Canon Law and the Common Law

By William W. Bassett*

Shortly after the publication in 1922 of the second volume of his edition of Bracton's On the Laws and Customs of England,1 George Edward Woodbine turned his attention to a lengthy study of the origins of the action of trespass.2 Woodbine was, no doubt, the ranking historian of the early common law in America in the decades bracketing the First World War. He was a scholar of solid repute and a friend and collaborator of Sir Paul Vinogradoff, one time Regius Professor of Roman Law at Oxford, and of the well-known Sir Frederick Pollock. He had spent a considerable portion of his adult life at Yale Law School in patient study of original source materials of legal history brought back from visits to the libraries of England and the Continent. In his study of trespass, which was otherwise a singular contribution to legal history, Woodbine stated that the action of trespass derived from the so-called actio spolii, a suit developed in the medieval canon law for damages for interference with the right of possession.3

By asserting that the origin of the action of trespass was in the canon law, Woodbine intended to counter the theory of Harvard's James Barr Ames4 that the action of trespass came into the King's

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3. Id., (pt. 1) at 807.
courts from the old popular courts of the hundred and the county. Woodbine adapted the research and analysis of Frederic William Maitland so as to link the origins of the common-law suit for damages to the legal conceptualizations of the jurists of the only truly international system of law the West has ever known, the canon law. He concluded that King Henry II and his advisors had looked not to Anglo-Saxon origins but to canon law to shape the action of trespass for the common law courts. Woodbine noted, almost parenthetically: "It is ... generally agreed, that for a half century on either side of the year 1200, the civil and canon law directly influenced the development of English law."

Since the mid-twenties, when Woodbine wrote, there has been a renaissance of studies of medieval canon law. Samuel E. Thorne


6. Woodbine connected the actio spolii, an adaptation of the old Roman Law interdict unde vi, to the introduction in 1166 of the assize of novel disseisin. For his understanding of the actio spolii in canon law, he apparently relied exclusively upon the work F. Ruffini, L'Actio Spolii: Studio Storico-Guirdico (1889).


8. Id. at 813. Woodbine cited his own study published two years earlier, The Roman Element in Bracton's de Adquirendo Rerum Dominio, 31 Yale L.J. 827 (1922). In this article Woodbine neither mentioned nor referred to any sources in medieval canon law. Yet we know now that Bracton knew canon law well and that much of his knowledge of Roman Law derived from the canonists. On Bracton's relationship to the canonistic tradition and the influence upon him of his contemporary and, perhaps, teacher, William of Drogheada, the canonist and regent master at Oxford, see H.G. Richardson, Azo, Drogheada, and Bracton, 59 Eng. Hist. Rev. 22 (1944). See also Post, Bracton on Kingship, 42 Tul. L. Rev. 519 (1937-1938); Thorne, Introduction to 1 Bracton, On the Laws and Customs of England at xxxiii-xlvi (S.E. Thorne trans. 1968).

9. Woodbine cited no primary sources of medieval canon law. Aside from Ruffini, supra note 6, he makes only several passing references to 2 W. Holdsworth, A History of English Law 176-77, 202-05 (1923) and 1 F. Pollock & F. Maitland,
has reedited and corrected Woodbine’s Bracton. The action of trespass has been reexamined, most recently by S.F.C. Milsom. Donald Sutherland and J.R. Strayer have done enormous work to unravel the mysteries of novel disseisin. H.G. Richardson and G.O. Sayles have taken up the canonists’ actio spolii again in reference to trespass, only to find serious objections to Woodbine’s theory indicated by the anachronism of ascribing to the thirteenth-century actio spolii an influence on English law existing half a century before.

Woodbine’s theory of the origins of trespass failed because he knew too little about medieval canon law. A vital comparative and contextual element was missing in his research. He had consulted but a single source to study a pivotal notion in the medieval canon law. Woodbine’s limited perspective, therefore, resulted in a conjecture so uncertain in its foundation that it could not survive the rigors of subsequent research.

Woodbine’s theory of the origins of the action of trespass is now dated and largely superseded by scholarly events. His theory, however, serves as a good starting point to illustrate the following idea pursued in this Article in sketching the relationship between canon law and common law. It is not historically unreasonable to look to the institutions of canon law for the medieval origins of modern

The History of English Law 116 (2d ed. 1898). Today, scholars may be quite overwhelmed by hundreds of studies of medieval canon law, as well as a growing library of critically edited primary source materials, appearing annually in journals and publications throughout Europe and America. See, e.g., Bulletin of Medieval Canon Law for bibliographical surveys compiled annually since 1956 under the direction of Professor Stephan Kuttner of the School of Law (Boalt Hall), the University of California at Berkeley. The Institute of Medieval Canon Law published its annual Bulletin in Traditio, vols. 12-26 from 1956-1970; thereafter it has been published separately as the Bulletin of Medieval Canon Law.

15. See note 6 & accompanying text supra.
causes of action, even of an action as mundane as that of trespass. Having looked in that direction, however, an historian is well advised to look even further to grasp the historical genesis and rationale of many of the most fundamental principles and values preserved in the law today.

Historians have access today to more information about canon law than ever before in history. On the basis of this newly-found knowledge in the English-speaking world, historians now can say that the influence on canon law was more foundational, in some areas more defined and in others more pervasive, than could possibly have been conceived by even the greatest of the English or American historians of the first half of this century. The influence of canon law was not limited to a brief, formative period in the thirteenth century; it extended well into the time of Sir William Blackstone in the eighteenth century.

Similarly, historians cannot circumscribe the influence of canon law by relegating the role of canon law in legal history to a catalogue of discrete actions, rules, or concepts attributable uniquely to the canonists. The canon law in its mature form was an international system of law created in the early Middle Ages as the first completely rational and scientific system of law the world has known. To a large extent it embodied the intellectual consensus of Western jurists about the practical meaning of man, nature, and society in the complexity of their real and ideal relationships. This consensus existed not only in the centuries of a united Christendom but lasted in philosophical principle into the nineteenth century beginnings of modern positivism. Medieval canon law served to diffuse the Judeo-Christian heritage of values surrounding the dignity of man through countless practical ramifications in life and social structures.

The medieval canon law is thus a vital part of the Western legal tradition. The English common law, as Raoul van Caenegem has pointed out in an effort to temper the chauvinism of English historians and as Harold Berman has very recently illustrated, is a part of that same tradition. It would be a serious distortion of historical facts to imagine that the common law developed within the fast of

the island fortress tutored solely by a supposedly singular English genius. The common law and its institutions owe an incalculable amount to an international legal culture that developed in the Middle Ages and to the creative genius of the canonists who were a significant part of that culture. At a time of immense intellectual and legal ferment in the renaissance of the early Middle Ages, the canonists created a system of law that first articulated many of the principles of modern law and of the democratic institutions of modern government.

Although English historians often refer to canon law as ecclesiastical law, this appellation betrays the reality that the canon law was the creation of both clergy and laity, including popes, bishops, officials of kings' courts and courts Christian, professors, and the jurists who occupied the major law faculties of Europe and England. The canon law quite properly addressed such secular actions as trespass, because it was a legal system intended to be more than a law for the church. The canon law was not limited to a congeries of rules governing belief or restricted to the affairs of the soul. In its maturity the canon law was a complete, detailed system of law in both practical and ideal dimension. It was a great attempt in a formative age to use law to achieve justice in the total life experience of men and nations. The medieval canon law was an endeavor to enshrine the Christian ideal in law. It paralleled in law the comprehensive Christianization of grammar and rhetoric, philosophy and cosmology, and art and science that marks the ages of Christendom. The canon law carried a detailed ideal of life and practical adjudication of life's affairs, deliberately intended to be an example to secular jurists, both to the civilists of the Roman-law tradition and the common-law practitioners, of how law should relate to justice from the ideal vantage point of a Christian perspective.

In the past few generations, the medieval canon law has become the object of increasing scholarly interest because it represents an important starting point in the study of the history of Western ideas. The canon law and the doctrines of the great canonists are important, as Richard O'Sullivan has convincingly demonstrated, because foundational principles of the Western legal tradition, including the common law of England, especially the conception of the free and lawful man, owe their formulation largely to the writings of Christian

philosophy and their practical application to the canon law. The old saying, "Christianity is a part of the law of England," does not imply that particular rules of Christian teaching can or ever could have been enforced in the common law courts. It does mean, however, that the basic principles and institutions of the common law are the products of a civilization whose principal values and ideals were articulated by the canon law which once dominated western Europe.20

The Canon Law

When in 1140 the Camaldolese monk, John Gratian of Bologna, completed his great compilation of the ancient canons and disciplinary regulations of the church, the *Concordia discordantium canonum*,21 canon law came of age as a distinct legal system and as a science.22 Gratian not only compiled the entire complex body of regulations23 for the Christian life and the administration of the church adopted by councils, popes, and patristic writers over the preceding eight or nine centuries, he also subjected the materials to a rigorous dialectical analysis. Although the church never formally adopted Gratian's work, the *Decretum*, as an official text of the canon law, almost immediately upon its appearance it became the fundamental and universally-consulted canonistic collection, upon which all subsequent development of canon law depended.

