



Thomas A. Brady, Jr.

Politics and Reformations: Histories and Reformations

Essays in Honor of Thomas A. Brady, Jr.

Edited by

Christopher Ocker, Michael Printy
Peter Starenko, and Peter Wallace



BRILL

LEIDEN • BOSTON

2007

HERMANN CONRING AND THE EUROPEAN HISTORY OF LAW

CONSTANTIN FASOLT

Hermann Conring has sometimes been described as “the founder of German legal history.” In a superficial sense, that description has some merit. But at a deeper level it betrays a fundamental misunderstanding of the historical relationship between the modern study of legal history and the medieval interpretation of Roman law. The purpose of this essay is to clarify that relationship by focusing on Hermann Conring’s case as a particularly telling instance of a more general phenomenon. I will proceed in three steps. First, I will outline the history of law in medieval and early modern Europe; second, I will examine the development of legal history; and third, I will describe Hermann Conring as the modern legatee of a tradition deeply embedded in the long course of European history.

The subject of this paper is the place of Hermann Conring in the history of European law. In order to make sense of this subject, three different matters need to be considered. One is the history of the law that governed Europe during the Middle Ages and the so-called early modern period. The second is the development of legal history. And third, of course, is Hermann Conring himself. I shall deal with each of these in turn.

Let me clarify what I mean by “law,” “history of law,” and “legal history.” Law is often defined in relatively narrow terms as the sort of thing aspiring lawyers learn in schools of law. On that understanding law is distinct from custom, manners, ceremonial rules, social conventions, habits of spiritual worship, and so on. Defining law that way is useful because of the special role that formally enacted laws play in the modern world—a world in which church and state are sharply divided, laws are generally kept distinct from morals, and custom lacks obligatory force while professional lawyers play a crucial and expanding role. But it can be confusing for earlier periods of history, when law was not so sharply distinguished from other kinds of norms. I shall therefore use “law” as a generic term for all of the rules and regulations by which the members of a given society distinguish between right and wrong in order to maintain a certain kind of order and settle their disputes without having to take recourse to unregulated violence. In principle

it makes no difference whether those rules and regulations consist of unwritten customs, mores, manners, spiritual beliefs, ecclesiastical canons, or formally enacted statutes. What matters is only whether or not their violation threatens the social order. If it does, they qualify as "law" as I shall mean it here. It does especially not matter whether they happen to have been written down or not. What is important is only that they are known and can be verified. They may be known from writing and verified by going to the library. But they may also be known from memory and verified by means of turning to elders and experts who know the ways of society from long experience and memory.¹

Let me also distinguish between two different uses of the term "history of law." One concerns the history of the law as it happened. "History of law" in this sense refers to changes that occurred in law over time. The other concerns the knowledge people have of those changes. "History of law" in *this* sense refers, neither to the law nor to the changes undergone by law over the course of time, but to a special form of knowledge *about* law and its changes that is usually academic and founded on an examination of the surviving evidence. In the first sense history of law consists of changes in the rules and regulations by which people organize their lives; it is something that happens to the law. In the second sense history of law consists of the study of those changes; it is something done by people with a special interest in the legal past. These are, of course, two very different things. Using the same expression for both is unnecessarily confusing. I shall therefore use the term "history of law" to refer to the changes that happened to law over the course of time, and "legal history" to refer to the study of those changes.

¹ For contrasting approaches to the study of law in Europe see Hermann Kantorowicz, *The Definition of Law*, ed. A.H. Campbell with an introduction by A.L. Goodhart (New York: Octagon Books, 1980); Herbert L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961); John Philip Dawson, *The Origins of the Law* (Ann Arbor: University of Michigan Law School, 1968); Otto Friedrich v. Gierke, *Das deutsche Genossenschaftsrecht*, 4 vols. (Berlin: Weidmann, 1868–1913); Otto Brunner, *Land and Lordship: Structures of Governance in Medieval Austria*, trans. with an introduction by Howard Kaminsky and James Van Horn Melton (Philadelphia: University of Pennsylvania Press, 1992); John Bossy, ed., *Disputes and Settlements: Law and Human Relations in the West* (Cambridge: Cambridge University Press, 1983); Simon Roberts, *Order and Dispute: An Introduction to Legal Anthropology* (New York: St. Martin's Press, 1979).

The History of European Law

The most important point to make about the law that governed medieval and early modern Europe from about 1000 C.E. until about 1600 C.E., and in some ways longer than that, is this: there were two very different types of law that operated on two very different levels. One was practiced on the ground in towns and villages; the other was studied in universities.²

It would be tempting—and it is not at all uncommon—to call the former the actual legal practice of medieval Europe and the latter a kind of legal theory. But it would also be misleading. Academic law and local law were not related to each other as theory is related to practice, but rather as two different kinds of practice are related to each other. Each was a practice of sorts, although the sorts were different. Each also had its own theoretical dimension and the theories differed as sharply from each other as did the practices. Local law governed the lives of people far more directly than university law, but its theoretical dimension was not well developed. University law was only practiced in rather special circumstances—at least in the beginning—but it did have a very well developed body of theory. Eventually that gave university law a decisive advantage. It is not nearly as clear as one might

² For solid overviews of European legal history as a whole, see Hans Hattenhauer, *Europäische Rechtsgeschichte* (Heidelberg: Juristischer Verlag C.F. Müller, 1992); Manlio Bellomo, *The Common Legal Past of Europe, 1000–1800*, trans. Lydia G. Cochrane (Washington, D.C.: Catholic University of America Press, 1995); Franz Wieacker, *History of Private Law in Europe with Particular Reference to Germany*, trans. Tony Weir (New York: Clarendon Press, 1995); O.E. Robinson, T. David Fergus, and William M. Gordon, *European Legal History: Sources and Institutions*, 3rd ed. (London: Butterworths, 2000); Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983); and Harold J. Berman, *Law and Revolution: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, Mass.: Belknap Press, 2004). These may be supplemented by legal histories focusing on particular nations or particular kinds of law, such as Hermann Conrad, *Deutsche Rechtsgeschichte*, 2nd ed., 2 vols. (Karlsruhe: C.F. Müller, 1962–66); François Olivier-Martin, *Histoire du droit français des origines à la Révolution* (Paris: Domat Montchrestien, 1948); Pier Silverio Leicht, *Storia del diritto italiano: Il diritto privato*, 2nd ed., 3 vols. (Milano: A. Giuffrè, 1941–48); idem, *Storia del diritto italiano: Il diritto pubblico*, 3rd ed. (Milano: A. Giuffrè, 1950); John Hamilton Baker, *An Introduction to English Legal History*, 3rd ed. (London: Butterworths, 1990); Barry Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962); Paul Koschaker, *Europa und das Römische Recht*, 4th ed. (München: C.H. Beck, 1966); Hans Erich Feine, *Kirchliche Rechtsgeschichte: Die katholische Kirche*, 5th ed. (Köln: Böhlau, 1972). For detailed bibliographical information, the single best source is Helmut Coing, ed., *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, 3 vols. (München: Beck, 1973–).

