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THE MEDIEVAL REVIVAL OF ROMAN LAW: IMPLICATIONS FOR CONTEMPORARY LEGAL EDUCATION

HENRY MATHER*

Legal systems have often borrowed laws or ideas from other legal systems.¹ For example, Solon's laws for Athens in the sixth century B.C. were influenced by the legal codes of other Greek city states. Much of the English Statute of Frauds of 1677 was copied from the French Ordonnance de Moulins. The 1960 Civil Code of South Korea borrowed extensively from German law. Perhaps the most momentous borrowing occurred when European lawyers transplanted into medieval society the ancient Roman law contained in Justinian's Corpus Juris Civilis.

This article deals with the medieval revival of Roman law. Part I provides a brief historical survey of the revival. Part II attempts to identify some of the factors that made the revival successful in the sense that it brought about vast improvements in the law. Part III suggests that these same factors can help us improve our American law, but only if we make substantial reforms in legal education.

I. A BRIEF HISTORY OF THE MEDIEVAL REVIVAL OF ROMAN LAW IN WESTERN EUROPE

Our historical sketch focuses on the period from the middle

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¹ Alan Watson has suggested that "borrowing has been the most important factor in the evolution of Western law in most states at most times." ALAN WATSON, THE EVOLUTION OF WESTERN PRIVATE LAW 193 (expanded ed. 2001). "[T]o an enormous extent law develops by borrowing from another place and even from another time." Id. at 263.
of the eleventh century to the end of the fourteenth century.

A. Law in the Mid-Eleventh Century

In the mid-eleventh century, Europe had no written, organized, and comprehensive legal system. Law was largely a matter of social custom, which is mainly unwritten.\(^2\) Even the written law codes were primitive. They consisted largely of penalties for various forms of violence and contained little contract, commercial, or property law.

Good examples are found in the written codes promulgated by various Lombard kings from 643 to 755 A.D. and still in effect in mid-eleventh century Italy.\(^3\) The code issued by King Rothair (or Rothari) in 643 A.D. contains 388 titles. Titles 1 through 152 and titles 277 through 358 prescribe in gory detail penalties for offenses we would characterize as crimes or torts. Title 48, for example, sets the penalty for gouging out a freeman’s eye, while title 50 prescribes a different penalty for cutting off a freeman’s lip.\(^4\) The penalty for cutting off a freeman’s index finger (title 64) is sixteen solidi, whereas the penalty for cutting off a freeman’s middle finger (title 65) is only five solidi.\(^5\) Rothair’s code contains no contract or commercial law except for titles 245 through 252, which deal with the pledge of collateral for a debt (what we would call a possessory security interest). A creditor could not take a pledge of collateral until he had three times demanded payment and had not been paid.\(^6\) This is not the kind of law that stimulates secured lending. The Laws of King Grimwald (668 A.D.) contain no contract or commercial law. The

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\(^2\) See MANLIO BELLOMO, THE COMMON LEGAL PAST OF EUROPE 1000–1800, at 41 (Lydia G. Cochrane trans., The Catholic Univ. of Am., 1995) (pointing out that the written barbarian laws recorded only a small part of the customs).

\(^3\) The Germanic Lombards had entered Italy in 568 A.D. and by the middle of the eighth century had captured all of northern Italy from the Byzantines. In 774 A.D. the Lombard Kingdom was conquered by the Franks under Charlemagne, but the Lombard codes remained in effect. They were supplemented by some new Frankish laws and subsequently supplemented by laws of the German Emperors who controlled most of Italy from the tenth century.


\(^5\) See id. at 63–64.

\(^6\) See id. at 101.
Laws of King Liutprand (713–35 A.D.) contain 153 titles; of these, twelve deal with pledges of collateral, and only three deal with other commercial matters. The Laws of King Ratchis (745, 746 A.D.) contain fourteen titles; two of these titles provide evidentiary rules concerning pledges and sales. The Laws of King Aistulf (750, 755 A.D.) contain no contract or commercial law.

Throughout Western Europe in the eleventh century, many people were governed by written law codes issued by Germanic rulers, but based on ancient Roman law. Some of these codes were a bit more sophisticated than the Lombard codes. In the Germanic kingdoms that replaced the Western Roman Empire in the fifth century, Roman law survived to some extent and was incorporated into written codes; however, what survived was a small part of the legal system developed by the ancient Romans, and even that small part was retained in a crude and simplified form. Historians thus refer to it as “vulgar Roman law.”

A good example of vulgar Roman law is the Lex Romana Visigothorum (or “Breviarium”) promulgated in 506 A.D. by Alaric II, King of the Visigoths. This code was probably intended only for the Visigoths’ Roman subjects but may have been applied to Visigoths as well. Either way, the code governed a vast majority of the people in Visigothic territory, as the Visigoths were far outnumbered by the Romans. The Breviarium was based largely on the Roman Theodosian Code, a collection, completed in 438 A.D., of imperial laws issued since the time of Constantine and concerned to a large extent with matters of imperial government rather than private law such as contract or commercial law. The Breviarium also included some writings of the Roman jurist and legal scholar Paul, and an abridgment of Gaius’ Institutes, a hornbook for Roman law students. Therefore, the Breviarium was an abridgment of an abridgment. Peter Stein suggests that the Breviarium became the main source of Roman law in Western Europe from the sixth century to the eleventh.

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9 See Laws of King Ratchis, titles 5, 8, in THE LOMBARD LAWS at 219, 221.
10 See Peter Stein, ROMAN LAW IN EUROPEAN HISTORY 32 (English ed., Cambridge Univ. Press, 1999).
The Germanic codes, including those based on vulgar Roman law, were primitive, partly because they were compiled by lawmakers who had little legal learning, and partly because these lawmakers had very limited aims. They assumed that the purposes of law were merely to prevent violence and enforce customary social practices.

B. Some New Questions

By the twelfth century, assumptions about the purposes of law had changed profoundly. A new class of intellectuals began to think that new social practices could be developed, practices that would not only prevent violence, but also give ordinary men and women the opportunity to live truly good lives in a secular world outside the monasteries. These new intellectuals began to ask three questions: Philosophically, what kind of human can live a good life in this world? Educationally, what kind of education does he need? Jurisprudentially, what kind of laws does he need? Because these were the questions asked, the major innovations of the “Renaissance of the Twelfth Century” tended to be in the fields of philosophy, education, and law.

The third inquiry, regarding the kind of law that was needed, was easily answered. Medieval polities needed law written in Latin and comprehensive enough to regulate all the various aspects of societies that were becoming increasingly complex. A special need existed for law that could facilitate contractual exchange and thus promote a commercial revolution, already underway, that promised to enhance the material basis

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11 For similar observations on important questions, see ALASDAIR MACINTYRE, AFTER VIRTUE 170–71 (2d ed. 1984).
12 The so-called “Renaissance of the Twelfth Century” really began in the late eleventh century. This renaissance should not be confused with the later renaissance of the fifteenth century, which (aside from the field of art) was not nearly as significant. “If one should want to specify in what age Western Christian civilization took on its definitive form, its configuration, one should have to decide upon the twelfth century. The twelfth century was a creative and formative age without equal.” JOHAN HUIZINGA, MEN AND IDEAS: HISTORY, THE MIDDLE AGES, THE RENAISSANCE 179 (James S. Holmes & Hans van Marle trans., Meridian Books 4th prtg. 1966). According to Norman Cantor, the intellectuals of the twelfth century tried to apply intelligence to the problems of society and improve society. “The most outstanding instance of this development is the transformation of European law during the twelfth century.” NORMAN F. CANTOR, THE CIVILIZATION OF THE MIDDLE AGES 306 (1993).
of a good life.\textsuperscript{13} And because the good life required the exercise of moral virtue, medieval societies needed law that enforced the virtues of good faith and fair dealing in private transactions.

