune would have agreed. Fortescue’s theory of legislation is not inconsistent or incoherent, but has the unmistakable imprint of the Ius commune.13

The context of every medieval legal text is crucial. When the Ius commune is omitted from the historian’s purview, the results can be seriously misleading. Joseph Strayer probably knew the French legal records of the late thirteenth and early fourteenth centuries, as well as anyone who has studied them. In his long distinguished, career he rather

11. Id. at 83.
12. Id. at 78.
13. For a discussion of these issues, see KENNETH PENNINGTON, POPE AND BISHOPS: THE PAPAL MONARCHY IN THE TWELFTH AND THIRTEENTH CENTURIES 17-29 (Philadelphia 1984) and THE PRINCE AND THE LAW, 1200-1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION Ch. 3 passim (Berkeley-Los Angeles 1993).
proudly and consciously kept the 'learned law' out of his text. In one of the last works he wrote, he examined an early fourteenth-century French court record, in which he found a passage that he thought illustrated Roman law's royalist and authoritarian tendencies in the hands of the French jurists of Paris. With some relish he wrote:

En fait, le droit romain est devenu ‘royaliste’ seulement quand il s’est établi à Paris. La poignée de gens de justice formés au droit romain qui ont travaillé là ont acquis la ‘religion de la monarchie,’ et ils ont interprété leurs connaissances juridiques à la lumière de leur nouvelle foi. Plaisians illustre peut-être, avec ses célèbres remarques sur l’autorité royale, en Gévaudan, le cas le plus extrême de cette tendance.

The text of Strayer’s ‘extreme case’ in the following:

Omnia que sunt intra fines regni sui sint domini Regis, saltim quoad protectionem et altam jurisdictionem et dominationem et etiam quantum ad proprietatem omnium singularium rerum . . . quas dominus Rex donare, recipere et consumere potest, ex causa publice utilitatis deffensionis regni sui . . . Item quod dominus Rex sit imperator in regno suo et imperare possit terre et mari et omnes populi regni sui eius regantur imperio.14

Strayer knew that this text drew upon Roman law. He read it literally and drew what he thought were self-evident conclusions. What he did not know was that these ideas date back to the twelfth century.15 Accursius wrote in the mid-thirteenth century to Cod. 7.37.3 (Bene a Zenone), the locus classicus for discussions of the emperor’s sovereignty:

Omnia principis esse intelligatur: et hic expone ad protectionem uel jurisdictionem . . . Vel uerius omnia sua sunt, scilicet fiscalia et patrimonialia . . . Vnde codex meus non est principis.

No jurist of the thirteenth or early fourteenth centuries interpreted the phrase ‘all things belong to the king or emperor or prince’ as Strayer interpreted it. They cheerfully acknowledged that the king might be said to have jurisdiction over all things, but they recoiled from concluding that this doctrine granted the king the right to expropriate property arbitrarily or to rule tyrannically.16 Furthermore, this French jurist acknowledges that the prince must act according to the public utility, the norm with which the jurists limited the prince’s authority to confiscate his


16. See id. at chs. 1, 2, and 3.
subjects' property. The jurists of the *ius commune* had created the terminology of *utilitas publica* a century before.

Strayer never would have written the paragraph that I have just quoted if he had read the *Glossa ordinaria* of Justinian's Code and the commentaries of the thirteenth century on the pertinent texts of Roman law. An unreliable witness has reported that he 'hated . . . Romano-canonical scholarship, which Strayer early saw was something of a racket.' 17 Whether Strayer hated the scholarship of the *ius commune* or not is an open question; he did not, however, know it.

One last example from Italy. In a recent book James Grubb put forward the remarkable thesis that the city-state of Venice rejected Roman law and the *ius commune*. 'Since Venice recognized no superior, it held a status independent of and equivalent to the emperor . . . Venetians make no use of the *ius commune* in sentences delivered in Venice.' 18 Grubb's claim is based on the work of Lamberto Pansolli.19 Pansolli cites texts to prove that Venice recognized no superior, was a sovereign state, and, consequently was not ruled by imperial law, but 'natural justice and its own laws.' 20

If Grubb and Pansolli are right, it would be one of the most intriguing stories of legal history. The Venetians compiled and codified their law in the twelfth and thirteenth centuries. Jacopo Tiepolo compiled a *Liber statutorum et legum Venetorum* in 1242. He modeled his new collection on Pope Gregory IX's *Decretales*. Andrea Dandolo imitated the model of Pope Boniface VIII's *Liber sextus* when he issued his own *Liber sextus* in 1346. The *ius commune* infiltrates every nook and cranny of these compilations.

