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James A. Brundage

ARTICLE

THE LEARNED JUDGE: THE DEVELOPMENT OF AN IDEAL

JAMES A. BRUNDAGE*

The upright judge has historically been seen as a lofty, almost superhuman, figure. A just judge, according to St. Thomas Aquinas (1224-1274), was a minister of God,[1] while Cardinal Hostiensis (d. 1271) considered him more meritorious than a contemplative monk.[2] Albericus de Rosate (d. 1354) went them both one better and ranked just judges with the angels.[3] Other writers ruefully admitted, however, that just judges, like all heroic figures, are uncommon. "We've seldom encountered a white raven or a black swan," said Hugo von Trimberg (ca. 1230-ca. 1313), "but even less often have I seen a righteous judge."[4]

What makes a judge just? The figure of the just judge has a lengthy and complex history. It was an ancient ideal even before Abraham left Ur of the Chaldees and it subsequently found eloquent expression in the Hebrew scriptures. The ideal judge as these texts describe him should above all be impartial. His judgments must be even-handed and he should show favors neither to the wealthy and powerful nor to those who are poor and distressed. The just judge will certainly not take bribes in return for favors,

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 Ahmanson-Murphy Distinguished Professor of Medieval History Emeritus, University of Kansas.

1. Thomas Aquinas, *Summa theologiae* 2-2 q. 60 a. 2 ad 2 (Marcus Lefebure ed. & trans., Black Friars 1975) (citing *Deuteronomy* 1:16 as his authority).

2. Hostiensis, *Summa aurea* pr. §8, fol. 2vb (Scientia 1962) (originally published by Joannes de Lambray 1537).

3. Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* 122 n. 104 (Princeton U. Press 1957) (quoting Albericus de Rosate, *Commentarium in Digestum Vetum* to Dig. 1.1.1, §11). Citations of Roman and canon law texts, as well as the glosses and commentaries on them, follow the conventional citation system. *See* James A. Brundage, *Medieval Canon Law* 190-205 (Longman 1995).

4. My paraphrase of "Selten wir gesehen haben / Swarze swanen und wîze raben: / Noch seltseiner diuhte mich ein rihtêre, / Der gereht an allen sachen wêre." Hugo von Trimberg, *Der Renner*, ll. 8367-8370, 1:349 (Gustav Ehrismann ed., Walter De Gruyter 1970) (revised by Günther Schweikle and originally published by Litterarischen Verein in Stuttgart 1908).

nor will he penalize those who fail to offer them. He will strive unswervingly to treat his enemies as fairly as he does his friends.[5]

The precise qualities attributed to this numinous figure have varied considerably over time and space. In the United States, in the early twenty-first century four qualities at a minimum seem to be regarded as essential. A just judge must first be learned in the law. He or she must know what the law is and consult other legal experts when in doubt. A judge must also follow the law, which, as we all know, may not necessarily be the same thing as knowing what it is.[6] Next we expect that a just judge will be impartial and disinterested and will deal fairly with each of the parties to a dispute.[7] Third, we demand that a just judge be discreet and refrain from comments that might seem to prejudice the outcome of matters currently before him or disclose confidential information acquired while performing his judicial duties.[8] Lastly, we reckon that a just judge must demonstrate personal integrity and refrain from words or actions that might damage the dignity or the reputation of the judiciary in the community.[9]

None of the qualities that make up our concept of proper judicial conduct has been universally accepted in the past, nor do all present-day societies subscribe to every one of them. Each of these characteristics is contingent and each has a history. I will limit myself here to a brief sketch of the history of only one element in our current Western vision of what a just judge ought to be, namely the idea that a judge should be learned in the law. This seems particularly suitable at a symposium that celebrates the founding of a law school and pays tribute to John Noonan.

The notion that a judge should be well versed in the law, obvious as it may seem to us, is by no means self-evident. Numerous societies in the past, and not a few in the present, have deemed other factors, such as socio-economic status, political loyalty, family connections, personal integrity, social prestige, and a reputation for fair dealing, as more important qualities in a judge than mere knowledge of the law. A prime example would be the Roman Republic, arguably the *fons et origo* of the Western legal tradition, the source or model for so many of our own legal ideas and ideals. Yet for five hundred years the Roman Republic had no professional judges at all. Its judges were amateurs, men whose names an elected magistrate, the praetor, had plucked from the voting rolls. These judges resembled jurors in our

5. *See Leviticus* 19:15; *Deuteronomy* 16:18-20; *Job* 36:17-19, *Psalms* 49:6; John T. Noonan, Jr., *Bribes* 3-14 (U. of Cal. Press 1984) (surveying earlier descriptions of the ideal ancient Near Eastern literature).

6. Model Code Jud. Conduct canon 3B(2), (7)(b)-(c) (ABA 1999).

7. Model Code Jud. Conduct canons 1A, 2B, 3B(5)-(7), E(1).

8. Model Code Jud. Conduct canon 3B(9), (11).

9. Model Code Jud. Conduct canons 1A, 2A.

system and like our jurors were not expected to have any special legal knowledge.[10]

Prudent lay judges, to be sure, took care to secure advice from knowledgeable jurists (*iurisperiti*) on the law relevant to the cases they handled, since they could be held personally liable for errors in applying the law.[11] Judges who actually knew some law themselves gradually began to displace these untrained amateur judges following the introduction of a complex procedural system known as *cognitio extraordinaria* in the middle of the fourth century C.E. Even so, it was not until the end of the fifth century that the Roman judiciary consisted almost entirely of trained jurists.[12]

