

**Charles Donahue, Jr., 'Private Law Without the State and During its Formation', *American Journal of Comparative Law*, 56 (2008) 541–65.**

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Charles Donahue, Jr.

## Private Law Without the State and During its Formation<sup>1</sup>

*It is possible to have private law without the state. Indeed, it is possible for a society to develop a system of private law without the state in the modern sense. When we come to the Western Middle Ages, however, we have to qualify. Though there were no nation-states, the systems of private law that began to be created in the twelfth century made use of the existing structures of power and authority. If one does not want to call these structures proto-states, then one has to say that they performed in some measure the functions of the later state, most notably in establishing and supporting a system of courts and in promulgating legally binding decrees that can be called, without too much anachronism, legislation. With the rise of the nation-state in the sixteenth century, changes did take place, but they were more subtle and initially less dramatic than some have thought. There was more focus on the national level. National legislation became more common in this period, and more elaborate. Despite these facts, I suggest that the basic developmental mechanism of private law, juristic discussion, remained largely unchanged in this period. That characteristic may have changed with the codifications of the nineteenth century, but that story is beyond of the scope of this piece.*

### INTRODUCTION

"If a camel laden with flax passed by in the public domain and its load of flax entered a shop and caught fire from the shopkeeper's light, and so sets fire to a large building, the owner of the camel is culpable; but if the shopkeeper left his

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\* Paul A. Freund Professor of Law, Harvard Law School. A.B. Harvard, 1962; LL.B. Yale, 1965.

1. Conversion of this piece from a lecture given at a conference to an article has proved difficult. The broad generalizations, perhaps appropriate for a lecture, seem bald in print. I have decided to preserve the lecture pretty much as given. References in the notes are more "suggestions for further readings" than detailed support for the points made, except where they support a point of detail. I have not felt it necessary to provide support for points that are well known and uncontroversial.

light outside, the shopkeeper is culpable. R. Judah says: If it was a Hanukkah-light, he is not culpable."

*The Mishnah*, Baba Kamma 6.6, trans. Herbert Danby (Oxford, 1933), 340; cf. b. Baba Kamma 22a.

So, the *mishnah* that begins a passage in the tractate Baba Kamma of the Babylonian Talmud.<sup>2</sup> In terms of our concerns here, there are three points to make about it: (1) The participants are engaged in what the rest of this passage makes clear is a debate about private law.<sup>3</sup> They would not have called it that, but that is our term for it. (2) The participants in this debate did not have a state, under any of the multiple definitions of that word. We can argue about whether they had one approximately 500 years before the Talmud passage was written down, but they certainly did not have one when it was written down.<sup>4</sup> (3) Not only is this an argument about private law, but the arguments being made are strikingly familiar. In 1914, the United States Supreme Court dealt with a case on quite similar facts.<sup>5</sup> Admittedly, in the American case the flax was stationary and sparks came from a passing train, but the same arguments were made about what trespassed on what. Indeed, the only argument found in the Talmud passage that is not found in the Supreme Court opinion is that the result might be different if the accident happened during Hanukkah.<sup>6</sup>

The problem is a classic one of private law. Who, if anyone, is liable, if a highly combustible material is ignited by a fire that is normally quite harmless? Should we carve up the world into areas with borders in which the liability is dependent on whether the flammable material or the fire crosses over the border? Or should we assign responsibility to the person whose behavior is the active cause of the harm? Or does the distinction between active and passive causes make any sense this situation?<sup>7</sup> Or should we privilege one activity

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2. Fol. 22a. For the Soncino translation of the whole passage, see [http://www.come-and-hear.com/bahakamma/bahakamma\\_22.html#22a\\_1](http://www.come-and-hear.com/bahakamma/bahakamma_22.html#22a_1) (last visited June 7, 2007).

3. Of course, if one is methodologically or philosophically committed to the proposition that there can be no law without the sanction of the state, then one has to find another word, but it should be a word that is quite close. I would suggest "wal etavirp," "private law" spelled backwards.

4. Further, this passage and the book within which it is contained were used as a foundation of a system of private law that certainly was not supported by a state until the foundation of the state of Israel in 1948, and Israel does not have that system of private law, although some argue that it should.

5. *LeRoy Fibre Co. v. Chi., Minneapolis & Saint Paul R.R., Co.*, 232 U.S. 340 (1914).

6. I learned about this passage in a lecture given by the late David Daube. His point was: "If you remember nothing else from this lecture, remember that you shouldn't bring a camel-load of flax into Jerusalem during Hanukkah."

7. One is reminded of the custom of England in the Middle Ages and beyond that he who lighted a fire was absolutely liable for its consequences. See *Beaulieu v. Fin-*

over another? Transportation by rail is more important than storing flax next to railroad tracks, or, normally, carriers of flammable goods are entitled to a clear path to get into Jerusalem, but not during Hanukkah?

What does the state have to do with this? The way I described it in the previous paragraph, nothing at all. What is required for the previous paragraph is a group, the “we” of the paragraph. The group can be the rabbis of the Talmud or the justices of the U.S. Supreme Court or the wisemen in an acephalous society to whom the parties to the dispute bring their problem. The “we” also includes, if the determination of the group is to have any practical effect, the disputants, who, willingly or unwillingly, bring the issue to those who are making the determination.

When we ask, however, what the effect of a particular determination of the issue is going to be, then having a state makes some difference, though perhaps not so much as is normally thought. However we define the state—and that is an issue to which we must return—the state will make some kind of claim to enforce the law. It will claim, if not the exclusive power to use legitimate force, at least a power to use legitimate force. It will also, if history is any guide, tend to delegitimize the use of force by non-state actors.

Despite Holmes’s famous aphorism (“For legal purposes a right is simply the hypostasis of a prophecy—the imagination of a substance supporting the fact that public force will be brought to bear on those who are said to contravene it.”),<sup>8</sup> I am not sure that the possible use of public force is a necessary element in a system of private law. Its absence is notable not only in the Jewish and Islamic legal systems in many of their periods but also, if we have this right, in the classical Roman legal system in many of its periods.<sup>9</sup> What is undeniable is that the possibility of using public force makes practical application of any system of private law more effective. One is reminded of the three *capias*’s associated with the English writ of trespass: *capias ad respondendum*, getting the defendant before the court to answer the complaint; *capias ad audiendum iudicium*, bringing him back before the court to hear the judgment, and *capias ad satisfaciendum*, getting him to pay the judgment.<sup>10</sup>

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glam, Y.B. Pas., 2 Hen. 4, fol. 18, pl. 6 (C.P. 1401), in J. H. BAKER & S. F. C. MILSOM, SOURCES OF ENGLISH LEGAL HISTORY 557-61 (1986).

8. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV., 40, 42 (1918).

9. For Jewish law, the argument is made in the preceding text. For Islamic law, the existence and amount of public enforcement was dependent on the relationship between the Islamic judge (*qadi*) and the secular authorities, which varied across time and place. For Roman law, the leading work on the topic is J. M. KELLY, *ROMAN LITIGATION* (1966). Kelly may exaggerate, but it is remarkable how much the *legis actio* and formulary procedures seem to have been dependent on enforcement by the litigants.

10. BLACK’S LAW DICTIONARY (8th ed. 2004), s.v. *capias*.

Those with political authority, whether or not that authority is exercised in the form of a full-blown modern state, will have a tendency to draw private law to themselves. They will do so in their own interests because a system of private law that they do not operate will have a tendency to use force to accomplish their objectives, and they want to delegitimize the use of force by anyone other than themselves. They will do so also because the operators of a system of private law will seek their help in order to make the system more effective. Once those with political authority become involved in a system of private law, they will have a tendency to use it to accomplish their own objectives. Not only will the substantive law reflect their interests but the judges and lawyers, or those who fill those roles, will tend to become, in some sense, their agents. In the West—and the West is not unique in this regard—political authority will regard doing justice as part of its function, and if a distinction emerges between making law and doing justice on the basis of law already made, political authority will seek to monopolize both functions.

