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Spring 2016

MEDIEVAL LAW

The “Learned Law”: 1000-1600 Tentative Syllabus and Assignments



Spring 2016



History 2080 (formerly 2126)
 (Medieval Law)

Law 2166
 (Legal History Seminar:
 The “Common Law”
 of the European Continent)

Professor Donahue

Spring, 2016

Requirements	Week 3	Week 6	Week 9	Week 12
Week 1	Week 4	Week 7	Week 10	Papers
Week 2	Week 5	Week 8	Week 11	

Requirements

If you have not taken Medieval Studies 119 (=Law 2165) (or had equivalent preparation elsewhere), you should attend the lectures in that course (Mon. and Wed. at 11:00) in the Yard, room Sever 202. Law students should sign up for an hour of “optional written work,” unless you are writing your third-year paper in conjunction with this seminar. It would also be useful for you to attend the “section” for graduate and law students in that course (Tues. 10:40–12:00) [room WCC 3007]. The sessions of this reading course will focus on the “primary readings” listed below in the light of the “secondary readings.” The primary materials will come either from my “coursepack,” *Documents on Continental Legal History (Mats.)*, or from xeroxes or online documents that I will provide. A research paper is not required (except for those law students who are doing their third-year papers in conjunction with this seminar). Rather, you should prepare three five-page papers each focusing on one or more of the texts to be discussed in the seminar. (More on this requirement below under “[Papers](#).”)

Syllabus:

Normally, this syllabus is quite loose. I have in the past accommodated particular interests of the participants in the seminar. I’ll try to do that this year, too, but please let me know as soon as possible if there’s something that is not on this list that particularly

interests you. Items in boldface in the primary readings will be the particular focus of the class. I've also tried to flag the particularly important secondary readings.

The new calendar makes everything very tight. We really have to hit the ground running in the first session. What is listed below under *Background generalities* used to be a separate session, but that is no longer possible. I have either given you below the URL of a website where you can find the readings for the first class or I have posted them on the course website.

Background generalities: Very quickly (we'll spend some time on this in the first session) we need to review some basic history, some basic constitutional history, and some basic legal history. I have to assume that you have some acquaintance with these topics, but here's one way of getting at them relatively painlessly. Two quick paperbacks on basic history: H. G. Koenigsberger, *Medieval Europe, 400–1500* (1987); H. G. Koenigsberger, *Early Modern Europe, 1500–1789* (1987). Two short, but not so quick books on legal history: James A. Brundage, *Medieval Canon Law* (London: Longman, 1996), 264 p. Manlio Bellomo, *The Common Legal Past of Europe* (Washington, DC: Catholic University, 1995), xix, 252 p.

Week 1—Tue., Jan. 26 *The legacy of the ancient world:*

Primary reading: (1) **Justinian's *Institutes*** (any translation will do, but you should read the contents, proemium, bk. 1, titles 1–3 (hereafter 1.1–3), 1.9–10, and 2.1 in Latin to begin familiarizing yourself with Latin legal vocabulary). A complete translation of the *Institutes* may be found on the [course website](#); of the various online versions of the Latin text [The Latin Library](#) has the cleanest html that I have found, but that in the [Roman Law Library](#) allows you to flip from the Latin to and English or French translation and back. Both seem to be relatively free of error.

(2) Paul's Letter to the Romans (any modern translation, e.g., New Revised Standard Version, New Jerusalem Bible, etc.)

(3) Extracts from the NT on marriage (**Mark 10:2–12; Luke 16:18; Matthew 5:31–32, 19:3–12; 1 Corinthians 7; Ephesians 5:21–6:9**). Of the numerous Biblical websites, the one that I use most often is <http://unbound.biola.edu/>; it allows you to compare up to four translations, including the Latin Vulgate and the Douai-Rheims translation of it, in parallel.

(4) The so-called “**Canones Apostolorum**” (C.H. Turner (ed), *Ecclesiae Occidentalis Monumenta Iuris Antiquissima*. 2 vols. (Oxford: Clarendon, 1899–1939), 1:2–34, or Migne, *Patrologia latina* [PL] 67.142–47. I have posted the latter on the [course website](#); with an old, but more or less ok, [English translation](#).

Secondary reading: Barry Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon, 1962), xiv, 281 p.; Jean Gaudemet, *Les sources du droit de l'Église en occident du IIe au VIIIe siècle* (Paris: CERF, 1985), 188 p.