The various clans and tribes among the so-called "Germanic" invaders who slowly took over the governance of the West Roman Empire during the fifth and sixth centuries brought with them traditional rules for settling disputes amongst themselves, but they only commenced to organize those rules and set them down in writing once they had secured firm control of the Roman provinces they had conquered. The settlement of disputes among the early "Germanic" settlers in the former West Roman Empire remained largely a function of rulers, of kings and village elders, rather than of individuals specially designated to exercise judicial functions during the centuries immediately following the initial invasions. Among the indigenous Roman (or Romanized) population, however, some vestiges of Roman legal practices remained in use following the invasions. Over the long run, however, the rapid disappearance of law schools, and with them of organized legal training, made it increasingly difficult to maintain a learned judiciary. Bishops often stepped in to fill this vacuum by assuming the role of judges and arbiters, not only in disputes among parties of Roman heritage, but frequently among those of "Germanic" descent as well.[13]

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10. W.W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* 635-36 (3d ed., Cambridge U. Press 1963) (rev. by Peter Stein); John P. Dawson, *A History of Lay Judges* 14-30 (Harvard U. Press 1960); Max Kaser, *Das Römische Zivilprozessrecht*, in *Rechtsgeschichte des Altertums: Im Rahmen des Handbuchs der Altertumswissenschaft* 59-60, 192-98 (2d ed., C.H. Beck 1996) (rev. by Karl Hackl).

11. Kaser, *supra* n. 10, at 196-97, 358-59; Fritz Schulz, *History of Roman Legal Science* 52-53 (Clarendon Press 1946).

12. *Iurisperiti*, or legal experts, however, continued to advise even these trained judges and they, rather than the judges, were largely responsible for innovations and intellectual developments in the law. Dawson, *supra* n. 10, at 30-34; Kaser, *supra* n. 10, at 438-43. As late as the time of Justinian (517-565), moreover, an exception was made for military judges, who were not required to have any legal training or even to be literate. "*Codex Justinianus* 3.1.17 in *Corpus iuris civilis* vol. 2." (Theodor Mommsen et al. eds., Weidmann 1965).

13. *See* Frederick L. Cheyette, *Suum cuique tribuere*, 6 French Historical Stud. 287, 299 (1970); Johannes Fried, *Die Entstehung des Juristenstandes im 12. Jahrhundert: Zur sozialen Stellung und politischen Bedeutung gelehrter Juristen in Bologna und Modena*, in *Forschungen zur neueren Privatrechtsgeschichte* vol. 21, 24-36 (Helmut Coing & Hans Thieme eds., Böhlau 1974); Maurizio Lupoi, *The Origins of the European Legal Order* 185-215, 225-31 (Adrian Belton trans., Cambridge U. Press 2000); *The Settlement of Disputes in Early Medieval Europe* (Wendy Davies & Paul Fouracre eds., Cambridge U. Press 1986); Steven D. White, *"Pactum . . . legem vincit et amor judicium": The Settlement of Disputes by Compromise in Eleventh-Century*

Judges trained in law did not begin to reappear in the West until the revival of the study of Roman law and the systematic study of canon law that began during the twelfth century. These developments lay at the center of a larger intellectual upheaval often described as the renaissance of the twelfth century. The causes of all this have been strenuously debated and remain controversial.[14] For my present purposes, however, it may suffice to say that by around 1150 schools that offered the kind of detailed, rigorous instruction in Roman civil law that learned judges and advocates required were again functioning in Western Europe for the first time in five hundred years.[15] As of 1150, law teaching of this sort was available only in a handful of geographically scattered centers—Bologna, Toulouse, and Paris are the ones we know most about—but others soon appeared.

Equally important, and even more novel, were the schools of canon law that also sprang up at about the same time and in the same places as the new schools of Roman law. Canon law had never been taught as systematically and rigorously as Roman law. The schools of canon law that began to appear at Bologna and elsewhere in the 1150s and 1160s were able to attain a new level of sophistication primarily because for the first time they now had a textbook that not only assembled an unparalleled array of authoritative sources of church law, but also showed students how to analyze those sources, resolve differences between them, and apply them to concrete situations. That textbook was the *Harmony of Clashing Canons* (*Concordia discordantium canonum*) of Gratian, more commonly known as Gratian's

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Western France, 22 Am. J. Leg. History 281 (1978) (all on courts and judges during the early Middle Ages).

14. Charles Homer Haskins, *The Renaissance of the Twelfth Century* (Harvard U. Press 1927) (reprinted Meridian Books 1958). *See also* Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard U. Press 1983); Richard H. Helmholz, *The Character of the Western Legal Tradition: Assessing Harold Berman's Contributions to Legal History*, in *The Integrative Jurisprudence of Harold J. Berman* 29-50 (Howard O. Hunter ed., Westview Press 1996); Stephan Kuttner, *The Revival of Jurisprudence*, in *Renaissance and Renewal in the Twelfth Century* 299-338 (Robert L. Benson & Giles Constable eds., Harvard U. Press 1982); Charles Radding, *The Origins of Medieval Jurisprudence: Pavia and Bologna, 850-1150* (Yale U. Press 1988); Richard W. Southern, *Scholastic Humanism and the Unification of Europe, Volume 1: Foundations* 264-318 (Blackwell 1995); Peter Stein, *Roman Law in European History* (Cambridge U. Press 1999); Paul Vinogradoff, *Roman Law in Medieval Europe* (2d ed., Clarendon Press 1929); C. Stephen Jaeger, *Pessimism in the Twelfth-Century "Renaissance,"* 78 Speculum 1151 (2003); Rudolf Schieffer, *"The Papal Revolution in Law"? Rückfragen an Harold J. Berman*, 22 Bull. Medieval Canon L. 19 (1998).