think why that should have been the case. But the theoretical power of university law clearly proved to be so great an attraction that over time it spread and managed to transform or displace the local law.³

Let me be more specific. The law according to which most people actually organized their relations with each other during the period in question differed widely from place to place and time to time. In southern Europe it was more often written, so that it was available for consultation and subject to formal procedures of reconsideration, repeal, amendment, and so on. This is one of the legacies of ancient Rome. Though the Roman Empire had lost political control over the western parts of Europe during the early Middle Ages, the legal practices that it had put into effect did not necessarily require the support of central government in order to survive. Of course the various so-called barbaric tribes that moved into the formerly Roman territories from the third to the sixth centuries and arrogated the exercise of political power to themselves brought their own legal customs. But they lived side by side with people who had long been accustomed to the law of the Roman Empire. They often allowed them to keep that law and they were not averse to modifying their own customs during the centuries that followed in light of Roman practices. Some of them were even proud to live by Roman law. Thus medieval southern Europe came to be covered by a patchwork of different legal regimes commonly grouped together under the somewhat condescending heading of Roman vulgar law. But there was never any guarantee that a particular decision concerning a particular issue in a particular place—about property, for example, or liberty, or responsibility for crimes, or inheritance—would be made the same way in other places. There is no way to write a book about the law of medieval southern Europe without dividing it into as many chapters as there were different legal localities.⁴

³ In one way or another, the contrast between local and university law features in virtually all accounts of medieval European law. For a cogent exposition see Bellomo, *The Common Legal Past of Europe*, 55–111, who refers to local law as *ius proprium* and to university law as *ius commune*. For other perspectives on this issue see, e.g., Erich Genzmer, *Mittelalterliches Rechtsdenken* (Hamburg: Stiftung Europa-Kolleg, 1961); Ennio Cortese, *La norma giuridica: Spunti teorici nel diritto comune classico*, 2 vols. (Milano: Giuffrè, 1962–64); Pietro Costa, *Iurisdiclio: Semantica del potere politico nella pubblicistica medievale, 1100–1433* (Milano: A. Giuffrè, 1969); Paul Koschaker, *Europa und das Römische Recht*, 4th ed. (München: C.H. Beck, 1966); Sten Gagnér, *Studien zur Ideengeschichte der Gesetzgebung* (Uppsala: Almqvist & Wiksell, 1960).

⁴ Max Conrat (Cohn), *Geschichte der Quellen und Literatur des Römischen Rechts im frühen Mittelalter* (Leipzig: J.C. Hinrichs, 1891); Ernst Levy, *West Roman Vulgar Law: The Law*

A similar patchwork covered northern Europe, but with this difference: it had not been affected by Roman law to anywhere near the same degree, and at first almost none of it was written. Here, too, there was much greater variance in legal practice than it is easy to imagine for inhabitants of the modern world, used, as they are, to the coherent legal regimes furnished by modern nation states. Salian Franks, Ripuarian Franks, Bretons, Alemans, Bavarians, Saxons, Angles, Thuringians, Northmen, Danes, Swedes, Wends, Poles, and the rest all had their own ideas of proper social order. Since few of their ideas were written down, the varieties of northern European law are still more difficult to ascertain than is the case for southern Europe. But that does not in any sense reduce their quality as law.⁵

Medieval Europe can therefore with some justice be divided into two legal regions: one southern, where Roman traditions were relatively strong, and one northern, where they were not. But local variations were far more important than the broad division into southern and northern, Roman and Germanic. The customs of northern European Germanic tribes were not unaffected by Roman habits, and the reverse is true as well. The clergy played a particularly important role in guaranteeing a minimum of legal harmony across the whole extent of Latin Christianity. They furnished the single most important means by which Roman law came to reshape local law in its own image. Long before the first universities were founded in the eleventh and twelfth centuries, the clergy had led the advance of Roman law by converting northern European pagans to Christianity. Conversion did not merely mean adopting a new faith, a new calendar, and a new liturgy. It also meant accepting a new kind of authority and some rather fundamental changes in the law the new authority required. Among the most important were rules concerning birth, death, and marriage, which is

of Property (Philadelphia: American Philosophical Society, 1951); Detlef Liebs, *Die Jurisprudenz im spätklassischen Italien (260–640 n. Chr.)* (Berlin: Duncker & Humblot, 1987); Georges Chevrier and Georges Pieri, *La loi romaine des Burgondes* (Milano: Giuffrè, 1969); Jean Gaudemet, *Le Bréviaire d'Alaric et les Epitomes* (Milano: Giuffrè, 1965); Roger Collins, *Law, Culture, and Regionalism in Early Medieval Spain* (Aldershot: Variorum, 1992).

⁵ Patrick Wormald, *Legal Culture in the Early Medieval West: Law as Text, Image and Experience* (Rio Grande, Ohio: Hambledon Press, 1999); Wendy Davies and Paul Fouracre, eds., *The Settlement of Disputes in Early Medieval Europe* (Cambridge: Cambridge University Press, 1986); Gerhard Köbler, *Das Recht im frühen Mittelalter: Untersuchungen zu Herkunft und Inhalt frühmittelalterlicher Rechtsbegriffe im deutschen Sprachgebiet* (Köln: Böhlau, 1971); Karl von Amira, *Germanisches Recht*, ed. Karl August Eckhard, 4th ed. (Berlin: W. de Gruyter, 1960).

to say, the most important occasions on which property changed hands in a society in which buying and selling had none of the significance for property exchange they have today while legitimate birth was an essential precondition for success.

Europe did thus not, as it were, fall into two sharply demarcated blocks of different legal practice. It rather fell into one huge mosaic, made up of tiny pieces, much smaller than most modern states, with infinite variegations ranging in many different shades and hues from Roman and written at one extreme to Germanic and unwritten at the other, with neither extreme ever existing anywhere in complete and unadulterated purity, such that the legal differences between one southern locality and another may well have outweighed the global difference between South and North.