Grubb claims that these statutes fell into disuse during the fifteenth century.21 This is an interesting theory. The statutes were translated into the Venetian dialect in 1477 and printed. In 1492, the Latin text and the translation were published together. Jacobo Novello printed the statutes again in 1564, and a final edition appeared in 1729. Either the Venetians were fascinated by legal history or they expended a lot of energy on statutes that were no longer used.22

20. *Id.* at 223-26.
22. See generally ARMIN WOLF, DIE GESetzgebung DER ENSTEHENDEN TERRITORIALSTAATEN, IN 1 HANDBUCH DER QUELLEN UND LITERATUR DER NEUERN EUROPÄISCHEN PRIVATRECHTSGES-
This example also illustrates the importance of understanding the language, norms, and principles of the *Ius commune* before leaping to ‘sensible’ and ‘obvious’ conclusions. Neither Grubb nor Pansolli recognizes the implications of the language of medieval and early modern sovereignty. When the jurists argued that a king, prince, city-state was ‘imperator in regno suo’ and ‘non superiorem recognoscunt,’ they established the authority of the king, prince, city-state to make law, to abolish law, and to be sovereign over their territory. They are, in other words, talking about the right of the prince or state to make, derogate, abrogate law without interference from a superior. This was a key issue of medieval jurisprudence. They are not discussing by which law their judicial system should be governed. These jurists understood that the positive law of the prince, or the state, and custom regulated local legal practices and statutes. They are not ‘rejecting’ the Roman law of the schools, the *Ius commune,* or any other set of norms.

The Venetians themselves had a close relationship to the *Ius commune.* They had one of the most distinguished law schools of the *Ius commune* at their doorstep, their sons attended its lectures and graduated with its degrees, their printers produced edition after edition of its jurisprudence, and most importantly, their law was saturated with its terminology, norms, and maxims. It would have been surprising, startling, if Venetians had consciously rejected the norms of a legal system that had shaped their own jurisprudence and the jurisprudence of every legal system of Europe.

One example of the norms of the *Ius commune* regulating Venetian law is provided by Patricia Labalme in her article on the prosecution of sodomy by Venetian courts. The torture of defendants and witnesses was severely circumscribed by the *Ius commune,* and the Italian city states generally enacted legislation to protect their inhabitants from arbitrary treatment at law. Labalme has shown that the norms of the *Ius commune*...
commune had been incorporated into the procedure of the Venetian courts during the fifteenth century and that these rules of procedure offered some protection to defendants from arbitrary treatment, even when the crime was as heinous as sodomy.27

Manlio Bellomo has used the imagery of the Ius commune as the sun and the iura propria, the legal norms of kingdoms, principalities, and city-states, as the planets, to explain the relationship of the Ius commune and iura propria.28 The metaphor is perceptive and accurate. The sun is not an inert mass, without energy or gravity, that does not exercise any influence on the planets. To describe the sun as a great theoretical star in the sky that has no real life or influence of its own would be silly. On the other hand, the planets have their own conditions, forces, norms that regulate their self-contained worlds. Each planet has a different set of rules, but each is affected in different ways and from a different distance by the energy of the sun. No planet would reject the sun; it would be folly and thinkable. The result would be chaos for the planet's system.

My conclusions can be stated succinctly: The Ius commune was not bookish law, was not the law of the greats, to be read, savored, and returned to the shelf, was not learned law in contrast to real law. It was the cauldron from which much of the precious metal of all European legal systems emerged.

27. Labalme, supra note 25, at 222-225, 227-229 (for other examples of 'due process' in the cases of sodomy, see 243-244).