15. Early medieval schools occasionally taught some elements of Roman law, to be sure, most commonly as part of the study of rhetoric. A scattering of elementary texts, principally Justinian's *Institutes*, as well as parts of the *Codex Justinianus* and *Codex Theodosianus*, were also available in a few places. The study of these texts, however, did little to acquaint students with legal analysis and reasoning, which were (and are) essential tools for the practice of law. They could only begin to learn those skills when Justinian's Digest became available for study and teaching. That did not occur in Western Europe until the very end of the eleventh century. Herman Lange, *Römisches Recht im Mittelalter, vol. 1: Die Glossatoren* 60-71 (C.H. Beck 1997); Wolfgang P. Müller, *The Recovery of Justinian's Digest in the Middle Ages*, 20 Bull. Medieval Canon L. 1 (1990).

Decretum. This book had been long in the making, but it was finally completed around 1150.[16]

Beginning in the mid-twelfth century, the schools of Roman and canon law soon attracted hordes of students who—to the dismay of teachers of the liberal arts and theology—quickly grasped the potential that the study of law offered for social, economic, and political advancement.[17] As the new law schools commenced to turn out more and more lawyers trained in the learned laws, authorities in both church and state began to employ them as judges. This was at least partly a matter of prestige. The intellectual difficulty of Roman and canon law texts, as well as their venerable age and dignity, inspired special deference toward those who were familiar with them. This was something that a utilitarian mastery of recent municipal statutes or unwritten customs of uncertain origin could not readily command. "Law schools make tough law," as Frederic William Maitland observed, and the techniques of analytical reasoning inculcated in the schools, vested the lawyers they produced and the conclusions they arrived at with a

16. Scholars have often speculated that the preparation of Gratian's *Decretum* was a long and complex process. Those suspicions were confirmed by new evidence that Anders Winroth presented in a paper at the Tenth International Congress of Medieval Canon Law at Syracuse, N.Y., in 1996. Winroth has since published his detailed findings. Anders Winroth, *The Making of Gratian's Decretum*, in *Cambridge Studies in Medieval Life and Thought*, 4th series, vol. 49 (Cambridge U. Press 2000). Winroth's conclusions have been examined and tested by numerous other scholars, some of whom have proposed alternative hypotheses. *See e.g.* Rudolf Weigand, *Causa 25 des Dekrets und die Arbeitsweise Gratians*, in *Grundlagen des Rechts: Festschrift für Peter Landau zum 65. Geburtstag* 277-90 (Richard H. Helmholz et al. eds., Ferdinand Schöningh 2000); Carlos Larrainzar, *El Decreto de Graciano del Codice Fc (= Firenze, Biblioteca Nazionale Centrale, Conventi Soppressi A. I. 402)*, 10 Ius ecclesiae 421-89 (1998); Carlos Larrainzar, *El borrador de la 'Concordia' de Graciano: Sankt Gallen, Stiftsbibliothek MS 673 (= Sg)*, 11 Ius ecclesiae 593 (1999); José Viejo-Ximénez, *La redacción original de C. 29 del Decreto de Graciano*, 10 Ius ecclesiae 149 (1998). Winroth has rejected these criticisms in *Le Décret de Gratien et le manuscrit florentin: Une critique des travaux de Carlos Larrainzar sur Gratien*, 51 Revue de droit canonique 211-31 (2001), as has Titus Lenherr, *Ist die Handschrift 673 der St. Galler Stiftsbibliothek (Sg) der Entwurf zu Gratians Dekret? Versuch einer Antwort aus Beobachtungen an D. 31 und D. 32*, http://home.vr-web.de/titus_lenherr/Sg-Entw.PDF (accessed March 16, 2004), and *Die vier Fassungen von C. 3 q. 1 d.p.c. 6 im Decretum Gratiani: Zugleich ein Einblick in die neueste Diskussion um das Werden von Gratians Dekret*, 169 Archiv für katholisches Kirchenrecht 353-81 (2000). Further detailed summaries of these controversies appear in Mary E. Sommar, *Gratian's Causa VII and the Multiple Recension Theories*, 24 Bull. Medieval Canon L. 78-96 (2000), and Jean Werckmeister, *Les études sur le Décret de Gratien: Essai de bilan et perspectives*, 48 Revue de droit canonique 363-79 (1998).

17. *See e.g.* John W. Baldwin, *Critics of the Legal Profession: Peter the Chanter and His Circle*, in *Proceedings of the Second International Congress of Medieval Canon Law* 249-59 (Stephan Kuttner & J. Joseph Ryan eds., Cultura Press 1965); Stephan Kuttner, *Dat Galienus opes et sanctio Justiniana*, in *Linguistic and Literary Studies in Honor of Helmut A. Hatzfeld* 237-46 (A. S. Crisavuli ed., Catholic U. Am. Press 1964) (reprinted with original pagination in his *History of Ideas and Doctrines of Canon Law in the Middle Ages* (2d ed., Variorum 1992)); John A. Yunck, *The Lineage of Lady Meed: The Development of Mediaeval Venality Satire* 133-70 (Philip S. Moore & Joseph N. Garvin eds., U. of Notre Dame Press 1963) (Vol. XVII in Publications in Mediaeval Studies); James A. Brundage, *Vultures, Whores, and Hypocrites: Images of Lawyers in Medieval Literature*, 1 The Roman L. Tradition 56 (2002).

reassuring aura of certainty.[18] The institutionalization of private twelfth-century law schools as law faculties in the universities that first began to take shape at Bologna, Paris, and Oxford in the years around 1200 further increased the prestige of rigorously trained lawyers.[19]