C. \textit{Justinian's Corpus Juris Civilis}

One and only one existing body of law could meet these needs. Justinian's \textit{Corpus Juris Civilis} was the obvious choice for the wholesale legal borrowing that was necessary, since there was neither enough time nor enough legal imagination to construct complete legal systems from the ground up. The \textit{Corpus Juris Civilis} is a vast compilation of ancient Roman legal materials, arranged and somewhat modified by a group of Byzantine professors and lawyers appointed by Emperor Justinian. Work on the \textit{Corpus Juris} began in 528 A.D. and was largely completed by 534 A.D.. The \textit{Corpus Juris} thus provided a picture of Roman law as seen through a Greek lens many years after the demise of the Western Roman Empire. The most important part of the \textit{Corpus Juris} is the \textit{Digest}, which contains scholarly commentary by Roman jurists and supplies the most detailed explication of Roman private law. Most of this commentary comes from the period 100-250 A.D. and presents various and often conflicting positions on each legal issue. The \textit{Corpus Juris} also contains: the \textit{Institutes}, a hornbook for students based partly on Gaius' \textit{Institutes}; the \textit{Code}, which includes imperial statutes and other pronouncements of Roman emperors; and the \textit{Novels}, which added imperial pronouncements issued after the publication of the \textit{Code}.

In 554 A.D., after Justinian took Italy from the Ostrogoths, he put his \textit{Corpus Juris} into force as the law of Italy. After the Lombards ousted the Byzantines, parts of the \textit{Corpus Juris} were still used, but the \textit{Digest} disappeared.

Fortunately, the \textit{Digest} was rediscovered in Italy in the late eleventh century; Justinian's complete \textit{Corpus Juris} was now available to European lawmakers, and it met their most important needs. It contained the world's most detailed and comprehensive private law written in Latin. It provided a

\textsuperscript{13} Charles Homer Haskins noted that especially in northern Italy, the new commerce demanded a law more flexible and commerce oriented than Lombard rural custom. \textit{See Charles Homer Haskins, The Renaissance of the Twelfth Century} 207 (Meridian Books 1957) (1927).
relatively sophisticated body of contract law and enforced the moral virtues of good faith and fair dealing.

An examination of Roman contract law reveals some serious defects, but also indicates why contract law has been the most highly regarded part of Roman law. The Romans had no general theory of contract. To be enforceable, an agreement had to fit squarely within one of a few contract types. The *stipulatio* was an oral contract formed when party A asked party B whether he would promise to do something and B immediately responded that he did so promise. *Stipulatio* could be used to promise anything not prohibited by law. However, it had limited usefulness for commercial exchange contracts. In the first place, the promise had to be made in a face-to-face meeting of the parties, not in a letter delivered to a distant party. Secondly, it was difficult and cumbersome to use *stipulatio* for bilateral exchange contracts. Each party had to make a very detailed stipulation, not only stating all of his duties, but also stating how those duties were conditional upon the other party’s performance.

Each of the four “real” contracts were formed informally but only when one party had delivered some tangible property to the other. Of these real contracts, only *pignus* (pledge) had commercial importance. A debtor transferred possession of property to his creditor as collateral security for the debt. If the debtor paid the debt, the creditor was obligated to return the pledged property. If the debt was not paid, the creditor could sell the collateral, but was obligated to pay the debtor any surplus of the sale proceeds over the amount of indebtedness. The three

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14 Alan Watson suggests that Roman law has been the most copied system in the West and contract law the most admired part of that system. See Watson, supra note 1, at 33.


17 See id. at 479.


19 See Watson, supra note 18, at 133.

20 See Schulz, supra note 16, at 521. But the creditor could claim reimbursement for his expenses incurred in disposing of the collateral. See id. So the net result was remarkably similar to that dictated by our American Uniform Commercial Code. See U.C.C. §§ 9-615(a), (d) (2001).
other real contracts involved gratuitous transactions, usually between friends.\textsuperscript{21}

In Roman contract law, the four "consensual" contracts were \textit{emptio venditio} (sale), \textit{locatio conductio} (hire), \textit{societas} (partnership), and \textit{mandatum} (mandate). Unlike the \textit{stipulatio}, the consensual contracts required mutual consent but no particular formal expression.\textsuperscript{22} Unlike the real contracts, the consensual contracts could be purely executory, with no prior delivery.\textsuperscript{23} In all consensual contracts, both parties were obligated to act in good faith in every aspect of the transaction.\textsuperscript{24}

There could be no duress, fraudulent misrepresentation, or even fraudulent nondisclosure.\textsuperscript{25} The mandate contract was formed if \textit{A} gratuitously promised \textit{B}, usually a friend of \textit{A}'s, to execute a commission given to him by \textit{B}.\textsuperscript{26} This contract was not useful in commerce because \textit{A}'s performance of the commission was gratuitous and not for a reward, and because \textit{A} lacked any agency power to create binding contracts between \textit{B} and third parties.\textsuperscript{27} Nor was the \textit{societas} partnership contract commercially useful. Among other things, a partner lacked the agency power to bind his partners to contracts he formed with third parties,\textsuperscript{28} and the partners owed each other only a

\textsuperscript{21} \textit{Mutuum} (loan for consumption) was a loan of "money or other fungible things"; the borrower merely had to return an equal quantity of like things and did not have to pay interest unless he made a separate \textit{stipulatio} to that effect. \textit{See Nicholas, supra} note 15, at 167–68; \textit{Schulz, supra} note 16, at 508–10. In \textit{commodatum} (loan for use), the borrower had to return the very thing he borrowed, but paid nothing for the use of that thing. \textit{See id.} at 508, 513. \textit{Depositum} (deposit) was used when one party entrusted property to the other party for safekeeping (not use) and did not pay a fee. \textit{See Nicholas, supra} note 15, at 168; \textit{Schulz, supra} note 16, at 517–18; \textit{Watson, supra} note 1, at 39.

\textsuperscript{22} \textit{See Nicholas, supra} note 15, at 171; \textit{Schulz, supra} note 16, at 524.

\textsuperscript{23} \textit{See Nicholas, supra} note 15, at 171; \textit{Schulz, supra} note 16, at 524.

\textsuperscript{24} \textit{See Nicholas, supra} note 15, at 163, 171; \textit{Schulz, supra} note 16, at 525.

\textsuperscript{25} Thus, in the sale contract, a seller acted in bad faith if he knew of a defect in the thing he was selling, knew that the buyer was not aware of the defect, and failed to tell the buyer about the defect. \textit{See Nicholas, supra} note 15, at 176, 181; \textit{Peter Stein, The Character and Influence of the Roman Civil Law: Historical Essays} 28 (1988).

\textsuperscript{26} \textit{See Nicholas, supra} note 15, at 187; \textit{Schulz, supra} note 16, at 554; \textit{Watson, supra} note 18, at 44.

\textsuperscript{27} \textit{See Schulz, supra} note 16, at 555 (pointing out that the party carrying out the commission was not the direct agent of the party at whose request he was acting).