So much for local law. University law presented an entirely different picture. On the one hand, it was more or less the same all over Europe. But on the other hand, it did not even exist until the first universities were founded in the eleventh and twelfth centuries. It was invented more or less from scratch when some curious and gifted northern Italian intellectuals began to read and systematically study the single manuscript of the *Digest of Justinian* that still survived in Western Europe. The *Digest* was the largest and by far the most important of the four volumes of laws and jurisprudence collectively known as the *Corpus Iuris*—the other three being the *Code*, *Institutes*, and *Novels*—that had been compiled mostly from older sources and published in the sixth century C.E. at the command of Emperor Justinian. The *Digest* embodied much of the legal wisdom of ancient Rome, albeit in a classicizing form that stood at a remove from legal practice even at the very time when it was codified. In the Byzantine East, it was soon modified or superseded by new imperial legislation. In the European West it fell pretty much into oblivion—and if that single manuscript of the *Digest* had not by chance survived, the *Corpus Iuris* might never have been resuscitated at all. Yet that manuscript did survive, and it served as the focus of an extraordinary explosion of intellectual activity that, together with the study of canon law, occupied one of the three higher faculties into which European universities were normally divided (the other two being theology and medicine, the lower one being philosophy).⁶

⁶ Stephan Kuttner, "The Revival of Jurisprudence," in *Renaissance and Renewal in the Twelfth Century*, ed. Robert L. Benson and Giles Constable (Cambridge, Mass.: Harvard

The study of Roman law thus began as a purely academic enterprise in faculties of law, entirely distinct from local legal practice.⁷ It was conducted by intellectuals enamored of the *Corpus Iuris*, seduced, almost, by what seemed to them a form of reason transcending mere human creativity. They thought the *Corpus Iuris* embodied legal reason itself, and they regarded its interpretation as a sacred responsibility. Of course there always were connections between the study of Roman law at the universities and actual legal practice. Some of those connections were rooted in the plain fact that some local legal habits had a history that went back to ancient Rome and were accordingly, and unsurprisingly, somehow related to the laws contained in the *Corpus Iuris*. Others arose from the fact that professors of Roman law were admired and increasingly consulted on questions of law, so that university law began to have effects outside the universities. Still more ran through the close relationship between Roman law and canon law.⁸ Not least, all over southern Europe there were notaries public who played a crucial role by keeping official registers of documents and whose job required them to have some knowledge of Roman law. But no place in Europe was actually governed by the *Corpus Iuris*. At heart, the study of Roman law existed in an intellectual universe entirely its own.⁹

University Press, 1982), 299–323; Woldemar Engelmann, *Die Wiedergeburt der Rechtskultur in Italien durch die wissenschaftliche Lehre* (Leipzig: K.F. Koehler, 1938); Harold J. Berman, *Law and Revolution: The Impact of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983); Manlio Bellomo, *The Common Legal Past of Europe, 1000–1800*, trans. Lydia G. Cochrane (Washington, D.C.: Catholic University of America Press, 1995); Paul Vinogradoff, *Roman Law in Medieval Europe*, ed. F. de Zulueta, 2nd ed. (Oxford: Clarendon Press, 1929); James A. Brundage, *Medieval Canon Law* (London: Longman, 1995).

⁷ Bellomo, *Common Legal Past of Europe*, 61, makes this point with special clarity: "Itrnerius was not a jurist acting as a custodian for normative texts that he was lucky enough to have available and perhaps to own; he was a master of the liberal arts who made himself into a jurist in order to shatter the status of tradition, because tradition brought distortion and confusion."

⁸ It is worth noting that both Pope Clement V (1305–1314) and Pope John XXII (1316–1334) taught Roman law before they rose to high ecclesiastical office. For an informative scholarly exchange on the relationship between the church and Roman law see Walter Ullmann, "Honorius III and the Prohibition of Legal Studies," *Juridical Review* 60 (1948): 177–86, and Stephan Kuttner, "Papst Honorius III. und das Studium des Zivilrechts," in *Festschrift für Martin Wolff. Beiträge zum Zivilrecht und internationalen Privatrecht*, ed. Ernst von Caemmerer, Walter Hallstein, F.A. Mann, et al. (Tübingen: J.C.B. Mohr, 1952), 79–101.

⁹ The kingdom of Naples furnishes a particularly striking illustration. Law professors at the university of Naples were expected to teach Roman law, but did not teach the law that actually obtained in the kingdom of Naples (or Sicily), the so-called *Constitutions of*

One of the most important trends in the history of European law—if not the most important one—consists of the way in which the difference between local law and university law was gradually resolved. Speaking broadly, it was resolved in favor of university law. The speed and the depth of the changes that were wrought in legal practice as a result differed considerably across the various regions of Europe. In southern Europe, there was a larger percentage of urban and literate laity than in northern Europe, and the difference between local law and university law was smaller to begin with, both in terms of language and in terms of historical origins. Hence, in Italy, the laity played a more prominent role in bringing local law into conformity with university law, and reached the goal more quickly. In Italy, the laity was able to produce a quasi-professional class of experts trained in legal matters from very early on. In northern Europe no such class existed until much later. In northern Europe the lead was taken by university-trained clerics who were employed as secretaries, councilors, and diplomats, first by ecclesiastical governments, but then increasingly often by temporal governments as well. In those capacities they spread what they had learned in the universities to settings far removed from questions of faith or prohibited degrees of marriage.

Regional variations persist even today, not only between nations, but also within nations—and never mind the addition of a grand new level of legal conformity in the body of laws that issue from the European Union. But the scope of the differences was reduced and enough agreement was reached on points of legal substance and procedure to result in a common understanding of the law that was rooted in the study of the Roman law. By the late thirteenth and early fourteenth centuries experts trained in Roman law played a crucial role in helping King Philip IV of France to govern his state.¹⁰ By the later Middle Ages the governments of German princes and towns, particularly in the Southwest of Germany, increasingly relied on the services of officials who

Melfi or *Liber Augustalis*. Yet the *Constitutions of Melfi* and the university of Naples were the work of one and the same Emperor Frederick II, the former promulgated in 1231, the latter established in 1224; see Bellomo, *Common Legal Past of Europe*, 93–5.