Subsequent changes in judicial systems were a consequence as well as a cause of the development of what has come to be known as the Romano-canonical procedural system. This procedural system lay at the heart of what contemporaries often called the *ius commune*, a blend of Roman and canon law rules and principles widely shared by local legal systems throughout Western Christendom.[20] Twelfth-century jurists began to construct this system out of elements they found in the *congnitio* procedure used in the late Roman Empire, combined with other components that they took from canon law and a few that originated in the customary practices of Italian civil courts. Although early versions of this procedural system appeared in the mid-twelfth century, it did not reach full maturity until the second half of the thirteenth century.[21] In its fully-developed form Romano-canonical procedure became highly complex—its technicalities were numerous and its details were difficult to master. Many people, to be sure, found this anything but agreeable:

> Would that the quibbling and deceits of the lawyers could be done away with and lawsuits could be finished without fuss, as used to be done forty years ago [wrote Roger Bacon around 1267]. Oh, if only I might see this happen with my own eyes![22]

That was not to happen. As the prevailing procedural system became ever more elaborate, judges who lacked specialized training could scarcely hope to avoid missteps that, under *ius commune* rules could leave them person-

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18. Frederic William Maitland, *English Law and the Renaissance*, in *Select Essays in Anglo-American Legal History* vol. 1, 168-203 (Assn. Am. Law Schools ed., Little, Brown, & Co. 1907).

19. Helmut Coing, *Die juristische Fakultät und ihr Lehrprogramm*, in *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* vol. 1, 39-128 (Helmut Coing ed., C.H. Beck 1973); Antonio García y García, *The Faculties of Law*, in *A History of the University in Europe vol. 1: Universities in the Middle Ages* 388-408 (Hilde de Ridder-Symoens & Walter Rüegg eds., Cambridge U. Press 1992).

20. On the *ius commune*, see Manlio Bellomo, *The Common Legal Past of Europe, 1000-1800*, in *Studies in Medieval and Early Modern Canon Law* vol. 4 (Lydia G. Cochrane trans., Catholic U. Am. Press 1995); Francesco Calasso, *Introduzione Al Diritto Comune* (Dott. A. Giuffrè 1951); Paul Koschaker, *Europa und das Römische Recht* (3d ed., C.H. Beck 1958). In addition, two scholarly journals, *Ius commune* (printed by Vittorio Klostermann) and the *Rivista internazione di diritto comune* (printed by Il Cigno Galileo Galilei) regularly carry articles and reviews that deal with current research on this topic.

21. Linda Fowler-Magerl, *Ordines Iudiciarii and Libelli de Ordine Iudiciorum* [from the Middle of the Twelfth to the End of the Fifteenth Century] 16-35 (Brepols 1994). I am extremely grateful to Dr. Fowler-Magerl for sharing with me some of her more recent unpublished work, particularly "Judicial Ordines and Their Circulation."

22. Roger Bacon, *Opus tertium*, c. 24, in *Opera*, Rolls Series, No. 15, 85 (J. S. Brewer ed., Longman, Green, Longman & Roberts 1859) (quoting "Utinam igitur excludantur cavillationes et fraudes juristarum, et terminentur causae sine strepitu litis, sicut solebant esse ante quadraginta annos. O si videbo oculis meis hoc contingere!").

ally liable for damages that resulted from their errors.[23] Accordingly, it became increasingly more common for trained jurists to sit with lay judges on a regular basis as judicial advisers or assessors.

The swelling supply of men trained in civil and canon law that began to emerge from independent law schools in the twelfth century, and later from the law faculties of universities, soon made it feasible to create courts staffed by judges trained in the two learned laws.

By the middle of the twelfth century, popes were beginning to find that hearing and deciding disputes took so much of their time and energy that they could do little else.[24] In order to ease this burden they commenced to delegate parts of this task to cardinals and other members of their consistory, or advisory council.[25] Starting with the pontificate of Innocent III (1198-1216), popes began to appoint trained lawyers to handle specialized cases that arose out of conflicting claims to ecclesiastical offices and appointments. These professional judges comprised the Court of Disputed Letters (*Audientia Litterarum Contradictarum*).[26] In the middle of the century, Innocent IV (1243-1254) appointed another group of trained lawyers, called Auditors of Cases in the Sacred Apostolic Palace (*auditores generales causarum sacri palatii apostolici*), to deal with other kinds of litigation appealed to the pope. This group ultimately became the papacy's chief appeals court, known as the Rota.[27]

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23. William Durantis, *Speculum Iudiciale* 1.1 *De assessore* §4.2 and 2.2 *De requisitione consilii* §2, 1:101, 763 (Apud Ambrosium et Aurelium Froebenios Fratres 1574) (reprinted Scientia 1975); Dr. Woldemar Engelmann, *Die Wiedergeburt der Rechtskultur in Italien durch die wissenschaftliche Lehre: Eine Darlegung der Entfaltung des gemeinen italienischen Rechts und seiner Justizkultur im Mittelalter* 336-54 (K.F. Koehlers Antiquarium 1938); S. Raimundus de Pennaforte, *Summa de Penitentia*, in *Universa Bibliotheca Iuns* vol. 1, 511-12 (Xavier Ochoa Sanz & Aloisio Diez eds., Commentarium pro Religiosis 1976); Guido Rossi, *Consilium Sapientis Iudiciale: Studi e ricerche per la storia del processo romano-canonico*, vol. 18, 246-53 (Dott. A. Guiffre 1958); Johannes Teutonicus, *Glossa ordinaria* to C. 2 q. 6 c. 37 v. *vel iniquo*, in *Corpus juris canonici* (Apud Iuntas 1605).