\textsuperscript{28} \textit{See Nicholas, supra} note 15, at 187; \textit{Schulz, supra} note 16, at 551.
minimum of obligations.\textsuperscript{29}

The \textit{emptio venditio} (sale) was used for sales of specific goods or real property in exchange for a money price and was a contract of great commercial importance.\textsuperscript{30} The contract included an implied warranty by the seller that the buyer would have quiet enjoyment of the thing being purchased (that the buyer would not be evicted by someone with a better title).\textsuperscript{31} Various implied warranties by the seller also existed to protect the buyer in the event of latent qualitative defects in the thing being purchased.\textsuperscript{32} Protection against mistakes in contracting was provided by a complicated set of rules that made a sales contract unenforceable if there was some “fundamental” mistake. Fundamental mistakes included mutual misunderstanding concerning the specific thing to be sold and mutual mistake about the materials with which the thing was made, but it was not always clear which other mistakes counted as fundamental.\textsuperscript{33}

Like the contract for sale, \textit{locatio conductio} (hire) was commercially useful. It was a versatile contract that could be used for leases of goods or real estate, service contracts, and virtually any bilateral agreement involving a money price, so long as it was not a sale.\textsuperscript{34}

\textbf{D. The Law School at Bologna}

Justinian’s \textit{Corpus Juris}, with its complex body of contract law, could not be used to improve European legal systems until it was understood. This long process of understanding began in earnest when a man called Irnerius began teaching the entire \textit{Corpus Juris} at Bologna near the end of the eleventh century. Although Irnerius was merely a private teacher and not an employee of any educational institution, he soon began to attract

\textsuperscript{29} See SCHULZ, supra note 16, at 553 (suggesting that the Roman societas was excessively individualistic and therefore did not serve as a model for modern commercial partnerships).

\textsuperscript{30} See NICHOLAS, supra note 15, at 171–74.

\textsuperscript{31} See SCHULZ, supra note 16, at 534; WATSON, supra note 18, at 41.

\textsuperscript{32} See NICHOLAS, supra note 15, at 181–82; SCHULZ, supra note 16, at 535–39; WATSON, supra note 18, at 41.

\textsuperscript{33} See generally NICHOLAS, supra note 15, at 176–78; SCHULZ, supra note 16, at 528–29.

\textsuperscript{34} See NICHOLAS, supra note 15, at 182–85; SCHULZ, supra note 16, at 542–43, 544; WATSON, supra note 18, at 43.
students from all over Europe.

In the twelfth and thirteenth centuries, the private law schools of Irnerius and his early successors at Bologna were transformed into an institutionalized law school that was the leading center of legal studies in Europe. The leadership of Bologna was due in large part to the fact that it taught Justinian’s Corpus Juris, with increasing emphasis on the Digest, the part of the Corpus Juris that was the most fruitful source of legal ideas.

The institutionalized law school at Bologna had one especially interesting feature. Until it was taken over by the city in the late thirteenth or early fourteenth century, the University of Bologna was a student corporation, an amalgamation of student guilds, that controlled the professors. Each time a professor was late for class or ended class before the closing bell, the students fined him. If he did not cover all the material in the syllabus by the end of the term, he was again fined by the students.35

By the end of the twelfth century, the law school at Bologna taught both Roman law and canon law and had an enrollment of at least 1000 students.36 Yet the school taught little, if any, royal law, municipal law, customary law, or other primary source of local positive law. What the school taught was legal method and an ideal law (Roman law and canon law) containing general principles that could be applied to any area of law in any part of Europe. Apparently, the students flocked to Bologna because they knew what they needed in order to participate in the development of new legal systems back home. There is thus justification for Hastings Rashdall’s claim that in many respects, the work of the law school at Bologna “represents the most

35 A number of justifications can be offered for student control. (1) Most of the students were not Bolognese citizens, but foreigners who lacked civil rights and needed protection. (2) Most of the students were mature adults who had already obtained bachelor degrees and had begun careers in the Church, in government, or in business. (3) Many of the students were wealthy. (4) If the students were unhappy, they might leave Bologna, and the professors and other citizens of the city would lose a lot of income. See HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 124–25 (1983).

36 Harold Berman notes that some modern estimates of typical enrollments in the twelfth and thirteenth centuries range as high as 10,000. See id. at 124, 124 n.3.
brilliant achievement of the intellect of medieval Europe.”

The Bolognese model was copied by new law schools that sprang up in the twelfth century (Modena, Pisa, and Montpelier, for example) and thirteenth century (notably Naples, Toulouse, Orléans, and Salamanca). Like Bologna, these new schools taught Roman law and canon law but deemphasized or ignored local law.

E. Glossators, Commentators, and Canonists

From the early twelfth century to the middle of the thirteenth century, legal scholarship was dominated by the “Glossators,” Irnerius and the teacher-scholars who succeeded him at Bologna. In addition to Irnerius, some of the most important Glossators were Bulgarus, Martinus, Bassianus, Placentinus, Azo, and Accursius. The Glossators focused on mastering the text of Justinian’s Corpus Juris, an important first step that had to be taken before the Corpus Juris could be successfully used by medieval lawmakers. The Glossators intensively studied and explained each fragment in the text, interpreting difficult passages, providing cross-references to other fragments dealing with the same issue, identifying conflicts between different fragments, and trying to reconcile such conflicts. All of this was done in glosses (annotations) written between the lines of a Corpus Juris manuscript or in its margins or, when no space was left in the manuscript book, on separate pieces of paper.

From the late thirteenth century to the end of the fifteenth century, the most important legal scholars were the “Commentators” (or “Post-Glossators”), a group who taught at various law schools, not just Bologna, and included influential scholars such as Cinus de Pistoia, Bartolus de Saxoferrato, and Baldus de Ubaldis. The Commentators wrote broad and systematic commentaries that attempted to apply Roman law to the needs of medieval society in a practical way. They thus took

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37 1 Hastings Rashdall, The Universities of Europe in the Middle Ages 254 (2d ed. 1936).
38 The Glossators also wrote treatises in which they attempted to systematize one or more large portions of the Corpus Juris. Their more specific glosses seem to have been their more important work, however. See Nicholas, supra note 15, at 46–47.
a significant step beyond the work of the Glossators, who had chiefly been concerned with understanding and explicating Roman law. The Commentators studied customary, feudal, royal, and municipal law and were aware of the gaps in these systems. Many of these gap issues also had not been addressed in Justinian's *Corpus Juris*. The Commentators therefore derived general principles from the *Corpus Juris*, canon law, and the works of natural law philosophers such as Aristotle and Thomas Aquinas, and then used these principles to suggest how the gaps in contemporary positive law should be filled in order to make European legal systems not only more complete but also more equitable. The major achievement of the Commentators was showing how Roman law, canon law, and moral philosophy could be used to improve European legal systems.

The accomplishments of the canonists were as significant as the work of the Glossators and Commentators. In medieval Europe, canon law was important because the Church courts asserted a wide jurisdiction over matters we now regard as secular. This jurisdiction extended to marriage and the other sacraments, and to anything closely related to sin or the welfare of human souls; it thus included marriage, the termination of marriage, the legitimacy of offspring, the validity of testamentary wills, contracts made under oath or requiring good faith, usury, the manipulation of commercial markets, defamation, perjury, homicide, theft, sexual misconduct, and the lawful times and conditions of work. In the late eleventh century, Popes Gregory VII and Urban II had issued many new canons in their attempt to reform the Western Church, and by 1100 A.D. canon law consisted of a greatly enlarged but disorganized and unsystematic mass of materials taken from the Bible, works of the early Church Fathers, canons enacted by Church councils, and papal decretals (letters announcing papal decisions on actual cases). The needed systematization was provided by Gratian, a monk who taught canon law at the monastery of San Felice in Bologna. About 1140 A.D., he published his *Concordance of Discordant Canons*, which became known as the “*Decretum*” and was the first truly scholarly study of canon law. In this work, Gratian reorganized the canonical authorities and added his own comments, many of which were drawn from Roman law. He also noted apparent conflicts in the authorities and used a dialectical method in trying to reconcile
them. Gratian's *Decretum* served as the basic guide to canon law for many centuries.\(^{39}\)

After the middle of the twelfth century, canon law scholars and Roman law scholars worked in close cooperation.\(^ {40}\) Canon law was strongly influenced by Roman law. The procedural rules for ecclesiastical courts were based in large part on Justinian's *Corpus Juris*. The canonist concept of marriage as a consensual union, based on mutual affection and respect, came from Roman law.\(^ {41}\) Canonist doctrine concerning mistake as a ground for nullifying marriage was partly borrowed from Roman doctrines of mistake in contracts of sale.\(^ {42}\) Canon law also allowed nullification of marriage contracts made under duress, and the test for duress (consent induced by fear that a "constant" man would not overcome) was taken from Justinian's *Digest*.\(^ {43}\) In turn, Roman law scholars borrowed ideas from the canon law. For example, canon law was the major inspiration for the gradually successful attempts by the Glossators and Commentators to liberalize Roman law so that contracts could be enforced even when they did not fit within any of the contract

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\(^{39}\) Rashdall exuberantly summarized the impact of Gratian's book: "The *Decretum* is one of those great text-books which, appearing just at the right time and in the right place, take the world by storm." RASHDALL, supra note 37, at 127. After the time of Gratian, various collections of new canons (mostly papal decretals) were published. The most important of these collections were the *Liber Extra* (1243 A.D.), the *Liber Sextus* (1298 A.D.), the *Clementinae* (1317 A.D.), the *Extravagantes Johannis XXII* (1325–27 A.D.), and the *Extravagantes Communes* (1503 A.D.). In 1582 A.D., the aforementioned collections, along with Gratian's *Decretum*, were synthesized and printed as the official body of Roman Catholic canon law. They had this official status until the twentieth century.