The purpose of this paper is to make concrete these generalizations in the context of the development of systems of private law in Europe in the medieval and the early modern periods. Before we get there, however, there are three points about the generalizations that are going to affect our account of the history. The first is that the generalizations make use of the modern western European distinction between public law and private law. That distinction is derived from Roman law, made explicitly at the beginning of the *Institutes* and the *Digest*<sup>11</sup> and reinforced by the contents of the *Institutes*, the overwhelming bulk of the contents of the *Digest*, and well over half of the contents of the *Code* and *Novels*. The distinction is certainly not universal; indeed, it may be unique to legal systems that have been influenced by Roman law.<sup>12</sup> Perhaps more important, while the distinction was known in most of the periods that we will be discussing, it was not often used until quite recently. Hence, for most of the history that we will be discussing our employment of the term is an anachronism.

The second point about the generalizations is that they assume that a system of private law is going to be applied in resolving actual disputes between real people. Only if this is the case do the concerns about enforcement that bring those with political authority into the picture become relevant. This assumption should not go unchallenged. There are a number of historical examples of people who were

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11. J.I.1.1.4; D.1.1.1.2.

12. The bibliography is large. I have found useful: HANS MÜLLEJANS, *PUBLICUS UND PRIVATUS IM RÖMISCHEN RECHT UND IM ÄLTEREN KANONISCHEN RECHT, UNTER BESONDERER BERÜCKSICHTIGUNG DER UNTERSCHIEDUNG IUS PUBLICUM UND IUS PRIVATUM* (Münchener theologische Studien: 3 Kanonistische Abt. Bd. 14, 1961).

interested in developing a system of private law with little regard, it would seem, for whether the system ever got applied to actual disputes. The reader can imagine the igniting of a camel-load of flax and argue with the rabbis of the Talmud as to where liability ought to be assigned without being concerned about whether the results of the debate will ever get applied to a real case. In some societies this type of development can go on for centuries with little or no evidence that the results of the debate ever got applied to the resolution of actual disputes. The Roman lawyers of twelfth and thirteenth centuries may be an example; the interplay across time and culture that is reflected in the code of Hammurabi and the Covenant Code in the Bible may be another.<sup>13</sup> There does seem, however, to be a constant about such discussions: the people who were engaged in them, or their students, were involved in the resolution of real-world cases.<sup>14</sup> The rabbis of the Talmud probably conducted rabbinical courts, though some have doubted how much the law of the Talmud actually got applied in those courts. The earliest medieval Roman lawyers were all judges; their students in later periods were judges, advocates, and legal administrators. Once more, we can doubt how much of the law that they developed actually got applied. It does, however, seem to be a necessary condition for the development of systems of private law that the participants in the development be themselves involved, in some way, in the resolution of real cases. I say "seem" because to say that we are poorly informed about the respective roles in their societies of the compilers of the code of Hammurabi and of the Covenant Code is greatly to exaggerate the extent of our knowledge.

The third point about the generalizations is that they assume that there is at least a group within the society, if not the whole society, that is interested in the development of a *system* of what we call private law. Not every society has such a group. In the ancient world the Jews did; the Romans did, and the Greeks did not. Now, to say that not every society has a group interested in the development of a system of private law is not to say that there are societies without private law, or its functional equivalent. There may be such societies, but if they exist, they would seem to be quite rare. Certainly the Greeks were not such a society. Systematic discussion of private law among the Greeks is, however, largely absent until the Roman pe-

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13. The standard edition of the code of Hammurabi is in 2 G. R. DRIVER AND J. C. MILES, *THE BABYLONIAN LAWS* (1955). The covenant code may be found in *Exodus* 20:22-23:33. The classic study is J. J. FINKELSTEIN, *THE OX THAT GORED* (1981).

14. See CHARLES RADDING, *THE ORIGINS OF MEDIEVAL JURISPRUDENCE: PAVIA AND BOLOGNA 850-1150* (1988), a book that has proved to be controversial in some respects, but which is solidly grounded on this point. Cf. JOHANNES FRIED, *DIE ENTSTEHUNG DES JURISTENSTANDES IM 12. JAHRHUNDERT: ZUR SOZIALEN STELLUNG UND POLITISCHEN BEDEUTUNG GELEHRTER JURISTEN IN BOLOGNA UND MODENA* (Forschungen zur Neueren Privatrechtsgeschichte, 21, 1974); ENRICO SPAGNESI, *WERNER-IUS BONONIENSIS IUDEX. LA FIGURA STORICA D'IRNERIO* (1970).

riod. For the Greeks there seems to have been no room between top-level generalizations of the philosophers and the specifics of the rhetoricians for the middle-level generalizations that characterize systems of private law. Non-literate societies also seem to show the same dichotomy.<sup>15</sup>

### *The Middle Ages*

I do not know why some societies develop systems of private law and some do not. So far as I am aware the phenomenon has not been studied comparatively. Thus, I cannot fully explain why there was an explosion of interest in private law in Europe in the twelfth century. It has been suggested that the phenomenon is related to the religious reform movement of the eleventh century, the so-called Gregorian reform.<sup>16</sup> There may be a connection between the two, but the concerns of the reform movement were, for the most part, quite far from the topics that we normally think of as private law. Most of those concerns had to do with what we would call criminal law (for example, simony), or administrative law (for example, the appointment of bishops and abbots), or constitutional law (for example, the respective powers of the emperor and the pope).<sup>17</sup> We can, perhaps, save the possibility of a connection if we recall that the divisions of law that I just mentioned were not paramount in the minds of the men of the twelfth century, if they were there at all. Perhaps the search was for law, of whatever type it might be.<sup>18</sup>

Be that as it may be, the explosion occurred, and it occurred in a society that did not have anything that looks much like the modern or

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15. There seem to be some, the Barotse might be an example, who show considerable interest in the development of private law; others, the Tiv might be an example, who do not seem to be particularly interested in it, despite the fact that they have a functional equivalent of private law, at least in the sense that they have a method for resolving disputes among the members of the society. Compare MAX GLUCKMAN, *THE IDEAS IN BAROTSE JURISPRUDENCE* (1972) and MAX GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE* (1967) with PAUL BOHANNAN, *JUSTICE AND JUDGMENT AMONG THE TIV* (1957) and *LAW AND WARFARE: STUDIES IN THE ANTHROPOLOGY OF CONFLICT* (Paul Bohannan ed., 1967).

16. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983). ANDERS WINROTH, *THE MAKING OF GRATIAN'S DECRETUM* (2000) places a "first recension" of Gratian's *Concordance* (text at *infra* note 29) somewhat earlier than had been traditionally thought but casts considerable doubt on much study of Roman law at Bologna before Gratian's time. If he is right, that places the beginning of Bolognese legal studies quite a bit later than the controversies that attended the Gregorian reform.

17. On the reform movement, see UTA-RENAE BLUMENTHAL, *THE INVESTITURE CONTROVERSY: CHURCH AND MONARCHY FROM THE NINTH TO THE TWELFTH CENTURY* (1988); BRIAN TIERNEY, *THE CRISIS OF CHURCH & STATE, 1050-1300* (1964); GERD TELLENBACH, *CHURCH, STATE, AND CHRISTIAN SOCIETY AT THE TIME OF THE INVESTITURE CONTEST* (Ralph Francis Benett trans., 1991).

18. This point is intimately connected with a point made at *supra* notes 11-12, that the distinction between public law and private law is not often used in this period.

even the early modern state. That brings us to the question of definition that we avoided earlier in the paper. A preliminary paper for the conference takes the position that the nation-state does not appear until the sixteenth century.<sup>19</sup> That is a position with which, with some qualifications, I and many, though certainly not all, historians would agree. If we take that position, however, we have to find a way to describe the institutions that performed some, at least, of the functions of the modern state prior to the sixteenth century. That is not an easy task, and we are going to have to engage in some oversimplification in order to keep the discussion within reasonable bounds.