¹⁰ Joseph R. Strayer, *Les gens de justice du Languedoc sous Philippe le Bel* (Toulouse: Association Marc Bloch, 1970); Franklin J. Pegues, *The Lawyers of the Last Capetians* (Princeton: Princeton University Press, 1962); André Gouron, *Etudes sur la diffusion des doctrines juridiques médiévales* (London: Variorum, 1987).

had studied Roman law in order to “reform” their legal procedures.¹¹ And in 1495 Roman law was officially “received” in Germany and the *Reichskammergericht*, a kind of newly established Supreme Court for the entire Holy Roman Empire that was required to follow Roman law.¹² It came to be taken for granted everywhere that law ought to be written, codified, formally enacted by the proper authorities, promulgated, known to those to whom it applied, coherent, subject to revision and repeal, adjudicated in courts with clearly identified responsibilities, allowing for appeal to higher courts against contested judgments, following definite rules of proof and evidence, consistently enforced and equally applied to all—and it was almost entirely forgotten that every single aspect of this understanding of the law conflicted with the local law of medieval Europe.

Thus Europe gradually acquired a common legal culture. It is worth noting that this culture includes not only the Continent, but also England.¹³ English common law differs, of course, in basic ways from continental European law. The most obvious differences are that common law does not originate in Roman law but in the legal customs of medieval England, that English law therefore has concepts (such as *seisin*) and procedures (such as writs) quite different from those found in continental law, and that England developed a class of professional jurists trained at Inns of Court, and not at universities. Thus England presents a special case. But England experienced the same conflict between local law and university law as the rest of Europe did, and may well have experienced it particularly sharply. It merely solved the

¹¹ Erich Genzmer, “Kleriker als Berufsjuristen im späten Mittelalter,” in *Etudes d'histoire du droit canonique, dédiées à Gabriel Le Bras, doyen honoraire de la Faculté de droit et de sciences économiques de Paris, membre de l'Institut* (Paris: Sirey, 1966), 2:1207–36; Sven Stelling-Michaud, *L'université de Bologne et la pénétration du droit romain et canonique en Suisse au XIII. et XIV. siècles* (Genève: E. Droz, 1955); Winfried Trusen, *Die Anfänge des gelehrten Rechts in Deutschland: Ein Beitrag zur Geschichte der Frührezeption* (Wiesbaden: F. Steiner, 1962).

¹² Helmut Coing, *Römisches Recht in Deutschland* (Milano: Giuffrè, 1964); Rudolf Smend, *Das Reichskammergericht: Geschichte und Verfassung* (Weimar: H. Böhlau, 1911); Filippo Ranieri, *Recht und Gesellschaft im Zeitalter der Rezeption: Eine rechts- und sozialgeschichtliche Analyse der Tätigkeit des Reichskammergerichts im 16. Jahrhundert*, 2 vols. (Köln: Böhlau, 1985).

¹³ On England see the classic by Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2d ed., 2 vols. (Cambridge: Cambridge University Press, 1968); the standard by John Hamilton Baker, *An Introduction to English Legal History*, 3rd ed. (London: Butterworths, 1990); Patrick Wormald, *The Making of English Law: King Alfred to the Twelfth Century* (Oxford: Blackwell Publishers, 1999); and R.H. Helmholz, *Roman Canon Law in Reformation England* (Cambridge: Cambridge University Press, 1990).

conflict differently: not by following the lead of the universities and university-trained literati; not by adopting Roman law and weeding out local practices; but by doing the opposite, turning local law into a body of coherent jurisprudence with the same function as Roman law had on the Continent and leaving Roman law where it had started, in universities. England and Italy thus are the two European countries in which the conflict between local law and university law was most effectively resolved: in Italy, because the two were closely enough related to each other that it proved relatively easy to make the former cohere with the latter; in England, because Roman law was not applied directly, but taken as a model. The homegrown practice was equipped, not only with a homegrown theory, but also with a homegrown class of jurists. It may not be far wrong to say that in this way the English followed the spirit of ancient Roman law more closely than any other European nation.¹⁴

European Legal History

Let this suffice for a brief sketch of the history of European law. Now let me turn to the development of legal history. Every known society of human beings, no matter how small or large, how ancient or recent, how simple or how complex, has rules and regulations by which it organizes its affairs. And those rules change. Thus law has a history at every moment in the history of Europe, just as it does at every moment in the history of any other society. Not so for legal history. Legal history is a recent invention, a rarity among the forms of knowledge human beings have produced since they began to think.

Certainly no such thing as legal history existed when Irnerius (or Werner, c. 1055–c. 1130) inaugurated the study of Roman law in Bologna. That does of course not mean that Irnerius had no knowledge of changes that affect law over time. He most certainly did. In fact, such knowledge was precisely the foundation on which he turned to the study of Justinian's *Digest*. He knew that the *Digest* had been forgotten, and he sought to renew attention to its teaching. But his was not the

¹⁴ Peter Stein, *Roman Law and English Jurisprudence Yesterday and Today: An Inaugural Lecture* (London: Cambridge University Press, 1969); Alan Watson, *The Spirit of Roman Law* (Athens: University of Georgia Press, 1995).

kind of knowledge taught by legal history. So far from studying change as something worth knowing in its own right, as legal historians do, Irnerius and his followers wished to restore Roman law to the place of honor they believed it ought to occupy by right. They viewed change as a form of corruption and abuse, of deviations from a proper norm.¹⁵ They thought that in the *Digest* they had discovered the golden truth of law. They sought to grasp that truth as best they could in order to share it with their fellows and let it be their guide in furnishing justice to their society.

Nothing surprising about that. What was surprising was rather something else, namely, that the golden truth Irnerius found in the *Digest* conflicted with local law. What was unusual was that medieval Europe revered a body of law in its universities that was practiced only in very special circumstances and everywhere else—at least outside the church—practiced a law that differed from the law that it revered. The distance between the legal truths embodied in the *Digest* and those put into practical effect in legal transactions day in, day out all over Europe created a kind of cognitive dissonance. That dissonance prepared the field for legal history. It opened a door through which knowledge of change could enter. It seems unlikely that legal history could have developed otherwise.