\(^{40}\) Cooperation was facilitated by the fact that many canonists and many Romanists had studied both Roman law and canon law in law school and obtained joint degrees. James Brundage suggests that law students who hoped to make a good living as practicing lawyers needed to study both bodies of law. See JAMES A. BRUNDAGE, MEDIEVAL CANON LAW 60, 96–97 (1995). This need may have arisen because secular judges often borrowed procedural or substantive doctrines from the canon law and ecclesiastical judges were likely to adopt Roman law doctrines. See *id.* at 97.


\(^{42}\) See R.C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO PRIVATE LAW 65–66, 66 n.72 (1992).

\(^{43}\) See BRUNDAGE, supra note 40, at 166–67, 166 nn.44–46 (citing the *Liber Extra* and Justinian's *Digest* and pointing out the similarity of the "constant" man and the "reasonable" man of the Anglo-American common law).
types recognized by classical Roman law.\textsuperscript{44}

\textbf{F. Spread of the Ius Commune}

By the fourteenth century, the combination of Roman law and canon law had become known as the \textit{ius commune} and had spread throughout a good part of Western Europe. The reception of the \textit{ius commune} was, of course, facilitated by the fact that it was written in Latin, the common language of educated Europeans. Equally important was the legal education of the men who filled new positions as judges, advocates, and assistants to secular and ecclesiastical rulers; most of these new legal professionals had been trained in law schools that concentrated on Roman and canon law. The \textit{ius commune} was thus the law that the new lawmakers knew best.

Canon law had an easy victory. It was the primary source of law in Church courts throughout all of Catholic Europe, including the British Isles. The spread of the new Roman law based on Justinian's \textit{Corpus Juris} was slower, and the pace varied from one region to another. The new Roman law was quickly received in Italy, the southern part of France, and the Iberian peninsula.\textsuperscript{45} In the northern part of France, customary law continued to prevail, but by the thirteenth century, Roman law had become an important supplement.\textsuperscript{46} In the German principalities of the Holy Roman Empire, Roman law was not received to any great extent until the late fifteenth and early sixteenth centuries. But when it occurred, the reception was massive.\textsuperscript{47} In Scotland, Roman law was established as the primary gap filler in the sixteenth century. However, Roman law never really took hold in the English royal courts (except for the

\textsuperscript{44} See \textsc{Rudolf B. Schlesinger et al.}, \textsc{Comparative Law: Cases-Text-Materials} 272 (5th ed. 1988).

\textsuperscript{45} In the Spanish Christian kingdoms, Roman law co-existed with a large amount of written customary law.

\textsuperscript{46} Philippe de Beaumanoir's treatise on the \textit{Customs of Beauvaisis} (about 1280) showed the influence of both Roman law and canon law; it drew heavily on the Roman law of contracts because customary contract law was not highly developed. For further information about de Beaumanoir's work (and northern France generally), see \textsc{Bellomo}, \textit{supra} note 2, at 101-05; \textsc{Stein}, \textit{supra} note 10, at 66.

\textsuperscript{47} See \textsc{Stein}, \textit{supra} note 10, at 88-92. In 1495, Roman law and canon law officially became mandatory law in the Reichs-kammergericht, the highest court of the Holy Roman Empire.
chancery and admiralty courts).48

We must remember that nowhere in late medieval Europe were Roman law and canon law the only kinds of law being used. In each geographical region, there were a number of legal systems, each with its own law and its own courts: canon law, feudal law, manorial law, royal law, municipal law, and the law merchant.49 And everywhere, social custom was still a recognized source of law. The primary role of the *ius commune* was to fill the huge gaps in the local legal systems. Roman law and canon law were also used in interpreting existing local law, and provided standards by which courts determined whether a local custom was unreasonable and thus legally invalid. In these ways the *ius commune* gradually shaped the legal systems that ruled most of Western Europe until they were replaced by the massive codifications of the eighteenth and nineteenth centuries.

II. REASONS FOR THE SUCCESS OF THE REVIVAL

Why was the medieval revival of Roman law successful in the sense that it substantially enhanced the quantity and quality of law in Western Europe? The following summary will provide a partial answer to our question and will focus on factors that have important implications for contemporary legal education.

The medieval revival of Roman law involved a massive transplant into medieval societies of a legal system that had been developed in ancient times before the fall of the Western Roman Empire. We will therefore begin by identifying some

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48 Beginning with the reign of Henry II (1154–89 A.D.), the Angevin Kings of England and their royal courts rapidly developed a common law based on case law precedent and feudal custom. Members of the ruling class were not interested in a Roman law which would have altered their precious feudal relationships. For explanations of how Roman law differed from feudal law, see BERMAN, *supra* note 35, at 453–54; VAN CAENEGEM, *supra* note 42, at 80–81; WATSON, *supra* note 1, at 243–45. And from the reign of Edward I (1272–1307 A.D.), advocates in the royal courts were trained in the Inns of Court (which were anti-Roman), rather than in the universities where Roman law was taught. This effectively sealed the fate of Roman law in England.

49 The law merchant was developed by the merchants themselves and designed primarily for commercial transactions between merchants of different nationality. Although the law merchant was more suitable than Roman law for such transactions, it was not generally used for noncommercial contracts or contracts between a consumer and a nearby merchant. There was thus a need for a new general law of contracts. Medieval lawmakers filled this void by resurrecting Roman contract law and then modifying it.
factors that are essential for the success of any legal transplanting or "borrowing" enterprise.

For borrowing to even occur, lawmakers who work within one legal system must be aware of and receptive to legal ideas and intellectual concepts that come from outside that system (factor 1). The external ideas and concepts might be found in the contemporary legal system of a foreign country. They might be found in the legal history, the legal past, of the borrowing system itself. They might be found in some non-legal discipline such as philosophy, economics, or sociology. Whatever their source, these external ideas and concepts must be studied and understood before they can be truly borrowed and not caricatured (factor 2).

If the enterprise of borrowing is to succeed in improving the borrowers' legal system, some additional factors are required. The ideas being borrowed will probably have to be modified somewhat if they are to fit the borrowing legal system and its social and cultural context. The borrowers will thus have to perform a critical analysis of the external ideas, identify their strengths and weaknesses and eliminate, or at least mitigate, the weaknesses (factor 3). In order to determine what is a strength or weakness in the external ideas, the borrowers must consider contemporary social and economic circumstances in their own society (factor 4). They must also ask whether a particular external idea would promote the purposes or goals of their own legal system (factor 5).

Finally, legal education will have to be structured so that future generations of lawyers working within the borrowing legal system will be able to use the newly borrowed ideas — and ideas that may be suitable for future borrowing — in ways that improve that legal system (factor 6). Law schools must therefore train their students to do all the things involved in factors 1 through 5.