24. For a vivid, highly charged description of the extent to which mid-twelfth-century popes were besieged by legal business, see St. Bernard of Clairvaux's (1090-1153) stern warning about this to his former pupil, Pope Eugene III (1145-1153). St. Bernard of Clairvaux, *Sancti Bernardi Opera* vol. III, 1.III.4-S, 1.XI.14, in *Tractatus et Opuscula* 397-99, 409 (Jean Leclercq & H.M. Rochais eds., Editiones Cistercienses 1936); *see also Five Books on Consideration* 31-33, 45-46 (John D. Anderson & Elizabeth T. Kennan trans., Cistercian Publications 1976) (English version).

25. *See* Werner Maleczek, *Das Kardinalskollegium unter Innocenz II. und Anaklet II.*, 19 Archivum Historiae Pontificiae 27 (1981); I.S. Robinson, *The Papacy, 1073-1198: Continuity and Innovation* 187-92 (Cambridge U. Press 1990) (both on the twelfth-century papal consistory).

26. Peter Herde, *Audientia Litterarum Contradictarum: Untersuchungen über die päpstlichen Justizbriefe und die päpstliche Delegationsgerichtsbarkeit vom 13. bis zum Beginn des 16. Jahrhunderts*, in *Bibliothek des Deutschen Historischen Instituts in Rom* vol. 31-32 (Max Niemeyer Verlag 1970).

27. Gero Dolezalek & Knut Wolfgang Nörr, *Die Rechtsprechungssammlungen der mittelalterlichen Rota*, in *Handbuch der Quellen und Literatur der Neueren Europäischen Privatrechtsgeschichte* vol. 1, 849-56 (Helmut Coing ed., C.H. Beck 1973); Egon Schneider, *Über den Ursprung und die Bedeutung des Namens Rota als Bezeichnung für den obersten päpstlichen*

Local bishops by the late 1170s, were likewise beginning to delegate the bulk of their own time-consuming judicial duties to one or another of the trained lawyers they had begun to add to their households.[28] These officers (who came to be called Officials-Principal, to distinguish them from other officials in episcopal administration) ultimately replaced the bishop himself as chief judges of what came to be known as bishops' consistory courts.[29]

Civil authorities likewise began to appoint jurists trained in Roman and canon law to their courts. At first, this practice was most common in Italy but it soon spread to other regions. Thus, for example, judges at Bologna and Modena, beginning in the closing decade of the twelfth century, were drawn increasingly from the ranks of trained jurists. By the middle of the thirteenth century they completely dominated the municipal judiciary.[30] In France, to take another example, although the king, together with his barons, the bishops, and the principal officers of his realm nominally constituted the *curia regis*, the chief royal law court for the resolution of disputes among the monarch's subjects, the actual administration of royal justice lay increasingly in the hands of the *magistri curiae*, a group of trained lawyers, mainly clerics, who were far better equipped than the great magnates to deal with the technicalities of law and procedure. These judges appeared as early as the reign of Louis VII (1137-1180) and gained prominence during the reign of Philip Augustus (1180-1223). The reign of St. Louis (1226-1270) formalized this situation with the transfer of the administration of royal justice to the newly-created Parlement de Paris, whose professional judges, trained in the learned laws, constituted for practical purposes the supreme law court of the French kingdom.[31] Customary law

Gerichtshof, 41 Römische Quartalschrift fur christliche Altertumskunde und Kirchengeschichte 29 (1933).

28. One of the earliest to do so was Robert Bloet, Bishop of Lincoln from 1093-1123, who employed Master Gilbert of Sempringham as a clerk and legal adviser. Archbishop Thomas Becket not only studied law himself during his exile from England, but also kept Lombard of Piacenza, William FitzStephen, and Philip of Calne, all trained as canonists, in his household. C. R. Cheney, *English Bishops' Chanceries 1100-1250*, at 4-21, 23 (Manchester U. Press 1950); David Knowles, *Thomas Becket* 57 (Adam & Charles Black 1970); Beryl Smalley, *The Becket Conflict and the Schools: A Study of Intellectuals in Politics* 121-25 (Rowman & Littlefield 1973).

29. Paul Fournier, *Les Officialités au Moyen Âge: Étude sur l'Organisation, la Compétence et la Procédure des Tribunaux Ecclésiastiques Ordinaires en France de 1180 à 1328* (Scientia Verlag 1984) (originally published by E. Plon 1880) (remains the classic study of these developments). *See also* Winfried Trusen, *Die gelehrte Gerichtsbarkeit der Kirche*, in *Handbuch der Quellen und Literatur der Neueren Europäischen Privatrechtsgeschichte* vol. 1, 467-504 (Helmut Coing ed., C.H. Beck 1973); Colin Morris, *From Synod to Consistory: The Bishops' Courts in England, 1150-1250*, 22 J. Ecclesiastical History 115 (1971).

30. Fried, *supra* n. 13, at 158-69, 237-44. Claudia Storti Storchi, *Intorno ai Costituti pisani della legge e dell'uso (secolo XII)* 85-99 (Liguori 1998); Chris Wickham, *Legge, pratiche e conflitti: Tribunali e risoluzione delle dispute nella Toscana del XII secolo* 105-13, 196-206 (Viella 2000).