The work of Gratian was completed in the waning years of the Investiture Struggle,24 the great crisis between church and state,

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21. Also known as the *Decretum* or the *Decretum Gratiani*. The standard, though imperfect, text of Gratian was edited by E. Friedberg and published as the first volume of the *Corpus Iuris Canonici* (1879).
23. In ancient tradition the disciplinary regulations of the early councils were called the sacred canons, canones, meaning standards or rules of morality and belief, as distinct from the civil laws, nomoi, which were essentially secular.
which formed the threshold of the twelfth century renaissance. The Decretum (the Decree) provided a methodology for harmonizing the regulations of the church and hermeneutic criteria for their authentication and relative arrangement. It distinguished for the first time the relative from the absolute in law and the particular from the general, and thus set in principle a conceptual foundation for the unification of the canonistic system.

Historians of canon law generally date the classical period in the history of Western canon law from the appearance of Gratian's Decree in 1140 to 1348, when an era of enormous intellectual creativity in law was terminated with the death of the great lay canonist John Andreae.²⁵

**Pre-Gratian Collections**

Prior to 1140 there existed numerous collections of the canons of the church.²⁶ These collections, however, tended to be uneven in accuracy and local in coloring. During the Merovingian period,

Documents are available in an English translation in B. Tierney, The Crisis of Church & State 1050-1300 (1964).

²⁵. A good general history of canon law in English has yet to be written, notwithstanding the urging of English legal historians from as far back as Maitland. See 1 F. Pollock & F. Maitland, The History of English Law 124 (2d ed. 1898). In German two works are commendable: W.M. Flöchtl, Geschichte des Kirchenrechts, (1953-1959); H.E. Feine, Kirchliche Rechtsgeschichte (3d ed. 1955). These works fairly replace the older works of P. Hinschius and J.F. von Schulte, upon which the former generation depended. In French there is a multivolume history now in progress, begun by the late G. LeBras, Histoire du droit et des institutions de l'Église en Occident (1955-). In Spanish the first volume of a general history of canon law is now available in A. García y García, Historia del Derecho Canonico (1967). For technical information on the sources of canon law and the collections, see 1 A. Stickler, Historia Fontium, in Historia Iuris Canonici Latinorum Institutiones Academicae (1950); B. Kurtscheid & F. Welches, Historia Iuris Canonici (1943); Commentarium Lovaniense in Codicem Iuris Canonici 1/1 Prolegomena (A. van Hove ed. 1945). Biographical details of the canonists and the technical meaning of the various institutes of canon law can be found in the seven-volume Dictionnaire de droit canonique (1935-1965). Critical work in progress is regularly reported in the Bulletin of Medieval Canon Law. See note 9 supra.

²⁶. For a detailed exposition and evaluation of these collections see Ryan, Observations on the Pre-Gratian Canonical Collections: Some Recent Work and Present Problems, Congrès de Droit Canonique Médiéval Louvain et Bruxelles 88 (1958).
the early collections, such as the *Dionysiana* or later the *Hispana*, had been supplemented with canons of local councils, particularly those held in Arles in France and, later, Toledo in Spain. Irish-Scottish and Anglo-Saxon missionaries brought to the Continent books of casuistry called the penitentials, for the use of confessors. The penitentials ultimately influenced local practices, first in France and then throughout Europe, in many ways in contrast to the influence of the disciplinary traditions of the ancient church contained in the great canonical collections.

During the Carolingian period, Pepin initiated ecclesiastical reforms by way of an elaborate series of imperial and episcopal capitularies and a number of reform councils. These reforms, continued by Charlemagne, effected an institutional restructuring of the church. Charlemagne also introduced a model code of canon law, the *Hadriana*, which Charlemagne received from Pope Adrian I in 774. From the Council of Aix-la-Chapelle in 802 to the eleventh century, the *Hadriana* was the official book of the canons of the Western church. There existed in the Carolingian era, however, no real ecclesiastical jurisprudence, that is, no theoretical and systematic study of the canons and their sources. As a result, partisans quite frequently cited the canons to cross purposes and used them to support controversial political or ecclesiastical views. It is clear now that the great historical forgeries of the ninth century, the *Pseudo-Isidorian Decretals*, were partially successful because of the great disarray of ecclesiastical legislation caused by the political breakdown and ultimate fissipation of the empire that began with Louis the Pious.


28. An adaptation of the *Dionysiana* promulgated by the Council of Toledo, 589, for use in Spain.


The Gregorian Reform of the eleventh century thus began without any clear consensus as to the nature of authority in the church or in the state. It was initiated in a swelter of contradictory opinions about who could or should control the destinies of the churches, their offices, revenues, and properties. Moreover, the opinions came forth without providing any insight into a method that could be used to distinguish the authentic collections from the spurious ones or to distinguish the important from the trivial in resolving the conflicts among authorities.

Burchard, Bishop of Worms (ca. 1023), had tried to unify the ecclesiastical collections. The eleventh-century Roman reformers dismissed his efforts as too Germanic. Ivo, Bishop of Chartres, made a more successful attempt in his influential Decretum of 1096. Also, in 1096 in a prologue to the Panormia, a general summary of church law, Ivo applied certain principles of biblical and rhetorical hermeneutics to his study of the canons and thereby separated precept from counsel and suggested a principle of relativity in the canons based upon the conditioning of time and place. Ivo and Alger of Liege were on the threshold of a creative insight that eventually pulled the system together and therefore made possible a unified canonical order for the church. Ivo prepared the ground for such a unified system, not merely by cultivating the idea of the rule of law but also by stressing the kind of society that could call itself Christian and the role of law within it. This time was also the threshold that separated the barbarian legal orders in the civil law from the beginnings of the modern legal systems and the science of law in the West.

Two other scholars contributed to the origins of the science of canon law. First, Irnerius (1055-1130), who, in examining the Pisan
manuscript of the Roman Law since 1100, which historians had recently discovered, led a vigorous revival of legal studies and drew students from all over Europe to Bologna. The study of law at Bologna in the twelfth century, begun by Irnerius, was the cornerstone for the creation of law faculties throughout Europe and for the scientific study of law as a distinct intellectual discipline. Second, Peter Abelard (1079-1142) developed between 1115 and 1117 the principles of the scholastic method in a theological setting in the preface to Sic et Non, a treatise in which patristic texts are played off dialectically against one another to achieve a balanced, coherent tradition. The genius of Abelard and Irnerius established a method of scientific analysis culminating in a text of Roman civil law that emerged after a dark age to become a lodestone of intellectual curiosity. This method of analysis captivated a world rising from chaos, desperately searching for understanding and order.

Gratian and a New Methodology

Gratian adopted the scholastic method developed by Abelard in compiling a summa of the canonical tradition. He applied the dialectical method to the conflicting texts supplied by the existing collections; he proposed texts for and against chosen propositions, defined terms rigorously and applied the rules of interpretation relentlessly. The result of Gratian's efforts was the Concordia discordantium canonum, the foundation of a new system of jurisprudence and an ordering of the canons that provided immediate impetus to a new science, a distinct and coherent body of knowledge with its own methodology. The system of canon law soon developed its own profession with jurists, practitioners, faculties and schools of study, a system of courts, and an immense array of treatises that explored,

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38. J. de Ghellinck, Le movement theologique du XIIe siècle (1948).
developed, interpreted, and applied law to the life of the church, as well as to the lives and earthly destinies of men and women. The system created a milieu of its own, an internationally known jargon, a fraternity of scholars, a culture as peculiarly legal as that of the Inns that surrounded the royal courts and public offices of London. No other European ruler of the thirteenth and fourteenth centuries had such a cosmopolitan galaxy of legal talent, learning and practical experience at his disposal as the Pope.

The Decree of Gratian provided a coherent synthesis of the ancient canons of the councils and teachings of the popes on the structure of the church and on the attributes of Christian society. It included the dicta of Gratian, his explanations, interpretations, and generalizations of rules and concepts. The Decree's 3,823 chapters related to virtually every problem imaginable in a Christian society. By 1150, the Decree was in use in schools and chanceries. Its influence in the Middle Ages was without parallel. Only the number of manuscripts of the Bible surpassed those of Gratian's Decree. It assuredly was the most successful textbook ever written. Although never received officially as a code of laws for the church, the Decree became the manual of the Roman Curia from the time of the lawyer pope Alexander III (1159-1181). Commentaries and glosses upon it began to appear immediately, first in Bologna and then in France and England. The commentators of that first generation, the Decretists, expanded Gratian's work, asked new questions, explored new ways of textual criticism, and tested new solutions for a Christian use of law to achieve order and justice. The Decretists provided the first wave of creative development in canon law following Gratian.