In the remainder of Part II, we will see that each of the factors necessary for a successful legal transplant was present in the medieval revival of Roman law. Indeed, all six factors were present to a high degree.

A. Receptive Awareness of Legal History and Comparative Law
(Factor 1)

Factor 1 in our list of requirements for successful borrowing
is a receptive awareness of ideas that come from outside the legal system that is to engage in borrowing. The medieval revival began with an awareness of legal history. With the rediscovery of Justinian's *Digest* in the late eleventh century, the entire *Corpus Juris* became available to legal scholars. Almost immediately, Irnerius and his Glossator successors at Bologna made their students and other law professors aware of Justinian's compilation of ancient Roman law, a body of law that had been developed more than eight centuries earlier, and after the fall of the Western Roman Empire had been applied only in "vulgar" and mutilated form.\(^{50}\)

Medieval lawyers not only borrowed materials from a historically prior legal system, they also engaged in what we would call comparative law, the study of contemporary legal developments in other countries and other legal systems. Law professors and lawmakers throughout Europe borrowed ideas from Italian Commentators, such as Bartolus de Saxoferrato and Baldus de Ubaldis. The Italian Commentator, Cinus de Pistoia, was heavily influenced by the French legal scholars, Jacques de Révigny and Pierre de Belleperche. We have already seen that secular courts and professors of Roman law borrowed ideas from canon lawyers, who in turn derived much of their canon law from Justinian's *Corpus Juris*.

B. Receptive Awareness of Other Disciplines: Teleological Natural Law Philosophy (Factors 1 and 5)

Factor 1 in our list of requirements for successful borrowing can be satisfied by a receptive awareness of ideas found in non-legal disciplines. Medieval lawyers were in touch with other disciplines and borrowed ideas from them, especially from philosophy. Lawyers were particularly interested in moral and political philosophy, and here the most influential tradition was natural law theory.

Medieval notions of natural law were drawn from Cicero,

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\(^{50}\) In looking back to ancient Roman law, medieval lawyers were acting in the spirit of their own time. The "Twelfth Century Renaissance" was, to a large extent, an attempt to recover the cultural treasures of ancient Greece and Rome and give them new life. This renaissance (which actually began in the eleventh century and continued past the twelfth) involved the revival of classical philosophy, law, literature, and art.
Justinian’s *Digest*, Aristotle, and Aquinas. A key idea found in all of these sources is that human conduct should be regulated by norms that are both derived by means of rational reason and consistent with human nature. Although natural law theory is rationalistic, it is also aware of both the potentialities and limitations of the human animal. This rational but not unduly optimistic approach produced helpful answers to all three of the questions posed by twelfth century intellectuals: What kind of human can live a good life in this world? What kind of education does he need? What kind of laws does he need?

Natural law theory provided a teleological answer to the first question. In natural law teleology, everything is evaluated according to how well it fulfills its *telos*, its end or purpose. Aristotle had said that the natural end of a human being was to live well, rationally, and virtuously. Thus, the kind of human who can live a good life in this world is a human who lives rationally and virtuously.

Because the purpose of educational institutions is to enable people to live good lives, natural law teleology provided an answer to the second question: humans need education that teaches them how to live rationally and virtuously.

Natural law theory gave a similar answer to the third question. Humans need laws that help them live good lives. The purpose of positive law, according to Aquinas, is to facilitate good lives for all citizens (the “Common Good”). The law should

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51 The development of natural law theory involved a considerable amount of cross-cultural borrowing. Cicero derived much of his natural law approach from the Stoics and other Greek schools of philosophy. The popularity of Aristotle’s moral philosophy was partly due to commentaries on Aristotle written by Islamic thinkers, such as Avicenna and Averroes, and Jewish writers like Avencebrol and Maimonides. St. Thomas Aquinas produced a moral and legal philosophy that synthesized Aristotle’s Greek philosophy and Roman natural law theory with the Christian tradition.

52 See, e.g., CICERO, DE RE PUBLICA 3.22.33, at 68 (Niall Rudd trans., 1998) (asserting that true law is right reason in agreement with nature); ST. THOMAS AQUINAS, THE TREATISE ON LAW [BEING SUMMA THEOLOGIAE, pt. I-II, QQ. 90 THROUGH 97]) q. 91, art. 2, corpus, at 159–60 (R.J. Henle ed. and trans., 1993) (suggesting that natural law is the part of God’s eternal law that can be discerned by human reason).

53 See ARISTOTLE, NICOMACHEAN ETHICS 1098a 7–17, at 17, 1099b 25–26, at 22 (Martin Ostwald trans., 1962) (suggesting that a good human life is a life of rational activity in conformity with virtue).

54 See AQUINAS, supra note 52, at 131–34 (Q 90, art. 2, corpus and translator’s comment noting that the Common Good is the good of all members of society).
therefore help people to live rationally and virtuously. Legal rules and penalties can perform a moral education function that supplements familial training by teaching citizens to treat others fairly, without coercion, deceit, or exploitation.\textsuperscript{55} In suggesting that the purpose of law was to help people live good lives, natural law theory provided medieval lawmakers with a teleological criterion that could be used in evaluating the various rules of ancient Roman law. Medieval lawmakers were thus able to satisfy factor 5 in our list of requirements for successful borrowing: lawmakers in the borrowing system must judge particular ideas in the borrowed system by asking which of these ideas would promote the purposes or goals of their own legal system.

The teleological approach of natural law theory was used not only to identify the general purposes of law, but to resolve particular legal issues as well. In the field of contract law, the obligations of parties to a contract depended on the immediate end or purpose of the type of contract the parties formed. The purposes of the marriage contract, for example, were the good of the offspring and the mutually beneficial association of the two spouses. Therefore, the contractual duties of the spouses were determined by these purposes.\textsuperscript{56} A second example also involves contract law. The Commentators Bartolus de Saxoferrato and Baldus de Ubaldis suggested that, although a sales contract cannot be avoided for mistake about the "accidental" form of the thing to be sold, such a contract can be avoided for mistake about the "substantial" form of the thing, and the substance (or essence) of a thing may depend on the human purpose it serves.\textsuperscript{57}

Because the Common Good involves a good life for every citizen, canon lawyers tried to design laws that would protect the poor and achieve a greater measure of social equality. Unlike Roman law, which gave poor people harsher sentences than wealthy people received, canon law afforded equal treatment by the law. See Colish, supra note 41, at 327. Canon law even provided that litigants who could not afford to pay for legal counsel would be given an attorney at the court's expense. See id.\textsuperscript{58} See Aquinas, supra note 52, at 281–82 (Q. 95, art. 1, corpus and translator's comment).


\textsuperscript{57} See id. at 57–61. As Gordley notes, the mistake doctrines of Bartolus and Baldus were not without their own problems. As it turned out, the distinction
Natural law theory was also influential in the development of the method by which lawmakers derived legal rules from general principles. The typical natural law method was to begin with very general moral principles, derive more specific principles from them, and finally arrive at rules to be applied to particular situations. Canon lawyers readily adopted this method and began searching for general moral principles that could be applied in all areas of law. Soon, both canon law scholars and Roman law scholars were busy identifying significant principles and teaching them to their students.

