

# The Lawyers Discover the Fall of Rome

---

JAMES Q. WHITMAN

Petrarch detested lawyers. The story of his experience of law is familiar. In 1316 Petrarch, then twelve years old, was sent by his father to study law, first in Montpellier, then in Bologna, the oldest center of Roman law studies in Europe. Bologna entranced him in some ways: there were great law teachers there, he later wrote, who were like the ancients themselves returned to life.<sup>1</sup> Nevertheless, if he looked up to some of his teachers, his studies in Bologna taught Petrarch to despise the general soullessness and avarice of fourteenth-century lawyers. Lawyers, he later wrote, cared nothing for antiquity and everything for money: to them “everything is for sale.”<sup>2</sup> It was not, he assured readers of his *Epistle to Posterity*, that he found the subject too difficult. On the contrary, “many asserted that I would have done very well if I had persisted in my course. Nevertheless I dropped that study entirely as soon as my parents’ supervision was removed. Not because I disliked the power and authority of Roman law, which are undoubtedly very great, or its saturation with Roman antiquity, which I love; but because men, in their wickedness, pervert Roman law when they employ it.”<sup>3</sup> Appalled by what he had seen, he gave up law for more honorable pursuits.

In subsequent centuries, it became a fundamental tenet of the humanist tradition that the mature work of Petrarch represented a historic break with the crass mentality of medieval lawyers. Once Petrarch had escaped from his ignorant and inflexible teachers, later humanists believed, he was able to see what they had not been able to see: that Italy had fallen into a state of desperate barbarism. He recognized the bad Latin of his teachers for what it was. And he recognized the political situation of Italy for what it was, awakening

---

James Q. Whitman is assistant professor of law at Stanford University.

*Law and History Review* Fall 1991, Vol. 9, No. 2  
© 1991 by the Board of Trustees of the University of Illinois

to a terrible truth that no one else had yet grasped: that the Roman Empire had fallen, destroyed centuries earlier by a barbarian onslaught.

Much of this grand humanist legend has suffered in recent decades. In particular, historians have discovered that classical latinity was quite widespread among lawyers well before Petrarch was born.<sup>4</sup> But if Petrarch has lost his place of honor as the first classicizing-latinist, he has largely retained his reputation as an unprecedented knower of historical reality. The old humanist claim that Petrarch was the first to comprehend that terrible truth—that *the Roman Empire had fallen*—still survives, even among scholars who insist vigorously on the existence of a pre-Petrarchan classical latinity.<sup>5</sup> Notwithstanding some very learned recent studies,<sup>6</sup> the idea persists that Petrarch was the first to know history as we know it. “Despite the difference in religion, until Petrarch medieval men failed to notice a fracture between the classical age and their own times.”<sup>7</sup> It was only Petrarch who, “in contradiction to the political theorists and historians of the Middle Ages” saw the Roman Empire as having been “‘impaired, debilitated, and almost consumed at the hands of the barbarians.’”<sup>8</sup> Living in an Italy that had been repeatedly overrun during the last centuries of the Roman Empire, an Italy dotted with ruins and populated by trousered descendants of Germanic tribesmen, pre-Petrarchan Italians remained incapable of understanding that a great *caesura* separated them from the ancients. They thought they were still living in ancient Rome.

I will try to show, despite the tenacity of this humanist legend, that thirteenth-century Bolognese lawyers had already come to the typically Petrarchan conclusion that the Roman Empire had fallen. I will argue that these thirteenth-century lawyers arrived at this proto-Petrarchan conclusion as a result of their hatred of Lombard law, a rival legal tradition that dated back to the Lombard invasions of Italy centuries earlier. Their hatred of Lombard law reached a critical pitch, I will argue, under the pressure of an identifiable event in the political history of Bologna: an urban revolution of the years 1128–33, which recast the statute book of Bologna in partly Lombard form. At the close of the article, finally, I will propose a partial explanation for the odd divergence between Petrarch’s probable debt to this tradition among thirteenth-century Bolognese lawyers and his hostility to the “wicked” Roman lawyers of his age.

In making this argument, I have a number of goals. First of all, I wish to show some of the neglected virtues of linking legal history with political and social history.<sup>9</sup> Thus I will place Bolognese law in the context of Bolognese city politics and try to show that details of marital property law that have hitherto interested only social historians are of

great importance for understanding intellectual developments among learned lawyers. I also wish to add evidence for a proposition I have argued at length elsewhere: that the study of Roman law in the centuries after the recovery of the Digest was deeply bound up with the image of Rome itself.<sup>10</sup> Roman lawyers, I want to demonstrate, had a powerful (if often dormant) tendency to think of themselves as the guardians of Roman tradition—as representatives of a social and moral order different from, and superior to, the order of their own times. As a result, they should be seen, in many periods, less as eager servants of the existing power structure, than as aloof moralizers and visionary revivalists.<sup>11</sup> In all this, I hope to strike a blow for the general proposition that legal history can never be understood without a vivid understanding of the social and cultural details of the lives lawyers have led; and for the proposition that there are deep connections between social and intellectual history that clearly reveal themselves only in law.

## II

At the outset, it is important to say a careful word about the Petrarchan historical sensibility. What was noteworthy about Petrarch's outlook was not the conviction that Rome had sunk into decline. The sense of decline is common enough in all periods. Moreover, the sense that Rome in particular had suffered a decline could already be found very early in the twelfth century, and it was already expressed in a classicizing couplet when Hildebert described the ruins of the city of Rome:

urbs cecidit, de qua si quicquam dicere dignum  
moliar, hoc potero dicere "Roma fuit."

(The city now is fallen; I can find  
No worthier epitaph than: "This was Rome.")<sup>12</sup>

It was not Hildebert's sense of decline, but a sense of historical rupture that marked the Petrarchan attitude. What set the Petrarchan attitude apart was the belief that some particular, identifiable, historical disaster had barbarized Italy; that Rome had, not decayed over a period of time, but been defeated at some moment. What marked the Petrarchan attitude was, not a sense of decline, but a sense of calamity.<sup>13</sup>

That sense of calamity had already begun to appear in the thirteenth century, in attacks, mounted by Roman lawyers of Bologna, on a leading rival legal tradition of the day: Lombard law. Lombard law

dominated in much of Italian legal practice of the thirteenth century; in particular, numerous Lombard practices were codified, over the course of the century, in the statutes of the northern city-states. Medieval Roman lawyers were accordingly conscious of the presence, on the legal landscape, of a distinctly un-Roman body of law, with a distinctly barbarian history.

Lombard law was the legacy of one of the most destructive of the barbarian invasions of the last decades of the Roman Empire. More than any other barbarian people during the harrowing centuries at the end of the Roman Empire, it had been the Lombards who destroyed Roman society in Italy. The Ostrogoths, the first Germanic people to take control of the governmental institutions of Italy, had lived in comparative peace with Roman society.<sup>14</sup> Their Gothic Kingdom was, however, destroyed by the Byzantines in the mid-sixth century.<sup>15</sup> The Byzantines themselves quickly gave way to the Lombards, a Germanic people with an old reputation for unique ferocity,<sup>16</sup> who descended into Italy late in the sixth century, erecting a kingdom in the north and duchies in the south. The Lombard kingdom was, in its turn, destroyed by the Franks in the eighth century. But the Lombards left a vigorous legal tradition that coexisted with Roman law, canon law, and a number of other traditions well into the high Middle Ages in northern Italy.<sup>17</sup>

In the thirteenth century, the details of the history of the Lombard conquests in Italy were, to be sure, not well known. Nevertheless, its general outlines were known, particularly in the laudatory *History of the Lombards* of Paul the Deacon, composed in the eighth century and highly popular throughout the Middle Ages.<sup>18</sup> Moreover, the presence of Lombard law, still widely applied, kept the memory of the Lombards fresh. Indeed, the presence of Lombard law stimulated generations of denunciations by learned Roman lawyers—denunciations that, in the thirteenth century, took the form of what are, to us, recognizable accounts of the barbarian invasions. It is these accounts—in particular Boncompagno da Signa's *Rhetorica Novissima* of 1235 and various commentaries on the *Corpus Iuris* by Odofredus—that I wish to place in the larger context of social and legal history.

Let me begin with the *Rhetorica Novissima*, a long, florid lecture read to a Bolognese audience in 1235. In this work we find, a century before Petrarch's time, a Bolognese lawyer identifying the sixth-century Lombard descent into the Italian peninsula as the barbarizer of Italy. From the early twelfth century onward, Bologna was the home of a great medieval revival of the learned study of Roman law.<sup>19</sup> Throughout the twelfth and thirteenth centuries the learned lawyers of Bologna (generally known as "glossators") worked to explicate the legal books

produced by the Byzantine emperor Justinian in the second quarter of the sixth century: the *Institutes* (a preliminary textbook), the *Digest* (a compilation of texts from the classical Roman jurists), the *Code* (a compilation of Imperial legislation), and the *Novels* (a supplementary compilation of further Imperial legislation). By 1235, the learned Bolognese lawyers had acquired specially privileged status as “doctors of law”—and had acquired, as well, a rich scholarly tradition and a prestige that had attracted students from remote parts of the western continent.<sup>20</sup> Bologna had, moreover, become a center of more than legal scholarship: Students came to study not only law, but also the “*ars dictaminis*,” the art of crafting formal letters and documents. The *Rhetorica Novissima* was the work of Boncompagno da Signa, a lawyer who was a master of the *ars dictaminis* (as well as an early experimenter with the revival of ancient styles of historiography<sup>21</sup>). Boncompagno took an active interest in rhetoric, and he expounded that subject before Bolognese audiences throughout the early decades of the thirteenth century.