The traditional generalization was that the feudal society of the Middle Ages gave way to the absolute monarchies of the sixteenth century, and that the absolute monarchies became possible when the Reformation destroyed the temporal power of the papacy, leaving monarchs both Protestant and Catholic with undisputed sovereignty. Hence, the modern nation-state was born. That bald a statement would not find much favor with historians today. We can make that statement more sophisticated in a number of different ways. We can emphasize the development of governmental institutions in the feudal monarchies, so that we can speak of the medieval origins of the modern state.<sup>20</sup> We can emphasize the development in the Middle Ages of ideas that allowed the society to separate person from office and to develop an increasingly abstract notion of governance, so that the sixteenth century could speak comfortably of the king's two bodies and sovereignty.<sup>21</sup> We can question the very notion of feudal society.<sup>22</sup> But we can also ask whether we may be putting the notion of government too far back; perhaps we should speak of lordship rather than government until quite late in the Middle Ages.<sup>23</sup>

We are certainly not going to be able to resolve this fundamental question of medieval historiography in this paper, but maybe we can put pieces of it together in order to describe the situation in the twelfth century when the revival of interest in private law occurred. First, the structures of power that we would call governmental in central Italy, one of the major centers of the revival of interest in private law, were not the same as they were in England, another of

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19. Nils Jansen & Ralf Michaels, *Private Law and the State. Comparative Perceptions and Historical Observations*, 71 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT*, 345, 356-57 (2007).

20. *E.g.*, JOSEPH R. STRAYER, *ON THE MEDIEVAL ORIGINS OF THE MODERN STATE* (1970).

21. *E.g.*, ERNST KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY* (1957); GAINES POST, *STUDIES IN MEDIEVAL LEGAL THOUGHT; PUBLIC LAW AND THE STATE*, 1100-1322 (1964).

22. *E.g.*, SUSAN REYNOLDS, *FIEFS AND VASSALS* (1994).

23. See the essays collected in *CULTURES OF POWER: LORDSHIP, STATUS, AND PROCESS IN TWELFTH-CENTURY EUROPE* (Thomas N. Bisson ed., 1995). I am reminded that the German for "lordship" is *Herrschaft* and wonder if the standard translation of Max Weber's use of *Herrschaft* as "domination" quite captures it.

the major centers.<sup>24</sup> This difference may well explain why the revival of interest produced somewhat different results in the two places. But everywhere lords were important. Some of these lords—and the tendency was for it to be those at the notional top of the effective hierarchy or those who were also ecclesiastics—were beginning to develop techniques of control that were not totally dependent on brute force. We may look to the development of accounting; we may look to the development of courts; we may struggle to see how accounting and courts might be the same thing.<sup>25</sup>

Now what is the relationship between these developments and law? In the first place this is a society that is not going to have much use for the distinction between public law and private law as we see it. Lordly power was in most places related to control over land, and the world of the twelfth century was one that did not comfortably distinguish between property and government.<sup>26</sup> In the second place, if we are looking at a society that is witnessing a proliferation of courts, it is going to need people to operate those courts. As the economy expanded in the twelfth century, society became able to afford specialists to run the courts, and those specialists had to be trained. If the society was also experiencing an increase in non-violent methods of administration, administrators were also needed, and while there is no necessary reason why administrators should be trained as lawyers, many of those who were so trained proved to be quite good at it.<sup>27</sup>

If we are going to train lawyers in a society in which the exercise of non-violent power was intimately connected with writing, we need

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24. For England, one might begin with two recent works by a younger scholar: JOHN HUDSON, *LAND, LAW, AND LORDSHIP IN ANGLO-NORMAN ENGLAND* (1994); JOHN HUDSON, *THE FORMATION OF THE ENGLISH COMMON LAW: LAW AND SOCIETY IN ENGLAND FROM THE NORMAN CONQUEST TO MAGNA CARTA* (1996). Good general works on central Italy are harder to find. CHRIS WICKHAM, *LEGGE, PRATICHE E CONFLITTI: TRIBUNALI E RISOLUZIONE DELLE DISPUTE NELLA TOSCANA DEL XII SECOLO* (2000), translated as *COURTS AND CONFLICT IN TWELFTH-CENTURY TUSCANY* (2003), is a fine study of a specific region.

25. The relationship between the Exchequer and the beginnings of the central royal courts in England is well known. The work of Thomas N. Bisson and his student Robert Berkhofer may suggest that this relationship can be generalized over all of Europe. See ROBERT F. BERKHOFFER, *DAY OF RECKONING: POWER AND ACCOUNTABILITY IN MEDIEVAL FRANCE* (2004); *FISCAL ACCOUNTS OF CATALONIA UNDER THE EARLY COUNT-KINGS (1151-1213)* (Thomas N. Bisson ed., 1984).

26. Susan Reynolds, at times, seems to question whether the distinction between property and government was always blurred in this period. REYNOLDS, *supra* note 22, at 25-27, 51-52, 403-04, 475-77. The story of the emperor and the horse, however, is pretty good evidence that some in the twelfth century did blur the distinction. KENNETH PENNINGTON, *THE PRINCE AND THE LAW, 1200-1600*, 8-37 (1993).

27. For the general point, see ALEXANDER MURRAY, *REASON AND SOCIETY IN THE MIDDLE AGES* (1978), though Murray might emphasize mathematics as much as, or more than, law.

to have books with which to train the lawyers.<sup>28</sup> One such book was written in the twelfth century, Gratian's *Concordance of Discordant Canons*.<sup>29</sup> It became the basic textbook for faculties of canon law in the middle to late twelfth century, and remained one of the basic textbooks in such faculties well into the early modern period. There is not a great deal of what we would call private law in Gratian's *Concordance*, though there is some. Marriage, as we might expect, features quite prominently; there is some law of property, particularly about property of the church; some law about obligations can be derived from the book.

The other book that was used for study was, of course, the compilations of Justinian, what a later age called the *Corpus Iuris Civilis*. Why this became such a popular teaching book is something of a mystery. It is largely, though not quite exclusively, concerned with private law.<sup>30</sup> Unlike Gratian's book, the vast bulk of which was concerned with pressing issues of the twelfth century, much, one might even say most, of the contents of the *Corpus Iuris Civilis* were quite irrelevant to the world of the twelfth century. The law of persons reflected a slave-based society, and, for the most part, the family structure of a pagan society. The society of the twelfth century was neither of these things. The law of property assumed the distinction between public and private law and said nothing about the role of lordship. The law of delicts was both too sophisticated and too primitive for twelfth-century society, and the law of contract was built around a series of typical transactions, transactions of types that were only beginning to be revived in the twelfth century.

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28. When we consider the comparative history of the development of systems of private law, it is striking how important it is that there be an authoritative text or texts from which to begin the discussion. For the rabbis of the Talmud it was the Hebrew Bible and the Mishnah; for the Islamic jurists it was the Qu'ran and the Hadith; for the Roman jurists it was the praetor's edict, Quintus Mucius' *Ius civile*, and, to a lesser extent, the Republican statutes. I would be reluctant, however, to attribute much in the way of causative effect to the existence of such a text or texts. The Qu'ran is not a particularly good base on which to build a legal system (it is much less of a "law-book" than are at least parts of the Hebrew Bible). As the example of medieval canon law shows, if those who want to create a system of law do not have a book, they will create one. (The Mishnah probably falls into the same category.) Further, once the discussion gets going, it rapidly passes beyond the *ipsissima verba* of the text, and the teachers begin to cite each other. Although the existence of such a text (or the material to create one as in the case of Gratian and the Mishnah), is almost certainly not a sufficient condition for the beginning of a discursive tradition, it may be a necessary condition. The Greeks had Homer, but it is even harder to get law out of Homer than it is out of the Qu'ran, and authoritative as Homer was, he was not authoritative in the same way as the Qu'ran, the sayings of the older rabbis, or even the praetor's edict.

29. 1 *CORPUS IURIS CANONICI* (Emil Friedberg ed., 1879). The book came to be called Gratian's *Decreta*. I have not found any examples of its being called Gratian's *Decretum*, as it is called in the early modern and modern printed editions, before the mid-fifteenth century, but I may have missed them.