Week 2—Tue., Feb. 2 *The legacy of the early Middle Ages:*

Primary reading: (1) Æthelbert’s “Code” (L. Oliver ed., *The Earliest English Laws*) (in course materials). We should start by having some fun. Bring your computer and set it to <http://www.bl.uk/tp2/hiddentreasures.html>. Focus in on the first folio of the *Textus Roffensis*, and compare what you see there with modern edition on the [course website](#). Then go to the website of the [archive](#) where the manuscript is kept and learn why you can’t rely on Google to bring you to what you really want. (The size of the URL for the archive’s website is monstrous; be patient; it takes a while to load.)

(2) the “Tabulae” from the Hispana (PL 84.23–91 or G. Martínez Díez, *La colección canónica hispana* (Madrid: Consejo Superior de investigaciones científicas, 1966–), 1:501–83 (you can ignore the ones in verse).

(3) **The sections on “anger” and “envy” from an Old Irish Penitential**, (L. Bieler, *The Irish Penitentials*, *Scriptores Latini Hiberniae*, 5 (Dublin: The Dublin Institute for Advanced Studies, 1963), 269–71, or J.T. McNeill and A.M. Gamer, *Medieval Handbooks of Penance* (New York: Columbia University Press, 1938), 164–65 (to be used only if you can’t find Bieler). (Available on the [course website](#), from McNeill and Gamer.)

(4) Pseudo-Anacletus *Epist.* 3, Pseudo-Zepherinus *Epist.* 1, **Pseudo Evaristus *Epist.* 1** (P. Hinschius, *Decretales Pseudo-Isidorianae* (Leipzig, 1863), 81–8, 131–3). (Available on the [course website](#); you’ll need some time with this; the Latin is not easy.)

(5) **Nicholas I, *Epist. ad consulta Bulgarorum c.3*** (PL 119.980 or MGH, *Epist.* 6.2.569 (a slightly better text)). (Available on the [course website](#) [the print in the image is a bit fuzzy, but if you blow it up to 130% it’s quite legible].)

(6) Burchard of Worms, *Decretum* bks. 7, 9, 17 (PL 140.778–87, 811–30, 918–34.)

Secondary reading: Introductory material to Oliver, as above (you need the book for this); Landau, Peter. “Gefälschtes Recht in den Rechtssammlungen bis Gratian”, in *Fälschungen im Mittelalter*, *Schriften der Monumenta Germaniae Historica*, 33 (Hannover: Hahn, 1988), 2:11–49; Cyrille Vogel, *Les “Libri Paenitentiales”*, *Typologie des sources du moyen âge*, 27 (Turnhout: Brepols, 1978) mise à jour par A.J. Frantzen (*id.*, 1985); Walter Ullmann, *The Growth of Papal Government in the Middle Ages: A Study in the Ideological Relation of Clerical to Lay Power*, 3d ed. (London: Methuen, 1970), 1–228.

Week 3—Tue., Feb. 9 *The reform movement and Gratian’s Concordance of Discordant Canons:*

Primary reading: The Collection in 74 Titles (J. Gilchrist, *Diuersorum patrum sententiae siue Collectio in LXXIV titulos digesta*, *Monumenta Iuris Canonici [MIC]*, B: Corpus Collectionum, 1 (Città del Vaticano: Biblioteca Apostolica Vaticana, 1973) (read English introduction by Gilchrist, the *tabula*, **tit. 1–15, 62–4**). [There is also an English

translation by the same author *The Collection in Seventy-Four Titles: A Canon Law Manual of the Gregorian Reform*, Medieval Sources in Translation, 22 (Toronto: Pontifical Institute of Medieval Studies, 1980). Except for the introduction, these are available in the course materials. I have placed pdf's of the Latin of tits. 62–4 on the [course website](#).] Gratian Distinctio [D.] 1–20 (trans. James Gordley and Augustine Thompson, *Gratian: The Treatise on Laws* (Washington, DC: Catholic University Press, 1993)); **C.27. q.2** (partial trans. in course materials; try to get some sense of what it says in the original). [There are two online editions of the Friedberg edition of Gratian, one from the [Columbia University Library](#) (in pdf format) and the other from the [Bavarian State Library](#) in Munich (in html format). I have placed pdfs of the latter for C.27 q.2 on the [course website](#). The Latin of the some of the extracts (canons) is quite hard, but Gratian's own Latin is quite easy to follow.]