Some of these general principles were found in book 50 title 17 of Justinian's *Digest*. They include important principles that are still applied today: in interpreting testamentary wills, we should try to carry out the wishes of the testator;\(^5\) no one can change his mind to another person's disadvantage (the estoppel principle);\(^6\) nothing is so contrary to consent as force or duress;\(^6\) no one should be allowed to profit from his own wrongdoing;\(^6\) there is no obligation to do something that is impossible;\(^6\) no one should become richer through another person's loss (the unjust enrichment principle).\(^6\) *Digest* 50.17 was a favorite subject of the Glossators and the Commentators, who wrote extensively between substance and accident did not provide good solutions to mistake cases. In the nineteenth and twentieth centuries, American courts were still wrestling rather unsuccessfully with similar distinctions between substance (or essence) and quality (or value). *Compare* A&M Land Dev. Co. v. Miller, 94 N.W.2d 197, 203 (Mich. 1959) (ruling that the fact that the condition of purchased land was such that the purchaser/developer could not obtain permits to install septic tanks was not a fact that went to the substance of the land), *with* Sherwood v. Walker, 33 N.W. 919, 923 (Mich. 1887) (ruling that the fact that a purchased cow was fertile and not barren was a fact that went to the substance, the very nature, of the cow). A better approach is to jettison the Aristotelian metaphysical distinction between substance and accident and simply ask whether the mistake has a material and adverse effect on a mistaken party. The American *Restatement (Second) of Contracts* takes this approach and permits avoidance of the contract because of such a material and adverse mistake if some other requirements are also met. *See* Restatement (Second) of Contracts § 152 (mutual mistake), § 153 (unilateral mistake) (1981).


\(^6\) Id. 50.17.75.

\(^6\) Id. 50.17.116 pr.

\(^6\) Id. 50.17.134.1.

\(^6\) Id. 50.17.185.

\(^6\) Id. 50.17.206.
about how the Roman principles might be interpreted and applied in order to improve positive law.

In developing specific legal rules, medieval lawmakers used general principles flexibly and cautiously. Aquinas wisely observed that as we work our way down from general principles toward specific rules, we descend into levels of greater particularity and contingency, and our reasoning becomes more fallible, more prone to error. For example, goods that have been deposited for safekeeping should, as a general rule, be returned. But this rule should not be applied in a case where the depositor wants his goods back so that he can use them to attack his own country. The canon law regarding usury provides an example of how medieval lawmakers used general principles flexibly and recognized the fallibility of legal rules. Canon law had long held that loaning money at interest was sinful and illegal. Gradually, canon lawyers realized that lending was necessary for continued economic expansion, and that lenders deserved compensation for the opportunity costs they incurred when they loaned money they could have spent on themselves or their own businesses. By the end of the medieval period, canon law allowed lenders to charge interest, so long as it was not excessive.

The impact of natural law philosophy on medieval law was profound. Due to natural law theory, lawyers were constantly aware of the moral purposes of law. They used natural law ideas when they interpreted Roman law. They used natural law principles to develop new legal rules that could fill gaps, and to identify existing rules that were unjust and thus candidates for elimination or alteration. The contribution of natural law philosophy is well summarized by Harold Berman:

Natural law was not an ideal law standing outside the existing legal systems but rather the morality of the law itself standing within the existing legal systems. . . . It was because of the programmatic or political character of the law, represented particularly by that part of it that was called natural law, that thousands of young men went annually to the universities to study law. . . .

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64 See Aquinas, supra note 52, at 260–62 (Q. 94, art. 4, corpus); see also id. at 164 (Q. 91, art. 3, reply 3, noting that human laws are necessarily fallible).
65 See id. at 261.
66 See Berman, supra note 35, at 248–50.
order to prepare themselves for political careers. These were among the most intelligent and ambitious young men of Europe. They were taught the positive law and the techniques of applying it, but they were also taught the natural law, the law that was to be.

[The impulse for legal growth and reform] was manifested in the continuity of the legal profession, as successive generations of lawyers were trained in the universities and went out into the ecclesiastical and secular chanceries and courts to practice what they had been taught.\(^{67}\)

C. Intensive Study of External Ideas (Factor 2)

External ideas from legal history, comparative legal studies, or non-legal disciplines must be carefully studied and understood before they can be usefully borrowed by a legal system. This was factor 2 in our list of requirements for successful borrowing.

Medieval lawyers undoubtedly devoted much effort to the study of ancient Roman law, contemporary legal developments in foreign countries, and natural law philosophy. The study of Roman law was especially intensive. We noted in Part I that the Bolognese Glossators who dominated legal scholarship from the early twelfth century to the middle of the next century were devoted to mastering each fragment in the text of Justinian’s *Corpus Juris*. Their study must have been intensive; it was continuous, not sporadic, and it took about 150 years to complete.

D. Critical Analysis of External Ideas (Factor 3)

If external ideas are to be successfully borrowed by a legal system, they must be critically analyzed so that their weaknesses can be identified and eliminated. This was factor 3 in our list of requirements for successful borrowing (Borrowing is not successful if it does not improve the borrowing legal system).

Medieval lawyers analyzed Roman law with a critical and questioning spirit. We will note in section II. F that this spirit was an important aspect of the “scholastic” method, which

\(^{67}\) *Id.* at 254.
dominated medieval intellectual activity. Here, we will merely mention two examples of this medieval ability to spot weaknesses in Roman law and correct them. In Part I, we noted that a weakness in Roman contract law was the lack of a general theory of contract that could be applied to any type of agreement; to even be enforceable, an agreement had to fit squarely within one of a few prescribed contract types. We also noted in Part I that the medieval Glossators and Commentators, inspired by the canonists, gradually succeeded in liberalizing Roman law so that contracts could be enforced even when they did not fit within any of the ancient Roman types. A second example was also previously noted. In our discussion of natural law philosophy, it was pointed out that the medieval canonists rejected the Roman law’s harsh and discriminatory treatment of poor people and tried to ensure that the poor would not be disadvantaged in Church courts.

E. Awareness of Contemporary Social Circumstances and Needs (Factor 4)

In order to determine how borrowed ideas should be modified and adapted to the borrowing legal system, the lawyers of that legal system must consider contemporary circumstances and needs in their society. This was factor 4 in our list of requirements for successful borrowing.

In Part I, we saw that a major concern of the Commentators was to adapt Roman law to the needs and circumstances of medieval society. We also noted, in our discussion of natural law theory, that the relaxation of the canon law prohibition of lending at interest was partly due to a perceived need to stimulate lending in order to assist economic development.

F. Legal Education (Factor 6)

For legal borrowing to be successful, law schools serving the borrowing legal system must educate their students so as to

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68 See supra text accompanying note 15.
69 See supra text accompanying note 44.
70 See supra text accompanying note 54.
71 See supra text following note 38.
72 See supra text accompanying note 66.
enable future generations of lawyers to use imported ideas in ways that improve that legal system (factor 6 in our list of requirements for successful borrowing). The ability of medieval lawyers to make vast improvements in European legal systems was due, in large part, to the quality of legal education. The law schools provided their graduates with the new legal concepts of Roman law, canon law and, even more importantly, the intellectual skills and attitudes necessary for socially useful lawyering.

Entering law students were well prepared. To be admitted to law school, a person usually had to have a liberal arts degree. Obtaining a bachelor of arts degree required four to six years of study. The master of arts degree, a license to teach arts anywhere in Western Europe, required another two to four years. The arts curriculum emphasized the “trivium,” which consisted of (Latin) grammar, rhetoric, and logic.73 Other courses included the “quadrivium” of arithmetic, geometry, astronomy, and music, and (by the middle of the thirteenth century) a healthy dose of Aristotelian moral philosophy. The beginning law student had thus already been trained to read and write good Latin, think logically and analytically, and argue persuasively.