30. See *supra* notes 11-12 and surrounding text.

What both Gratian's book and the *Corpus Iuris Civilis* allowed the law-teachers of the twelfth century to do was to talk about law with their students. What the students got from these books, at least the better students, was not so much a scheme of rules as a method, a method that could be applied to any body of law, to any set of legal rules. As an educational system, it was quite successful. By the beginning of the thirteenth century, law graduates were not only running the judicial and administrative systems of the church throughout western Europe, they were also becoming increasingly important in secular courts and secular governmental institutions.<sup>31</sup>

The role of law graduates in the secular courts was less prominent in northern Europe than it was in southern. Let us turn to the situation in England, because there a somewhat different starting point was to have long-term consequences. The English monarchy of the twelfth century was more centralized than any of the other monarchies of Europe. It is not surprising, therefore, that the two most powerful of the twelfth-century monarchs, Henry I (1100–1135) and Henry II (1154–1189), were able to establish a system of central royal courts. By the end of the twelfth century, that system of central royal courts had a large share of, and claimed exclusive control over, cases involving serious crimes, and, with important consequences for our story, cases involving freehold interests in land. They also heard some cases involving delictual and contractual obligations, but here the proportion of such cases that the central royal courts heard was far more modest, as were their jurisdictional claims.<sup>32</sup>

It is a commonplace that the English development took place before the time when the study of Gratian and the *Corpus Iuris Civilis* had much effect on the law either as stated or as applied. Like many commonplaces, this one needs some qualification. The first treatise written on the practice of the central royal courts goes under the name of *Glanvill* and was written shortly before the death of Henry II in 1189. Its author knew some Roman law and some canon.<sup>33</sup> The second treatise written on the practice of the central royal courts goes under the name of *Bracton* and was written for the most

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31. For a masterly account of these developments, see JAMES A. BRUNDAGE, *THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS* (2008).

32. A classic account is RAOUL CHARLES VAN CAENEGEM, *THE BIRTH OF THE COMMON LAW* (2d ed. 1988), which is one of the few to consider the development comparatively. For more recent work, see *supra* note 24.

33. *THE TREATISE ON THE LAWS AND CUSTOMS OF ENGLAND COMMONLY CALLED GLANVILL* (George Derek Gordon Hall ed., 1965). The author had probably read the *Institutes*, and he seems to have had some awareness of the practices of the ecclesiastical courts. See JOHN L. BARTON, *ROMAN LAW IN ENGLAND*, 9-10 (*Ius Romanum Medii Aevi*, V.13.a, 1971); Charles Donahue, *Ius Commune, Canon Law, and Common Law in England*, 66 *TUL. L. REV.*, 1745, 1751-2 (1992).

part, we now know, in the 1220s and 1230s.<sup>34</sup> Its authors (I use the plural advisedly) knew a great deal of Roman and canon law.<sup>35</sup>

In the case of both *Glanvill* and *Bracton*, the Roman and canon law distorts, to some extent, the underlying conceptual economy of the system. It also, at least in some instances, seems to have transformed it. (Illustrations of this point are complicated; I must leave an example to an Appendix.)

Now what does all this have to do with the state? Nothing at all if we insist that the state have all the characteristics of the nation-states of the sixteenth century. If we relax our definition of state, however, and ask how all this activity relates to what will become state functions in the sixteenth century, the answer becomes more complicated. In the case of the students of Roman and canon law, those who were obtaining what we may call, without too much anachronism, professional training in one or both of these disciplines, their studies were going to lead them, if they were successful, to positions of power and influence in the courts and administration of the church, and, in some cases, of secular authorities. In the case of the church, we can now say with considerable confidence that the canon law that they learned in what became in the thirteenth century universities was, by and large, the law that was applied, with no more than the usual amount of slippage between the law on the books and the law applied in courts and with the qualification that in some areas both geographical and substantive there was a substantial amount of local law both statutory and customary that changed the practical effect if not the statement of the common law of the church. The problem is not determining whether the medieval canon law was *ius vigens*; it was.<sup>36</sup>

The problems are how to compare the medieval church to the nation-states of the sixteenth century and how much of canon law can be called private law. One of F. W. Maitland's famous aphorisms is that the medieval church was a state.<sup>37</sup> It had a hierarchy, a sovereign, legislation, courts, sanctions, and troops. All of that is true, at least in some sense. In no place, however, except perhaps in the papal

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34. The argument is laid out cryptically but masterfully by Thorne in the Introduction to vol. 3 of *BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND*, at xiii-lii (George Woodbine ed., Samuel E. Thorne trans., 1977). I am not convinced by John L. Barton, *The Mystery of Bracton*, 14 J. LEGAL HIST., 1-142 (1993). See Paul Brand, *The Age of Bracton*, in *THE HISTORY OF ENGLISH LAW: CENTENARY ESSAYS ON "POLLOCK AND MAITLAND"*, 65-89 (Proceedings of the British Academy, 89; John Hudson ed., 1996).

35. Tancred's *Ordo* and Azo's *Summa* on the *Institutes* are among the works that figure quite prominently on its pages. See BARTON, *supra* note 33, at 18-24.

36. See CHARLES DONAHUE, LAW, MARRIAGE AND SOCIETY IN THE LATER MIDDLE AGES: ARGUMENTS ABOUT MARRIAGE IN FIVE COURTS (2007).

37. Frederic William Maitland, *Canon Law in England: III. William of Drogheda and the Universal Ordinary*, 12 ENG. HIST. REV., 625 (1897), in *FREDERIC WILLIAM MAITLAND, ROMAN CANON LAW IN THE CHURCH OF ENGLAND*, 100 (1898).

states, did the church claim exclusive authority in all the areas that we would call governmental, and while it made use of force to enforce its judgments, that force, in many places, was exercised through the secular authorities.<sup>38</sup> There is also no question that some of the substantive topics covered by canon law were topics that we would call private law, but the canonists themselves recognized that one needed Roman law to complete the picture. In no place, even in those in which the church also exercised secular authority, was canon law the exclusive source of private law, and in no place were the church courts the only courts in which private disputes were resolved.

The story on the secular side is even more complicated. In no place in western Europe that I know of was Roman law the exclusive source of law. There was more of it in the south than in the north; more, perhaps, in southeastern France and certain parts of Italy than in southwestern France and Spain. Court records do survive for some of these places for some periods, but they are poorly explored.<sup>39</sup> The formal sources of law, local legislation and customs, have been better explored, though much more work still needs to be done. These sources show a curious mixture of ideas that seem to be derived from Roman and canon law, from local custom, and from local invention.<sup>40</sup> What is clear is that in many of these places, both in the north and in the south, there developed over the course of the thirteenth century many active court systems, some of which were quite professionalized. Law graduates were involved in their operation, at least in some places. The systems of governance that lay behind these court systems were varied indeed. Some of them were dependent on the monarch, some on local lords, some on local urban structures.

England was different in degree but perhaps not in kind. The central royal courts were more influential, and the practice of the central royal courts tended to influence that of local courts.<sup>41</sup> Seigniorial courts declined in importance over the course of thirteenth century insofar as freeholders were concerned but not insofar as those who held by servile tenure. Urban courts became more important. The one major difference from the Continent was that university graduates in law were not involved in the operation of the central

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38. *E.g.*, FRANCIS DONALD LOGAN, *EXCOMMUNICATION AND THE SECULAR ARM* (1968). The principal tool for enforcement of church judgments that did not use secular force was excommunication, and as time went on that tool was overused and so became less effective.

39. A notable exception is the work of Daniel L. Smal: *THE CONSUMPTION OF JUSTICE: EMOTIONS, PUBLICITY, AND LEGAL CULTURE IN MARSEILLE, 1264-1423* (2003); *IMAGINARY CARTOGRAPHIES: POSSESSION AND IDENTITY IN LATE MEDIEVAL MARSEILLE* (2000).

40. The *Usatges de Barcelona* are a good example: *USATGES DE BARCELONA: EL CODI A MITJAN SEGLE XII* (Joan Bastardas ed., 1984).