Boncompagno’s *Rhetorica Novissima* is often cited as a model product of thirteenth-century “proto-humanism.”<sup>22</sup> Yet the passage I will present here, while it is familiar to legal historians, is rarely discussed by historians of humanism—perhaps because in it Boncompagno offered his listeners a piece of scatological invective not much in keeping with the elegance of humanist rhetoric. In this passage, entitled “De origine juris,” Boncompagno improved on the *Digest*<sup>23</sup> by identifying no fewer than fourteen different types of law, each with its own origin. He began with divine law, continued through the law of “the Paradise of Delights,” customary law, Athenian law, Roman law, canon law, and others. Finally he arrived at the laws of the Goths and the Lombards, barbarians who had penetrated Italy centuries before his time; and then the laws of the Italian cities of his own time:

The eleventh [origin of law] was among the Goths, who promulgated the *lex gothica* which is observed today in some places. The twelfth was in the time of the Emperor Charlemagne and of certain kings who gave law to the Lombards—law which is now called the *Lombarda*. But it shouldn’t be called “law.” It should be called “a piece of shit,” since it is filthied with the shit of the execrable masses [*Non debet dici lex, immo potius fex; quoniam est fece turpium vulgarium sordidata.*] It can also be called, if the nature of the business can reveal itself grammatically, “whoever law,” since practically every law begins with the phrase “whoever . . .” [*quia fere lex quelibet inceptionem habet ab hac dictione Si quis . . .*] The thirteenth was in the laws of the cities; of which one finds many examples in Italy nowadays on account of the great degree

of liberty. But these municipal laws and plebiscites are as evanescent as lunar shadows, since they wax and wane like the moon according to the will of those who promulgate them.<sup>24</sup>

Boncompagno's attack on the Lombard "*fex*" (a pun that was an old favorite at Bologna<sup>25</sup>) and on city statutes admittedly showed little of the humanist elegance of Petrarch. Moreover, there is no doubt that Boncompagno lacked Petrarch's horrified sense of utter rupture between the Roman world and his own. Nevertheless Boncompagno's belief that, "in the time of Charlemagne," some sordid thing had been done, and his conviction that law had declined into arbitrariness in his own time, are striking: Boncompagno felt that the proper order had been deeply offended at some point by the invasions of the earlier centuries—though to be sure he was vague about the precise course events had taken—and that the legal order had somehow fallen on contemptibly hard times.

Two decades or so later, another lawyer, Odofredus, had a clearer sense of the shape of the historical disaster that had befallen the Roman order.<sup>26</sup> Odofredus was one of the leading law-teachers of the mid-thirteenth century. Like law-teachers throughout the Middle Ages, he taught with the texts of ancient Roman law before him, reading his commentaries to his student audience—commentaries that bear the unmistakable mark of their origin in lectures, often beginning with the word "*Signori*," "Gentlemen." The lectures Odofredus gave to his gentlemen students contain the bulk of our information about the early history of the revival of Roman law studies in Italy, preserved in cryptic anecdotes and historical digressions. These anecdotes and digressions have found little favor with legal historians, who consider Odofredus given to invention and embellishment.<sup>27</sup> Odofredus's tendency to historical invention does not, however, make him any the less significant for my purposes here; quite the contrary, it is the rise of historical inventions like his that I am attempting to trace.

Odofredus, lecturing some hundred and fifty years before Leonardo Bruni,<sup>28</sup> was arguably aware of the Gothic invasions, and associated them with a flight of the Roman lawyers from Rome to Ravenna.<sup>29</sup> But, like Boncompagno (of whose attack on Lombard law he approved<sup>30</sup>), Odofredus reserved his special venom for the Lombards and their law. Odofredus arrived at the topic of Lombard law while lecturing his students on marriage settlements. When, in his lectures on the *Code*, Odofredus reached the law called "*dos data*"—a law detailing rules of dowry law which I will describe in full below—he declared that the law embodied Lombard custom. This led him to a brief polemic, not

only on Lombard law, but on Bolognese city politics. Lombard law, he said lacked the form of a *lex*: “[I]n order that Lombard law should have no place in this city, we cause the *podestà* to swear an oath to maintain ‘*leges et rationes*.’ The city statute-book expresses it this way because Lombard law is neither ‘*lex*’ nor ‘*ratio*’ but a certain kind of right [*ius*] established by the kings for their own benefit. And [these kings] are called ‘longobardi,’ that is to say Apulians, because they came from Germany, first going to Sardinia, then afterward to Apulia.”<sup>31</sup> Here a proto-Petrarchan historical sensibility is clearly on view: In Odofredus’s eyes, Lombard law has a historical origin, and a most definitely un-Roman and disreputable one. Perhaps twenty years after Boncompagno’s *Rhetorica Novissima*, Odofredus has introduced, into Bolognese polemic against Lombard law, some form of the idea of barbarian invasion. Moreover, Odofredus elsewhere shows the same hostility to the making of municipal statutes as does Boncompagno: “When the plebeians of this city want to make statutes for themselves, they have no more called upon men of learning than upon asses, and accordingly they make statutes that have neither learning nor sense.”<sup>32</sup>

The sections that follow trace the confluence of urban politics and barbarian and Roman legal traditions that gave the impulse to these thirteenth-century ideas of the violent break with the Roman past, which seem to us now to offer such a striking mix of naiveté and great learning. In the first of the following sections, I will lay out the background of Roman-Lombard legal conflict in northern Italy generally, emphasizing Odofredus’s concern, dowry law. I will then discuss the experience of Bologna in particular. Finally, I will return to Petrarch and the Roman law of his time.

### III

Why did Odofredus present his denunciation of the Lombard invasions in a commentary on dowry law? The answer will suggest itself immediately to medieval social historians, who have themselves been much occupied with dowry in recent years. As social historians have discovered, dowry law in particular, and marital property law in general, were violently contested in the thirteenth-century communes. The structure of thirteenth-century Italian society was such that marital property law involved both the most urgent economic pressures and the most delicate moral questions. Economic concerns may have been uppermost in the minds of lawyers debating marital property: In thirteenth-century Italy, as in most ancient and medieval societies,

considerable wealth would generally pass hands at the time of marriage. There was more, however, to marital property than just money. The structure of medieval family life, and of medieval gender relations, also largely depended on the shape of marital property rules. Thus the whole delicate complex of sexual and moral questions that surround family organization were implicated in discussions about marital property.

And on questions of marital property, Lombard law and Roman law differed starkly. In both systems, property changed hands at the time of marriage. The two systems diverged radically, however, over what property passed, from whom, and to whom. The two systems also diverged radically on the status of married women, who were in some respects better off under Roman law, and in others better off under Lombard law.<sup>33</sup>

Roman law was not monolithic. The texts of the classical law differed from the texts of late Imperial law. Classical Roman law offered a relatively simple marital property scheme. In the classical law, property passed to the newly formed household from the family of the bride, in the form of a dowry. The bride was not, however, excluded from further participation in the wealth of her family of birth. A Roman woman retained the right to return her dowry to her family of origin upon the death of her father, receiving in exchange a share of her father's estate.<sup>34</sup> Matters grew somewhat more complicated in the law of the later Empire. A Roman woman still retained her classical right to trade in her dowry, upon her father's death, in return for her share of his property. But Roman legislators of the later Empire developed a more elaborate system of property transfers in an attempt to cope with the huge variety of customary systems in the sprawling empire. Late imperial legislators were faced with a populace that largely lived by brideprice, an institution under which grooms made a payment to the family of the bride at the time of marriage.<sup>35</sup> In order to accommodate both Roman dowry and brideprice, late imperial legislators struck a kind of compromise, requiring not only that the family of the bride provide a dowry of the Roman type, but also that the family of the groom provide a kind of partial brideprice known as the *donatio propter nuptias*, the "gift on account of marriage."<sup>36</sup> By the time the Lombards descended into late-antique Italy, "gift on account of marriage," made by the groom to his bride, was expected to equal dowry exactly, so that the families of both the groom and the bride should have made the same contribution to the sum of marital property.<sup>37</sup>

The law of the Lombards differed strikingly from both classical and late imperial Roman law. In Lombard law, marriage was accompanied

by a variety of property transfers. Lombard grooms paid two sums: one to the father of the bride (generally known as *mundio* or *meta*, a payment for the guardianship of the daughter), and one to the bride herself (known as *morgengabe*, or “morning-after gift,” a payment for the bride’s virginity, made the morning after the wedding night). The father of the bride also often gave his daughter a sum, known as the *faderfio*. Morning-after gift and *faderfio* together could be quite large, so that a married woman’s property rights under Lombard law exceeded a married woman’s property rights under Roman law. Nevertheless if, in this respect, Lombard women were better off, in another they were worse off: Upon marriage, a Lombard woman, unlike her Roman counterpart, generally lost all property rights in her family of origin. Under Lombard law, a woman’s male relatives could cut her off, at the time of marriage, by giving her a single property settlement—a practice I will refer to as “bridal exclusion.”<sup>38</sup> Like classical Roman law, Lombard law underwent some changes over the centuries, but they were not drastic ones. In the eighth century, the strict exclusion of brides from the wealth of their family of origin was limited legislatively.<sup>39</sup> Soon after, an effort was made by the Lombard kings to check perceived excesses of brideprice: the morning-after gift was limited by legislation to a quarter of the groom’s property; in Italy of later centuries this *quarta* (still, of course, a hefty percentage) became the standard Lombard measure of appropriate morning-after gift.<sup>40</sup>

Despite such changes, however, Lombard law remained strikingly different from Roman in the time of Boncompagno and Odofredus. Moreover, by the time of Boncompagno and Odofredus, Lombard law had become the subject of learned study, actively cultivated in schools at the historic Lombard capital of Pavia and elsewhere from at least the beginning of the eleventh century.<sup>41</sup> Lombard marital property law, including the exclusion of brides from the wealth of their family of origin, was sanctified, with a few limitations, in the work of the learned lawyers of Pavia, in an eleventh-century text known as the *Lombarda*.<sup>42</sup> It was this *Lombarda* to which Boncompagno gave the epithet *fex*.

In the time of Boncompagno and Odofredus, there were thus two dramatically different systems of family law at large in Italy, both of which formed the basis of sophisticated learned bodies of law. The differences between these two systems were of tremendous financial weight. They were of tremendous weight, too, for the charged mix of morals and interests that comprise family law. That vehement polemic should appear in debates about marital property is thus hardly surprising. That learned Roman lawyers should hate, with particular vehemence, a rival marital property system that pretended to scholarly

sophistication is also hardly surprising. But the vehemence that one might ordinarily expect was heightened when debates over marital property became bound up with constitutional conflict over the right of the communes to promulgate innovative statutes.