Let me mention the stages by which the possibility became reality. At first the dissonance was weak because the conflict was scarcely perceived. This was in part because there was, as yet, no systematic knowledge of the different practices prevailing in different areas of Europe. It was as well because those different legal practices could be dismissed as mere aberrations from the norm. But above all it was because the *Corpus Iuris* itself first needed to be mastered. It took two centuries and a whole school of jurists commonly known as the glossators before there was anything like an agreed-upon interpretation of Roman law.¹⁶

¹⁵ For the lack of any historical dimension in the thought of the glossators and canonists see, e.g., Bellomo, *Common Legal Past*, 65–6, 68. For a classic exposition of this theme see Fritz Kern, "Recht und Verfassung im Mittelalter," *Historische Zeitschrift* 120 (1919): 1–79. For similar accounts see Fritz Kern, *Kingship and Law in the Middle Ages*, trans. Stanley B. Chrimes, 2 vols. (Oxford: Blackwell, 1939); Gerd Tellenbach, *Church, State and Christian Society at the Time of the Investiture Controversy*, trans. Ralph F. Bennett (London: Basil Blackwell & Mott, 1959); Otto Brunner, *Land and Lordship: Structures of Governance in Medieval Austria*, trans. with an introduction by Howard Kaminsky and James Van Horn Melton (Philadelphia: University of Pennsylvania Press, 1992).

¹⁶ On the glossators see Erich Genzmer, "Die iustinianische Kodifikation und die Glossatoren," in *Atti del Congresso internazionale di diritto Romano: Bologna e Roma, xvii–xxvii*

Once that work was finished, the conflict became more difficult to ignore. By the middle of the thirteenth century there was a standard set of glosses compiled by Accursius (ca. 1182–1260) and known as the ordinary gloss. By the late thirteenth century local law itself had been so thoroughly described and codified by experts and regional legislators like Ranulf de Glanville (1130–90) and Henry de Bracton (d. 1268) in England, Philippe de Beaumanoir (ca. 1250–96) in France, King Alfonso the Wise (1221–84) in Spain, and Eike von Repgow (ca. 1180–ca. 1233) in Saxony as to leave little doubt about the disparities, not only between each of them, but also between all of them and Roman law.

The first attempt to resolve the conflict was made by the so-called commentators. The commentators rose to prominence in the fourteenth century. They are called commentators because their writings did not consist of line-by-line glosses, but of longer and more discursive “commentaries” in which they sought to adapt the meaning of Roman law to the realities of medieval social and political life. They relied heavily on logical distinctions in order to find common ground between local and university law. Their most famous representative was Bartolus of Sassoferrato (1313/14–1357). Hence they were sometimes called “Bartolists.” Since their method arose in Italian schools, it is often called “the Italian manner,” *mos italicus*, of interpreting the law. Their work was so successful that it dominated legal practice well into the sixteenth century.¹⁷ But it came at a price. The price was that Roman law needed to be explicitly adapted to purposes and circumstances that it had never been meant to serve—and the adaptation showed.

By the fifteenth century it was too late for adaptation. Or more precisely, by the fifteenth century those who knew the law the best

and who had done the most to persuade themselves and others that the apparent conflicts between the laws could be resolved by logical analysis were no longer able to believe their own conclusions. The chains of reasoning became too long. And then they snapped. The point at which they snapped is the point at which legal humanists invented legal history. Legal humanism originated in Italy in the fifteenth century, but its most prominent advocates were French or Italians who taught in France. Hence legal humanism is commonly distinguished from the “Italian manner” as the “French manner,” *mos gallicus*. Among the best known legal humanists are Lorenzo Valla (1406–57), Guillaume Budé (1468–1540), Andrea Alciato (1492–1550), and Jacques Cujas (1522–90).¹⁸

Legal humanists broke sharply with the glossators and the commentators. From their point of view, Roman law was simply the law of an ancient people—admittedly an ancient people of particular importance, but nonetheless essentially no different from any other ancient or, for that matter, contemporary people. They recognized full well that there were deep historical connections between ancient Rome and their own society. But they were also certain that the differences were so fundamental as to require a very different approach to Roman law. They did not believe Roman law could be regarded as valid in the contemporary world without significant adjustments. From their point of view, the logical distinctions drawn by glossators and commentators concealed a fundamental ignorance of the real meaning of Roman law. They thought its meaning depended on the specific conditions that had obtained during antiquity and that had disappeared since then. Hence they set about studying the history of ancient Rome and Roman law, and the discoveries they made led them to reject some of the most fundamental convictions upheld by glossators and commentators.

Legal history thus made it possible to account in a convincing way for a tension that threatened to undermine all faith in law by leaving lawyers no alternative but to choose between different kinds of law as they pleased—a choice that was by definition impossible to justify by

aprilie MCMXXXIII (Pavia: F. Fusi, 1934–35), 1:345–430; Hermann Kantorowicz, *Studies in the Glossators of the Roman Law: Newly Discovered Writings of the 12th Century* (Aalen: Scientia-Verlag, 1969); Ugo Gualazzini, *L'insegnamento del diritto in Italia durante l'alto Medioevo* (Milano: Giuffrè, 1974); and for an incisive account of a major issue Francesco Calasso, *I glossatori e la teoria della sovranità*, 3rd ed. (Milan: Giuffrè, 1957).

¹⁷ Salvatore Riccobono, “*Mos italicus e mos gallicus nella interpretazione del corpus iuris civilis*,” in *Acta congressus iuridici internationalis VII saeculo a decretalibus Gregorii IX et XIV a codice Iustiniano promulgatis Romae 12–17 Novembris 1934*, ed. Pontificum institutum utriusque iuris (Roma: Libreria pontificii instituti utriusque iuris, 1935), 2:377–98; Ernst Holthöfer, “Literaturtypen des *mos italicus* in der europäischen Literatur der frühen Neuzeit,” *Ius commune* 2 (1969): 130–66; Donald R. Kelley, “Civil Science in the Renaissance: Jurisprudence Italian Style,” *Historical Journal* 22 (1979): 777–94; Hans Erich Troje, *Humanistische Jurisprudenz: Studien zur europäischen Rechtswissenschaft unter dem Einfluss des Humanismus* (Goldbach: Keip Verlag, 1993).

¹⁸ Domenico Maffei, *Gli inizi dell'umanesimo giuridico* (Milano: Giuffrè, 1956); Guido Kisch, *Erasmus und die Jurisprudenz seiner Zeit: Studien zum humanistischen Rechtsdenken* (Basel: Helbing & Lichtenhahn, 1960); Donald R. Kelley, *Foundations of Modern Historical Scholarship: Language, Law, and History in the French Renaissance* (New York: Columbia University Press, 1970); Donald R. Kelley, “Civil Science in the Renaissance: Jurisprudence in the French Manner,” *History of European Ideas* 2 (1981): 261–76.

law, since law was just what was at issue.¹⁹ Legal history pointed a way out of that dilemma. Legal history made it possible to acknowledge that the conflict between university law and local law was real. But it offered a reason why they conflicted and a new way of explaining their relationship. The reason was change over time and the way of explaining it was history. Some laws were old and some were new. Each law was valid in its own time and place—but *only* in its own time and place. Roman law was law in the full sense of the term. But it was ancient law. The law that lawyers practiced was modern and valid for the present time.