Secondary reading: Ullmann, *Growth*, pp. 229–457; Gérard Fransen, *Les collections canoniques*, Typologie des sources du moyen âge occidental, 10 (Turnhot: Brepols, 1973) mise à jour (*id.*, 1985); **Anders Winroth, *The Making of Gratian's Decretum*** (Cambridge, Eng.: Cambridge University Press, 2000). Stephan Kuttner, *Harmony from Dissonance* (Latrobe, PA: Archabbey Press, 1960), repr. S. Kuttner, *The History of Ideas and Doctrines of Canon Law in the Middle Ages*, Collected Studies Series, CS113 (London: Variorum Reprints, 1980), 1–16; S. Kuttner, “Research on Gratian: Acta and Agenda,” in P. Linehan (ed.), *Proceedings of the Seventh International Congress of Medieval Canon Law*, MIC C: Subsidia, 8 (Città del Vaticano: Biblioteca Apostolica Vaticana: 1988), 3–26.

Week 4—Tue., Feb. 16 *Roman law from Irnerius to Accursius:*

Primary reading: Justinian's *Institutes* [J.I.] **2.1.12–13** with the ordinary gloss; *Digest* [D.] **41.1.55**, with the ordinary gloss [selections from the *summae* and *quaestiones* may be added].

Secondary reading: Review Bellomo, pp. 44–60, 89–117. Read P. Vinogradoff, *Roman Law in Medieval Europe*, 2d ed. (Oxford: Clarendon, 1929), 43–70; Stephan Kuttner, “The Revival of Jurisprudence”, in *Renaissance and Renewal in the Twelfth Century*, Robert L. Benson and Giles Constable ed. (Cambridge: Harvard Univ. Press, 1982), 299–323; Charles Radding, *The Origins of Medieval Jurisprudence: Pavia and Bologna* (New Haven: Yale University Press, 1988).

Week 5—Tue., Feb. 23 *Decretists, decretals and decretal collections:*

Primary reading (I have omitted the simony material for class discussion this year, though there's no reason why someone could not do a paper on it): Rufinus on C.1 q.1 and **C.27 q.2** (Heinrich Singer, *Die Summa Decretorum des Magister Rufinus* (Paderborn: Schöningh, 1902), 196–224); Summa Coloniensis on C.1 q.1 and **C.27 q.2** (Gérard Fransen and Stephan Kuttner, *Summa 'Elegantius in iure diuino' seu Coloniensis*, MIC A: Corpus Glossatorum, 1, 4 vols. (New York: Fordham U.P., 1969; Città del Vaticano: Biblioteca Apostolica Vaticana, 1978; *id.*, 1986; *id.*, 1990), 2:1–48

and 4:1–57; *Liber Extra* [X] **4.16.2., 4.4.3, 4.1.15, 4.3.1, 4.12.2**, 5.3.10–13, 15–24, 31–32 (in the Friedberg edition, *Corpus iuris canonici*, vol. 2); **1 Comp. 4.4.5(7), 4.4.6(8), 4.5.4(6)**, 2 Comp. 5.2.6 (in the Friedberg edition of the *Compilationes antiquae* (Leipzig: Tauchnitz, 1882)).

Secondary reading: Gérard Fransen, *Les décrétales et les collections de décrétales*, Typologie des sources du moyen âge occidental, 2 (Trunhout: Brepols, 1972) mise à jour (*id.*, 1985); I.S. Robinson, *The Papacy, 1073–1198: Continuity and Innovation*, Cambridge Medieval Textbooks (Cambridge: Cambridge U.P., 1990).

Week 6—Tue., Mar. 1 *The formation of Romano-canonical procedure (Bulgarus to Tancred):*

Primary reading: Tancred, *Ordo 3.5–12* (Fridericus Bergmann, *Pillii, Tancredi, Gratiae, Libri de iudiciorum ordine* (Göttingen: Vandenhoeck & Ruprecht, 1842), 222–48.)