The idea that communes might promulgate innovative statutes was something radically new in the legal world of the thirteenth century. Generally speaking, in the early Middle Ages, law was understood as coming from two sources: custom, on the one hand; and royal (or imperial) fiat, on the other. There was no room for entities other than a prince or emperor to issue statutes; and even princes and emperors tended to offer their legislation as ratification of customary practices. There is, perhaps, an eleventh-century exception in the inventive and disruptive reforming pope Gregory VII, who claimed the right to make “new laws in accordance with the needs of the times.”<sup>43</sup> The Church, however, was exceptional.<sup>44</sup> The law of the communes<sup>45</sup> did not diverge from the traditional model: Through the twelfth century, communal statutes were conceived of simply as codifying custom. Thus the formal concession of power to the communes made by Frederick Barbarossa at the Peace of Constance in 1183 generally granted them the right to be governed by their own “*mores*” and “*consuetudines*”—their own practices and customs.<sup>46</sup>

In the thirteenth century, however, the communes began to claim the right to do something almost unprecedented in the medieval legal world: the right to make novel statutes that did not simply purport to codify custom. Even princes and emperors had not exhibited the righteous sense exhibited by the thirteenth-century communes, the sense of representing a new force in the world, needing new laws. Perhaps the communes were drawing on the model of Frederick II of Sicily, himself a startlingly aggressive innovator.<sup>47</sup> Whether or not they borrowed from Frederick, thirteenth-century communal legislators began to sound very much like him. Thus the statutes of Teramo declared “all things wither and nothing lasts beneath the sun,” while the thirteenth-century statute-book of Forlì stated quite matter-of-factly that human nature was continually busy creating new forms which Roman law could not accommodate, but which it behooved a city to deal with in its laws. The statutes of Gaeta, for their part, were prefaced with the bold statement, *times change, laws change*.<sup>48</sup>

Such declarations could, of course, be read as nothing more than platitudes. But in fact they were accompanied by strikingly innovative statutes—statutes largely concerned with marital property law. Indeed, it may have been in marital property law that the communes demonstrated most vividly their willingness to innovate. The statutes in

the new communes typically ratified neither Roman nor Lombard law. Rather, they borrowed from both traditions in an effort to restrict the property rights of married women. This tendency showed, first of all, in violent opposition to the old Germanic institution of the morning-after gift. Opposition to morning-after gift was so powerful that it eventually acquired its own name, *odium quartae*—that is, hatred of the one-quarter of his wealth a Lombard groom was expected to disgorge the morning after his wedding night.<sup>49</sup> Where the morning-after gift had been the Lombard norm, the new communes insisted that the only appropriate property transfer at time of marriage was a dowry. In their hostility to morning-after gift, the communes were, clearly enough, anti-Lombard. But in a second tendency, they were unmistakably Lombardizing. The statutes of the new communes typically insisted, not only on the abolition of morning-after gift, but also on complete exclusion of the bride from the wealth of her family of origin. Statutes throughout northern Italy in the thirteenth and fourteenth centuries ordained that daughters be dowered, and thereafter be cut off from any further inheritance.<sup>50</sup>

All of this was neither Roman nor Lombard. Rather, communal legislators had borrowed from each of the two systems the rules most restrictive of the property rights of married women. In so borrowing from both systems, the communal legislators had, presumably, a single goal: to prevent the dissipation of family wealth by preventing daughters, to the extent possible, from carrying off shares of the common patrimony to a new household.<sup>51</sup> This was done, apparently, only over the bitter objections of Italian women.<sup>52</sup> Nevertheless, done it was, in the northern communes in general, and in Bologna in particular.

#### IV

The experience of Bologna, in this great period of legal transformation, was much that of the other northern communes. Indeed, in the case of Bologna, we can see the northern-Italy-wide connections between marital property conflict and the drive toward innovative statute-making in particularly dramatic form. For when innovative marital property legislation was introduced in Bologna, it was introduced in conjunction with a violent urban uprising.

Bologna was one of many historically Roman-Byzantine towns that shared the northern plain with the Lombard kingdom in the early Middle Ages, and that formed communal governments beginning in the eleventh century. The city was hardly twenty-five miles from the

point where the old frontier had divided the Lombard regions at the head of the Po from the Roman-Byzantine sees and provinces at its mouths, and its law was accordingly mixed in the early generations of the commune. Lombard law prevailed in the Bolognese *contado*, the subject countryside that surrounded the city. Within the city itself, many citizens lived according to a mix of Lombard and Roman customs unusual in Italy.<sup>53</sup> With both Lombard and Roman traditions thus present, the great conflict over marital property played itself out in Bologna throughout the centuries when the city's international reputation as a center of learning was growing.

As elsewhere, the conflict became bound up with a new willingness to assert a sovereign communal right to make statutes. Indeed, the conflict became bound up with a violent reordering of the city statute-book, as a result of a major uprising in the years 1228–33. In 1228, a type of urban class-conflict typical throughout northern Italy<sup>54</sup> struck Bologna: there began a revolt of the *popolo*, the non-noble population of Bologna, directed against the last of the old aristocratic governing bodies, the *curia*.<sup>55</sup> This uprising aimed from the beginning at altering the Bolognese statute-book, which was the object of the wrath of a crowd of *popolo* that stormed the city palace in 1228.<sup>56</sup> With the successful seizure of power, a number of statutes were made by the newly dominant “people in arms.”<sup>57</sup> Among the new statutes was one, dated 1233, which definitively ratified Lombard bridal exclusion. The statute showed the new dowry system, strictly limiting women's property claims, in full force: “We hereby enact as follows: whoever dies intestate. . . if his daughter has married, let her be content with the dowry she received. . . .”<sup>58</sup> This statute was a model of the new marital property legislation.<sup>59</sup> From 1233 on, Bologna was thus falling into the control of its *popolo*, and was definitively modernizing in its marital property law—though to be sure, political conflict, and the process of statute-making, had not come to end. For decades after the uprising, violent partisan politics, and attempts to re-make the statute-book, marked Bolognese city life.

It was thus in the midst of a centuries-long communal conflict over marital property law, culminating in a violent and innovative reshaping of the communal statutes, that the Bolognese Roman law revival took shape. To understand the anti-Lombard rhetoric of Boncompagno and Odofredus, we must recognize that the Roman lawyers had, from the earliest years of the Bolognese revival, attitudes about both Lombard law and the propriety of the new statute-making at odds with prevailing sentiment in the communes.

For the Roman lawyers at work in Bologna during the first century

and a half of the Roman law revival should be seen as, in large measure, an exceptionalist sect, aloof from the desires of their fellow townsmen. A few of the early lawyers may have sympathized with the legal program of the communes.<sup>60</sup> But others, presumably the majority, desired something rather different: an unimpaired restoration of the Roman imperial order. Such a desire inevitably made them unsympathetic to the pretensions of the commune in which they lived. For men who desired a *renovatio imperii*, a renewal of the Empire, through the person of the Holy Roman Emperor,<sup>61</sup> found it difficult to tolerate the notion that any other body of law could coexist with Roman law.<sup>62</sup> The anonymous author of the *Questiones de juris subtilitatibus*, writing sometime between the first half of the twelfth century and the beginning of the thirteenth, may have spoken for this view when he declared: "there must be either one law in one Empire, or a multiplicity of laws in a multiplicity of kingdoms."<sup>63</sup> Favoring a renewal of the one Empire, an Empire to which clung an air of sanctity and immutability,<sup>64</sup> lawyers could hardly favor any but the most modest of claims of new communes. Indeed Irnerius, traditionally considered the founder of Roman law studies in Bologna, was so much opposed to the political pretensions of the new communes that he denied that even municipal *custom* could derogate from Roman law.<sup>65</sup>

If imperial restorationism made the Roman lawyers unsympathetic to the claims of the communes, it also inevitably made them unsympathetic to Lombard law. Conflict over Lombard marital property law may have left its mark from the very beginnings of the revival of Roman legal studies in the late eleventh century.<sup>66</sup> Through the twelfth century, the Roman lawyers of Bologna yielded, at least occasionally, to anti-Lombard impulses.<sup>67</sup> Conflict over Roman and Lombard law on marital contributions was heated from an early stage on,<sup>68</sup> and glossatorial argumentation attained a high level of sophistication.<sup>69</sup> To be sure, the early Bolognese jurists were capable of mounting sober lawyerly discussions of the differences between Lombard and Roman law. Nevertheless, there is evidence of scholarly hostility to Lombard law in some of the surviving fragments of twelfth-century legal writing. Thus Bulgarus, one of the second generation of the Bolognese scholarly revival, and a scholar famous for his opposition to Lombard marital property law,<sup>70</sup> reported the existence of anti-Lombard polemic with which even he could not agree: "There are some who wish to [argue] that Lombard law is no law at all, because it does not have the form of a law. I do not agree with them. . . ."<sup>71</sup> Another example of scholarly hostility came from the anonymous author of the *Questiones de juris subtilitatibus*, who was clearly denouncing the Lombards when he

spoke of enemies “who invade our land” and decried the continued teaching of enemy law despite the fact that the enemy kings themselves had vanished.<sup>72</sup> The jest beloved of Boncompagno, on the Lombard *fex*, was also present late in the century.<sup>73</sup> Thus anti-Lombard polemic presaging that of Boncompagno and Odofredus had begun in the twelfth century, if with uncertain force.

With the upheaval of 1228–33, however, this anti-Lombard polemical tradition seems to have taken a powerful new turn.

The marks of those violent years are particularly perceptible on Boncompagno, who left the most detailed record of opinion on municipal statute-making that we possess from the thirteenth century. In 1201 he produced *The Cedar*, a brief handbook on the drafting of statutes. He included there a famous definition of statute that corresponded to the prevailing twelfth-century view, that statutes embodied custom and added that cities throughout Italy made statutes<sup>74</sup>—statutes which, he noted, took precedence over Roman law.<sup>75</sup> Boncompagno’s 1201 discussion did not betray any particular hostility to the making of statutes.

By 1235, however, when he delivered the *Rhetorica Novissima*, hostility had arrived. Let me quote again the thirteenth origin of law: “The thirteenth was in the laws of the cities; of which one finds many examples in Italy nowadays on account of the great degree of liberty. But these municipal laws and plebiscites are as evanescent as lunar shadows, since they wax and wane like the moon according to the will of those who promulgate them.”<sup>76</sup> This was, in fact, only one of several passages he produced on statutes in 1235. His most biting passage lamented the fact that Roman law prevailed in only a hundredth part of the lands of the world and added, “shamefully, Roman law fades with the growth of the statutes of bumpkins . . . abashed, it must fall silent where statute or ‘the will of the people’ speaks.”<sup>77</sup> Boncompagno’s legal analysis had not changed. But he had come to express it in an ugly language wholly absent from his work in 1201. The cause of Boncompagno’s changed attitude toward statutes is, we may speculate, identifiable: 1233—the date of the violent enforcement of Lombard bridal exclusion through the new means of municipal state-making—was only two years before the public reading of Boncompagno’s *Rhetorica Novissima*. The recent uprising, I suggest, accounts for the hostility to statutes that marks the text of that work.

Two decades later, moreover, the marks of that same uprising of 1228–33 could still be seen in Odofredus’s anti-Lombard polemic. That polemic belonged, clearly enough, to the Bolognese *odium quartae*. Odofredus mounted his polemic in the course of his explication of the

law *dos data*, a law that embodied the late-antique decree of Justinian requiring equal contributions from bride (*dos*) and groom (*donatio propter nuptias*). It began: "A dowry once given entitles the giver to a gift on account of marriage [*donatio propter nuptias*]."78 Odofredus, like some other Roman lawyers, interpreted the phrase *donatio propter nuptias* as a translation of "morning-after gift";79 he read the law *dos data*, accordingly, as sanctioning Lombard practice. When he commented on that law, he was thus addressing himself to a bitter current social conflict.