Commentaries and Glosses

Gratian's own protege and, perhaps, amanuensis, Paucapalea, was the first to receive Gratian's Decree enthusiastically as a textbook and as the basis of lectures he gave in Bologna.39 Roland Ban-

39. DIE SUMMA DES PAUCAPALEA ÜBER DAS DECRETUM GRATIANI (J. von Schulte ed. 1890). Another major work to benefit from Gratian was the Sententiae of Peter Lombard. The Sententiae, written around the year 1158, became, after the Bible, the most important textbook of medieval theologians. On the relationship between Gratian and Peter Lombard and the influence of the latter on theology, see J. DE GHELINCK, LE MOUVEMENT THEOLOGIQUE DU XIIe SIECLE (1948), and the classic work of 2 M. GRABMANN, DIE GESCHICHTE DER SCHOLASTISCHEN METHODE 392-98 (1911).
dinelli, presumably the same who later became Pope Alexander III, edited a collection of glosses on the text of the Decree sometime before 1148, while he was a lecturer in the canon law studium in Bologna. The Bolognese master Rufinus, Stephen of Tournai, a Belgian who taught in Paris, Sicard of Cremona, and Huguccio or Hugh of Pisa, however, wrote the greatest of the early commentaries on Gratian. Finally, a number of anonymous authors in the first two generations after Gratian, composed works that used and commented upon his Decree. The most notable of these are the Summa Parisiensis, apparently a collaborative effort, and the Summa "Prima primi" created by the Anglo-Norman school of canonists in England between 1191 and 1210.

These early works in canon law, the principal but not exclusive representatives of the twelfth century origins of the science of canon law, were truly international in character. The presence of authors and schools of learning far removed from Bologna, in France, in England, along the Rhine, and elsewhere in Italy, particularly Rome, which were flourishing centers of a common intellectual enterprise, indicates the widespread interest of the times in the study of canon law. The principal but not exclusive representatives of the twelfth century origins of the science of canon law, were truly international in character. The presence of authors and schools of learning far removed from Bologna, in France, in England, along the Rhine, and elsewhere in Italy, particularly Rome, which were flourishing centers of a common intellectual enterprise, indicates the widespread interest of the times in the study of canon law.
law. A new insight into law, well established by the turn of the century, was already having an impact upon the civil and common law, even as far away as England, evidenced by the first treatise on the English common law, *Glanvill*, written in or about the year 1187.

**Early English Masters of Canon Law**

Historians have long remarked on the extraordinary interest the English took in the work of Gratian and his school in the late twelfth and early thirteenth centuries. Papal judge delegates, who used the principles and rules of canon law to handle cases originally appealed to Rome, were a common and well-established part of life by the turn of the century. English scholars compiled collections of papal decretal letters, either of delegation or in response to particular questions addressed to England. These scholars studied the collections as a distinctive supplement within the papal law to Gratian's *Decree*. Schools of canon law studies existed in Oxford, Exeter, Northampton, Lincoln, and London, and probably in Durham and York as well. Advisors to the king, who were the clerks of court, the hierarchy, and barons, were well abreast of the latest developments in canonical jurisprudence throughout the formative period of the canon law tradition. Historians must not underrate the contribution of the Anglo-Norman masters to the development of canon law and legal science in general.

It is clear that the English canonists played an important role in the late twelfth and early thirteenth centuries in the development and spread of canonistic learning. In England the new science of

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canon law first attracted the bishops\textsuperscript{51} and abbots,\textsuperscript{52} who sent clerks to study at Bologna or, later, Paris. Collections of canon law texts appeared as prized possessions in chancery and monastic libraries.\textsuperscript{53} English students flocked to Bologna from the time of Thomas Becket to the beginning of the thirteenth century, when the Englishmen Richard, Gilbert, and Alan and the Welshman John, among others, were among the magistri active in Bologna.\textsuperscript{54} In addition, a separate Anglo-Norman school of canon law existed in England. Masters from England and English schools came to lecture in canon law in Italy, France, and Germany. Master Philip de Calne, who came from London and was a friend of John of Salisbury, a clerk to Archbishop Theobald and Thomas Becket, taught at Reims. Becket, while in exile, recommended de Calne to Fulk, dean of Reims, referring to him as a man learned in humanum ius.\textsuperscript{55} Gilbert de Glanville, later bishop of Rochester, was learned in both civil and canon law and had left England to teach in France. Sometime after 1192, Master P. of Northampton, who had been lecturing in canon law in Paris, sought the permission of the scholasticus of Reims to teach in that city. Benedict of Sawston, clerk to Prince John, royal treas-

\textsuperscript{51} See C.R. Cheney, English Bishops' Chanceries, 1100-1250, 6-21 (1950).

\textsuperscript{52} See 1 F. Pollock & F. Maitland, The History of English Law 121 (2d ed. 1898).

\textsuperscript{53} Benedict, Prior of Canterbury and later Abbot of Peterborough, left three copies of decretal collections, together with two complete texts of the Corpus Iuris Civilis, two copies of Gratian, and several treatises on Roman and canon law at his death. M.R. James, Lists of Manuscripts Formerly in Peterborough Abbey Library, 21 (1926). Baldwin, Bishop of Worcester and later Archbishop of Canterbury, who had been a fellow-student in Bologna with the later Pope Urban II and Stephen of Tournai, left an important collection of decretals to Worcester cathedral library, the famous Wigorniensis. On the tradition of the Worcester collection, see C. Duggan, Twelfth-Century Decretal Collections and Their Importance in English History 49-51 (1963).

\textsuperscript{54} Thomas Becket studied canon law in Bologna as a young clerk and then later, while in exile in Pontigny, studied under the guidance of Master Lombard of Piacenza. Peter of Blois, who became archdeacon of Bath and later of St. Paul's, one of the most learned men of his day, and Master David of London, a counsellor and agent for Bishop Foliot, were also canon law students in Bologna. Vacarius, whom Archbishop Theobald brought from Bologna to Canterbury not long after 1139 and who introduced formal legal instruction in England, was also familiar with canon law, though it is doubtful that he actually taught canon law courses at Oxford. These names are left to history from among the hundreds in England for whom Bologna was the wellspring of legal learning. For estimates of the number of English natives among the ten to thirteen thousand students in Bologna in the mid-twelfth century, see P. Kibre, The Nations in the Mediaeval Universities (1948).

\textsuperscript{55} Kuttner & Rathbone, supra note 48, at 289.
urer, precentor of St. Paul’s, and bishop of Rochester between 1215 and 1226, also lectured in canon law in Paris.\textsuperscript{50} Gerard Pucelle\textsuperscript{57} lectured for several years in Cologne. Finally, before going to Bologna to teach canon law, Richard Anglicus was associated with a faculty of serious canonists in England.\textsuperscript{58} English canonicistic scholarship at that time was more than a mere reception of Bolognese learning. It became a positive, productive school of legal scholarship.

The practical, procedural works of the English canonists of that time are well-known today. Such works include the so-called \textit{Ulpianus de edendo},\textsuperscript{59} the \textit{Ordo Bambergensis} (1182-1185),\textsuperscript{60} and the \textit{Practica legum et decretorum} (1183-1189), written by William Longchamps before his chancellorship,\textsuperscript{61} as well as the voluminous, unfinished treatise on procedure, the \textit{Summa Aurea},\textsuperscript{62} written by William of Drogheda, regent of Oxford in the mid-thirteenth century. In addition to these writings, a large number of works in canon law, not confined to practical matters but rather systematic and jurisprudential in nature existed during the late twelfth and early thirteenth centuries. The earliest systematic treatise on canon law of English provenance was the \textit{Summa De multiplci iuris divisione}, a commentary on Gratian. It was written between 1160 and 1170 and was based to a large extent on the \textit{Summa} of Stephen of Tournai.\textsuperscript{63} In the same period Master Odo of Dover wrote his \textit{Decreta minora}.\textsuperscript{64}


\textsuperscript{57} See text accompanying note 68 infra.


\textsuperscript{59} See \textit{Incerti Auctoris Ordo Iuridicarius} (G. Haenel ed. 1838).

\textsuperscript{60} See \textit{Der Ordo Iuridicarius des Codex Bambergensis} P.I. 11 (J.F. von Schulte ed. 1872).

\textsuperscript{61} See Caillemer, \textit{Le droit civil dans les provinces anglo-normands au XIIe siècle}, \textit{Memoires de l’Academie Nationale des Sciences, Arts . . . 45 CAEN} 204 (1883).

\textsuperscript{62} See \textit{3 Quellen zur Geschichte des römischenkanonischen Processes im Mittelalter} 2 (E. L. Wahrmund ed. 1914).


\textsuperscript{64} See S. Kuttner, \textit{Repertorium der Kanonistik}, 1140-1234, 172-77 (1938) [hereinafter cited as \textit{Repertorium}]. This Odo of Dover, in all likelihood, was the
Thus, a new generation of canonists in England had appeared, devoting themselves to the doctrinal elaboration of Gratian. This generation produced the *Summa qui iuste*, the most complete of all of the early commentaries, as well as an elaborate grouping of other writings, including the very successful *Summa decretalium quaestionum* of Master Honorius.