41. See John S. Beckerman, *Procedural Innovation and Institutional Change in Medieval English Manorial Courts*, 10 *LAW & HIST. REV.*, 197-252 (1992).

royal courts of common law, and at the end of the thirteenth century clerical participation in the operation of these courts declined almost to the point of nothingness.<sup>42</sup> The result was that those like the authors of *Bracton*, who sought to explain the operation of these courts in terms of Roman and canon law, stepped out of the picture, and what was left was the indigenous system, influenced as it had been earlier in the century by those who knew something about Roman and canon law, but which now proceeded to develop on its own with little or no reference to either of them. Courts that show much more influence from Roman and canon law do appear in England late in the fourteenth century, the most important of which was the court of the chancellor, later called the court of equity. Although England was certainly not unique in this regard, we should also mention that the late thirteenth century sees quite extensive statutory changes in the system of the English common law, statutory changes of an extent that was not to be found again until the sixteenth century, perhaps not until the nineteenth.<sup>43</sup>

### *The Ius Commune*

I have told my story so far without referring to the *ius commune*. The phrase does appear in university writing about law in the thirteenth century, though it is a bit difficult to figure out precisely what it means. In the fourteenth century, Italian jurists, traditionally called commentators, began more systematically to take into account local legislation and local custom in their exposition of Roman law. Though various phrases were used, one in quite common use described local legislation and local custom as *ius proprium* in contrast to *ius commune*, the law that was found in the books that were used in university teaching of both Roman law and canon. Over the course of the fourteenth and fifteenth centuries university-trained jurists developed a comprehensive system of private law (with quite a bit of public law as well). This system was, at least notionally, the default system of law in Italy, Southern France, and Spain.<sup>44</sup> If there was local law, that was what prevailed, but in the absence of local law, the *ius commune* would apply. But the influence of the *ius commune* was even stronger than that statement would imply, at least in some geographical areas. The *ius proprium* was interpreted in the light of the

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42. See Paul Brand, *Edward I and the Transformation of the English Judiciary*, in *THE MAKING OF THE COMMON LAW*, 135-68 (1992).

43. See PAUL BRAND, *KINGS, BARONS AND JUSTICES: THE MAKING AND ENFORCEMENT OF LEGISLATION IN THIRTEENTH-CENTURY ENGLAND* (2003).

44. There is much about this generalization that should make one uncomfortable, but for specific studies that tend to confirm it, see LAMBERTO PANSOLLI, *LA GERARCHIA DELLE FONTI DI DIRITTO NELLA LEGISLAZIONE MEDIEVALE VENEZIANA* (Fondazione Guglielmo Castelli, 41, 1970); ALBERTO LIVA, *LA GERARCHIA DELLE FONTI DI DIRITTO NELLE CITTÀ DELL'ITALIA SETTENTRIONALE* (1976).

*ius commune*, harmonized with it when possible. Statutes in derogation of the *ius commune* were strictly construed. Local legislation was written by men trained in the *ius commune*, and used its categories and terminology. Litigants and judges sought the opinions of university jurists on difficult questions of law, and these jurists answered those questions in terms of the *ius commune*, except where a local statute or custom was called to their attention. These opinions, *consilia*, tens of thousands of which have survived, were published, and were cited in other opinions.

Those who are looking for a system of private law that functions without the state frequently cite the period of the *ius commune* as an example. Indeed, there are some who seem to be arguing for a return to the *ius commune* as a kind of golden age, a solution for the problem of private law in the European Community today. I think that it is dangerous for historians to make this kind of an argument, and I will not get into that argument here. What needs to be emphasized here is that the era of the *ius commune*, while it certainly began in a period in which there were no modern states (or even states in the sixteenth-century sense), was not an era that lacked institutions with political authority both to make and to enforce law. The *ius commune* was there. As a system it was largely the creation of the university-trained jurists, with considerable help from the Roman jurists, Tribonian, and innumerable popes and church councils. Whether the *ius commune* would be applied in any given case, however, was dependent on a judge who was ultimately responsible to those who exercised political power. Both judges and litigants sought the opinion of the law professors. Indeed, the litigants paid them handsomely for them. Whether the opinion was followed was up to those who asked for it.<sup>45</sup> The system of the *ius commune* was comprehensive. There was no question that it could not answer. Indeed, there were few questions to which it did not provide multiple and often contradictory answers. Complaints about the uncertainty of the law were common in the period of the *ius commune*.

So what difference did the rise in the sixteenth century of the nation-state in more or less its modern form make? We must be careful here because we are venturing into a very complicated period.<sup>46</sup> The impression, however, is that considering the substantial social, economic, governmental, and religious changes of the sixteenth cen-

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45. The parties could also contractually bind themselves to follow the results of arbitration, and arbitrators frequently seem to have been following the *ius commune*. Arbitration in the later Middle Ages deserves a study that, so far as I am aware, has not been done. See Linda Fowler-Magerl, *Forms of Arbitration*, in PROCEEDINGS OF THE FOURTH INTERNATIONAL CONGRESS OF MEDIEVAL CANON LAW, TORONTO, 21-25 AUGUST, 1972, at 133-47 (*Monumenta iuris canonici*, C:5, 1976).

46. And one about which I confess that I know less than I do about the earlier periods.

tury, their effect on private law was not so great as one might expect. In England, the common law at the end of the fifteenth century was something of a mess. Narrowly confined to landed property and crime with a smattering of close to incomprehensible ideas about obligation, it had evolved into a system that was unworkable for all except the few who had the patience and the money to manipulate it. By the end of the sixteenth century, the system had largely reformed itself. There was some, though not much, help from statute, some, but not much, help from the crown, particularly in its appointment of judges. The equity court was largely taken over by the common lawyers, and its jurisdiction confined. An unseemly competition among the central royal courts of common law resulted in a system of private law, which, although still quite bizarre for those brought up on the categories of the *Institutes*, was sufficiently comprehensive and efficient that the cries for radical reform that had been heard at the beginning of the sixteenth century died down.<sup>47</sup>

What does this have to do with the nation-state? Not much, at least if one looks just to the specific interventions in the legal system by increasingly powerful Tudor monarchs. A bit more perhaps, if one sees the rise of the nation-state as a matter as much of sentiment as of constitutional development. The central royal courts of common law had been courts for all of England from at least the time of Henry II. Hence, the rise of the nation state could tolerate the slow and awkward process by which those courts reformed themselves and developed a system of private law that was by 1603 far more comprehensive both in terms of the substantive areas that it could handle and in terms of the types of people that it could accommodate (though it was still far too expensive for those of modest means). The sixteenth century certainly sees the rise of a quite strong sentiment in some quarters in England against anything foreign being admitted into the legal system. That sentiment was not new in the sixteenth century, but it became much stronger then.<sup>48</sup> Foreign ideas, however, continued to have some influence. The English civilians ensured that England was aware of developments in the *ius commune* on the Continent,<sup>49</sup> and the more sophisticated English lawyers were aware

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47. A masterly account of the first half of the story may be found in JOHN BAKER, 6 1483-1558: THE OXFORD HISTORY OF THE LAWS OF ENGLAND (2003). We await the second half of the story, promised by David Ibbetson.

48. See DANIEL COQUILLETTE, THE CIVILIAN WRITERS OF DOCTORS' COMMONS, LONDON: THREE CENTURIES OF JURISTIC INNOVATION IN COMPARATIVE, COMMERCIAL AND INTERNATIONAL LAW, esp. 84-94 (Comparative Studies in Continental and Anglo-American Legal History, 3, 1988). The opposition was not confined to England; see GERALD STRAUSS, LAW, RESISTANCE, AND THE STATE: THE OPPOSITION TO ROMAN LAW IN REFORMATION GERMANY (1986).

49. See generally STRAUSS, *supra* note 48; DAVID IBBETSON, COMMON LAW AND IUS COMMUNE: SELDEN SOCIETY LECTURE DELIVERED IN THE OLD HALL OF LINCOLN'S INN, JULY 20TH, 2000 (2001).

that the scheme of Roman private law was quite different from a collection of holdings of cases arranged under thirty or forty titles in alphabetical order from *abbe* to *withernam*.