31. *See* John W. Baldwin, *The Government of Philip Augustus: Foundations of French Royal Power in the Middle Ages* 37-44, 137-44 (U. of Cal. Press 1986); John P. Dawson, *The Oracles of*

courts in the German-speaking lands likewise adopted Romano-canonical procedures, although they did so considerably later. As this occurred, the old-style judges (*Schöffen*) experienced in the customary law, but without formal training in the learned laws, gradually faded away. They were replaced by learned judges who had studied law at a university and were accordingly equipped to deal with the complexities of the new procedural system.[32]

The confluence of the three developments that I have sketched here, namely a swelling supply of lawyers trained in Roman and canon law at law schools and university law faculties, the introduction and elaboration of highly technical Romano-canonical procedures, and the increasing transfer of judicial functions to new kinds of courts, little-by-little dislodged popes and kings, bishops and counts, as well as other untrained judges from the courtroom.[33] Educated judges, trained as jurists, rapidly occupied the places on the bench that their predecessors had vacated and the learned judge rapidly became the ideal for generations.

The transition began in a small way during the late twelfth century but it only started to take hold during the first half of the thirteenth century. Around 1217, when Johannes Teutonicus (d. 1245) was putting the finishing touches to what became the standard commentary on Gratian's *Decretum*, destined to be taught in law faculties throughout Europe, he waffled on the question of whether judges had to know the law. "It can be argued," he wrote at one point, "that no one can be a judge, especially an ecclesiastical judge, unless he is a [legal] expert," and he proceeded to cite numerous authorities in support of this position. Then, in typical scholastic fashion, he raised the opposing view, citing in its support a constitution of Justinian concerning military judges. He concluded that "a modest amount of learning is quite enough for a judge, just as it is for a prelate."[34]

Twenty years later authorities began to take a more ambitious view. A reforming council held at Tours in 1236, for example, decreed that Officials-principal appointed to preside over bishops' consistory courts must have studied law for at least five years or have the equivalent in practical

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the Law 273-290 (U. of Mich. L. Sch. 1968); J.H. Shennan, *The Parlement of Paris* 9-24 (2d ed., Sutton Publg. 1998).

32. Dawson, *supra* n. 10, at 103-09; Dawson, *supra* n. 31, at 148-213; Heinrich Mitteis, *Deutsche Rechtsgeschichte: Eine Studienbuch* 328-36 (19th ed., C.H. Beck 1992).

33. Ernst H. Kantorowicz, *Kingship under the Impact of Scientific Jurisprudence*, in *Twelfth-Century Europe and the Foundations of Modern Society* 94 (Marshall Clagget et al. eds., U. of Wis. Press 1961).

34. Johannes Teutonicus, *Glos. ord.* to D. 20 d.a.c.1 v. *scientia*, in *Corpus juris canonici*, *supra* n. 23 ("Arg. quod nullus potest esse iudex, maxime ecclesiasticus, nisi sit peritus. . . . Sed contra C. de assess., presides [Cod. 3.1.17] ubi dicitur quod milites possunt esse iudices, quid per quotidianum usum possunt habere peritiam iudicandi. Mediocris tamen scientia sicut in praelato, ita et in iudice sufficit, ut extra de elect. cum nobis olim [X 1.6.19]."). *Cf.* Thomas Aquinas, *Summa theologiae*, *supra* n. 1, at 2-2 q. 60 a. 5.

experience as judges.[35] The following year, a papal legate, Cardinal Otto da Tenengo, in a council at London likewise demanded that judges in bishops' consistory courts be trained in law, although he failed to specify how long that training should last.[36] Similar requirements appeared and reappeared in various places during the thirteenth and following centuries.[37]

Records of judicial appointments confirm that church authorities took these normative requirements seriously. After 1234 in Flanders, for example, all of the Officials-principal of the bishops of Tournai had at least some university training in law.[38] Similarly at Lyon between 1300 and 1500, twenty-two out of twenty-seven of the bishop's Officials-principal held degrees, while in England, judges in the dioceses of Canterbury, York, Rochester, Lichfield, and Ely, at least from the fourteenth century onward, usually held law degrees.[39] Judges in the Rota and the other tribunals that formed part of the papal curia, as mentioned earlier, were chosen with increasing frequency from among members of the papal household with formal legal training.[40] To make it easier for curial clerks to qualify, Pope

35. *See Council of Tours* (1236) ¶ 5, in *Les Conciles de la Province de Tours Concilia Provinciae Turonensis (saec. XIII-IV)* 159-60 (Joseph Avril ed., Centre National de la Recherche Scientifique 1987). When they required five years of legal studies the council fathers (or whoever drafted this canon for them) no doubt had in mind a similar requirement current in the late Roman Empire and maintained by authoritative thirteenth-century writers on Roman civil law; Justinian, Const. *Omnem rei publicae* (533) in Dig., proem., in Corpus iuris civilis vol. 2.7.24.4 (Theodor Mommsen et al. eds., Weidmann 1965); Azo, *Summa super Codicem* 2.7 (originally printed by Bernardinus et Ambrosius fratres de Rouellis, 1506), in *Corpus glossatorum juris civilis* vol. 2, 24 (Ex officira erasmiana 1966); Accursius, *Glos. ord.* to Dig. 50.13.1 v. *quoqu*, in *Corpus iuris civilis* (Iuntas 1584).

36. *Legatine Council of London (1237)* ¶ 23, in *Councils and Synods with Other Documents Relating to the English Church: A.D. 1205-1313*, at vol. II, pt. I, 255-56 (F.M. Powicke & C.R. Cheney eds., Clarendon Press 1964).