The law school course of study consumed from five to ten

73 Of the trivium subjects, logic (or “dialectic”) received the most emphasis. Liberal arts students read the Aristotelian treatises on logic, but the professors were innovative and went well beyond Aristotle, especially in semantic theory. See Norman Kretzmann, Introduction, to THE CAMBRIDGE HISTORY OF LATER MEDIEVAL PHILOSOPHY: FROM THE REDISCOVERY OF ARISTOTLE TO THE DISINTEGRATION OF SCHOLASTICISM (1100–1600) 1, 5 (Norman Kretzmann et al. eds., paperback ed. 1988). Late medieval logic included subjects that today would be regarded as philosophy of language or metaphysics. Philosophy of language became an important part of medieval logic because logic evaluates arguments constructed with words or symbols, and medieval logic lacked our modern symbols for terms, propositions, and operators; extensive interpretation of words was therefore necessary. See Klaus Jacobi, Logic (ii): The Later Twelfth Century, in A HISTORY OF TWELFTH-CENTURY WESTERN PHILOSOPHY 227, 249 (Peter Dronke ed., paperback ed. 1992). Semantic theories developed by late medieval logicians were surprisingly sophisticated. Peter Abelard, for example, tried to explain the difference between what common nouns name and what they signify; his explanation resembles the distinctions between reference and sense made by twentieth century Anglo-American analytic philosophers. See Martin M. Tweedale, Logic (i): From the Late Eleventh Century to the Time of Abelard, in id. at 196, 217 (discussing Abelard). Like the training in using Aristotelian syllogisms, the semantic theory was undoubtedly valuable to pre-law students.
years, depending on the school and the type of degree being pursued. A student could obtain a doctorate in civil (Roman) law in seven or eight years, a bachelor’s in five. A bit less time was required for the degrees in canon law. In ten years, one could obtain a joint degree in civil law and canon law. The curriculum was rigidly fixed. Civil law courses covered Justinian’s *Corpus Juris*; canon law students studied Gratian’s *Decretum* and subsequent collections of canons. There were no electives. All students pursuing the same degree took the same courses.

Law school teaching techniques were based on the new “scholastic method,” so called because it was the method of analysis employed by the schoolmen, the professors in various institutions of higher learning. This method, used in both scholarship and teaching, was already rather fully developed in the twelfth century and made use of both authority and reason. The analysis began with authoritative texts dealing with a particular question. A civil law professor might begin with Justinian’s *Digest*; a theology professor was likely to begin with Biblical texts. Apparent conflicts would then be identified. In order to decide whether two textual passages really conflicted, the schoolmen would interpret each of them, using reason and hermeneutic techniques that focused on contextual variables such as time, place, author, and issue. Great efforts were made to harmonize the texts. If they could not be interpreted as consistent, the schoolmen might reconcile them by means of a reasoned distinction. They would suggest, for example, that one rule should be applied to marriage contracts while a contrary rule was appropriate for commercial contracts. If the opposing texts could not be reconciled, schoolmen could either choose one and reject the other, or reject both of them in favor of a new synthesis. Any proposed solution of the conflict was proposed because it seemed the best way to promote human well-being, given the ultimate purposes of life and contemporary circumstances and needs. The criteria for identifying the proper conclusion of the scholastic analysis were thus teleological.\(^74\)

\(^{74}\) It seems impossible to identify any one person or discipline as the originator of scholastic method. Most likely, canon law professors, Roman law Glossators, and philosopher-theologians all borrowed techniques from each other and added further refinements. George Makdisi has suggested that scholastic method may have been imported into Western Europe from Islamic law schools. See George Makdisi, *The Scholastic Method in Medieval Education: An Inquiry into Its Origins in Law and Theology*, 49 *Speculum* 640,
The spirit of scholastic method was interrogative. Although the schoolmen tried to harmonize authorities so as to preserve as much of the existing body of authority as possible, each authoritative proposition was questioned and open to doubt. Peter Abelard, one of the early developers of scholastic method, asserted that "the first key to wisdom is called interrogation, diligent and unceasing. . . . By doubting we are led to inquiry; and from inquiry we perceive the truth." Scholastic method thus involved a ruthless analysis of traditional views. Quoting authority was not a way to end debate; it was the way to open debate.

Law school teaching exhibited both the form and spirit of...
scholastic method. In a morning lecture, the professor would read a portion of the assigned text, read the interpretive glosses to that text, try to resolve apparent conflicts, propose conclusions, note general principles that could be derived from the text, and raise questions not directly addressed in the text (for example, how some hypothetical case should be decided). In an afternoon or evening session, the students and professor would discuss questions that arose from the morning lecture.

In the twelfth century, the “disputation” developed into an important educational device. The disputation was like a modern moot court, except that anyone present was free to argue and there was no assigned hypothetical fact situation. The disputation was a debate on a previously announced topic, usually an important contemporary issue not covered in the Corpus Juris or canon law. Sometimes the disputation was merely a classroom exercise, sometimes it was a public event in which all students and professors of the university were free to participate. The designated “disputant,” who might be a professor or a student, would begin by stating his position and would then have to listen to objections raised by the other persons present and respond to these objections. The disputation was, like the chivalric tournament, a very competitive and dangerous game.  

Teaching methods in the medieval law schools helped students acquire the intellectual skills they would need in order to be effective counselors and advocates for their clients. Law students learned to read legal texts carefully, to be aware of alternative interpretations, to consider all arguments on both sides of a question, to reason logically, and to argue persuasively. At the same time, law students acquired intellectual habits that enabled them to contribute to the improvement of legal systems. They learned to question everything. They developed a critical attitude toward existing authority. They learned to construct general principles that could be used in fashioning new rules for developing areas of law. And in learning how to reconcile disparate authorities, they acquired an antidote to oversimplification and extremism; they learned to appreciate what is valuable in each opposing theory or proposition and

77 See Huizinga, supra note 12, at 189 (observing that the twelfth century was a time of intense intellectual competition, and comparing the scholastic disputation to a chivalric tournament).
construct a synthesis that preserved those valuable elements. The medieval law students thus learned how subtle and complex our normative world is. In all these ways, the law schools enabled their graduates to achieve one of the great goals of medieval civilization: to improve society by improving the law.78

III. PROPOSALS FOR AMERICAN LAW SCHOOLS

Our law schools should prepare students not only for the practice of law, but also for lawmaking that improves the law. American lawmakers obtain formal legal training only in law schools. Many of our legislators and administrative officials, and all of our judges, are trained in law school. And they are not our only lawmakers. Practitioners who represent clients before courts, legislatures, or administrative bodies also help to shape the law. How well they do this depends to a large extent on their law school training.

We have seen that the medieval law schools did a number of things that helped their graduates practice law successfully and contribute to the improvement of legal systems. The medieval law schools taught basic intellectual skills: reading texts carefully, thinking analytically, thinking critically, and arguing persuasively. They also exposed students to external ideas (from outside local positive law) that could be borrowed from legal history, comparative law, and philosophy.

In some respects, our contemporary American law schools are doing these things better than the medieval law schools did. In other respects, however, our law schools are not doing as well as the medieval law schools, and some substantial reforms in legal education are necessary.

A. Basic Intellectual Skills

Our law students are not devoting enough time to learning basic intellectual skills.79 One reason for this is that students

78 Most law school graduates had opportunities to improve the law. Many of them joined the staffs of secular or Church lawmakers (popes, kings, city governments, etc.). Some of them became judges. Even those who were merely advocates for private clients made arguments about what rules should be applied in court.

spend too much time "learning" (memorizing) black-letter rules, most of which will never be used by the typical student. On most case law issues, each state's current rule differs somewhat from the rules used in other states and is also likely to change over time; the rules presented in the law school casebook for a given issue (the California rule as of 1985 and the North Carolina rule as of 1992, for example) are thus unlikely to be the rules that will govern the student's future clients in Illinois or New Jersey in the year 2013. Basic intellectual skills, on the other hand, will be useful for practice in any state at any point in time.

1. Law students should learn to read legal texts slowly and carefully.

Whether reading cases or statutes, whether reading American law or foreign law, a student should be in the habit of reading slowly and carefully. She must discern the logical structure of any legal rule she is reading, noting, for example, whether the connecting conjunction between rule elements is "and" or "or." She must take time to consider the alternative ways in which the rule might be interpreted. She must, of course, search for statutory, case law, or law dictionary definitions of key terms in the rule. She should also compare the textual passage she is reading with other passages dealing with the same issue. All of this requires great attention to little details and not just an effort to see "the big picture."