It was a bitter conflict in which he was not more than partially victorious. For while the system of morning-after gift had been abolished in Bologna, it had not been abolished through the direct influence of Roman lawyers like Odofredus. Rather, the abolition had been the work of the revolt of 1228–33. Odofredus himself referred to the consequences of the revolt as he lectured his students. He described for them the pre-1233 order: "Once upon a time—indeed, not twenty-five years ago—things were done according to the practice [of morning-after gift]."80 Clearly the date, "not twenty-five years ago," when morning-after gift was abolished in Bologna, must fall around 1228–33. It was the triumph of those revolutionary years which allowed Odofredus to declare, in his commentary on the law *dos data*, that Lombard law had no place in the Bolognese statute-book. It was because he condemned Lombard marriage practices that he launched into his anti-Lombard polemic in a commentary on the law *dos data*. Let me quote Odofredus's commentary once again: "[I]n this city, we cause the *podestà* to swear an oath to maintain '*leges et rationes*.' And this embodied in the city statute-book, as Lombard law is neither '*lex*' nor '*ratio*.' . . ."81 Reading the passage against its larger background, we can see that Odofredus, when he spoke of the history of Lombard law, spoke with the vivid memory of recent and far-reaching constitutional change in his own city. Direct experience of social change of a very radical kind, imposed by politics of a very violent kind, underlay Odofredus's new historical sensibility.<sup>82</sup>

And the frustration of political defeat underlay his polemical attitude. Odofredus could not approve of the Bolognese constitutional change. Like Boncompagno's, his heart lay with the revival of Roman law in its pure form as he understood it.<sup>83</sup> If the statute-book did not precisely embody Lombard law, it did not embody Roman law either (the law on bridal exclusion began "Whoever . . .!"). So it was that Odofredus complained bitterly that the learned lawyers had not been entrusted with the drafting of the city laws. For the *popolo* had made the laws and continued to make the laws in subsequent decades.<sup>84</sup> To quote

once more his resentful attack on popular statute-making: "When the plebeians of this city want to make statutes for themselves, they have no more called upon men of learning than upon asses, and accordingly they make statutes that have neither rhyme nor reason."<sup>85</sup> In sum, we can see an Odofredus resentful at the work of a commune performed through innovative statute-making rather than through the operation of Roman revivalist scholarship.

We can see a similar Boncompagno. To the extent the uprising of 1228–33 belonged to the *odium quartae*, it cannot have been entirely unwelcome to a Boncompagno. He, after all, shared Odofredus's distaste for Lombard morning-after gift, fouled as it was by shit of the "execrable masses." Perhaps, then, we see Boncompagno offering some words of approval for some of the work of the revolution when he praised—to be sure, in an ironic spirit—the accomplishments of statute-makers. He arrived at the subject of statutes in the course of a model "Invective against glossators": "It is not more marvelous than marvelous, nay more miserable than miserable, that municipal laws, plebiscites and the statutes of bumpkins, glow with such felicity and authority that they can be understood on a simple reading without gloss or commentary . . . ?"<sup>86</sup> Most of this was simply irony at the expense of glossators. Nevertheless, we should also recognize that Boncompagno was appealing to some real sense, current among his listeners, of the *felicitas atque auctoritas* of at least some statutes. Still, it remains clear that Boncompagno found it difficult to accept statutes beginning "whoever, . . ." ratifying bridal exclusion, and imposed by uprisings of a *popolo* not much obedient to the aspirations of Roman lawyers.

Taking all this in sum, we can discern something of the confluence of intellectual ambitions, social struggles, and political experience that colored the thinking of purist Roman lawyers in the thirteenth century. In Odofredus, and possibly also in Boncompagno, we can see the traces of widespread controversy over family wealth, a controversy that stirred violence and polemical venom throughout communal society. In both Odofredus and Boncompagno we can read unfulfilled longing for the ancient order, and hatred for the Lombard law that in part triumphed in the legal struggles of the day. It was from their hatred of Lombard law that the idea of the Lombard invasions as a barbarizing calamity grew in these men. Their historical consciousness thus began in Roman revivalist polemic, mounted in an age of polemic.

In all of this, the special significance of their experience of urban political upheaval deserves emphasis. Earlier lawyers had mounted polemic against Lombard law without proposing anything quite like the Petrarchan idea of barbarian invasions. Before Boncompagno and

Odofredus took the final step into specifically *historical* polemic, something intervened: the experience of political violence and statutory innovation in Bologna. Both men had, before their eyes, scenes of violent rupture in the political order of their own city, during the uprising of 1228–33, and violent rupture that had introduced into the world an aggressively new form of law. It was in the face of this partly Lombardizing rupture that they began to speak of the Lombard irruption into Rome. Indeed, it is worth dwelling on the close consonance between lived experience and form of historical thought in these lawyers. It was precisely what they experienced in their own commune—violent rupture, forceable innovation—that was replicated in the incipient Petarchan sense that characterized their historical polemic: the sense that history is a thing of sudden caesura, of calamity.<sup>87</sup>

## V

In 1320, some sixty years after Odofredus's lecture on the *lex data*, the sixteen-year-old Petrarch arrived as a law student at Bologna. Prevailing methods and beliefs among the Roman lawyers had, in the meantime, begun to change, and to change quite radically in some respects. Sometime near the height of Odofredus's activity, the first century and a half of Bolognese legal learning was fixed by the general acceptance of the *Glossa Ordinaria* of Accursius, who died around 1263. With the fixing of the *Glossa Ordinaria*, Roman law debate began to free itself from the strict confines of direct explication of the texts of the *Corpus Iuris*; over the next generations, what are now called the "commentators" came to dominate Bolognese Roman law scholarship, bringing with them a profoundly changed attitude.

It was a changed attitude that can perhaps most conveniently be described by means of an analogy to art history. The transformation of Bolognese law was similar both in kind and extent to the larger transformation of European art that goes by the name "International Gothic Style." Thirteenth-century lawyers had embraced, as it were, a proto-Renaissance or "renascence" style: a classical revivalist style much like the classical revivalist style which culminated in the classicizing art of the Pisani, Giotto, and others. By contrast, after the mid-fourteenth century, artists (notably in Bologna in particular) began to abandon the classical revivalist style in favor of the so-called International Gothic Style, which showed little of the old determination to revive ancient models.<sup>88</sup> Where a Giotto had attempted to evoke, in what he perceived as its purity, the ancient world, artists of the

International Gothic Style, under growing French influence,<sup>89</sup> preferred to describe, with a graceful, delicately heightened realism, the existing order of their own world. Something of the same shift, from evocation to description, took place among the lawyers. By the mid-fourteenth century, Bolognese lawyers had ceased striving to revive Antiquity. Like contemporary Bolognese artists, they too began looking to French models<sup>90</sup>—models that were not motivated by classicizing purism, but rather sought to balance and blend the various legal sources at large in the European fourteenth century. The result was what could well be called the International Gothic Style in law. Where lawyers of the time of Odofredus and Boncompagno had attempted simply to explicate Roman law, in the hope of reinstating the ancient legal order, their Bolognese successors began to reorder and rethink Roman law, in the hope of making it a functioning element in an eclectic modern legal system—a legal system that would, as it were, offer a graceful description, in the International Gothic mode, of the contemporary world. Where lawyers of the time of Odofredus and Boncompagno had hoped to conform the world to Roman law, their successors wished to conform Roman law to the world.

With this change in attitude, the old hostility toward municipal statutes began to slip away. The thirteenth century lawyers had been, as it were, anti-civic humanists, advocates of an imperial tradition fundamentally hostile to the sovereign authority of communes to make statutes. To the commentators (whom Kelley would call “civil humanists”<sup>91</sup>), by contrast, municipal statutes became an established part of the legal landscape—not a derogation from a proper Roman order, but simply one of many legitimate aspects of a varied modern legal world in which practitioners had to function. The change in attitude toward municipal statutes came, to be sure, slowly. Early in the fourteenth century, Odofredus’s attitude to municipal statute-making could still be found, elegantly argued in the work of one of the most prominent early commentators: Petrarch’s teacher and the pioneer of the *Dolce stil nuovo* in poetry, Cino da Pistoia.<sup>92</sup> Cino was one of the last of the Bolognese lawyers to invoke the old thirteenth-century arguments in favor of the use of Roman law over statutes, and he invoked them in the old thirteenth-century context of dowry law. Cino was generally willing to accept the new communal marital property order.<sup>93</sup> But he denied the legitimacy of statute-making as a way of instituting the new order. He wrote, “throughout virtually all of Italy there are customs and statutes which declare that daughters do not inherit along with brothers, but rather are to be dowered either by their fathers or by their brothers. . . . The resolution of this point of

law depends on whether an inheritance can be abolished by statute. This matter has been debated in Bologna. The answer is that a statute cannot have such an effect."<sup>94</sup> Cino preferred to see the new ends achieved through the reinterpretation of Roman law, without the intrusion of statutes. Thus at least one Roman lawyer embodied both the thirteenth-century attitude and the skill at vernacular verse that would characterize Petrarch as well; perhaps some of this attitude was also present in the surviving verse of Lovato Lovati, the lawyer-poet of late thirteenth-century Padua whom Petrarch admired.<sup>95</sup>

After Cino, however, a new generation of practically minded commentators began a revolution: The new acceptance of the sovereign right of city republics to make statutes spread among the Bolognese lawyers. By the 1330s, Bartolus (and after him his great student Baldus), the lawyers who dominated Bolognese scholarship during Petrarch's adulthood, were on the scene. These were men willing to accept the integration of municipal statutes into the legal system in a way that diverged sharply from the approach of Cino.<sup>96</sup> Indeed, Baldus endorsed the old formula that had prefaced the statutes of Forli in the revolutionary thirteenth century: "Human nature," he observed, "is forever creating new forms."<sup>97</sup> The force of resentment against non-Roman law that had driven so much of the work of the late glossators dissipated in the newly practical atmosphere of bartolist Bologna.