37. Thus, e.g., the Council of Buda (1279) c. 38 required at least three years study of canon law for judges in matrimonial cases in Hungary and Poland. Giovanni Domenico Mansi, *Sacrorum Conciliorum Nova, et Amplissima Collectio* vol. 53, 287-88, ¶ 24 (H. Welter 1903); *Constitutions of Archbishop Robert Kilwardby (1273)*, in David Wilkins, *Concilia Magnae Britaniae et Hiberniae* vol. 2, 27 (R. Gosling et al. eds., Culture et Civilisation 1964) (originally published in London in 1737); Henry Burghersh, *Statuta consistorii episcopalis Lincolniensis* in *id.* at vol. 2, 572.

38. Monique Vleeschouwers-van Melkebeek, *De officialiteit van Doornik: Oorsprong en vroege ontwikkeling (1192-1300), Verhandelingen van de Koninklijke Academie voor Wetenschappen, Letteren en Schone Kunsten van België* vol. 47, no. 17 (Paleis der Acadamiën 1985).

39. James A. Brundage, *The Cambridge Faculty of Canon Law and the Ecclesiastical Courts of Ely*, in *Medieval Cambridge: Essays on the Pre-Reformation University*, in *The History of the University of Cambridge, Texts and Studies* vol. 2, 43-44 (Boydell Press 1993); René Fédou, *Les hommes de loi Lyonnais à la fin du moyen âge: Étude sur les origines de la classe de robe*, in *Annales de la Université de Lyon*, 3d series, vol. 37, 122 (Les Belles Lettres 1964); Richard H. Helmholz, *Marriage Litigation in Medieval England* 142-43 (Cambridge U. Press 1974); Richard H. Helmholz, *Les officialités Anglo-Saxonnes et la culture juridique latine: Approches historiennes*, 38 Année canonique 97, 97-101 (1996).

40. Jane E. Sayers, *The Court of "Audientia Litterarum Contradictarum" Revisited*, in *Forschungen zur Reichs-, Papst- und Landesgeschichte: Peter Herde zum 65. Geburtstag von Freunden, Schülern und Kollegen dargebracht* vol. 1, 416-27 (Karl Borchardt & Enno Bunz eds., Anton Hiersemnn 1998); Jane E. Sayers, *Papal Government and England during the Pontificate*

Innocent IV (1243-1254) founded a new university attached to the curia in 1245 specifically to provide them with the opportunity to acquire the educational credentials they needed.[41]

The pope's initiative both illustrated and contributed to the gradual rise in the level of educational qualifications for judicial appointments from the middle of the thirteenth century onward. Authoritative writers generally agreed by that point that ecclesiastical judges must have studied both Roman and canon law at a university for a substantial period of time, regardless of whether or not they received a law degree.[42] At the beginning of the fifteenth century the quest for credentials reached the point where Pope Martin V (1417-1431) could decree that every candidate for appointment as a judge of the Rota must be a well-known doctor of law of unsullied reputation who had taught law for at least three years after receiving the doctorate.[43] The pope directed his vice-chancellor, moreover, to create an examining commission to test the depth of each candidate's legal knowledge before his appointment was finalized.[44] He also directed judges of the Rota to keep the basic legal texts at hand and consult them when they dealt with cases.[45]

It is more surprising to find that growth in educational expectations also affected papal judges-delegate. These ad hoc appointees, who were named to settle disputes in distant regions with the same force and authority as if the pope had gone there to decide them himself, had for long been chosen from among the respected bishops and abbots in the locality where the dispute arose. They had not traditionally been expected to have much

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of Honorius III (1216-1227), in *Cambridge Studies in Medieval Life and Thought*, 3d series, vol. 21, 38-39 (Cambridge U. Press 1984).

41. Innocent IV, *Quum de diversis*, in VI 5.7.2 (Akademische Druck-u. Verlagsanstalt 1959); Agostino Paravicini-Bagliano, *La fondazione dello "Studium Curiae": Una rilettura critica*, in *Luoghi e metodi di insegnamento nell'Italia Medioevale (secoli XII-XIV)*, Università degli studi de Lecce, Dipartimento di scienze storiche e sociale, Saggi e ricerche, series 2, vol. 3, 57-81 (Congedo 1989).

42. Bernard of Parma, *Glos. ord.* to X 4.14.1 v. *potestatem*, in *Corpus juris canonici*, *supra* n. 23; Gratiae Aretini, *De Iudiciorum Ordine*, in *Pillius, Tancredus, Gratia Libri de Iudiciorum Ordine* 1.1, 320 (Friedrich Christian Bergmann ed., Scientia 1965) (originally published 1842); Hostiensis, *In quinque decretalium libri commentaria* to X 1.32.1 §13, 5 vols. in 2 (Apud Iuntas 1581; reprinted Bottega d'Erasmo 1965), 1:169rb; William Lyndwood, *Provinciale* 2.4.1 v. *officiales principales* and John of Acton, *Apparatus* to Const. Othonis c. 23, v. *peritiam*, both in *Provinciale seu constitutiones Angliae* pt. 1, 105, pt. 2, 59 (H. Hall 1679).

43. Martin V, *In apostolice dignitatis specula* (1418) §16, in Michael Tangl, *Die Päpstlichen Kanzleiordnungen von 1200-1500*, at 139 (Wagner 1894) (reprinted by Scientia 1959). Auditors of the Rota were still unsalaried at this period, as we know from *The Chronicle of Adam Usk, 1377-1421*, at 176-78 (Chris Given-Wilson ed. & trans., Clarendon Press 1997), and the pope therefore required that prospective appointees possess benefices or private means that produced an annual income of at least 200 gold florins.