The effect of the rise of the nation-state on the Continent, and on private law in particular, was more complicated than it was in England. Part of the problem arises from the fact that the states that emerged in the sixteenth century were not a unitary phenomenon. England, France, and Spain, with somewhat different borders, particularly in the case of France, did emerge quite clearly as ancestors of modern nation-states; Germany and Italy did not. The traditional view was that the rise of the nation-state in the sixteenth century led to the "reception" of Roman law in those areas that had not already received it. That view can no longer be maintained in that form. The reception statute that accompanied the establishment of the *Reichskammergericht* in 1495 has been shown not to have led to a massive importation of Roman law into the proceedings of that court.<sup>50</sup> The supposed reception of Roman law in France has turned out, it would seem, to be more a change in the style rather than in the substance of the arguments made before the *parlement de Paris*.<sup>51</sup> By the nineteenth century there was more law of obviously Roman origins in the private law of both France and Germany than there was in England, but that difference was the product of centuries of development, starting well before the sixteenth century and not complete in either France or Germany until the adoption of the civil codes.

In the sixteenth century Roman law does, however, become more important for Continental European private law in areas that had formerly been governed by customary law than it had been in previous centuries. The way in which this happened varied depending on the region that one is talking about. Let us take one example, France. As is well known there was an explosion of intellectual interest in law in France in the sixteenth century centered around the humanist jurists. Their interests were comparative and historical. They made contributions to the systematization of Roman law, to the recovery of the pre-Justinianic corpus of Roman law, to the comparison of Roman

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50. I derive this generalization from the essays in *DAS REICHSKAMMERGERICHT IN DER DEUTSCHEN GESCHICHTE: STAND DER FORSCHUNG, FORSCHUNGSPERSPEKTIVEN* (Quellen und Forschungen zur höchsten Gerichtsbarkeit im Alten Reich, 21; Bernhard Diestelkamp ed., 1990), though I am not sure that all of the authors of the essays would agree with me.

51. My support for this is Professor Elizabeth A. R. Brown's still-unpublished study of the *plaidoyers* in the *parlement* during the tenure of Christophe de Thou as *premier président* of the *parlement* (1554-1582). Once more, I am not sure that she would agree with me. Scholarly views on the topic of reception have shifted from the notion that there was a definite moment of reception in the sixteenth century, to the notion that relatively little happened with regard to reception in the sixteenth century, to what I think is an emerging consensus expressed in the following sentence.

law and French customary law, and to political theory.<sup>52</sup> Their efforts with regard to French customary law may be analogized to those of the authors of *Bracton* three centuries earlier. As was the case with the authors of *Bracton*, not all of the comparisons worked. The long-term effect of what they did may have been more important in filling in gaps in the customary law, particularly in the area of contractual obligations, than it was in making sense of those areas that the customary law did cover, but the humanist jurists began a discussion about a system of private law for France that was to result in Domat's work in the seventeenth century, Pothier's in the eighteenth and, ultimately, the *code Napoléon*.<sup>53</sup>

Once more we must ask what the nation-state had to do with this, and the way that we have described it, the answer has to be again, "not much," despite the fact that the same men were also the primary theoreticians of the French nation-state. The rise of the nation-state did, however, lead the humanists to focus on the national level.<sup>54</sup> They spoke more comfortably of the law of France than had French jurists of the fifteenth century, who tended to think either in terms of the law of, say, Paris or the *ius commune*, but there is plenty about the law of Paris and about the *ius commune* in the sixteenth-century French jurists as well.

The effect of the rise of the nation-state on the development of French thinking about private law cannot be so easily dismissed, however. The first half of the sixteenth century also witnessed the homologation of French customs. Almost three hundred French customs ended up with royally authorized texts. The comparative effort in which the humanist jurists engaged would not have been possible—at least it would not have been possible at the level of sophistication at which they conducted it—had this homologation not taken place. The sixteenth century also sees the rise of *grandes ordonnances*. These *ordonnances* were, of course, both royal and national. Those of the sixteenth century were large, sprawling statutes covering a wide variety of topics, most not concerning private law, but they made the jurists aware of the possibility of the use of statute for making large changes in the law and for bringing large areas of the law

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52. See DONALD KELLEY, *HISTORY, LAW, AND THE HUMAN SCIENCES: MEDIEVAL AND RENAISSANCE PERSPECTIVES* (1984). Cf. DONALD KELLEY, *FOUNDATIONS OF MODERN HISTORICAL SCHOLARSHIP: LANGUAGE, LAW, AND HISTORY IN THE FRENCH RENAISSANCE* (1970) (collected essays). For a somewhat fuller account of these developments, with references, see Charles Donahue, *Historical Introduction: Comparative Law Before the Code Napoléon*, in *OXFORD HANDBOOK OF COMPARATIVE LAW* 3, 15-22 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

53. For an example, see Donahue, *supra* note 52, at 16-19.

54. The nation-state seeks unification of the law. That is going to be a problem in France with 285 customs. Roman law provides a mechanism for unification. These facts do not tell us much about how discussion is going to proceed, but the nation-state gives it an impetus to have it proceed along lines that will lead to unification at the national level.

into harmony. *Grandes ordonnances* that were much more like modern codifications were to follow in the seventeenth and eighteenth centuries.

The sixteenth century is frequently thought of as a period of decline for the *ius commune*. Certainly the French humanists were quite critical of the *ius commune* as it was practiced by the Italian jurists. When the French humanist jurists actually came to do their work, however, particularly when that work was directed to contemporary law, a strikingly large amount of it builds on the work of Italian authors. If the *mos italicus* went out of fashion in the sixteenth century, what replaced it was not too far different. The system of Roman law, largely based on the *Institutes*, and thought to be present in all the Roman texts was still there. The resolutions of particular problems, largely the work of medieval jurists attempting to apply ancient texts to the problems of their own society, were still there. The method and focus had changed somewhat but perhaps not so radically as the humanists claimed.

This last point leads me to my final generalization, the most sweeping that I will offer and hence the most dangerous. In terms of their relation to the state the intellectual movements in law that follow upon the French humanists in the seventeenth and eighteenth centuries, insofar as they are concerned with private law, share with the *ius commune* of the fourteenth and fifteenth centuries and with the French humanists of the sixteenth the characteristic that they are not particularly dependent on the nation-state. It is this characteristic that allowed the late Helmut Coing to gather together works of the French humanists, the second scholastic, elegant jurisprudence, the natural law school, and the *usus modernus pandectarum* into one commodious *Handbuch* and call it *älteres gemeines Recht*.<sup>55</sup> While each of these movements, with the exception of the natural law school, is pretty firmly associated with what was or what was to become one nation-state, they all based their discussions largely on texts from the ancient world, with particular emphasis on Roman law. They also—there are very few exceptions—wrote in Latin. Hence, to take an example that is exceptional in some ways, but which illustrates the general point quite nicely, a treatise on feudal law written in Scotland in the late sixteenth or early seventeenth century could be published in Leipzig in 1718 without a translation.<sup>56</sup>

55. HELMUT COING, *EUROPÄISCHES PRIVATRECHT: 1: ÄLTERES GEMEINES RECHT* (1500-1800) (1985). Not the least striking thing about Coing's achievement is its title, for there are those who would argue that the period from 1500-1800 was not the period of the *älteres gemeines Recht*, but of the collapse of an institution, which had had its greatest period in the fourteenth and fifteenth centuries. *E.g.*, MANLIO BELLOMO, *L'EUROPA DEL DIRITTO COMUNE* (1989).

56. THOMAS CRAIG (1538-1608), *JUS FEUDALE* (1st ed. 1635) (Leipzig ed. 1718). The vagueness in the text about when the book was written is the product of the fact that

Thus, I think it is possible to speak of a European conversation about private law that survived the rise of the nation-state and came to end, if it did come to an end, only with the codifications of the nineteenth century.