Secondary reading: Linda Fowler-Magerl, *Ordo iudiciorum vel ordo iudiciarius: Begriff und Literaturgattung*, Ius Commune, Sonderhefte, 19 (Frankfurt: Klostermann, 1984); Knut Wolfgang Nörr, “Institutional Foundations of the New Jurisprudence”, in *Renaissance and Renewal* 324–38; Charles Donahue, “Proof By Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned Law,” in M. Arnold et al. ed. *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne* (Chapel Hill: Univ. NC Press, 1981), pp. 127–58.

Week 7—Tue., Mar. 8 *Customals on Marriage:*

Primary reading: Usatges de Barcelona ch. 1–5, 108, 147; Coutumes de Touraine-Anjou ch. 61, 56 (57); Beaumanoir chs. 598–600; 621–628, 1625, 1639.

Why Did Bologna Happen?

A discussion based on a collection of ‘explanations’ for Bologna found on the outline.

The materials for this session may be found on the [course website](#).

Week 8—Tue., Mar. 22 *Political Ideas of the Glossators:*

Primary reading (all these texts are short; they may found on the [course website](#)): **Continuator of Otto of Morena (MGH, *Scriptores* 18 (1863) 607); Azo *Summa Codicis* 3.13; C.7.37.3 (with the gloss); D.14.2.9 (with the gloss); Odofredus on D.2.13; Odofredus on C.7.37.3; Hostiensis on X 1.7.3, 1.7.1, 1.7.2, 3.8.4, 3.34.7, 3.32.7, 3.35.6, 5.31.8; D.1.3.31 and J.I. 2.6 (with the gloss); C.1.14(17) (with the gloss); Johannes Monachus on Extrav. comm. 2.3.1.**

Secondary reading: **Kenneth Pennington, *The Prince and the Law*** (Berkeley: University of California Press, 1993); Brian Tierney, *The Crisis of Church and State, 1050–1300* (Englewood Cliffs: Prentice-Hall, 1964) (read the introductions to the

documents if you have not already done so).

The Formation of the ius commune: Accursius to Baldus I: Procedure.

Primary reading: **Albertus Gandinus on witnesses** (ed. H. Kantorowicz, in *Albertus Gandinus und das Strafrecht der Scholastik*, 2 (1926) 69–72). Available on the [course website](#).

Secondary reading: Review Bellomo, 118–61; read Francesco Calasso, *Medio evo del diritto* (Milano, 1954).

Week 9—Tue., Mar. 29 *The Formation of the ius commune: Accursius to Baldus II: Wild Animals:*

Bartolus on mills (*repetitio* on D.43.12.2 in *Opera omnia* (Basle 1562) 5:350–4).

The Formation of the ius commune: Accursius to Baldus III: Dealing with the other I.

Bartolus on conflicts of laws, §§ 13–51 of his *repetitio* on C.1.1.1

Secondary reading: N. Hatzimihail, “Pre-Classical Conflict of Laws,” Harvard Law School S.J.D. dissertation, September, 2002, ch. 4.

Week 10—Tue., Apr. 5 *The ius commune in action: cases, case-reports and consilia with a focus on marriage:*

Primary reading: *Decisio* (Holy Roman Rota, 1360 X 1365) (in Bernardus de Bosqueto, *Decisiones antiquiores* [Cologne, 1581]), 627–8; **Nicholaus de Tudeschis, Consilium 79** (in *id.*, *Consilia* (Venice, 1569), fol. 162v–163v; *id.*, *Consilium 1* (in *id.*, *Consilia* (Lyons, 1562), fol. 2ra–vb).

Secondary reading: M.M. Sheehan, ‘The Formation and Stability of marriage in the Fourteenth Century: Evidence of an Ely Register’, *Mediaeval Studies* 33 (1971) 228–63; Charles Donahue, ‘The Canon Law on the Formation of Marriage and Social Practice in the Later Middle Ages’, *Journal of Family History* 8 (summer 1983) 144–58; Julius Kirshner, ‘Maritus Lucretur Dotem Uxoris Sue Premortue in Late Medieval Florence’, *ZRG (KA)* 108 (77) (1991) 111–55.

Customary law revisited:

Primary reading: Extracts from the *Sachsenspiegel*. There’s a relatively new translation of the *Sachsenspiegel* that I’d like to try out: Maria Dobozy (trans.), *The Saxon mirror : a Sachsenspiegel of the fourteenth century* (Philadelphia: University of Pennsylvania Press, c1999). The original is normally divided into two parts *Landrecht* and *Lehnrecht*. The transmission tradition is a nightmare, but if you can handle Middle High German, you ought to take a look at the various editions by Karl August Eckhardt.