44. Martin V, *supra* n. 43, at 139, §18; Hermann Hoberg, *Die Ältesten Informativprozesse Über Die Qualifikation Neuernannter Rotarichter (1492-1547)*, in *Reformata Reformanda: Festgabe für Hubert Jedin zum 17. Juni 1965*, vol. 1 129-41 (Erwin Iserloh & Konrad Repgen eds., Aschendorff 1965) (Reformationsgeschichtliche Studien und Texte, Supplementband I).

45. Martin V, *supra* n. 43, at 140, §20.

legal learning, if any. Rather they were normally selected because they were well-regarded, reputed to have shrewd judgment, and, most important of all, because the parties to the controversy considered them acceptable. The letters of appointment that judges-delegate received typically laid out two or more alternative conclusions that they might arrive at and instructed them how to handle whichever conclusion they might reach.[46] In practice, judges-delegate usually functioned more like arbitrators than like judges. Their primary task was to restore peace among the quarreling parties and for this purpose tact and persuasive skills were likely to be more important than legal expertise.[47] Yet by the middle of the thirteenth century a consensus was emerging that judges-delegate should also be required to show some legal expertise.[48]

Similar developments were also taking place in the civil courts of many north Italian city-states. At Bologna, Padua, Florence, and Treviso, for example, untrained judges began to fade away during the thirteenth century and by the fourteenth century had almost entirely disappeared. They were replaced by judges who employed their university training in Roman and canon law to interpret and apply municipal statutes and local customary law.[49] They did so using the complex and highly technical Romano-canonical procedural system that for all practical purposes required litigants to seek assistance from advocates, proctors, and notaries, many of whom were also products of university law faculties, if they were to have any hope of prevailing.

During the thirteenth century, judges, as well as the advocates who appeared before them, became professionals. The process of professionalization commenced in Mediterranean Europe and slowly but inexorably spread from there into northern, central, and eastern Europe. Church courts became the principal vehicle of this expansion, since the core elements and institutions of canon law constituted a working international legal system that transcended ethnic, linguistic, and political boundaries throughout

46. The similarity of this practice to the formulary procedure in classical Roman law is unlikely to be coincidental. On classical formulary procedure *see* Buckland, *supra* n. 10, at 627-42; Kaser, *supra* n. 10, at 151-71, 310-22; J.A.C. Thomas, *Textbook of Roman Law* 93-99 (North-Holland Publg. Co. 1976).

47. Jane E. Sayers, *Papal Judges Delegate in the Province of Canterbury, 1198-1254: A Study in Ecclesiastical Jurisdiction and Administration* 93-99 (Oxford U. Press 1971).

48. Bernard of Parma, *Glos. ord.* to X 4.14.1 v. *potestatem*, in *Corpus juris canonici*, *supra* n. 23; Hostiensis, *Summa aurea*, lib. 1, *De officio et potestate iudicis delegati* §3 [1537 ed.] fol. 46vb.

49. Bianca Betto, *I collegi dei notai, dei giudici, dei medici, e dei nobili in Treviso (secc. XIII-XVI)* 155-56 (Deputazione Editrice 1981) (Deputazione di storia patria per le Venezie, Miscellanea di studi e memorie, vol. 19); Fried, *supra* n. 13, at 158-69; J.K. Hyde, *Padua in the Age of Dante* 123 (Manchester U. Press 1966); Lauro Martines, *Lawyers and Statecraft in Renaissance Florence* 133-45 (Princeton U. Press 1968).

Western Christendom.[50] Although practices varied in numerous details, depending on local needs, customs, and habits, the basic elements of the system were essentially uniform from Bologna to Bergen and Cracow to Coimbra.[51]

As judges became professionals in the High Middle Ages, they also developed a distinctive juristic culture. Unlike law professors, judges needed to arrive at workable decisions grounded on the specific circumstance of each individual case.[52] Important as this development was, the contrast between the judges' approach to juristic questions and that of the professoriate should not overshadow the connection between them. Certainly judges were usually more concerned with immediate practical applications of the law than with its theoretical ramifications, but law professors were scarcely isolated from the realities of practice. Many of them were involved with the courts, in one capacity or another, all the time. Some served as judicial assessors who routinely advised judges on fine points of law. Even judges with legal training regularly consulted legal experts, including law professors, before they handed down decisions. In important cases where the stakes were high and the legal issues complex, judges often approached them to seek authoritative written opinions on difficult issues. These formal opinions (*consilia*) were not free of charge. Indeed they were apt to be extremely well-paid. The fees that a highly regarded law professor could command for his *consilia* might well exceed his academic income several times over.[53]

It even happened from time to time that the juristic cultures of learned judges and learned law professors might converge and fuse together in the same person. Such rare but fortunate events may even occur now and again in the present. Happily we have a living exemplar in our midst in the person of John Noonan, whose learning, both judicial and academic, we celebrate today.

50. Robert C. Van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* 135 (Cambridge U. Press 1987).

51. Manlio Bellomo, *The Common Legal Past of Europe* 78-83, passim (Lydia Cochrane trans., Catholic U. Am. Press 1995); Richard H. Helmholz, *The Ius commune in England: Four Studies* 240-45 (Oxford U. Press 2001); Francesco Migliorino, *In terris ecclesiae: Frammenti di ius proprium nel Liber Extra di Greogrio IX* 9-60 (Il Cigno Galileo Galilei 1992).

52. Ennio Cortese, *Scienza di giudici e scienza di professori tra XII e XIII secolo*, in *Legge, Giudici, Giuristi* 93-148 (A. Giuffrè 1982) (Università di Cagliari, Pubblicazioni della Facultà di Giurisprudenza, ser. 1, vol. 26).

53. Bellomo, *supra* n. 51, at 213-14.