Thus legal humanists adopted change over time as one of the most basic criteria required to understand the meaning of the law. Needless to say, this could not happen without a great deal of upheaval and uncertainty. The yardstick of legal respectability that had been used so far suddenly lost credibility. The playing field was leveled. Roman law no longer stood head and shoulders above the rest, as though it alone deserved to be regarded as *ratio scripta*, reason in writing. It was reduced to the more humble status of just one set of laws among many, especially important to be sure, for many different reasons, but mostly for reasons that were themselves historical, and not the special sanctity with which Roman law seemed to have been imbued before. All law, ancient as well as modern, could claim to represent reason in writing now.

The introduction of legal history thus solved one problem only at the cost of creating another. The problem that it solved was how to account for the difference between the laws taught at the universities and those practiced in Europe on the ground. The problem that it created was how to prevent the law from changing with every passing moment. How could the knowledge that law had a history be stopped from turning law into mere opinion?

The answer to that question came in the form of the doctrine of sovereignty as first developed by Jean Bodin, not coincidentally a lawyer well-trained in the methods of both the *mos italicus* and the *mos gallicus*, and keenly aware of the need to find some means with which to resupply the laws that had now been subjected to the winds of time with

¹⁹ For a beautiful illustration of the cynicism that could be inspired by that choice see Bartolomeo Scala, "Dialogue on Laws and Judgments," in *The Renaissance*, ed. Eric Cochrane and Julius Kirshner, University of Chicago Readings in Western Civilization, 5 (Chicago: University of Chicago Press, 1986), 171–4.

the obligatory force the law must have in order to fulfill its purpose. Sovereignty was that means. The sovereign was thought to stand as far outside of time as Roman law had done in medieval Europe. The sovereign was exempt from law and for that reason entitled to make law for his subjects. The matter is more complicated than can be settled here. A fuller consideration would require attention to distinctions between positive law, fundamental law, natural law, and divine law, not to mention the distinction between laws and contracts. Suffice it to say that sovereignty did manage to reendow the law with however much authority it had lost to history, and not unlikely more. That made it possible to accept the truths of legal history without having to sacrifice the legal stability that every society requires.²⁰

The history of law in Europe is therefore marked by a deep irony. In one sense law never enjoyed greater respect than at the beginning of this story, the time when the conflict between the laws was at its height. For at that time the conflict was not perceived as such. As time went on, the conflict was reduced. Through canon law, the clergy, and an increasingly well-trained laity, university law spread its effects. The differences between the legal regions into which Europe might otherwise have been divided were covered by a web of common Romano-canonical jurisprudence, and as the web grew thicker the conflict between the laws was smoothed out. Thanks largely to the work of the commentators, a common European legal culture came into existence above the local varieties, and it was recognized as such. There cannot be many examples in the history of the world in which an academic enterprise that started with the study of a single manuscript played so obvious and easily identifiable a role in shaping the destiny of an entire continent. Yet to the same degree that the jurists succeeded, they destroyed the foundations of their success. As they clarified Roman law and spread their teaching far and wide, they revealed the extent to which Roman law differed from legal practice on the ground. That cast growing doubt on the authority of law. In the end, they had to stop claiming

²⁰ On sovereignty in general see Francis Harry Hinsley, *Sovereignty*, 2nd ed. (Cambridge: Cambridge University Press, 1986); Daniel Engster, *Divine Sovereignty: The Origins of Modern State Power* (DeKalb: Northern Illinois University Press, 2001), stresses the sovereign's aspirations to the realm of the eternal. On Bodin see Julian Franklin, *Jean Bodin and the Rise of Absolutist Theory* (Cambridge: Cambridge University Press, 1973); Diego Quagliani, *I limiti della sovranità: Il pensiero di Jean Bodin nella cultura politica e giuridica dell'età moderna* (Padova: Cedam, 1992); and Yves Charles Zarka, ed., *Jean Bodin: Nature, histoire, droit et politique* (Paris: Presses universitaires de France, 1996).

that their knowledge of Roman law was identical with knowledge of the law as such and were compelled to turn themselves from practicing jurisconsults into historians of law, surrender their authority to sovereigns who legislated new laws as they saw fit, and make room for lawyers who applied a law that was no longer Roman.²¹

Hermann Conring

Hermann Conring was born in 1606 in the East Frisian town of Norden, close to the North Sea. He spent most of his adult life as a professor of medicine and politics at the University of Helmstedt, at the time one of the leading universities in northern Europe.²² He died in 1681, widely respected as one of the leading intellectuals in Germany. He is best remembered for his contributions to the study of politics, history, and law. He has therefore been called “the founder of German legal history.”²³

There is a sense in which that is a fair description: Conring played a crucial role in disentangling the history of German law from that of Roman law. He did so first and foremost in a book entitled *De origine iuris Germanici commentarius historicus* or *Historical Commentary on the Origin of German Law*, that was published in 1643.²⁴ He made a point that may seem obvious from hindsight, but that had never been made so well before: Roman law was practiced in Germany because German

²¹ Roman Schnur, ed., *Die Rolle der Juristen bei der Entstehung des modernen Staates* (Berlin: Duncker & Humblot, 1986).

²² For detailed information about Conring and further bibliography see Constantin Fasolt, *The Limits of History* (Chicago: University of Chicago Press, 2004); Michael Stolleis, ed., *Hermann Conring (1606–1681): Beiträge zu Leben und Werk* (Berlin: Duncker & Humblot, 1983); Patricia Herberger and Michael Stolleis, *Hermann Conring, 1606–1681: Ein Gelehrter der Universität Helmstedt* (Wolfenbüttel: Herzog August Bibliothek, 1981).

²³ Once Otto Stobbe, *Hermann Conring, der Begründer der deutschen Rechtsgeschichte* (Berlin: W. Hertz, 1870), had made the designation familiar, it percolated through the literature. Equally important was Ernst von Moeller, *Hermann Conring, der Vorkämpfer des deutschen Rechts, 1606–1681* (Hannover: E. Geibel, 1915), whose title makes the same point in a different way.