Week 11—Tue., Apr. 12 *Lawyers and politics in the later middle ages: a conciliar moment*

Primary reading: Boniface VIII “Unam sanctam” (1302), Extrav. comm. 1.8.1, trans. in *Church and State through the Centuries: A Collection of Historic Documents with Commentaries*, Sidney Z. Ehler and John B. Morrall trans & eds. (London: Burns & Oates, 1954), pp. 89–92; Clement V “Meruit” (1306), Extrav. comm. 5.7.2, trans. in *id.* 92–3; Council of Constance “Sacrosancta” (29 May 1415), COD 416–17; “Frequens” (1417), COD 438–9, trans. in *id.* 104–6; Council of Basel “?Deus” (July, 1439), Mansi 29.179, trans. in *id.* 121–5; Pius II “Execrabilis” (1460), in Cherubini (ed.), *Magnum Bullarium Romanum* I: 368, trans. in Ehler & Morall; **extracts from Nicholas of Cusa, *De concordantia catholica* (*The Catholic Concordance*, Paul Sigmund trans. (Cambridge: CUP, 1991).**

Secondary reading: Brian Tierney, *Foundations of the Conciliar Theory* (Cambridge: Cambridge, 1955); extracts from J.H. Burns (ed), *History of Late Medieval Political Thought*.

Legal Humanism:

Primary reading: Pierre Pithou on the *Collatio*. (I may add or substitute here.)

Week 12—Tue., Apr. 19 *Dealing with the “other”—II Victoria on the Indies*

Primary reading: Francisco de Victoria, *De Indis et de iure belli relectiones* (a translation is available in the “The Classics of International Law” series and another (it may not be complete) in the Cambridge Texts in the History of Political Thought series).

Secondary reading: James Muldoon, *Popes, lawyers, and infidels : the church and the non-Christian world, 1250–1550* (Philadelphia: U. Penn. Press, 1979).

Customary law tamed, though perhaps not quite:

Primary reading: Extracts from Guy Coquille, *Institution au droict des francois*. For Coquille, the extracts in the course materials will suffice.

Secondary reading: G. Strauss, *Law, Resistance and the State* (Princeton: Princeton Univ. Press, 1986). P. Ourliac, *Histoire du droit privé français* (Paris, 1985). If your French can’t make it, try A. Watson, *The Making of the Civil Law* (1981). It has a very different point of view, but tells basically the same story.

Papers

You should prepare three five-page papers each focusing on one or more of the texts to be discussed in the course. (As the semester goes on we can broaden the texts to include texts in which you are interested but which we will not be discussing in class.) The papers should offer an idea supported by an analysis of the text and by appropriate external evidence. You should prepare a draft of your paper before (preferably) or shortly after we take up your text in class. I will comment on your draft, and in the light

of the comments, you should prepare a final draft. The final drafts are due by the end of the FAS reading period (Fri., May 6).

Here are some examples of suitable paper topics (all of these have been successful paper topics in the past):

- The requirements that Nicholas I sets forth for a valid marriage in the *Epistula ad consulta Bulgarorum*;
- 74T c. 48 (tit. 5)—what did this list of people who cannot accuse mean at the time at which it was written (9th century) and what did it mean when it appeared in 74T (11th century)?
- The interpretation of the law on the capture of wild animals offered in the ordinary gloss to J.I. 2.1.12-13;
- The use of the story of Gehazi (2 Kings 5:15–27) in Gratian’s tractate on simony (C.1 q.1);
- How the decretals of Alexander III (e.g., X 4.16.2, 4.4.3, 4.1.15, 4.3.1, 4.12.2) modify the law on the formation of marriage set out in Gratian’s C.27 q.2;
- The main thrust of Tancred’s treatment of witnesses (*Ordo* 3.12);
- How and why Bartolus develops a law of mills in his *repetitio* on D.43.12.2;
- What the various versions of the story of the emperor and horse tell us about the glossators’ ideas about the power of the prince (Continuator of Otto of Morena; Azo, *Summa codicis* 3.13; Odofredus on C.7.37.3);
- Bartolus on conflicts of law (*repetitio* on C.1.1.1 *sv* Cunctos populos).