One of the new generation, Gerard Pucelle, Bishop of Coventry, 1183-1184, taught both laws at the University of Paris in the mid-twelfth century. He was a person of great learning in theology as well as law. Among his pupils were Ralph Niger, the historian, Walter Map, the canonist, Master Richard, and Gervase, who later retired as a canon lawyer in Durham. Pucelle was a counsellor at the court of Louis VII and was a member of Becket's *familia* during the exile. In late 1165 or early 1166 Gerard Pucelle went to Germany on a mission for the emperor, Frederick Barbarossa. He remained in Germany and taught in Cologne until the early seventies, where he apparently had a lasting influence upon a flourishing Rhenish school of canon law. Pucelle may have been involved in composing the *Summa Elegantius in iure divino* in Cologne. Maitland thought Vacarius had used this *Summa*. After returning to Paris, Gerard Pucelle served Archbishop Richard as a canonist, diplomat, and advocate in various cases in England. In Herbert of Bosham's words, he was a canon lawyer, *nomine et fama celebris* to his con-
Thomas of Marlborough spoke of Master Honorius, another of the new generation of English canonists whose *Summa decretalium quaestionum* this Article has mentioned, as one of his teachers. Also, Roger of Hovendon recounts Master Honorius’ long struggle for the archdeaconry of Richmond. His teaching career must have spanned the decade between 1185 and 1195. In 1192 he witnessed, among other magistri, a judgment delivered by John of Cornwall and Robert of Melun at Oxford. In 1195 he served as officialis and vicar general in the service of Archbishop Geoffrey Plantagenet of York. In 1198 Geoffrey conferred the vacant archdeaconry of Richmond upon Master Honorius. This appointment involved Honorius in a series of lawsuits with Simon of Apulia, the powerful dean of York. Record of these suits was included in a series of papal letters until the case was finally decided in Rome in 1202.

Honorius’ *Summa* is a work of singular literary merit. He combined the characteristics of a systematic summa with the dialectical techniques of the quaestiones. He dealt with procedure, orders and offices, and marriage. A general introduction and a survey of the law preceded each section.

The work of Honorius is a singular jurisprudential contribution. In the *Summa’s* preface, he announced the literary genus of his work as quaestiones decretales, and by so doing, he used a technical term for quaestiones, that is, discussions of problems pertaining to the interpretation of the decreta or the canon law. This usage is similar to that of quaestiones legitimae of the civilians, which pertain to the interpretation of the leges. The questions, varying in length and form, concerned problems of construction and interpretation presented by the law itself. They also concerned problems of clarifying the juridical nature of or the specific rules governing a particular institute, as well as practical problems presented by a case or a hypothetical situation. Honorius used the dialectical technique of the masters of Bologna to argue and solve difficult and dubious legal

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72. III MATERIALS FOR THE HISTORY OF THOMAS BECKET 525 (J.C. Robertson ed. 1875-1885).
73. See note 67 & accompanying text supra.
75. See Pipe Roll, 3 John 160 for record of a 300 mark debt Honorius owed King John for letters of protection for his journey to Rome in 1201.
problems. His *Summa decretalium quaestionum* remains the leading representative of a literary type of forensic debate that canonists came to use throughout the schools in the succeeding years as a professorial, lecturing technique, a legal counterpart to the *quaestiones disputatae* of the theologians. The formal training in common law given in the Inns of Court incorporated this literary elaboration of cases and problems in law.\(^7\)

John of Tynemouth, another master of the Anglo-Norman school, and a member of that new generation, left his record in the late twelfth century copy of the *Decree* of Gratian containing a wealth of glosses, now known as Manuscript 676 (283) of Gonville and Caius College, Cambridge.\(^7\) Historians have concluded that the glosses are based on lectures given by John because so many are ascribed to J.Ti.J. at Cambridge or Jo.de Ti. John of Tynemouth and his colleague Simon of Southwell frequently pitted themselves against each other as rivals. They debated a wide range of law, from items of topical interest derived from the Becket controversy to the relative severity of the *leges* and *canones*, the relations between Christians and Jews, and marriage law. The glosses contain references to numerous Bolognese scholars, as well as to other English canonists, such as Master Simon of Derby, Master John of Kent, presumably a clerk of Archbishop Hubert Walter, and Master Gregory of London, persons whose names remain now as mere scratchings in the chronicles of legal history.

The English masters of canon law lectured in schools in Exeter and Lincoln and with Vacarius during his stay in Northampton. Oxford, however, where Vacarius taught Roman law in Stephen's reign, continued as the chief school of canon law in England. During the pontificate of Alexander III, about 1175, the studium of canon law at Oxford became so well established that students travelled from overseas to study canon law there.\(^7\) With English clerks they took down the glosses *ex ore magistrorum*.\(^7\)


\(^7\) *Repertorium*, supra note 64, at 22.

\(^7\) For example, Nicholas of Hungary, whom King Richard of England supported there for several years (Pipe Rolls, 5-8 Ric. I, 22, 88f. 142, 70); Emo of Friesland and his brother Addo who sat up all night copying the *Decretum*, the *Decretals* and the *Liber Pauperum* of Vacarius (*Menkonis Chronicon*, 524, 531 [L. Weiland ed., M.C.H. Script 23]).

\(^7\) *Menkonis Chronicon*, 524: "Parisiis, Aurelianis et Oxonie audierunt et ex ore
This thumbnail sketch of the Anglo-Norman school of canonists illustrates the early role English scholars played in the origins of the science of canon law. This summary points up the widespread interest in canon law studies and profound knowledge of the canons that existed in England in the formative years of the universities and the common law, in the reigns of Stephen, Henry II, Richard I, and John.

Phase two in the classical development of canon law encompasses the growth of the decretal law. Historians have reason to believe that as the science of canon law matured, the canons and their interpretation remained of vital interest in England.80

The Decretals

Stephen of Tournai complained to Pope Gregory VII toward the end of the twelfth century about a dilemma that serves to introduce the second phase in the development of canon law. The flow of papal rescripts, which were written answers to inquiries about matters of law or belief, had begun to enlarge the law, modify it, and render once simple solutions almost hopelessly complex. Stephen, in admonishing the Pope, stated:

Again, if a case comes up which should be settled [under the] canon law either [by your judges' delegate or by the] ordinary judges, there is produced from the vendors an inextricable forest of decretals [letters presumably under the name] of Pope Alexander of sacred memory, and older canons are cast aside, rejected, expunged. When this plunder has been unrolled before us, those things which were wholesomely instituted in councils of holy fathers [do not settle the case, nor is the conciliar prescription followed], since letters prevail which perchance advocates for hire invented and forged in their shops or cubicles under the name of Roman pontiffs. A new volume composed of these is solemnly read in the schools and offered for sale in the forum to the applause of a horde of notaries, who rejoice that in copying suspect opuscula both their labor is lessened and their pay increased.81

magistrorum glossaverunt . . . Oxonie etiam Decreta, Decretales, Librum Pauperum necnon alios libros canonici iuris et regulis, vigilias dividendo scripturunt, audierunt et glossaverunt.”


81. UNIVERSITY RECORDS AND LIFE IN THE MIDDLE AGES 23-24 (L. Thorndike
Gratian’s Decree may have suggested almost as many questions as it had provided answers. The papacy, having emerged from the Gregorian Reform as the undisputed guardian and master of the canon law, attempted to answer the questions raised by the canonists. This attempt resulted in a flood of rescripts and decretal letters from the papal chancery, replies to particular questions, letters of delegation to local judges with instructions in the law applicable to particular cases,\textsuperscript{82} and mandatory solutions to moral problems. The multiplication of papal decisionary letters, particularly between 1159 and 1216 (from Alexander III to Innocent III), and the growing importance of the rules they contained necessitated new collections. These new collections, or Compilationes of the papal decretals, together with Gratian’s Decree and glosses upon the Decree,\textsuperscript{83} greatly enlarged and developed the canonistic science.

\textsuperscript{82} A rescript was a reply to a letter initiated elsewhere and sent to the Roman Pontiff. A decretal letter, whose style the popes had borrowed from the Roman imperial administration, was an authoritative papal statement on a controversial point in doctrine, liturgy, or discipline. The decretal letter was addressed to and created law for individuals and communities. Pope Siricius in 385 issued the oldest extant decretal. It was to the Spanish bishops to settle authoritatively a number of disputed points. 13 P.L., supra note 32, at 113. W. Stelzer, Reskript und Reskripttechnik, 14 Rom. Hist. Mitteilungen 207 (1972). See also P. Herde, Beiträge zum päpstlichen Kanzleium und Urkundenwesen im 13. Jhdt. (2nd ed. 1967); Papal Formularies for Letters of Justice (13th - 16th Centuries), Proceedings of the Second Intl. Congress of Medieval Canon Law 322 (1965). W. LaDue has made a very interesting and provocative comparison between the papal rescripts and the English royal writs of the same era, which suggests similarities and a strong derivative influence. W. LaDue, Papal Rescripts of Justice and English Royal Procedural Writs, 1150-1250 (1960). The Registers extant from the period of the high Middle Ages indicate hundreds of thousands of documents emanating from the papal Chancery. L.E. Boyle, A Survey of the Vatican Archives and Its Medieval Holdings 103 (1972). For examples of procedural formularies used in commissions to English judges delegate, see C.R. Cheney, English Bishops’ Chanceries, 1100-1250 123 (1950).