### *An Example: Formation of Marriage*

Before concluding, let me try to illustrate with an example: the formation of marriage.<sup>57</sup> On the basis of conflicting authorities from the past, Gratian (c. 1140) came to the conclusion that marriages were formed by the consent of the couple, but they were not indissoluble until the couple had had intercourse. On the basis of the same authorities and a somewhat different view of the underlying principles, Peter Lombard (c. 1155) came to the conclusion that indissoluble marriages were formed by consent with words of the present tense; sexual intercourse had nothing to do with it. A debate emerged among the doctors on the merits of these two positions. Pope Alexander III (1159–1181) resolved the debate by holding that an indissoluble marriage (in most instances) was formed by present consent without regard to sexual intercourse, but that future consent also formed an indissoluble marriage if it were followed by sexual intercourse. Alexander considered but rejected the idea that the exchange of consent would form an indissoluble marriage only if accompanied by the customary solemnities (e.g., the blessing of a priest). If one tells the story that way, as many writers on the topic have told it, it looks as if the decisive determination was made by the functional equivalent, for these purposes, of the sovereign. He may have been informed by the debate, but it was his decision. Recent work, however, suggests that by the time Alexander made his decision (probably in late 1170s) the debate was over. The doctors had arrived at a consensus that present consent formed a marriage, the issue was whether that marriage was indissoluble in all circumstances.<sup>58</sup>

Alexander's rules were in force throughout the west for the entire Middle Ages. They were changed by the council of Trent in 1563, and a new rule was substituted that required the presence of the parish priest and witnesses at the exchange of consent for it to be valid.<sup>59</sup>

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the first edition of the book was not published until twenty-seven years after Craig's death.

57. This example also figures prominently in Donahue, *supra* note 52. Good general accounts of these developments may be found in JAMES A. BRUNDAGE, *LAW, SEX AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* (1987) and JEAN GAUDEMET, *LE MARIAGE EN OCCIDENT: LES MOEURS ET LE DROIT* (1987), and reference should be had to them for the details about what follows.

58. See Charles Donahue, *Johannes Faventinus on Marriage, in MEDIEVAL CHURCH LAW AND THE ORIGINS OF THE WESTERN LEGAL TRADITION: A TRIBUTE TO KENNETH PENNINGTON 179-97* (Wolfgang P. Müller & Mary E. Sommar eds., 2006).

59. Council of Trent, sess. 24, *Canones super reformatione matrimonii*, c. 1 (*Tametsi*).

The rule of the council of Trent did not go into effect in England. The monarch was, by that time, a Protestant. England retained the pre-Tridentine rules. The rule did not go into effect in France, either. The French, instead promulgated their own rule, the *ordonnance* of Blois (1579), which required the promulgation of banns for the validity of the marriage (something that Trent had not required). It also introduced new and swinging penalties for those who participated in marriages that had not been consented to by the parents of the couple.<sup>60</sup> Both the English non-development and the French development clearly reflect the rise of the nation-state and its importance. The French development may also reflect the growing importance of Roman law, which unambiguously required the consent of fathers to the marriage of their children.

One would have thought that that would have put an end to the discussion, but it did not. A solemnity requirement remained a matter of discussion in England until 1753 when the English finally went along with the mainstream requirement by the passage of Lord Hardwicke's Act.<sup>61</sup> Parental consent also remained a matter for discussion until the adoption of the codes, which had a tendency to reduce the age at which consent was required.<sup>62</sup> At the same time, the focus of discussion shifted. The issue now became not whether solemnities would be required but what solemnities would be required, and that, in turn, raised the issue of whether they were to be religious (and, if so, what religion) or whether they were to be secular. This debate broke out most notably in the nineteenth century in Germany when the issue was raised of adopting a civil form of marriage like that of the *code Napoléon*,<sup>63</sup> but it also can be seen in England somewhat earlier when increasing religious toleration raised the issue of whether the solemnity before a church of England clergyman re-

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60. Ordonnance de Blois (1579), arts. 40-1, in *RECUEIL DES GRANDES ORDONNANCES, ÉDITS, ET DÉCLARATIONS DES ROIS DE FRANCE 173-4* (Jean A. H. M. B. Pichon ed., 1786).

61. The story is nicely told in R. B. OUTHWAITE, *CLANDESTINE MARRIAGE IN ENGLAND, 1500-1850* (1995); see also DIETER GIESEN, *GRUNDLAGEN UND ENTWICKLUNG DES ENGLISHCHEN EHERECHTS IN DER NEUZEIT BIS ZUM BEGINN DES 19. JAHRHUNDERTS VOR DEM HINTERGRUND DER ENGLISCHEN GESCHICHTE: RECHTS- UND KIRCHENGESCHICHTE* (Schriften zum deutschen und europäischen Zivil-, Handels- und Prozessrecht, 74, 1973).

62. *E.g.*, 2 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *DE L'ESPRIT DES LOIS* 4.23.7-8, at 107-8 (Gonzague Truc ed., 1962) (1748).

63. The most recent treatment of this topic that I know of is DOUGLAS B. KLUSMEYER, *BETWEEN CHURCH AND STATE: PRUSSIAN MARRIAGE LAW FROM THE GERMAN ENLIGHTENMENT THROUGH THE FOUNDATION OF THE SECOND EMPIRE* (Stanford University Ph.D. dissertation, 1989) (UMI Order No. 9011529). His references to literature prior to his writing are extensive. There may be something more recent that I have missed. I have not been able to examine INKEN FUHRMANN, *DIE DISKUSSION ÜBER DIE EINFÜHRUNG DER FAKULTATIVEN ZIVILEHE IN DEUTSCHLAND UND ÖSTERREICH SEIT MITTE DES 19. JAHRHUNDERTS* (doctoral dissertation, Universität Kiel, 1997; *Rechtshistorische Reihe*, 177, Frankfurt am Main, 1998).

quired by the 1753 statute would also be required of dissenting Protestants, Unitarians, and, ultimately, Catholics.

In the example of marriage, the legislation of the nation-state plays an important role, more important than it does, to take another example, in the development of the law of obligations. The latter has recently been given a magisterial account that can tell the story largely without reference to legislation between that of the Romans and the nineteenth-century codes.<sup>64</sup> Even in the area of marriage, however, it would be a mistake to see the law solely as a creature of the nascent nation-states. The Tridentine legislation was not authoritative in Protestant Europe (and not in all of Catholic Europe), but it had an effect well beyond the boundaries of the area in which it was officially in effect, among other reasons, because of the work of Tomás Sánchez (1550–1610): *Disputationum de sancto matrimonii sacramento tomi tres*.<sup>65</sup> This work was sufficiently comprehensive that it could not be ignored even by those operating in areas in which the Tridentine decrees were not in force and even in areas where the notion of *matrimonium* as a *sacramentum* was not in accord with the official religious views. Jean Domat (1625–1696), for the most part, ignores the formation of marriage in his *Les lois civiles dans leur ordre naturel*.<sup>66</sup> That is a topic for canon law, and beyond the scope of his book. Robert-Joseph Pothier (1699–1772), by contrast, essays a comprehensive account of the topic, combining divine and natural law, canon law, and French legislation into a whole that has a decidedly Gallican bias.<sup>67</sup> The participants in the debate in Germany about the appropriate role for civil marriage produced the first modern historical accounts of the development of the law of marriage, accounts that were to have an effect long after the legislation was passed and far beyond the area in which they were produced.<sup>68</sup>

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64. REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* (1996). Even in Zimmermann's account, the key developments in the early modern period take place largely within the confines of one *Sprachraum*, the practitioners of the *usus modernus Pandectarum* in what is now Germany.

65. The earliest editions of which I am aware are Venice and Antwerp, 1614 (three years after the author's death). I have used the edition of Antwerp: apud haeredes Martini Nuti & Ioannem Meursium, 1626. I know of twelve other editions, well into the eighteenth century, with Lyons joining the other two major publishing centers in 1637.