²⁴ Hermann Conring, *De origine iuris Germanici commentarius historicus* (Helmestadii: H. Müller, 1643), also in Hermann Conring, *Opera*, ed. Johann Wilhelm Goebel, 7 vols. (Brunsvigae: Meyer, 1730; reprint Aalen: Scientia, 1973), 6:77–202; cf. Hermann Conring, *Der Ursprung des deutschen Rechts*, ed. Michael Stolleis, trans. Ilse Hofmann-Meckenstock (Frankfurt: Insel Verlag, 1994); Klaus Luig, “Conring, das deutsche Recht und die Rechtsgeschichte,” in *Hermann Conring (1606–1681): Beiträge zu Leben und Werk*, ed. Michael Stolleis (Berlin: Duncker & Humblot, 1983), 355–95.

students had gone to Italian universities to study law and when they came back to Germany, they practiced the law that they had learned in Italy. That straightforwardly pragmatic explanation for the respect paid to Roman law in Germany destroyed the vestiges of the claim that Roman law was valid universally. It explained the respect for Roman law as the effect of actions taken by a specific group of people acting for reasons entirely their own. It thereby made the systematic study of German law and legal history a conceptual possibility. That is what people mean when they refer to Conring as “founder of German legal history.”

Yet there are two good reasons why it is nonetheless misleading to call Hermann Conring “founder of German legal history.” One is that it focuses attention on only one of many subjects to which he made path-breaking contributions. His lectures on the states, not only of Europe, but also the rest of the world, have been regarded as among the founding documents of the systematic study of statistics. He published widely in the field of political science and edited works like Machiavelli’s *Prince*, Aristotle’s *Politics*, and Tacitus’s *Germania*.²⁵ Perhaps the most original book he ever wrote (and certainly the book that took him the longest to complete and that confronted him with the greatest intellectual difficulties) was a systematic treatise on the nature of political science entitled *De civili prudentia* and published in 1662.²⁶ Some of his most important writings dealt with the constitution of the Holy Roman Empire and with the question of religious peace. In fact, the works collected in the six-volume edition of Conring’s *Opera* that Johann Wilhelm Goebel published in Brunswick in 1730 are so variegated that the list of titles alone is enough to document how far Conring’s publications went beyond the limits of legal history strictly speaking.

Moreover, Conring was trained, not as a historian at all, but as a natural philosopher and a physician. From 1626 to 1631 he studied medicine at the University of Leiden. In 1632 he was appointed professor of natural philosophy at the University of Helmstedt. In 1636 he was promoted to Doctor of Medicine and Doctor of Philosophy on

²⁵ Hermann Conring, ed., *Princeps*, by Niccolò Machiavelli (Helmestadii: H. Müller, 1660; rpt. in *Opera*, 2:973–1092); idem, ed., *Politicoorum libri superstites*, by Aristotle (Helmestadii: Typis & Sumptibus Henningi Mulleri, 1656; rpt. in *Opera*, 3:491–723); idem, ed., *De moribus Germanorum*, by Tacitus (Helmestadii: Lucius, 1635; rpt. *Opera*, 5:253–355).

²⁶ Hermann Conring, *De civili prudentia liber unus* (Helmestadii: H. Müller, 1662; rpt. *Opera*, 3:280–421).

the same day. In 1637 he resigned from the faculty of philosophy in order to take up a chair in the faculty of medicine. He continued to hold that position until his death in 1681, supervising students, treating patients, conducting experiments, and publishing a large number of writings on medicine, including one of the earliest to endorse William Harvey's theory of the circulation of the blood, an influential introduction to the entire field of medicine, and a blistering criticism of the work of Paracelsus.²⁷

Medicine has changed so much since the seventeenth century that the significance of Conring's medical writings is more difficult to reconstruct than is the case with his writings on history and politics. That may help to explain why Goebel decided not to include them in his edition of Conring's *Opera*. But if Conring is to be adequately judged, it must surely be kept in mind that his intellectual formation was that of a physician—like that of Marsiglio of Padua, Marsiglio Ficino, and John Locke—and that during the early stages of his career most of his intellectual creativity went into the study of natural philosophy and medicine. It was only in 1650 that he was formally appointed to teach politics—not history, much less law. He never joined the faculty of law and he never stopped acting as physician and professor of medicine. He was a polymath.

The other reason why it is inappropriate to call Conring the founder of German legal history is both more important and more difficult to explain. It consists of the place that Conring occupies in the story I have laid out for you. Roughly speaking, he may be grouped with the legal humanists and the “French manner” of interpreting Roman law. Like legal humanists, he was convinced that Roman law ought to be interpreted as a body of laws with which an ancient people had once upon a time governed themselves. Like legal humanists, he subjected the authority of Roman law to the reasons of time and thereby made room for other kinds of law to step into the place that Roman law had occupied so far. He had nothing but contempt for the glossators and commentators. Indeed, by his time the authority they had formerly enjoyed had already receded so far into the distance that Conring could afford to lampoon them without having to go into the details

²⁷ Hermann Conring, *De sanguinis generatione et motu naturali opus novum* (Helmestadii: H. Müller, 1643); idem, *De hermetica Aegyptiorum vetere et Paracelsicorum nova medicina liber unus* (Helmestadii: Typis Henningi Mulleri, sumptibus Martini Richteri, 1648); idem, *De hermetica medicina libri duo* (Helmestadii: Typis & sumptibus H. Mulleri, 1669).

of their analysis. It seemed self-evident to him that purely textual or logical interpretations without sound historical knowledge of antiquity could not possibly grasp the real meaning of Roman law. History and sovereignty occupied the same important place in his thought as it did in that of legal humanists. History enabled him to demolish the claims of glossators and commentators that Roman law was valid in contemporary Europe because it embodied “reason in writing.” And sovereignty enabled him to insist on the freedom of each state to make laws for itself.

These principles shaped his views on Germany and German law. Few things, he thought, had done more damage to the well-being of Germany than the confusion between Roman law and German law that had infected German minds, and the arrogance of lawyers who insisted against all better knowledge that German citizens ought to obey Roman law. From his point of view, unfounded claims like these were among the most important reasons for the Thirty Years War. The task at hand, as he defined it, was to disentangle the history of the Roman Empire from the history of the German state, investigate the history of German law from its beginnings to the present, and thereby to reconstitute the foundations of the German commonwealth. This is precisely what he did in one of his earliest published writings, the *Discursus novus de imperatore Romano-Germanico* or *New Discourse on the Roman-German Emperor* and he returned to the same issue repeatedly later on. He gathered whatever evidence he could in libraries and archives in order to describe the laws that had actually governed German towns and regions before Roman law arrived. No one had done the same before, or had at least not done it with the same clarity of conviction, the same depth of erudition, and the same pivotal success.