\textsuperscript{83} Ioannes Faventinus, whose Summa was written 1171, was among the glossators of Gratian. See Argnani, Ioannes Faventinus Glossator, 9 Apollinaris 418-43, 640-58 (1936). Other glossators included Lawrence of Spain whose Glossa Palatina was composed between 1210-1215. See Stickler, II Decretista Laurentius Hispanus, 9 Studia Gratiana, 461-549 (1966), and Richard Anglicus, supra note 58, whose Distinctiones Decretorum appeared c. 1196. Shortly after the Fourth Lateran Council in 1215, Johann Zemeke, a German professor in Bologna, known as Ioannes Teutonicus, gathered and reedited the work of earlier commentators on Gratian. See Kuttner, Ioannes Teutonicus, das Vierte Laterankonzil und die Compilatio Quarta, 5 Miscel-
Bernard of Pavia, a clerk in the Roman Curia, a Bolognese master, and later bishop of his native city, was the author of the first, great, systematic collection of papal decretal letters. His *Breviarium Extravagantium* contained the papal decretals from Honorius II (1127-1130) to Alexander III (1159-1181). Bernard arranged 927 decretals issued between 1140 and 1191 into titles and chapters in five books, each of which treated a relatively well-defined area of canonistic legislation. The books were entitled *iudex, iudicium, clericus, connubium,* and *crimen.* Thus, the first book dealt with the sources of laws and the juridical structure of the church; the second, with the courts Christian and their procedures; the third, with laws governing the clergy, church offices, and properties; the fourth, with the law of marriage; and the fifth book related the canonistic penal law. Four compilations produced after Bernard’s work, the *Compilationes antiquae,* accepted the *Breviarium’s* structure and division of the canon law.

Finally, the *Decretals* of Gregory IX, promulgated in 1234, the work of the great Catalan canonist, Raymond of Peñafort, made the systemization of canon law official. Raymond’s work was a vast, carefully classified and copiously detailed code of laws authoritatively promulgated to be the law of the Christian people and the church.

The decretal collections formed the basis of the burgeoning science of canon law in the next two centuries. Added to these collections, the legislation of Innocent IV (1198-1216) and the constitutions of the Fourth Lateran Council provided a living, contemporary law for the church which required the same kind of attention that scholars had previously given to Gratian and the ancient sources. As the Decretists interpreted Gratian, so the Decretalists would comment upon the Decretals. The era of the Decretalists was actually the most creative period of the classical canon law; in fact, it was one of the most creative periods of legal development in the history of the Western legal tradition.

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LANEA GIOVANNI MERCATTI 608-34 (1946). Bartholomew of Brescia subsequently re-edited and enlarged the apparatus of Joannes Teutonicus around 1245. Bartholomew’s work became the official version, the *glossa ordinaria,* of interpretations of Gratian’s work.

84. *Quinque Compilationes Antiquae* (E. Friedberg ed. 1882).

85. This division is an adaptation, no doubt, of the classification system of the Roman Law, concerning persons, things, and actions. See 1 A. STICKLER, *Historia Fontium,* in *HISTORIA IURIS CANONICI LATINI INSTITUTIONES ACADEMICAe* 226 (1950).
One of the earliest and most valuable of the commentaries on the Decretals is the *Compilatio prima* by the same Bernard of Pavia. Bernard's *Summa decretalium*, written between 1191 and 1198, was both a commentary on his collection and a general introduction to the canon law of his own day. Other scholars followed Bernard's lead so that, by the end of the first generation of the thirteenth century, the profusion of decretals and the variety of collections and commentaries on them called for a new *concordantia*. Thus, in 1230, Gregory IX commissioned Raymond of Peñafort to form a definitive collection of decretals that were not included in Gratian's *Decree*. Raymond's work, a major watershed in the development of medieval canon law theory, was authenticated and promulgated on September 5, 1234, as the Decretals of Gregory IX.

As a result of the commentaries and a vast undertaking to develop an entire legal system, the church had a uniform law, which concentrated on the consolidation of a hierarchical, centralized, and closely regulated society. As the canonists would say, *Romanus Pontifex iura omnia in scrinio pectoris sui censetur habere.* The Roman Pontiff, whose will made the law in the West, had succeeded Justinian. The Pontiff had universal jurisdiction, *juris dictio*, that is, the right solemnly to declare the law. In the following half century glosses, commentaries, *summae, lecturae*, and *reportoria* on the decretals poured from scribal cubicles in canon law faculties throughout Europe. These were transcriptions of the learned law, *gelehrtes Recht*, which the jurists of the canon law taught.

86. Bernard, *Summa decretalium* (E.A.H. Laspeyres ed. 1860). Peter of Spain, Richard de Mores, Alan of England, Lawrence and Vincent of Spain, and Tancred and John of Wales, among others, also wrote commentaries, so-called "apparatuses," on the *Compilationes*, as well as commentaries on Gratian's *Decree*.


88. The Roman Pontiff is considered to hold all laws within the repository of his own breast. (author's translation).


90. Many of the decretalist commentaries, such as the *Notabilia "Aliter Debet,"* Manuscript 23/12 of Gonville and Caius College, Cambridge, are anonymous. See *Reperthorum*, supra note 64, at 414 n.1 (1936). Among authors whose works historians know are Godfrey of Trani, whose *Summa*, written c. 1241-1243, is in the Fitzwilliam Museum, Cambridge (Manuscript McClean 137); Bernard of Parma, who
With these learned commentaries a parallel stream of papal and conciliar legislative activity fused.\(^91\) Intervening popes augmented the universal legislation of Gregory IX. Boniface VIII finally supplemented it in the *Liber Sextus* in 1298. The *Liber Sextus* is legislation in a modern sense.\(^92\) Boniface VIII composed it to meet new needs and to mitigate the decretal law promulgated since 1234. The *Liber Sextus* in turn stirred new canonistic activity, as did the final book of the classical corpus of canon law, the *Clementinae*, which John XXII added nineteen years later.

The classical age of canon law ended with the death of the great Bolognese lay canonist John Andreae.\(^93\) The scientific study of the canons of the church begun by Gratian reached the apex of its development in the work of John Andreae. He produced, among other works, two *glossa ordinaria*: one on the *Liber Sextus*, 1301, and the other on the *Clementinae*, 1322. In the *Novella Commentaria* on the Decretals of Gregory IX, completed in 1338, John Andreae surveyed the whole of decretalist literature from the five *Compilationes antiquae* forward and arranged a century of glosses on the decretals into a coherent, enduring tool.\(^94\) The Black Death claimed the life of John Andreae in 1348, ending the classical period of canon law in the death of one of its finest representatives and its first literary historian. Legal scholars and historians, of course, continued to study, teach, collect, revise, and rely on the canon law to decide cases through the Middle Ages and, indeed, into the present time. The Great Schism, however, that tore the church apart, came soon

\(^91\) In particular, the legislative activity of canonist pope Innocent IV (1243-1254), who as Sinibaldo Fieschi had taught at Bologna, and the laws stemming from the constitutions of the two councils of Lyons, 1254 and 1274.

\(^92\) On the popes and the theory of legislation, see J.B. Sägmüller, *Zur Geschichte der Entwicklung des päpstlichen Gesetzgebungsrechts* (1937).

\(^93\) John Andreae's daughter, Elizabeth, who was a professor of canon and civil law in Bologna, may have been the first modern woman professor of law in the Western legal tradition.

upon the heels of the Black Death. Division in the church and repressive measures taken to heal it rendered virtually impossible the revival of a unified canonical system and the creative scholarship that supported it.

From the twelfth century to the Reformation, faculties of canon law were a part of university life all over Europe. In France, for example, canon law faculties existed in Angers, Orleans, Montpellier, Toulouse, and Paris; in Spain, in Palencia, Salamanca, and Valladolid; in Italy, in Padua, Vercelli, Siena, and Piacenza, as well as Bologna; in Germany, in Cologne; and in England, chiefly at Oxford. Professors and regent doctors lectured on the ordinary text of the *Decree* and the *Decretals*. The course of studies for the license to lecture, the licentiate, generally comprised three years of civil law, two years on the *Decree*, and a complete study of the *Decretals*. The doctorate required a further three or four years of study in addition to engaging in public disputations, like the moots of the Inns, and lecturing assistantships.