I suggest that Petrarch's distaste for lawyers was at least in part distaste for the new "Gothic Style" of the commentators, the style that had begun to establish itself during his student years, and that came to dominate Italian legal life in the latter half of the fourteenth century. The thirteenth-century revivalists attitude—echoes of which could still be heard when, in a testy letter, the elderly Petrarch attempted to offer legal advice on the public pig problem in Padua<sup>98</sup>—was much more congenial to Petrarch than what he found in the legal scholarship of his own day. Let me quote again the passage with which I began: Petrarch abandoned law, "not because I disliked the power and authority of Roman law, which are undoubtedly very great, or its saturation with Roman antiquity, which I love; but because men, in their wickedness, pervert Roman law when they employ it."<sup>99</sup> It was the *employment* (if so we should translate *usus*) of Roman law that bothered Petrarch; and *employment* was very much the fourteenth-century concern. Petrarch was far more at home in a thirteenth-century world of visionary Roman revivalists than in a fourteenth-century world of practically minded Gothic legal realists. What he rejected was thus, perhaps, not Italian Roman law as such, but the Italian Roman law of the commentators; and to that extent, he looked, not forward to the era of Bruni, but

backward to the era of the thirteenth-century doctors, of Boncompagno and Odofredus, of the anti-civic humanism of the early Roman lawyers; to that extent he was as much atavist as innovator. He was still fixed in the attitude of his teacher Cino—an attitude already falling into rapid eclipse during his student years.

Whether Petrarch would have accepted the Roman law of the thirteenth-century lawyers or not, in those lawyers the beginnings of the Petrarchan outlook were already to be found, formed at the juncture of intellectual ambition, social conflict, and urban violence. The fracture between the ancient and modern worlds was not a historical reality noticed by Petrarch; it was historical reality constructed, in the face of disturbing legal change, by thirteenth-century Roman lawyers who tried and failed to establish the exclusive use of Roman law. The “discovery” of the fall of Rome was, at least in part, the product of the thwarted hopes of the thirteenth-century advocates of Roman law—Roman law which thus proved itself, in this as in many other times and places, the medium of European intellectual engagement with the historical world *par excellence*.

#### NOTES

An earlier version of this paper was presented to a meeting of the American Roman Law Society. I am grateful to the participants for their comments. I would also like, in particular, to acknowledge the helpful comments of Richard Fraher, Donald R. Kelley, and Laurent Mayali. Responsibility for any errors is of course my own.

1. Epistle to Guido Sette (*Sen. X*, 2): “Bononiam perreximus, qua nil puto iucundius nilque liberius toto esset orbe terrarum. Meministi plane qui studiosorum conventus, quis ordo, que vigilantia, que maiestas preceptorum: iurisconsultos veteres redivivos crederes!” In *Epistole di Francesco Petrarca*, ed. U. Dotti (Turin, 1978), 710.

2. Epistle to Marco da Genova (*Fam. XX*, 4, 24): “Quam venale mercimonium fecere! lingua illis, manus ingenium anima decus fama tempus fides amicitie, ad postremum omnia venalia, neque pluris precii quam par est.” In F. Petrarca, *Opere*, 2 vols. (Florence, 1975), 1:1060.

3. Epistle “To Posterity,” in *Epistole*, ed. Dotti, 878. The final phrase reads, in the original, “quia earum [the laws] usus nequitia hominum depravatur.” I have somewhat rewritten the translation in *Letters from Petrarch*, trans. M. Bishop (Bloomington, Ind., 1966), 8. For Petrarch’s legal studies, see, most recently, U. Dotti, *Vita di Petrarca* (Rome/Bari, 1987), 16–23.

4. Since 1947, when Roberto Weiss declared that the lawyers’ “leading rôle” had not been “sufficiently stressed” [Weiss, *The Dawn of Humanism* (London, 1947), 5], much work has appeared, particularly under the influence of Kristeller’s work on the *ars dictaminis*. For the connection between *ars dictaminis* and law, see W. D. Patt, “The Early ‘Ars Dictaminis’ as Response to a Changing Society,” in *Viator* 9 (1978):

133–55. For literature in this strain, see generally R. Witt, “Medieval ‘Ars Dictaminis’ and the Beginnings of Humanism: a New Construction of the Problem,” in *Renaissance Quarterly* 35 (1982): 1–35; and e.g., J. Seigel, *Rhetoric and Philosophy in Renaissance Humanism* (Princeton, 1968), 205ff.; and H. Wieruszowski, “Arezzo as a Center of Learning and Letters in the Thirteenth Century,” in *Traditio* 9 (1953): 321–91. For other views of the early importance of the lawyers, see W. Ullman, *Medieval Foundations of Renaissance Humanism* (New York, 1977), 11–12; and esp. E. H. Kantorowicz, “The Sovereignty of the Artist: A Note on Legal Maxims and Renaissance Theories of Art,” in *Selected Studies* (Locust Valley, 1965), 352–65. See also R. Weiss, *Il Primo Secolo dell’Umanesimo* (Rome, 1949); Weiss, “Lovato Lovati, 1241–1309,” *Italian Studies* 6 (1951): 3–28; and Weiss, *The Renaissance Discovery of Classical Antiquity* (New York, 1969). Nevertheless complaints can still be heard. Cf. D. Kelley, “Vera Philosophia: The Philosophical Significance of Renaissance Jurisprudence” in *Journal of the History of Philosophy* 14, 3 (1976): 270: “In all of the recent discussions of ‘civic humanism,’ it seems curious that the contributions of jurists, especially contemporaries of Petrarch and Salutati like Bartolus and Baldus, who used to figure so prominently in discussions of the new *civilità* of the Renaissance, are almost universally neglected.” See also D. Kelley, “Jurisconsultus Perfectus: The Lawyer as Renaissance Man,” in *Journal of the Warburg and Courtauld Institutes* 51 (1988): 89.

5. Cf. R. Weiss, *Renaissance Discovery of Classical Antiquity*, 3. For other recent examples, see E. Kessler, *Petrarca und die Geschichte* (Munich, 1978); U. Dotti, *Petrarca e la Scoperta della Coscienza Moderna* (Milan, 1978). Note Petrarch’s placement at the opening of E. Fueter’s standard *Geschichte der neueren Historiographie* (Munich/Berlin, 1911), 2–5; and esp. the discussion in the wide-ranging recent study of A. Demandt, *Der Fall Roms: Die Auflösung des römischen Reiches im Urteil der Nachwelt* (Munich, 1984), 92.

6. Demandt’s readings in medieval sources (which does not include legal writings), while they reveal a number of important passages showing consciousness of a “Bewusstsein vom Ende Roms” (Demandt, *Der Fall Roms*, 83 ff.), sees an overwhelmingly “festgefügte Gedankenwelt, . . . unbefragte Mächte wie Kaiser und Kirche, die sich in eine institutionelle und ideelle Kontinuität mit dem römischen Imperium stellten.” *Ibid.*, 90. Thus even Demandt does not see any measure of the systematic and developed pre-humanism whose existence I will discuss here. D. Kelley, in “Clio and the Lawyers: Forms of Historical Consciousness in Medieval Jurisprudence,” in *Medievalia et Humanistica* 5 (1974): 25–49, does, of course, consider legal writings, but, as I will discuss below, from a rather different point of view from my own.

7. Weiss, *Renaissance Discovery of Classical Antiquity*, 3.

8. T. E. Mommsen, “Petrarch’s Conception of the ‘Dark Ages,’” in *Medieval and Renaissance Studies*, (Ithaca, 1959), 120–21 (quoting Petrarch, *Apologia contra cuiusdam anonymi Galli calumnias*).

9. To be sure, I will rely on a large number of first-rate studies of the doctrinal development of Bolognese law, which are cited throughout. In particular, I wish to acknowledge a very learned article by Donald Kelley. Kelly, “Clio and the Lawyers.” Kelley, of course, does bring the larger concerns of history of humanism to his work. Nevertheless, even Kelley has focused his attention on the texts that medieval lawyers studied, showing how a philological *sensus historicus* came naturally to lawyers whose lives were spent working with texts that were obviously the products of long histories of accretion and alteration. (Along these lines, see also C. Maschi, “Accursio Precursore del Metodo Storico-Critico nello Studio del ‘Corpus Iuris Civilis,’” in *Atti del Convegno*

*Internazionale di Studi Accursiani*, 3 vols. [Milan, 1968], 2:597–618.) I will, by contrast, attempt to widen our focus beyond texts to political and social context.

10. J. Whitman, *The Legacy of Roman Law in the German Romantic Era* (Princeton, 1990).

11. For broadly similar views of the attitude of the early generations of Bolognese jurists, see E. Cortese, “Scienza di Giudici e Scienza di Professori tra XII e XIII Secolo,” in *Legge, Giudici, Giuristi*. Atti del Convegno Tenuto a Cagliari nei Giorni 18–21 Maggio 1981 (Milano, 1982), 93–148; and A. Cavanna, “Il ruolo del giurista nell’età del diritto comune,” in *Studia et Documenta Historiae et Iuris* 44 (1978): 95–138; and the literature cited below n. 62. That the jurists harbored such attitudes does not, of course, imply that they did not manage, in daily practice, to serve the needs of the powerful. See generally the discussion of A. Padoa-Schioppa, “Sul ruolo dei giuristi nell’età del diritto comune: un problema aperto,” in *Il Diritto Comune e la Tradizione Giuridica Europea* (Perugia, 1980), 155–66.

12. Hildebertus, *Carmina Minora*, ed. A. B. Scott (Leipzig, 1969), no. 36. Quoted and translated in C. Morris, *The Discovery of the Individual, 1050–1200* (repr. Toronto, 1987), 51; on Hildebert’s attitude, see most recently Demandt, *Der Fall Roms*, 87.

13. For this attitude as characteristically humanistic, and for the differences between this attitude and many others toward the fall of Rome, see A. D. Momigliano, “Christianity and the Decline of the Roman Empire,” in Momigliano, ed., *The Conflict between Paganism and Christianity in the Fourth Century* (Oxford, 1963), 3ff. That the Petrarchan attitude saw *calamity*, and not merely rupture, distinguishes it from the various medieval ideas of Rome as having given way to a new Christian, or new Germanic kingly, order, surveyed in Demandt, *Der Fall Roms*, 83ff.

14. See A. D. Momigliano, “Cassiodorus and the Italian Culture of his Time,” in *Studies in Historiography* (London, 1966), 181–210.

15. See generally L. Musset, *The Germanic Invasions*, trans. E. and C. James (University Park, Pa., 1975), 85ff.

16. “Langobardi, gens etiam Germana feritate ferocior. . . .” Velleius Paterculus, *Hist. Rom.* 2.106.2.