66. 1.1.9. I have used the five-volume edition of Robert Pepie, Paris, 1696–99, where the specific reference appears at 1:329.

67. *TRAITÉ SUR LE CONTRAT DE MARIAGE* (1st ed., 1768). I have used the edition in *OEUVRES DE POTHIER* 6:1–314 (Jean-Joseph Bugnet ed., 1890).

68. Prominent among these are EMIL FRIEDBERG, *DAS RECHT DER EHE SCHLIESSUNG IN SEINER GESCHICHTLICHEN ENTWICKLUNG* (1865); RUDOLPH SOHM, *DAS RECHT DER EHE SCHLIESSUNG AUS DEM DEUTSCHEN UND CANONISCHEN RECHT GESCHICHTLICH ENTWICKELT. EINE ANTWORT AUF DIE FRAGE NACH DEM VERHÄLTNISS DER KIRCHLICHEN TRAUUNG ZUR CIVILEHE* (1875); EMIL FRIEDBERG, *VERLOBUNG UND TRAUUNG ZUGLEICH ALS KRITIK VON SOHM: DAS RECHT DER EHE SCHLIESSUNG* (1876); RUDOLPH SOHM, *TRAUUNG UND VERLOBUNG. EINE ENTGEGNUNG AUF FRIEDBERG: VERLOBUNG UND*

As time went on, however, it became more difficult for European lawyers to communicate with each other across national lines. Sánchez wrote in Latin, as did most of the members of the natural law school and the practitioners of the *usus modernus pandectarum*. They could communicate with all of Europe. Domat and Pothier wrote in French, and the first modern historians of marriage law wrote in German. Over the course of the nineteenth century knowledge of their works outside the area in which their language was spoken came increasingly to be confined those who made an academic specialty of the nascent disciplines of comparative law and legal history.

### Conclusion

The time has come briefly to summarize. We began with a proposition that I think is non-controversial. It is possible to have private law without the state. Indeed, we wondered if there is any society that does not have private law or the functional equivalent of it. We also suggested that it was possible for a society to develop a system of private law without the state in the modern sense, though relatively few such societies build systems as elaborate as the Jewish, the Islamic, or the Roman. When we came to the Western Middle Ages, however, we had to qualify. Though there were no nation-states, the systems of private law that began to be created in the twelfth century made use of the existing structures of power and authority. If one does not want to call these structures proto-states—and my own preference is not to call them that—then one has to say that they performed in some measure the functions of the later state, most notably in establishing and supporting a system of courts and in promulgating legally binding decrees that can be called, without too much anachronism, legislation. Of the three twelfth-century efforts at building a system of private law that we looked at, two of them, the law of the central royal courts of England and the canon law, were intimately associated with the structures of power surrounding, and the authority of, the king of England and the pope, respectively. The effort with the regard to Roman law, the one that ultimately was to prove the most influential, was more problematical in its relations to existing power structures. There was some connection with the Holy Roman Emperor, a connection that was later to prove embarrassing when Roman lawyers sought to bring their ideas into monarchies that quite emphatically did not recognize the authority of the em-

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TRAUUNG (1876); ADOLF VON SCHEURL, *DIE ENTWICKLUNG DES KIRCHLICHEN EHESCHLIESSUNGSRECHTS* (1877). A scant eleven years later, Joseph Freisen published the first edition of his *EHERECHTS BIS ZUM VERFALL DER GLOSSENLITTERATUR* (1888), a work that is still read for what it has to say about the history as opposed to the historiography of marriage law.

peror. We ultimately decided that the effort with Roman law succeeded because the church needed it to fill out its legal system and because kingdoms and communities, principally in southern Europe, were willing to accept the learning of Roman lawyers as a default law.

With the rise of the nation-state in the sixteenth century, changes did take place, but they were more subtle and initially less dramatic than some have thought. There was more focus on the national level. We saw this not only in England where the common law had been a national system for a long time, but also in France where there had previously been little discussion of the private law of all of France or even of what was common among the customs. National legislation became more common in this period, and more elaborate. Despite these facts, our suggestion was that the basic developmental mechanisms of private law remained largely unchanged in this period. In England, it was endless discussion within a small group of lawyers and judges who operated the central royal courts. On the European Continent, it was juristic discussion, now more firmly associated with intellectual schools in more narrow geographical areas but which still had the capability of communicating over all of western Europe. We suggested that this characteristic may have changed with the codifications of the nineteenth century, but at that point we ran out both of knowledge and of space.

## APPENDIX

THE INFLUENCE OF ROMAN LAW ON ENGLISH LAW IN THE LATE  
TWELFTH AND EARLY THIRTEENTH CENTURIES

Examples from this period, I am afraid, have to be a bit complicated. Let me offer one. Two of the principal actions of the land law of this period were the writ of right and the assize of novel disseisin.<sup>69</sup> In the writ of right, which is normally directed to the court of the lord of whom the demandant (plaintiff) claims to hold, the demandant claims that an ancestor of his was seised (I will not translate that term) of a free tenement at some time in the remote past, preferably in the reign of Henry I, and that he, the demandant, is the ancestor's heir. The procedure is complicated. Frequently, perhaps normally, the lord's court defaults; the sheriff takes the plea into the county court, and from there it is brought by writ into the central royal courts, where the tenant may either wage battle or put himself on the grand assize, a kind of blue-ribbon jury consisting entirely of knights. The assize of novel disseisin, by contrast, is brought in the central royal courts. The demandant claims that he was disseised unjustly and without a judgment of a free tenement within a relatively recent period. An assize (roughly a jury) of twelve ordinary freeholders is called at that session of court to determine if that statement is true. If it is, the demandant is put back in seisin, but his success does not preclude the tenant from bringing an action on the right.

Historical work in the last generation, led by S. F. C. Milsom, has made it reasonably clear that original conceptual economy of these actions was that both were actions of a tenant against his lord.<sup>70</sup> In the case of the writ of right, something has happened in the years intervening between Henry I and Henry II, a period which is styled, with considerable help from the publicists for Henry II, "the anarchy." The lord has let in the wrong man; he has, in the language of the twelfth century, seised someone else of the tenement. This is why the lord's court, it would seem normally, defaults. The lord is committed by his warranty to the current tenant; the lord's court cannot do right by the demandant, and hence the demandant must obtain redress, if at all, in the central royal courts. In the case of novel disseisin, the factual situation is simpler. The lord has disseised a tenant whom he had previously seised. This is a violation of the lord's warranty obligation to the tenant, unless he has done it, in the opposite of the words of the writ, "justly and with a judgment" of his court

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69. The basics of this story, including the Bractonian element are well laid out in the classic 2 *FREDERICK POLLOCK AND FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, 38-80 (2d ed. 1898).

70. S. F. C. MILSOM, *THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM* (1976). For the reader who finds this book tough going (and many do) a long review of the book by Robert C. Palmer, 79 *MICH. L. REV.*, 130-64 (1981), is a good place to start.

that the tenant has, for example, defaulted in performing his services.

Looked at from the point of view of Roman law, which knows nothing of lords and tenants, seisin and lordly obligations to warrant, these actions look quite different. The writ of right looks something like a *vindicatio*, an action claiming *dominium* or *proprietas* in the land, and the assize of novel disseisin looks something like the possessory interdicts. The analogy was already apparent to *Glanvill* who calls the action in the right proprietary and the assize of novel disseisin possessory. The analogy is even more apparent to the authors of *Bracton*, who extensively develop the conceptualization that the action in the right tries ownership while the possessory assizes try possession. They have a problem, however. In the years intervening between *Glanvill* and *Bracton*, another set of actions about land had developed in which the tenant was not suing the lord, but the lord was suing the tenant. This action required that the lord-demandant specify what was wrong with the tenant's title: the tenant was there for a term of years, but the term has now expired; the tenant was seised by the lord's ancestor but his ancestor was insane when he did it, and so forth. These writs of entry, as they are called, do not fit into the proprietary-possessory scheme, so the authors of *Bracton* call them mixed proprietary and possessory, a concept that should make any respectable Romanist shudder.