The civil law the canonists studied was the Roman law. They borrowed very heavily from it, using for their own purposes its principles, terminology, and concepts, particularly in the area of contracts and procedure. By the late Middle Ages a doctor's degree in both laws, doctor *utriusque iuris*, became a requisite for faculty status and high governmental positions. The education required of officials, clerks and staff of the courts Christian, the Chancery, and counsellors to the king and the bishops made a profound impact upon the history of legal ideas, also in the common law system.

In addition to the faculties, the courts, the science, and the technical literature that originated in the classic age of canon law, there

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95. The Roman Law traditionally has been prized by the church as part of its patrimony. *Ecclesia vivit lege romana* is an ancient truism. The earliest collection of Roman Law texts for the use of clerics is the *Lex Romana canonice compta*, a collection of 371 chapters from the *Code*, *Digest*, and *Novels* of Justinian prepared in northern Italy in the middle of the ninth century (C.G. Mor ed. 1927). See generally Boyle, *The Curriculum of the Faculty of Canon Law at Oxford in the First Half of the Fourteenth Century*, OXFORD STUDIES PRESENTED TO DANIEL CALLUS 135 (1964). See also Kurtscheid, *De utriusque iuris studio saeculo XIII*, 2 ACTA CONGRESSUS IURIDICI INTERNATIONALIS ROMAE 315 (1935).

96. For the role of the *utrumque ius* in creating a unified jurisprudence and law in the later Middle Ages, see W. Trusen, *Anfänge des gelehrten Rechts in Deutschland* 22-33 (1962). See also Kuttner, *Some Considerations on the Role of Secular Law in the History of Canon Law*, SCRITTI LUIGI STURZO 1 (1953).
was yet another literary genus that may have been equally influen-
tial. *Summae* of penitential practice, called *Summae confessorum*,
developed, which provided simple manuals of canon law for parish
clergy and confessors. These *Summae* touched on virtually all as-
pects of domestic, social, and economic life. These manuals were
the forerunners of the pastoral manuals that proliferated through the
late Middle Ages, spreading the knowledge of canon law and secur-
ing its observance. By the middle of the fourteenth century the
principles and the theories of the canonists virtually permeated so-
ciety. These principles and theories existed not only in treatises
and court records but also in the ritual books, sermons, tracts, epistol-
ary communications, laws and charters of rulers, municipal statutes,
chancery regulations, the annals and records of kings, and the numer-
ous *specula* composed to instruct rulers in Christian virtue and the
ways of government. The canonists interpreted the Bible itself as
a fundamentally legal document, a charter of authority and Christian
government. Thus, the canonists of the classical age left a record
of literally thousands of writings whose ultimate influence upon civil-
ization is impossible to circumscribe.

The Two Jurisdictions in a Unitary, Organic Society

We have the impression from modern manuals of common law
history that after the Constitutions of Clarendon in 1164, or, at least,
after the Statute of Merton in 1234, when the barons resisted the
canon law doctrine of legitimation, the canon law was isolated in
the confines of the courts Christian and separated from the main-
stream of ideas and legal development in England. The canon law
from this perspective was, therefore, concerned exclusively with spir-
itual matters, marriage law, wills and succession, frankalmoign provi-
sion of church offices, advowsons, crimes of clerics, other crimes,
such as defamation, adultery, usury, and tithes. This narrow view
of canon law, however, supposes a twofold anachronism. First,
it imposes upon history a modern dichotomy between church and
state which never existed before the sixteenth century. Second, it
suggests a compartmentalization of knowledge as if canon law and

Gratiana* 133 (1987).
98. See generally Jones, *The Two Laws in England: The Later Middle Ages*, 11
*J. Church & St.* 111 (1969).
its science were an autonomous specialty. Both suppositions run directly counter to the essentially unitary and organic nature of medieval society. The financial, legislative, and judicial claims of the church wove the temporal and spiritual tightly together in the fabric of medieval life. Indeed, canon law was an integral part of Christian society, an indivisible factor in a holistic world view. Conrad of Mechlenberg expressed it thus: *liquidum est religionem christianam quoddam totum esse.*

Canon law was not and could not be isolated from life, particularly from the lives of those for whom law was important. Moreover, law was important not only to lawyers but to anyone in government in a society that equated obedience to law and *fides*, or loyalty to king, pope, and God. Walter Ullmann has often observed that in the Middle Ages "the law became the most crucial and vital element of the whole social fabric." It is clearly accepted by the canonists, part of the common stock of that culture, were known to all and enjoyed the widest measure of assent. W.R. Jones observed:

> It is sobering to remember that *regnum* and *sacerdotium* alike drew their ministers and servitors from the same clerical pool and that in England the Chancery clerks, lawyers, and judges who were proclaiming the rights of the crown were often clerics, who previously had asserted and upheld the claims of the church.

Although there existed two separate jurisdictions and two expanding systems of law in medieval England, modern scholars tend to downplay the severity of the conflict between the church courts and the common law courts. Actually, there was much more cooperation and interchange between the two jurisdictions than Maitland would have supposed. The findings of Jones, confirmed more...
recently by Charles Donahue, Jr. in a study of the York Consistory Court,104 were that jurisdictional competition seemed to have been minimal. Christopher Cheney said, "Church courts and king's courts compromise partly by drawing subtle legal distinctions, partly by the exercise of restraint on both sides."105 Royal writs of prohibition106 formed the jurisdictional frontier only gradually over the thirteenth century. Indeed, even after the royal writs, private persons, lay or clerical, tried their luck in either court on issues that were basically the same. The justice they found was comparable.

Furthermore, notwithstanding the injunction contained in the Constitutions of Clarendon against suing outside the kingdom without the permission of the king,107 it appeared that, throughout the reign of Henry II, the king tolerated appeals from the English courts Christian to Rome so long as his rights were not infringed.108 In addition, in the thirteenth and fourteenth centuries, the crown allowed and sometimes even encouraged litigation abroad when it was not likely that such litigation would set aside royal judgments or deny royal rights.109 Thus, by and large, through the reign of Henry III, when royal jurisdictional claims for the common-law courts had reached an ascendancy, cooperation between the two systems was more characteristic than conflict. Practitioners in either system, therefore, were familiar with at least the principles and fundamental juridical concepts of their jurisdiction's judicial counterpart.

104. Charles Donahue, Jr., found that between 1300 and 1399 as many as forty percent of the cases heard in the York Consistory Court concerned issues properly cognizable in the king's courts. Roman Canon Law in the Medieval English Church: Stubbs v Maitland Reexamined After 75 Years in the Light of Some Records From the Church Courts, 72 Mich. L. Rev. 647, 660 (1975). C. Morris made similar findings in the study of the Lincoln Consistory Court. A Consistory Court in the Middle Ages, 14 J. of Ecclesiastical His. 150 (1963).
106. Flahiff, The Writ of Prohibition to Courts Christian in the Thirteenth Century, 6 Medieval Studies 261-313 (1944); id. vol. 7 at 229-90 (1945).
107. W.R. Stubbs, Select Charters and Other Illustrations of English Constitutional History 166 (9th ed. 1913).
The Contributions of the Canonists to the Common Law

The great creative activity of the canon lawyers of the classical period had run its course by the onset of the Black Death. Eight generations of canonists, over a period of slightly more than two hundred years, had erected an international system of law, defined the principal problem areas of the institutional administration of the church, and had found workable solutions to myriad practical difficulties in the interrelationships of persons and society. Innovative, imaginative, and positive use of law to achieve peace and justice in society provided a legacy of purpose that inspired later jurists to break the fatalism and rigid determinism of the feudal laws. The canonists created a dynamic, living law. They broke the tyranny of inflexible folk customs and restored life to the mummified corpse of the Roman Law. In so doing they gave the Western legal tradition the distinctive stamp of a law that is both a rational science and a growing, ever-changing, living element within a constantly developing social structure.

Within a century after Gratian, all the countries of Christianity conformed their laws and their customs to the principles of canon law; all teachers of law and all judges gave consideration to the canon law. In fact, a whole body of literature, the Differentiae, evolved, contrasting the civil and canon law. On virtually all points of difference the civilists ceded to the canonists, so that the Roman Law of the Middle Ages became deeply Christianized. In addressing the contributions of the canonists to the common law, it is important to remember the cooperative nature of the formative period of the Western legal tradition in which the canonists played such an impor-

111. G. Le Bras, C. Lefebvre & J. Rambaud, L'Age Classique, 1140-1378 at 14 (1965). C. Lefebvre examined the Differentiae iuris civilis et canonici to show how canon law modified secular law in the Middle Ages. For example, canon law accorded a number of rights to women which were denied by Roman Law; viz., jurisdiction in governmental affairs, freedom of choice in marriage, and the unrestricted right of widows to re-marry. Canon law also recognized true marriage between slaves, whereas Roman law acknowledged only contubernium. Canon law also stipulated the duty of parents to care for their children born out of wedlock, whereas in Roman law such children had no legal right to parental support. Canonical equity gradually evolved towards a recognition of complete equality among persons in opposition to current secular law. C. Lefebvre, La femme, l'enfant adulterin, le serf en droit canonique médiéval, 30 Ephemerides Iuris Canonici 109 (1974).
tant, contributory role. It is remarkable that among the persons whose works live on as classical representatives of the canonistic art most, if not all, were persons who in their lifetimes served both bishop and king, chancery and court, church and society because of their great intellect and rich experience in the practical affairs of life.