Those are the reasons why Conring has been called founder of German legal history. They are good reasons—but only if we are clear in our minds exactly what they prove. They prove that Conring created something identifiably new by continuing something very old. The founding was real, but it was not from scratch. The founding amounted to an important point of change in a continuing tradition—and the continuity matters as much as the new beginning or more. Conring stands at that point in time at which Roman law had come to be so deeply embedded in local law that the logical and institutional distinctions on which their peaceful coexistence had so far depended needed to be replaced by the historical distinctions that legal humanists introduced. That changed the place of Roman law in the organization of

European society. But so far from eliminating its authority, it rather enhanced that authority by translating it into the new vernacular of national legislation.

It is no accident that, in the very same book in which he used legal history to refute the notion that Roman law was binding in Germany, Conring envisaged the creation of a new code of German law. His advocacy of codification stands in the same relationship to Roman law as did his study of legal history itself. In the obvious sense it amounted to a break. There never had been a code of German law before. And given that it took until the beginning of the twentieth century before a German code of civil law was actually put into effect, Conring's recommendation may be taken as evidence for his farsightedness, the difficulty of the task, and the depth of the break. But in a more fundamental sense his call for codification reflected nothing more clearly than the degree to which Roman law had taken root in Europe. It was the study of Roman law that furnished Europeans with the notion that law ought to be homogeneous for any given people and that it ought to be set forth in codes. There had been no "Germany" so far, much less a body of "German law." There had been an assemblage of many different territories and many variegated forms of law peculiar to each. The very idea that there was such a thing as German law that had a history and could be codified reflects nothing more clearly than the effects of centuries of training in Roman law. Had it not been for those effects, Conring could neither have envisioned the possibility that Germany was a sovereign state, as Rome had been, nor could he have called for Germany to have a law of its own, as Rome had had, and to define it by means of a code as Rome had done.

Henceforth, German law was going to range side by side with Roman law. It was going to have its own theory, its own practice, its own history, its own code, its own legislator, and its own jurists, as though German law and Roman law were simply different members of the same species "law," distinguished from each other not in kind, as theory from practice, or comprehensive code from variegated custom, or universal reason from local application, but only by the temporal circumstances of their making and the source from which they drew their obligatory force. Roman law was made in ancient Rome and drew its force from the will of ancient Roman people. German law was made in medieval and early modern Germany and drew its force from the will of German people. Apart from that, German law was now entitled to the same kind of authority as Roman law.

A charming indication of the new state of affairs is the arrangement adopted by the *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, one of the most venerable journals in the field of legal history. That journal is divided into three separate sections: one *Germanistisch* (devoted to German law), one *Romanistisch* (devoted to Roman law), and one *Kanonistisch* (devoted to canon law). Thus tensions that once upon a time used to beset the relationship between three different kinds of law were overtaken by a common dedication to legal history allowing *Romanisten*, *Germanisten*, and *Kanonisten* to coexist more or less happily on the pages of one and the same publication.

Without the turn to legal history, that kind of coexistence would have been inconceivable. It was the turn to legal history that allowed Conring to envisage German law and Roman law as different species of one and the same genus, cast German law in a new mold, and thereby to endow it with a kind of authority that had previously been strictly reserved to Roman law. Legal history, we may conclude, is nothing other than the most recent means that Europeans have devised in order to resolve the conflict between the great respect they paid to Roman law and the loyalty they felt towards the law they actually practiced. Legal history has done something other than merely to uncover the history of law. It has cast that history in forms inherited from the study of Roman law and thereby obscured as much history of law as it revealed. Petrarch, a humanist with much knowledge of law, though not a legal humanist in the technical sense, already understood the link between the study of history and Rome. "What else, then, is all history," he asked rhetorically speaking, "if not the praise of Rome?"²⁸ Indeed. If Conring's work be used as evidence with which to test the truth of Petrarch's claim, Petrarch would have to be considered right. Legal history is not what it appears to be. So far from signaling an end to the effects of Roman law on European culture, Conring's devotion to German legal history offers ironic proof of Roman law's abiding significance. So far from breaking with the tradition beginning in medieval universities, Conring represents its culmination, the point at which the local law that had for so long been practiced in distinction from the law taught at the universities was finally reshaped to fit the academic model.

²⁸ "Quid est enim aliud omnis historia quam Romana laus?" *Opera omnia* (Basel, 1554), 1187, quoted from Theodor E. Mommsen, "Petrarch's Conception of the 'Dark Ages,'" in *Medieval and Renaissance Studies*, by Theodor E. Mommsen, ed. Eugene F. Rice (Ithaca: Cornell University Press, 1959), 122 and n. 64.

As a result, the stimulus to critical innovation that had characterized the history of medieval law—first forcing glossators to give way to commentators, and then commentators to legal humanists—was transformed. In modern Europe it no longer took the form of a conflict between local law and university law—a conflict between two different types of law and thus internal to the sphere of law as such—but rather of a conflict pitting all forms of law against the principles that govern politics and the relations between states. In the aftermath of legal humanism and the invention of sovereignty, law was demoted from the supremacy it had enjoyed during the Middle Ages to a subordinate position and a more narrowly defined terrain, beneath the sovereign and between the states. The line that used to divide academic jurists from local practitioners of law thus came to be redrawn in that strange modern no-man's land dividing politics from law. It now divided sovereigns, men of state, and political theorists, on the one hand, from lawyers, legal historians, and legal theorists on the other. That was a new distinction. But it was historically related to its predecessor, fulfilled similar functions, and led to similar difficulties. It arose directly out of the difference between academic law (codified, enacted, promulgated by a sovereign legislator) and local law (often unwritten, not necessarily enacted or promulgated, and highly variable over time and place). It continued the old conflict between the laws and the stimulus such conflict gave to innovation and critique, except that henceforth the innovation and critique would no longer run from academic law to local legal practice, but from politics to law. As Roman law had formerly served as a source of critical reflection on local legal practice, so politics would henceforth serve as a source of critical reflection on law and legislation. As glossators and commentators had once compelled local practitioners to change their ways, so men of state and theorists of politics were going to force lawyers to bow to sovereignty. The difficulties we now face in striking a proper balance between politics and law are the historical successor to the difficulties medieval people faced in trying to strike a balance between university law and local law. In that manner the memory of ancient Rome continues to confuse and challenge the world today.