17. In the earlier stages after the Lombard conquest, Roman law presumably survived as “personal” law. For the difficulty of determining the exact state of legal affairs under the Lombards, however, see the discussion of G. P. Bognetti, “Longobardi e Romani,” in *L’Età Longobarda*, 4 vols. (Milan, 1966), 1: esp. 89ff. Later, personality of law survived through the use of the so-called “*professio legis*” (attested from 769) the formal declaration that one lived by the law of the Romans or the law of the Lombards. See Bognetti, “Longobardi e Romani,” 120; Musset, *Germanic Invasions*, 93, and generally the discussion of L. Stouff, “Étude sur le principe de la personnalité des lois,” in *Revue bourguignonne de l’enseignement supérieur* 4 (1894): 5, for late examples of the “*professio legis*” of various laws. In one form—as the source of the feudal law of the *Libri Feudorum*—Lombard retained its importance into the early modern period. Professor Kelley lays much weight on the presence of the *Libri Feudorum* among the texts of learned law as a spur to historical thinking among the learned lawyers. See “Clio and the Lawyers,” 31, 37. In this paper, I will leave discussion of feudal law aside in favor of a discussion of private law, and in particular, marital property law.

18. On the popularity of the *History of the Lombards*, see W. Goffart, *The Narrators of Barbarian History (A.D. 550–800)* (Princeton, 1988), 329.

19. On the recovery of the *Digest* and the Bolognese revival, see, e.g., S. Kuttner,

“The Revival of Jurisprudence,” in *Renaissance and Renewal in the Twelfth Century*, ed. R. Benson and G. Constable (Cambridge, Mass., 1982), 299–323.

20. For a vivid evocation of the high social station of the learned lawyers, see G. Le Bras, “Velut Splendor Firmamenti: Le Docteur dans le Droit de l’Église Médiévale,” in *Mélanges Offerts à Étienne Gilson* (Toronto/Paris, 1959), 373–88.

21. See Boncompagno’s *Liber de Obsidione Ancone*, ed. G. Zimolo, *Rerum Italicarum Scriptores* T. VI, pars 3 (Bologna, n.d.), and the discussion of that work in C. Sutter, *Aus Leben und Schriften des Magisters Boncompagno* (Freiburg, 1894), 4ff.

22. See esp. T. Tunberg, “What is Boncompagno’s ‘Newest Rhetoric?’” in *Traditio* 42 (1986): 299–334, and the literature cited there. Parts of the *Rhetorica Novissima* are reproduced in L. Thorndike, *University Records and Life in the Middle Ages* (New York, 1971), 41–46. On Boncompagno, see esp. Sutter, *Boncompagno*; G. Misch, *Geschichte der Autobiographie* (Frankfurt a.M., 1962), 3:2:2, 1099–1123.

23. Cf. the “De origine juris” of Pomponius, at D. 1.2.2.

24. Boncompagno da Signa, *Rhetorica Novissima* (ed. Gaudenzi) in A. Gaudenzi, ed., *Scripta Anecdota Glossatorum* (Bologna, 1892), 2:253: “Undecima fuit apud Gothos qui legem gothicam ediderunt, que hodie in quibusdam partibus observatur. Duodecima fuit tempore imperatoris Karoli et quorundam regum qui Longobardis legem diderunt, que vocatur hodie Longobarda. Sed non debet dici lex, immo potius fex; quoniam est fece turpium vulgarium sordidata. Posset etiam dici, si natura facultatis grammaticae pateretur, lex siquata; quia fere lex quilibet inceptionem habet ad hac dictione *Si quis*. Tertiadecima fuit in legibus municipalibus; quas hodie Italia specialiter imitatur propter omnimodam libertatem. Sed iste leges municipales atque plebiscita sicut umbra lunatica evanescent, quoniam ad similitudinem lune crescunt iugiter et decrescunt secundum arbitrium conditorum.” The fourteenth origin, to complete the roll of laws of the era of decline: “iniuriosi et dampnabilis iuris origo fuit tempore Machometti. . .” Boncompagno was not the last to note that laws in some legal systems tend to begin “si quis. . .” For an analysis of “whoever law” as characteristically primitive, see D. Daube, *Forms of Roman Legislation* (Oxford, 1956), 2–8.

25. According to Kuttner, the “rude pun” on *lex/fex* dates back as far as the Bolognese canonist Huguccio, working at the end of the twelfth century. See S. Kuttner, “The Revival of Jurisprudence” in *Renaissance and Renewal in the Twelfth Century*, ed. R. L. Benson and G. Constable (Cambridge, Mass., 1982), 306, citing Huguccio, *Summa* 32.4.15. Professor Kelley elegantly translates this inelegant gag as “not writ but shit.” Kelley, “Clio and the Lawyers,” 37.

26. For the dating, see below, n. 84.

27. See, e.g., among many, E. Spagnesi, *Wernerius Bononiensis Iudex. La Figura Storica d’Irnerio*, Accademia Toscana di Scienze e Lettere “La Colombaria.” Studi XVI (Florence, 1970), 14.

28. Cf. Brunì, “De bello Italico adversus Gothos gesto libri IV. Prooemium,” in *Leonardo Bruni Aretino, Humanistisch-Philosophische Schriften*, Quellen zur Geistesgeschichte des Mittelalters und der Renaissance, vol. 1, H. Baron, ed. (Leipzig, 1928), 148: “Huius autem belli, quod nunc scripturi sumus, nulla apud Latinos notitia supererat, fama tantummodo quaedam et ea ipsa tenuis admodum et obscura.”

29. Odofredus on *Infortiatum*, L. 82 *ad L. Falc.*, verb. *Tres Partes*: “Debetis scire, studium fuit primo Romae, postea propter bella quae fuerunt in Marchia destructum est studium, tunc in Italia secundum locum obtinebat Pentapolis quae dicta Ravenna postea, unde Karolus fixit pedes suos, et ibi est testamentum eius, unde ibi cepit esse studium, post mortem Karoli, civitas illa collapsa est, postmodum fuit translatum studium ad civitatem istam.” Quoted in N. Tamassia, “Odofredo,” repr. in Tamassia,

*Scritti di Storia Giuridica* (Padua, 1967), 2:384 n. 108. For the identification of the “bella quae fuerunt in Marchia” with the invasions of Theodoric, see Kantorowicz, *Studies in the Glossators*, 196. Scholars are, however, uncertain what “bella in Marchia” Odofredus may have meant. See G. Cencetti, “Studium fuit Bononie,” in *Le Origini dell’Università*, G. Arnaldi, ed., (Bologna, 1974), 102.

30. For Odofredus’s approving citation of Boncompagno’s polemic against the “fetidissimum ius,” see Tamassia, “Odofredo,” 422 n. 6, citing Odofredus’s commentary on C. 4.46.5.P.76B.

31. Odofredus on C. 5.3.38 (Auth. dos data): “Sed, Signori, hoc erat secundum consuetudinem longobardorum, unde ut non habeat locum longobardorum ius, in civitate ista, facimus iurare ita potestatem servare leges et rationes. Et ita continetur in Statuto huius civitatis cum longobarda non est lex nec ratio, sed est quoddam ius, quod faciebant Reges per se, et vocantur longobardi, id est apuli, quia primo venerunt de Germania in Sardiniam et postea in Apuliam.” Quoted in Tamassia, “Odofredo,” 422 n. 7. Tamassia suggests that Odofredus’s odd reference to Sardinia may reflect confusion over the tradition that the Lombards had come from, in the words of Paul the Deacon, “Scadinavia.” But was such confusion really possible? The text of Paul was widely known, and any number of accounts of Lombard history recorded the origin of the Lombards in “Scandza” or “Scatinavia” or “Scadinavia.” See generally the texts collected in *Monumenta Germaniae Historica (Scriptores Rerum Langobardicarum et Italicarum Saec. VI-IX)*, ed. G. Waitz et al. (Hannover, 1878). I cannot discover in any of those texts any likely source for Odofredus’s statement. On this passage cf. also Engelmann, *Wiedergeburt*, 102. I am grateful to Professor Walter Goffart for his aid with this problem.

32. Odofredus, commentary on D. 1.3.1.P.10A: “Quando plebeii huius civitatis volunt facere sua statuta, non plus vocarent prudentes quam tot asinos, et ideo ideo ipsi faciunt talia statuta qui nec habent latinum nec sententiam.” Quoted in Tamassia, “Odofredo,” 341 n. 1.

33. For the general history in Italy, see M. Bellomo, *Ricerche sui Rapporti Patrimoniali fra Coniugi*, Ius Nostrum 7 (Milan, 1961). For older research, see F. Ercole, “Vicende Storiche della Dota Romana nella Pratica Medievale dell’Italia Superiore” in *Archivio Giuridico* 80 (1908): 393–490; *ibid.*, 81 (1908): 34–148; F. Brandileone, *Scritti di Storia del Diritto Italiano* (Bologna, 1931). Cf. also Kantorowicz, *Studies in the Glossators*, 94ff. and esp. 100–2.

34. This was the so-called right of *collatio dotis*. For a discussion with further references, see L. Mayali, *Droit savant et coutumes: L’exclusion des filles dotées, XIIème–XVème siècles*, Ius Commune Sonderheft 33 (Frankfurt a.M., 1987), 6ff.

35. For the terms “dowry” and “brideprice,” see D. O. Hughes, “From Brideprice to Dowry in Mediterranean Europe” in *Journal of Family History* 3 (1978): 262–96. There is some dispute, however, about the use of these terms. See J. Goody, *The Development of the Family and Marriage in Europe* (Cambridge, 1983), 240–61.

36. For a survey of possible sources for *donatio propter nuptias* (earlier denominated *donatio ante nuptias*) especially among customs of the Eastern Empire, see L. Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs* (Leipzig, 1891), 256–312.

37. Bellomo, *Rapporti Patrimoniali*, 226–27.

38. “De Nuptiis. Si pater filiam suam aut frater sororem legitimam alii ad maritum dederit, in hoc sibi sit contempta de patris vel matris substantia, quantum ei pater aut frater in diae traditionis nuptiarum dederit: et amplius non requirat.” *Leges Lango-*

*bardorum*, ed. F. Blu(h)me, *Monumenta Germaniae Historia* (LL.) (Hannover, 1868), 4:42.

39. "Si quis Langobardus se vivente filias suas nupto tradiderit, et alias filias in capillo in casa reliquerit, tunc omnes aequaliter in eius substantia heredis succedant, tamquam filii masculini." *Leges Langobardorum*, ed. Blu(h)me, 108.

40. Cf. D. Herlihy, *Medieval Households* (Cambridge, Mass., 1985), 50. Lombard marriage law also embodied an absolute subjection of wife to the power of husband through the *mundio* (which constituted literally a sale of the wife from her father to her new husband) which was, in theory, more rigorous in Lombard law than in any other of the medieval legal systems (Herlihy, *Medieval Households*, 48). Nevertheless, in practice, after the very early Middle Ages, *mundio* survived as a largely symbolic sale that left women considerable freedom (Hughes, "Brideprice to Dowry," 268). Significantly, the *faderfio*, too, became a substantial gift by the time of the central Middle Ages, resembling in many ways a supplemental dowry.