Notes on Some Recent Research

Von Gierke,\textsuperscript{112} the Carlyles,\textsuperscript{113} Kantorowicz,\textsuperscript{114} Kern,\textsuperscript{115} McIlwain,\textsuperscript{116} David,\textsuperscript{117} and others, and more recently Ullmann,\textsuperscript{118} Tierney,\textsuperscript{119} Watt,\textsuperscript{120} Morrison,\textsuperscript{121} Post,\textsuperscript{122} Cam,\textsuperscript{123} and Benson\textsuperscript{124} have mined extensively the political ideas of the medieval canonists now translated into modern governmental principles. The appraisal of the enduring contributions of the medieval canon lawyers to modern common law begins by noting the well-known connection between canonistic theory and the theories of representation, limited government, the rule of law, and modern constitutionalism. Such an appraisal should also take note of the contributions of the canonists to the philosophy of law found in the works of Friedrich,\textsuperscript{125} Jones,\textsuperscript{126}

\begin{itemize}
\item \textsuperscript{112} O. von Gierke, \emph{Political Theories of the Middle Ages} (repr. 1951).
\item \textsuperscript{113} R.W. \& A.J. Carlyle, \emph{A History of Medieval Political Theory in the West} (1909-1936).
\item \textsuperscript{114} E. Kantorowicz, \emph{The King's Two Bodies} (1957).
\item \textsuperscript{115} F. Kern, \emph{Gottescnadentum und Widerstandsrecht} (R. Buchner ed. 1966).
\item \textsuperscript{116} C.H. McIlwain, \emph{The Growth of Political Thought in the West from the Greeks to the End of the Middle Ages} (1956).
\item \textsuperscript{117} M. David, \emph{La Souveraineté et les limites juridiques du Pouvoir monachique du IXe au XVe siècle} (1954).
\item \textsuperscript{118} W. Ullmann, \emph{Law and Politics in the Middle Ages} (1975) (with extensive reference to his previous works).
\item \textsuperscript{119} B. Tierney, \emph{Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism} (1968); Tierney, \emph{Medieval Canon Law and Western Constitutionalism}, 52 \textit{Cath. Hist. Rev.} 1 (1966).
\item \textsuperscript{120} J. Watt, \emph{The Theory of Papal Monarchy in the Thirteenth Century} (1965).
\item \textsuperscript{121} K. F. Morrison, \emph{Tradition and Authority in the Western Church} 300-1140 (1999).
\item \textsuperscript{122} G. Post, \emph{Studies in Medieval Legal Thought: Public Law and the State} (1964).
\item \textsuperscript{124} R. Benson, \emph{The Bishop-Elect: A Study in Medieval Ecclesiastical Office} (1968).
\item \textsuperscript{125} C.J. Friedrich, \emph{The Philosophy of Law in Historical Perspective} (1968).
\item \textsuperscript{126} W. Jones, \emph{Historical Introduction to the Theory of Law} (1940).
\end{itemize}
Jolowicz,127 and the more recent, excellent work of Rudolf Wiegand.128 Such English jurists as Sir John Fortesque (1394-1476),129 Christopher St. German (1460-1540),130 and Richard Hooker (1553-1600)131 accepted the basic philosophical principles of a rational theory of law developed by the canonists. This acceptance continued in later centuries and came to America chiefly through the theories of Sir William Blackstone as expressed in his Commentaries.132

Recent research has enlarged the understanding of the contribution of the canonists to international law133 and to the medieval poor law,134 a forerunner of modern social welfare and charity law. Similarly, the gradual rationalization of the law of evidence,135 the development of standards of judicial objectivity and impartiality,136 the formation of the juristic concept of the corporation or jurat person,137 rehabilitative theories of penal law,138 and the modern legal notions of jurisdiction139 derive largely from the medieval canon lawyers. The canonists gave to our modern legal system the law of wills and probate administration,140 the basis for the law of contracts in the
notion of *assumpsit* and *fidei laesio*, the law of family and domestic relations, and the law of trusts. The canon lawyers were the first to separate the notions of crime and sin, to distinguish negligence from intent, and to define the various kinds of intent and degrees of causal connection, thereby setting the foundations for modern criminal jurisprudence. The development of the theories of representation and jurisdiction by the medieval canonists influenced the modern law of agency. Finally the canonists set a paradigm of jurisprudence, making their historical role even more crucial.

### A Jurisprudence of Reason

The handful of writs that the common law courts of the king had competency to entertain by Henry II's time were formularies of justice decided upon the will of the king. Indeed, by modern standards, the remedies the king gave through his courts, mostly to

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matters of real property litigation,\textsuperscript{147} seem very narrow and formalistic. The judges had little, if any, discretion to change the law or to enlarge upon it by giving relief outside the purview of the royal writs. This absence of discretion is not surprising. To a very large extent, justice in the premodern legal systems was a matter of favor, not right, and whole areas of private dispute were resolved by compromise or blood feud without any real legal or judicial intervention. The law that existed then would today seem blunt, harsh to an extreme, unyielding and totally voluntaristic. Similar observations fit the law presiding in the shiremoots, the courts of the hundreds and the manorial courts.\textsuperscript{148} Although the Roman Law manuscripts that Irnerius passed on to Accursius, Azo and Bartolus were of infinitely greater refinement of text, variety of application, and range of intellect, there was lacking in them an element of humanity, warmth, and pliability which many associate with modern law. Neither the ancient feudal laws nor the Justinianean corpus focused upon the individual person; they allowed no creative role in law lodged in the person of the judge or jurist who most immediately struggled with the concrete, day-to-day problems of people. The humanity in the laws today comes from the example set by the canonists within their own system, in the courts Christian, and in Chancery. Walter Ullmann observed that "canon law was the one written system of law that was created for contemporaries, grew out of the exigencies of society and was thus a living law . . . ."\textsuperscript{149}

For the canonists, all law was a rule of reason. Gratian and the commentators upon his \textit{Decree} brought together three distinct streams of ancient legal thought: Stoic, Christian, and Aristotelian. They used this synthesis to reject the concept of law as a blind mandate of a transcendant, prehistoric will. The canonists then proceeded to erect upon the synthesis a pragmatic notion of law as a means to achieve human ends of peace, justice, and individual well-being. This notion was an entirely new way of looking at law. For the

\begin{footnotes}
148. The shiremoots were early common law courts made up of eldermen from the shires, divisions similar to present day counties. These shires were made up of "hundreds," even smaller subdivisions, which had their own courts to settle local matters and controversies. Finally, the manorial courts were tribunals set up and presided over by the barons who owned manors. The baron, through these tribunals, settled issues among the tenants who worked and lived on the baron's manor.
149. W. \textsc{Ullman}, \textit{Law and Politics in the Middle Ages} 124 (1975).
\end{footnotes}
medieval canon lawyers, if a law ceased to have a reasonable purpose, it ceased being a law: *cessante causa cessat lex.* Law could be law only if it were reasonable. Laws should be obeyed only if reasonable in the light of the justice they produced in particular cases. By demanding that law conform to reason and that reason be the judge of any law, or indeed, any act of king or pope, the medieval canonists laid the foundations for a legal revolution. That legal revolution gradually led, within the common law tradition, to an exultation of the role of the judge as both keeper of conscience and oracle of the law. The ideal of law as both impartial and just in each particular case, an individually functional role of law, became a part of the Western tradition.

A second, and perhaps unexpected, consequence of the rationalization of law by the canonists was its gradual secularization, a distinctive attribute of the Western legal tradition. The secularization was only achieved, however, long after the Reformation. Moreover, it was attained in a way, strangely enough, that has preserved, as a humanistic ideal, the paramount dignity of the free and lawful person that was originally the creation of faith.