41. C. Radding, *The Origins of Medieval Jurisprudence* (New Haven, 1988), is unfortunately unreliable in detail. On Lombard legal scholarship, see still the standard histories of Italian law. See also P. Vaccari, *Diritto Longobardo e Letteratura Longobardistica intorno al Diritto Romano*, *Ius Romanum Medii Aevi* 1, 4 b *ee* (Milan, 1966); and the observations of E. Cortese, "Legisti, Canonisti e Feudisti: La Formazione di un Ceto Medievale," in *Università e Società nei Secoli XII-XVI* (Pistoia, 1982), 230ff.; and Cortese, "Lex, Aequitas, Utrumque Ius nella Prima Civilistica," in "'Lex et Iustitia' nell'Utrumque Ius: Radice Antiche e Prospettive Attuali," *Utrumque Ius* 20 (1989): 101 n. 11.

42. See the discussion of Mayali, *Droit savant et coutumes*, 13.

43. See the famous "dictatus papae" of 1075: "Quod illi soli licet pro temporis necessitate novas leges condere. . ." In P. Jaffé, ed., *Monumenta Gregoriana, Bibliotheca Rerum Germanicarum* 2 (Berlin, 1865), 174.

44. For canonist attitudes, see B. Tierney, *Religion, Law and the Growth of Constitutional Thought, 1150-1650* (Cambridge, 1982), 14, 37.

45. For the dating of the rise of the communes, establishing themselves at about the same time as the Gregorian reforms, see J. K. Hyde, *Society and Politics in Medieval Italy* (London, 1973), 49-60.

46. See the discussion of F. Calasso, *Lezioni di Storia del Diritto Italiano. Le Fonti del diritto (secoli V-XV)* (Milano, 1946), 341. Section 10 of the Peace also spoke of the "leges" of the communes [in *Monumenta Germaniae Historica* (Const. et Acta Publ.) 1:413], but the exact import of this term is not clear. See the discussion of U. Gualazzini, *Considerazioni in Tema di Legislazione Statutaria Medievale*, 2d ed. (Milano, 1958), 89 n. 18.

47. For the suggestion that the *Liber Augustalis* served as an inspiration in the Northern communes, see A. Wolf, "Die Gesetzgebung der entstehenden Territorialstaaten," in *Handbuch der Quellen und Literatur der neueren Europäischen Privatrechtsgeschichte*, ed. H. Coing (Munich, 1973-), 1:573.

48. Teramo: "omnia veterascunt et nichil est sub sole stabile." Forlì: "cum humana natura adeo novas satagat assidue addere formas, cum plura sint negotia quam vocabularia que sub iuris scripti regulis non clauduntur et quae municipali iure decet ac expedit cohortari." Gaeta: "ut secundum temporum diversitatem, idem ius eademque iustitia varie disponat." All quoted in Calasso, *Lezioni*, 335; see also M. Sbriccoli, *L'Interpretazione dello Statuto: Contributo allo Studio della Funzione dei Giuristi nell'Età Comunale* (Milano, 1969), 24-25. Professor Mayali has pointed out, in a personal communication, the similar example of the statutes of St. Gilles (1215), cap.

xxviii, *De jure fisci*: “Mundi status, semper variabilis et incertus, nunquamque stabilis, scilicet inter prospera et adversa fluctuans, etiam jura regnorum mutat.”

49. The *odium quartae* can be dated to the year 1090 in Milan. See Bellomo, *Rapporti Patrimoniali*, 6.

50. For the dating of the statutes, see Ercole, “Vicende Storiche,” part 2, 102–40. See also Mayali, *Droit savant et coutumes*, 56. For the general tendency of the statutes of the new communes to endorse Lombard practices, see the examples in F. Schupfer, *Manuale di Storia del Diritto Italiano* (Città di Castello; Rome/Turin/Florence, 1908), 445.

51. See generally the discussion of the literature in Hughes, “Dowry to Brideprice,” 287–91. See also (from a rather different point of view) the careful assessment of parallel developments in southern France in Mayali, *Droit savant et coutumes*, 71ff.; and the discussion of the imperative of “la conservation de la famille agnatique” in Mayali, “La notion de ‘statutum odiosum’ dans la doctrine romaniste au Moyen Age,” in *Ius Commune* 12 (1984), 68.

52. See the examples in Herlihy, *Medieval Households*, 99.

53. Ercole, “Vicende Storiche,” part 2, 138–40

54. See the survey in G. Tabacco, *The Struggle for Power in Medieval Italy: Structures of Political Rule*, trans. R. Brown Jensen (Cambridge, 1989), 224ff., and the literature cited there.

55. A. Hessel, *Geschichte der Stadt Bologna von 1116 bis 1280*, *Historische Studien*, Heft 76 (Berlin, 1910), 334.

56. *Ibid.*, 332.

57. See the editor’s introduction to A. Gaudenzi, ed., *Statuti delle Società del Popolo di Bologna*, 2 vols., *Fonti per la Storia d’Italia* 3 & 4 (Rome 1889–1896), 1: *Società delle Armi*, VII–VIII.

58. L. Frati, ed., *Statuti di Bologna dall’Anno 1245 all’Anno 1267*, 3 vols. (Bologna, 1869), 1:414–15 (L.4, Rub. 41): “Statuimus quod si quis moriretur intestatus relictis vel filiabus feminis, si filia nupta fuerit sit illa contenta de dote que fuit data quod ea in bonis paternis amplius non petat. . . . et hoc statutum dicimus habere locum voluntate consilii ab anno domini M.CC.XXXIII indictione XI.” There may have been earlier versions of this statute. Nevertheless, the aggressively innovatory dating of the statute supports the argument offered in the text.

59. For a later version of this provision of Bolognese law as a model for the new agnatic pattern, see Herlihy, *Medieval Households*, 200 n. 13.

60. In particular, the tradition represented by Martinus of Gosia and his followers. See Gualazzini, *Considerazioni*, 89ff. See also, most recently Mayali, *Droit savant et coutumes*, 41. For adept and subtle wrestling of the Bolognese lawyers over this question, see esp. Mayali, “La notion de ‘statutum odiosum’”; and Sbriccoli, *L’Interpretazione dello Statuto*.

61. See esp. the excellent discussions of Calasso, *Lezioni*, 333ff.; and Gualazzini, *Considerazioni*, 94ff.

62. Cf. A. Gouron, “Coutume contre loi chez les premiers glossateurs,” in A. Gouron and A. Rigaudière, eds., *Renaissance du Pouvoir Legislatif et Genèse de l’État* (Montpellier, 1988), 117: “Les romanistes se virent contraints d’opposer à un système juridique par essence universel, toutes les sources de droit laïque qui ne derivaient pas de l’*imperium romanum*. . . .”; M. Bellomo, “I Giuristi, la Giustizia e il Sistema del Diritto Comune,” in *Legge, Giudici, Giuristi*. *Atti del Convegno Tenuto a Cagliari nei Giorni 18–21 Maggio 1981* (Milano, 1982), 158–59: “[I]l giurista è e si sente l’interprete terreno di una dimensione strutturata in modo eterno. . . . Siamo qui sul versante opposto a

quello tenuto dai signori cittadini, dalle tante signorie erette a tirannide, ch'è bene rappresentato da chi teorizza l'*arbitrium voluntatis* della signoria come base e sostegno di ogni norma giuridica locale. . . . [L]a giustizia serve per discriminare le norme del *ius commune*, più giuste, da quelle del *ius proprium*, ingiuste e tiranniche. . . ." For the peculiar aloofness of the Bolognese doctors from the world of practice, which set them apart from jurists in other communes, see Cortese, "Scienza di Giudici e Scienza di Professori." Generally on this topic, see R. Benson, "Political *Renovatio*: Two Models from Roman Antiquity," in Benson and Constable, eds., *Renaissance and Renewal*, 339-86.

63. [Falsely attributed to Irnerius], G. Zanetti, ed., *Questiones de Iuris Subtilitatibus* (Florence, 1958), 16: "aut unum esse ius, cum unum sit imperium, aut si multa diversaque iura sunt, multa superesse regna." Discussed in Gualazzini, *Considerazioni*, 19.

64. See the discussion of Cortese, "Lex, Aequitas, Utrumque Ius."

65. See the discussions in Gualazzini, *Considerazioni*, 28-29; and Cortese, "Legisti, Canonisti e Feudisti," 248, and generally 246ff.

66. So argued in J. Whitman, "A Note on the Medieval Division of the *Digest*," forthcoming in *Tijdschrift voor Rechtsgeschiedenis*.

67. With, in particular, the exceptions noted above, n. 60.

68. See Kantorowicz, *Studies*, 94ff. and esp. 99-100; see also *ibid.*, 220ff.

69. See generally Bellomo, *Rapporti Patrimoniali*. Twelfth-century lawyers worked, for example, to construct Roman law devices that would somehow preserve some effective property rights for the spouses of Lombards. Cf. Vaccari, *Diritto Longobardo e Letteratura Longobardistica*, 12. See *ibid.*, *passim*, for numerous examples of Roman/Lombard marriage law conflicts. Vaccari presents these examples without attempting any explanation of the comparative predominance of marriage-law cases.

70. On the famous debate between Bulgarus and Martinus on marital property law, see Kantorowicz, *Studies*, 94.

71. Bulgarus on C. 1.14.3: "Quidam sunt, qui ex hac lege inferre volunt, legem Longobardam non esse legem, quoniam hac forma facta non est: quibus non consentio . . ." Published in "Anhang III" to Savigny, *Geschichte des Römischen Rechts im Mittelalter*, 2d ed. (Heidelberg, 1850), 4:476. On this topos, see Cortese, "Legisti, Canonisti e Feudisti," 215.