The critical intellectual function implanted into the canonists' science spawned the legal creativity with which this Article has dealt. Within the system of canon law itself, that intellectual function led to three basic kinds of innovation. First, the great canonists limited the application of particular laws in those cases wherein they agreed that the equitable rights of individuals would be compromised by more wide-ranging, latitudinarian interpretations. The interpretation of the crusader's vow illustrates the effect of this type of strict constructionism. The late eleventh and twelfth century canon law prohibited married persons from making a vow that would limit the rights of their spouses, unless the other spouse first consented to it. At the beginning of the thirteenth century, Pope Innocent III (1198-1216) faced a serious problem of recruiting for the crusade projects he was promoting. To solve the problem, the Pope decreed that husbands might unilaterally make and fulfill vows to go on crusades,

even without the consent of their wives. The papal ruling clearly contradicted the canonists’ belief in the consensual and contractual nature of marriage and the equality of spouses. They had steadfastly taught both these principles since the time of Pope Nicholas II (1057-1061). Pope Innocent’s ruling deprived wives of their rights in marriage. Instead of interpreting the papal decretal broadly to mean that a paramount public need of the church, namely a crusade, should take precedence over the private rights of married persons, the thirteenth-century canonists unanimously interpreted the crusader’s vow in the most restrictive way possible. There was no attempt to enlarge its scope or to apply it to other situations, although some could have made an argument by analogy so as to submerge personal rights in the exigencies of society. So restrictive was the canonists’ interpretation, in fact, that it led Thomas Aquinas to teach that, although legally permitted by the pope in this instance, such vows were nonetheless morally reprehensible. Both the canonists and later the theologians repudiated on moral grounds a legal position established by papal legislation. In effect, the canonists nullified the will of the legislator, the pope, by interpreting away his legislation. The repudiation of the crusader’s vow, though extreme, was not an isolated phenomenon; the classical period was rich in examples of the canonists’ reproving and thus nullifying laws notwithstanding their loyalty to the royal authorities who promulgated the laws and their acknowledgment of their obligation to obey. Thus, they set an instructive example for jurists in addressing the conflict between legal rights and moral responsibility in the Middle Ages.

Second, the canonists simply created new law where none existed. The canon law of conditional marriage is a good example of this kind of innovation. Although in the Talmudic law the possibility of conditional marriage was recognized among Jews in the first two centuries of the Christian era, neither the Roman Law nor the ancient canons took cognizance of it. There is no sign of canonical recognition of conditional marriage up to the time of Gratian. Gratian, however, first raised the possibility that marriage might legiti-

153. In the decretal Ex multa, addressed to the Archbishop of Canterbury, September, 1201. X 3.34.9 216 P.L., supra note 32, at 904-05. For further explanation, see Brundage, The Crusader's Wife: A Canonistic Quandry, 12 STUDIA GRATIANA 427, 434-35 (1967).
154. Thomas Aquinas, Quodlibetum 4.11 in 9 OPERA OMNIA 513 (1948).
mately be contracted although conditions were attached to the consent of one of the parties.\footnote{156} For the next eighty years the matter was disputed by the canonists in the schools and in the tribunals. By about 1220 a consensus had emerged among the canonists that conditional marriage was permissible. The law recognized this consensus, and it became a part of the canon law in the Decretals of Gregory IX in 1234.\footnote{157} The canonists thus created new law and new legal positions by advancing solutions to problems with which no legislator had yet dealt.

Third, the canonists believed that the public law, even the public law of the church, was not the ultimate law that man must obey. Henry of Segusio, one of the greatest of the thirteenth-century canonists, said that those who were moved by the spirit of God were not bound by the public law but by the private law, the final law, the law written in the heart by the Holy Spirit: "for where the spirit is, there also is liberty."\footnote{158} The canonists thereby provided a theoretical justification for disobedience to a tyrant and resistance to tyrannical laws. They also developed the notion of equity, or epikeia, far beyond the seminal notions of equity in Roman Law, which provided for the relaxation of the rigor of the law in particular cases in order to achieve the higher good of justice and mercy.\footnote{159} Where the letter of the law may have killed, the English chancellors, following the canonists, then applied the spirit. The chancellors were ecclesiastics until Wolsey; the theory of law they adopted and the rules

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\item 156. Decretum, C. 32, q.8, c.1.
\item 157. Decretals 4.5.5-7.
\item 158. Hostiensis, De voto in 3 Summa Aurea (X3.34), fol 176rb. Hostiensis bases his opinion on that of Pope Urban II, made to the Chapter of St. Ruf, incorporated by Gratian in the Decree, C. 19, q.2, c.2, Duae sunt.
\item 159. Gabriel LeBras once said: "Une grande force du droit canon est de prevoir l'application humaine de règles parfois dures. La souplesse est permise aux législateurs et aux juges, la discordance aux docteurs." G. LeBras, C. LEFEBVRE & J. RAMBAUDET L'AGE CLASSE, 1140-1378, at 11 (1965). For the influence of canonical equity on the English legal system, see Wolhaupter, Der Einfluss naturrechtlicher und kanonistischer Gedanken auf die Entwicklung der englischen Equity, 2 Acta Congressus Iuridici Internationalis 437 (1935); Coing, English Equity and the Denunciatio Evangelica of the Canon Law, 71 Law Q. Rev. 233 (1955); Meijers, Le conflit entre l'équité et la loi chez les premiers glossateurs 44 Études 142 (1966). For a definitive and thorough refutation of the old misunderstanding that persists among English historians that canonical equity was arbitrary and without principle, measured, as it were, by the size of the Chancellor's shoe, see P.G. Caron, AEQUITAS ROMANA, MISERICORDIA PATRISTICA ED EPAKELA ARISTOTELICA NELLA DOTTRINA DELL'A EQUITAS CANONICA (1968).
\end{footnotes}
of equity they developed, such as the notions of good faith, fairness, balancing of hardships, and the doctrine of clean hands, were those of the medieval canon lawyers.

For the medieval canonists, the lawyer was more than a person skilled, as Celsus said, in the "art of the good and the equitable." He was the minister of a quasi-mystical ideal, a member of a parallel priesthood. Gratian quoted Isidore of Seville on the positive law: "Law shall be virtuous, just, possible to nature, according to the customs of the country, suitable to place and time, necessary, useful; clearly expressed, lest by its obscurity it lead to misunderstanding; framed for no private benefit, but for the common good." He then added that the principal characteristic for which lawyers should look in the making of laws is their quality, their honesty, justice, possibility, and suitability to the circumstances, because once the laws have been adopted, society should live under the laws. If the values and authority of law were to be judged by reason, rather than by will or by mere antiquity, the lawyer and the jurist are then the ministers of reason in society.

Gratian gave to the Western legal tradition and to the common law that is a part of it, a subtle, pervasive, and staggering sense of confidence. Laws could be made and adopted to new circumstances, or they could die or be ignored, all under the paramount and preeminent criterion of a reasonable utility to society. Gratian and the medieval canonists broke the tyranny of the ancient laws and used law to create a new society and to serve the changing needs of people within that society. He and his followers left to the present that indefatigable optimism that was the single, universal characteristic of the great jurists who succeeded him. No matter what be our religious beliefs, since the canonists struck the spark to push back the night of the dark ages, we have believed and continued to hold firm the conviction, against waves of discouragement from almost overwhelming odds, that law is good and that good laws and good lawyers can make people whole and set them free from the greatest evil, that of ultimate irrationality. Perhaps this optimism and sense of purpose are the greatest contribution of the medieval canonists to the common law tradition.

160. Celsus (ca.67-ca.130) (quoted by Ulpian in the Digest, I, 1, 1).
161. Etymologies, v. 21; Decretum, cc.1 & 2, D.IV.
162. See also Decretum, cc. 4 & 7, D.VIII; c. 4, D.X; c. 1, D.XI.
Conclusion

Henry of Segusio said on one occasion, "If I wish to write briefly, I find I write obscurely."\textsuperscript{163} Thereupon he proceeded to compose, with great clarity, albeit somewhat tediously, a work that in the earlier editions comprised some 5100 folio columns. Similarly, it is extremely difficult to deal with a book-sized topic in the space of an article.

This Article, therefore, is merely a sketch of an answer to a problem of history that perplexed Maitland and has continued to preoccupy legal historians in the common law tradition. Someone could and should someday give this answer at much greater length and with far greater precision.

At the present time no one can measure precisely the influence of medieval canon law upon the development of the common law. Historians know, however, that the influence was great and enduring. The thicket of medieval canon law texts, that "no-man's-land [which lies] between history and law" of which Walter Ullmann earlier complained,\textsuperscript{164} has repelled historical research except by the most stalwart because of the great complexity and obscurity of the sources. Many scholars have now entered the thicket, however, and they are discovering the answers to problems of politics and law that earlier historians could not have imagined. Medieval canon law has emerged from the limbo of sectarian apologetics to take its rightful place in the history of ideas. Clearly, no one can understand either medieval society or the medieval formation of the common law without a familiarity with the work of the canonists.

The canon law as a phenomenon in the history of ideas supplied the jurisprudential framework of the medieval world. When the Reformation broke that framework, fragments of the structure remained. Several of the delicate cornices and angle stones of the once great edifice still stand today in the ideas and concepts, the institutions and principles of the modern law and of cherished democratic institutions of government. To understand them in their historical origins, particularly to see the richness of the concept of the free and lawful person served and protected by the law, makes the study of medieval canon law eminently worthwhile.

\textsuperscript{163}. \textit{Commentaria} 5.38.3 s.v. \textit{longum esset} (ed. 1581).

\textsuperscript{164}. W. \textsc{Ullman}, \textit{Medieval Papalism: The Political Theories of the Medieval Canonists} vii (1949).