72. Zanetti, ed., *Questiones de Iuris Subtilitatibus*, 15: "Qui vero nostra loca invadunt, quamdiu possent ipsi iure gentium depelli, tam diu statuta eorum velud hostium non discutimus. Set si regno eorum, qualecumque fuerit, extincto ipsi nobiscum ducendo invicem seu nubendo coalescunt, quotiens sue gentis vel nomen vel statuta predicant, non videntur aliud facere nisi vulnus antiqui doloris refricare. Statutorum enim vis si qua fuit, una cum suis auctoribus iam tunc expiravit. Recolunt tamen adhuc quidam huiusmodi suas, ut ipsi dicunt, 'leges.'" For a discussion of the dating of this work, see the editor's introduction to *ibid.*, VIIIff. For an expression of similar hostility, see the "Exceptiones Petri," ed. C. G. Mor, in *Scritti Giuridici Preirneriani*, 2 vols. in 1 (Torino, 1980), 2:178 (Title, "De iusticia et consuetudine)." For the Bolognese mix of suspicion and indifference toward Lombard law, see also Cortese, "Scienza di Giudici e Scienza di Professori," 119-20; and Cortese, "Legisti, Canonisti e Feudisti," 214ff. Disdain for the "*fex rusticorum*" of Lombard law may have been so powerful that learned lawyers preferred to remain anonymous when they commented on Lombard law. See E. Cortese and G. D'Amelio, "Prime Testimonianze Manoscritte dell'Opera Longobardistica di Carlo di Tocco," in *I Glossatori* (Pavia, 1974), 96.

73. At least among the canonists. See Kuttner, "Revival of Jurisprudence," 306,

citing Huguccio, *Summa* 32.4.15. Unfortunately I have not been able to see this passage. On Huguccio's attitude, see also Gouron, "Coutume contre loi," 117.

74. Boncompagno, "Cedrus," III: "statutum est arbitraria mundi norma que a vulgari hominum consuetudine procedit," and "quelibet civitas in finibus Ytalie sua facit statuta." In L. Rockinger, *Briefsteller und Formelbücher des elften bis vierzehnten Jahrhunderts*, 2 vols. (Munich, 1863-64), 1:122.

75. *Ibid.*: "non obstante aliqua lege que contra statutum dicere videatur." See the discussion in Gualazzini, *Considerazioni*, 109.

76. *Rhetorica Novissima*, 253. Quoted above n. 24.

77. *Rhetorica Novissima*, 289: "ius civile non debet plurimum commendari, quoniam per ipsum vel cum ipso non regitur centesima pars orbis terrarum et, quod est vituperabile, per statuta rusticorum iugiter evanescit et plebiscita popularia sibi auctoritatem subripiunt et favorem: quia non sine pudore tacere cogitur ubi plebiscitum loquitur vel statutum." The word "vituperabile" is an emendation of Solmi, accepted by Gualazzini, *Considerazioni*, 102 n. 4.

78. C. 5.3.20: "Dos data donationem propter nuptias meretur."

79. See F. Brandileone, "Rapporti patrimoniali fra Coniugi in Italia" in Brandileone, *Scritti di Storia del Diritto Privato Italiano*, 1:318-19; G. Haenel, ed., *Dissensiones Dominorum* (Leipzig, 1834), secs. 263, 433.

80. Odofredus on C. 5.3.20. p. 264B: "Iste donationes propter nuptias variis modis nuncupantur, secundum longobardum vocatur *murgitatio* (i.e., *morganatio*) sed secundum vulgare nostrum vocatur *murganale*, unde olim, et adhuc non sunt XXV anni, quicumque contrahebat sponsalia, dicebantur talia verba per iurisperitum: 'Vos, domina, habetis in pacto donare tantum in dotem?' 'Vos, domine vir, promittis ei facere secundum ius?' In aliis locis vocatur *antifactum*, sed in partibus ultramontanis vocatur *dotium* eius. . . ." Quoted in Tamassia, "Odofredo," 423 n. 10.

81. Quoted in full, above n. 31. Note that Odofredus, like the anonymous contemporaries of Bulgarus, denied that Lombard law had the form of *lex*.

82. Odofredus left a description of his own involvement in a typical marriage law case of the time. He represented a bride who had not demanded her morginca at the time of her marriage and who attempted to claim it some twenty-five years later. Tamassia, "Odofredo," 423nn.

83. Roman law as Odofredus understood did not, of course, exclude a greater "solicitude" for the feudal order than was shown by most of the Bolognese lawyers. On Odofredus's attitude, see Cortese, "Scienza di Giudici e Scienza di Professori," 140-41.

84. Particularly in the 1250s. (Hessel, *Geschichte der Stadt Bologna*, 337-40). If 1233 is approximately the correct date for the abolition of *morgengabe* in Bologna, then Odofredus gave his commentary on the *lex "dos data"* "not twenty-five years later"—that is, sometime around the mid-1250s. This dating tallies nicely with internal evidence of the manuscripts of Odofredus's commentary that place his activity sometime between 1247 and 1263. Cf. Tamassia, "Odofredo," 362.

85. Quoted above, n. 32.

86. *Rhetorica Novissima*, 292: "Non est hoc mirabilis mirabili, immo miserabilis miserabili, quod leges municipales, plebiscita, et statuta rusticorum tanta felicitate atque auctoritate refulgent, quod secundum litteram intelliguntur sine glosis et solutionibus alienis. . . ."

87. For a similar emphasis on the culturally disruptive, and accordingly culturally productive, effects of innovative statute making, see Kantorowicz, "Sovereignty of the Artist," 361.

88. See the famous treatment in E. Panofsky, *Renaissance and Renascences in Western Art* (repr. New York, 1972), e.g., 155–56. For Bologna as a center for the beginnings of the International Gothic Style—notably in the person of the so-called “Illustrator,” who worked on legal texts—see L. Castelfranchi Vegas, *International Gothic Art in Italy* (Dresden, 1966), 15ff.

89. For French influences on the art of fourteenth-century Bologna, see Castelfranchi Vegas, *International Gothic Art in Italy*, 15.

90. For the Orléans school of Roman law that influenced fourteenth-century Italian jurists, see, e.g., Cortese, “Legisti, Canonisti e Feudisti,” 263ff.

91. Kelley, “Jurisconsultus Perfectus,” 89. Kelley adds that the outlook of the commentators was “largely independent both of the political ‘crisis’ described by Baron and of the ‘Machiavellian moment’ defined by John Pocock.” *Ibid.* That may well be true. But I hope I have demonstrated that the Roman lawyers showed the marks of their own period of, so to speak, “Baronian” political crisis, dating to the thirteenth century.

92. On Cino as a lawyer, see esp. G. Astuti, “Cino da Pistoia e la Giurisprudenza del suo Tempo,” in *Colloquio Cino da Pistoia*, Atti dei Convegni Lincei 18 (Rome, 1976), 129–52; G. M. Monti, *Cino da Pistoia Giurista* (Città del Castello, 1924).

93. Mayali, *Droit savant et coutumes*, 61–62.

94. Cino da Pistoia, *Lectura super Codice cum Additionibus* (Venice, Andreas de Thoresanis, 1493), 416, commentary on “Sancimus,” [C. 5.4.]: “. . . per totam quasi Italianam sunt consuetudines et statuta terrarum quibus dicatur quod sorores cum fratribus non succedunt ipsas tamen dotare patres vel fratres. . . . Advertatis sicut ego dixi predicta solu. pendet ex illo articulo utrum per statutum possit auferri legitima qui iam disputatus fuit bononie et solutus de equitate quod non possit.” For Cino’s attitude as a late, but particularly powerful, statement of the attitude of the earlier Bolognese lawyers whom I have described above, see Bellomo, “I Giuristi, la Giustizia e il Sistema del Diritto Comune,” 158–59.

95. Lovato Lovati, the prominent late thirteenth-century Paduan jurist and poet praised at Petrarch, *Rerum Memorandum Libri* 2:61 and discussed by Weiss, “Lovato Lovati,” included the following lines in his verse epistle to Compagnino:

Theotonicus reboet boreali crudus ab arcto,  
Transeat [h?]ac siciens apula regna furor,  
Excipiat rabiem Karulus metuendus ab austro  
Et videant Ligures prelia pulcra ducum,  
Marchia Tarvisii nitidis horrescat in armis . . .

Reproduced in C. Foligno, “Epistole inedite di Lovato de’ Lovati e d’altri a lui,” *Studi Medievali* 2 (1906–7): 55. R. Sabbadini, in “Postille alle ‘Epistole inedite di Lovato,’” *ibid.*, 260, identified the events described with the descent on Italy of Conradin the Swabian in 1267–68. Regardless of the contemporary events to which Lovato was referring, it is worth suggesting that his experience of those events was colored by the Bolognese traditions of historical description of invasions of Italy embodied in Odo-fredus’s accounts of the Gothic[?] “bella in Marchia,” and the “Apulian”-Lombard invasions.

96. For the departure of Bartolus and Baldus from the historic hostility of the Roman lawyers for municipal statutes, see the subtle discussion of Bellomo, “I Giuristi, la Giustizia e il Sistema del Diritto Comune,” 159–60; also J. Canning, *The Political Thought of Baldus de Ubaldis* (Cambridge, 1987), 93–97 and the literature cited there. For Baldus’s view on the specific question of statutes on exclusion of dowered daughters,

see Mayali, "La notion de 'statutum odiosum,'" 66ff. The full range of learned theory on statutes is explored, and placed intriguingly in social context in Sbriccoli, *L'Interpretazione dello Statuto*.

97. Quoted in Kelley, "Clio and the Lawyers," 35. The statute-book of Forlì is quoted above in n. 48. Professor Kelley also cites a number of similar statements from pre-fourteenth-century lawyers involving the public law of the Empire. See *ibid.*, esp. 34 (discussing Placentinus and Cino), 40–41 (discussing canonists). I do not know whether such sentiments were confined, among pre-Bartolist Roman lawyers, to discussions of public law, nor whether Placentinus in particular may have represented some dissenting tradition connected with Martinus of Gosia and the canon law tradition. At any rate, Baldus's embrace of this idea corresponded with Bartolist accommodationism toward municipal statute-making.

98. For Petrarch on the pigs of Padua, see Letter to Francesco da Carrara (*Sen. XIV, 1*) in *Epistole*, ed. Dotti, 790: ". . . dixisti statutum populi vetus esse ne id fieret penamque additam, ut porcos in publico repertos auferre volentibus liceret. Sed an nescis ut homines sic humana cuncta senscere? Senescunt iam pene romane leges, et nisi in scholis assidue legerentur, iam procul dubio senuissent: quid statutis municipalibus eventurum putas?" The suggestion that this passage reflects the thought of Cino on statutes is made by L. Chiapelli, *Vita e Opere Guiridiche di Cino da Pistoia* (Pistoia, 1881), 175. The passage is also discussed by N. Tamassia, "Francesco Petrarca e gli Statuti di Padova," in *Scritti di Storia Giuridica*, 2:527–30; and in Sbriccoli, *Interpretazione dello Statuto*, 25. For the contrast in attitude to that prevalent among advocates of communal law-making, note the language of the statutes of Teramo, quoted in Calasso, *Lezioni*, 335, and discussed above, n. 48.

99. Epistle "To Posterity," in *Epistole*, ed. Dotti, 878.