If students are to develop the habit of reading slowly and carefully, daily assignments in each course must be short, usually not more than fifteen casebook pages. And the professor should use socratic questioning in the classroom. This is the most dramatic (because the most embarrassing) way to make students realize that they have overlooked a relevant detail.

(suggesting that more emphasis be placed on producing "students who can think critically, analyze complex material efficiently, articulate their opinions cogently and persuasively, [and] write forcefully. . . .")

Statutory law is a different matter. Many of the statutory rules studied in law school (rules in the Internal Revenue Code or Uniform Commercial Code, for example) will be used by a significant number of law school graduates. But there is no reason why these complex statutory rules should be memorized by law students. As practicing attorneys, they will (or should) work with the statutes in front of them and not rely on their memories. Law school examinations in statutory courses, like exams in case law courses, should therefore be open-book exams.
2. *Law students should learn to think analytically.*

A lawyer cannot successfully practice law or assist in the lawmaking process unless he can think analytically. Analytical thinking must at least be logical. But it also involves classification and the ability to discern whether a particular concept is a subcategory of another concept or is extrinsic to that other concept. Analytical thinking also requires a student to compare two legal rules and identify the differences between them, so that he can determine which rule he would want a court to apply if he represented a particular party.

These analytical skills cannot be taught by the lecture method. They are probably best taught by means of socratic method and assigned hypothetical problems in which the students are told which party they represent. In the classroom, the professor should ask students to predict the outcome under each of the alternative rules presented in the casebook and select the rule they would urge the court to apply (the rule that favors their client).

Legal analysis is too important to leave to the first-year legal writing course. Every course should be designed to teach analytical skills. Law schools might also advise their applicants for admission that pre-law programs should include courses in logic, mathematics, economics, foreign languages, or other courses that help students develop analytical abilities.

3. *Law students should learn to think critically.*

If a law student is to later practice law successfully and identify elements of positive law that need to be improved, he must develop a habit of thinking critically. He must habitually question everything, including judicial decisions and commentary by casebook editors. He must habitually consider the arguments on both sides of any issue that arises.

These critical habits are best developed by means of the case method, which involves classroom discussion of judicial opinions. Many law students assume that judges are always right. Critical analysis of judicial opinions will soon show otherwise. Even in statutory courses, it will be helpful for students to read a few cases and identify some of the judges’ mistakes. Studying actual cases also enables students to see that typically both parties have some respectable legal arguments and weighty
equities in their favor.\footnote{See \textsc{Anthony T. Kronman}, \textit{The Lost Lawyer: Failing Ideals of the Legal Profession} 113–14 (1993) (suggesting that one of the advantages of the case method is that students learn to identify the strengths and weaknesses of each party's argument and come to look "with a friendly eye...at...positions they personally reject. . .".).}

A professor's lecture cannot teach students to think for themselves. It will not teach students to think independently and critically. But socratic questioning can do this. A student who knows he may be asked to make an argument in class will be encouraged to spend some time before class developing arguments on both sides of each important issue presented in the assigned reading. (This is another reason why assignments should be short.) In order to further enhance the students' ability to appreciate arguments on both sides of an issue, socratic dialogue between professor and student should frequently give way to open classroom discussion in which all students are free to express their opinions. One result of such an open disputation is that each student will hear many diverse viewpoints, most of which he will respect because they are expressed by classmates he already knows and respects.

4. \textit{Law students should learn how to argue persuasively.}

I have suggested that students should be forced to argue in the classroom. Sometimes a student would have to argue with the professor. Sometimes a group of students would be told that they must argue a hypothetical case at the next class meeting. For example, two students would be assigned to represent the plaintiff, and two students assigned to represent the defendant, in a twenty minute moot court or settlement negotiation. By arguing in the classroom and then being criticized by the professor and fellow students, a student learns by doing. This is a hard way, but an effective way, to learn a skill. This is essentially the way one learns how to play basketball or how to play the piano.

But classroom argumentation and critique is not enough. Rhetoric, the art of persuasive communication, involves a number of principles and techniques that can be taught by lectures and assigned readings and can accelerate the process of learning how to argue effectively. The first-year legal writing course should therefore include a substantial rhetoric
To this point, I have focused on reforms in classroom teaching methods. I have proposed a priority for intellectual skills and have emphasized the need for case method and extensive socratic questioning. We shall now consider reforming the law school curriculum.

B. The Need for Jurisprudence, Comparative Law, and Legal History in the Law School Curriculum

In order to improve contemporary American legal systems, lawmakers will have to borrow ideas from sources outside their own legal system. With very few exceptions, lawmakers are not creative geniuses. Innovative ideas are most likely to come from foreign legal systems, the legal past, and nonlegal disciplines such as philosophy.

The successful borrowing of such external ideas will require a receptive awareness and understanding of the various ideas that might be borrowed. It will also require critical evaluation of these ideas, so that lawmakers can identify the ideas that would

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82 My impression is that while case method is still used in most law school courses (where the primary text is usually a casebook, not a treatise), a majority of professors use socratic method sparingly, if at all. It is difficult to see how professors might be induced to use socratic method more extensively. Unfortunately, most law students want to be spoon-fed. Professors who engage in rigorous socratic questioning tend to be not as popular with students as professors who lay everything out in well organized lectures that are supplemented by outlines prepared by the professor and handed out to the students. Professors who are aware of this tendency and who also fear that mediocre student evaluations will impair their prospects for promotion and tenure will be tempted to eschew socratic method and resort to spoon-feeding. Perhaps we should abolish quantitative student evaluations in which students give the professor numerical scores that can readily be compared with the numerical scores of other faculty members. All that is really necessary is an opportunity for students to comment on things they are competent to judge: Does the professor come to all the scheduled classes? Is she well prepared for class? Does she make the students think? Does she encourage the expression of dissident views?

83 One might ask why a legal system cannot be improved by means of ideas already contained within that system's intellectual tradition. The answer, I believe, is that problems and defects — and a perceived need for improvement — usually appear only when it becomes evident that the internal resources of a legal system are inadequate for a particular task. If the legal system's internal resources were adequate, there would be no problem, no defect, and no need for improving the legal system; there would merely be a need to recognize the conclusions entailed by the premises already provided by that system.
improve our legal systems. This evaluation must be made with an eye toward the proper purposes of law and an awareness of our contemporary social and economic circumstances. We have seen that medieval lawyers met these same requirements with considerable skill and good judgment.

In one respect, improving contemporary American legal systems is a less daunting task than that which confronted the medieval Europeans. Our state and federal legal systems are already highly developed. At the dawn of the twelfth century, on the other hand, European legal systems were quite primitive, and European lawmakers were virtually starting from scratch.

In another respect, however, our task is more difficult. Medieval lawyers knew exactly where to look for external ideas that could be borrowed. There were only two readily accessible sources: ancient Roman law and natural law philosophy. But contemporary American lawyers have a great variety of external sources at hand. Our world offers many different highly developed legal systems, we have over 2000 years of extensively recorded legal history to look at, and there are numerous philosophical traditions competing with the natural law theories that dominated medieval Europe. The challenge to our law schools is formidable. They must somehow produce lawyers who can understand and evaluate these various sources of ideas that might be borrowed for the improvement of our law.

1. Jurisprudence should be a required course.

Jurisprudence should be a required part of the law school curriculum. A course in normative jurisprudence (which emphasizes moral and political philosophy and asks what the law should be) offers many different theories of justice that can provide moral foundations for law. These moral foundations act as guidelines for lawmakers. They offer criteria that can be used in deciding which aspects of our law are unjust and need to be changed, and can also be used in deciding what shape new law should take.

Students in a jurisprudence course will be exposed to some philosophical approaches with which they were previously unfamiliar. They will also acquire some sympathy for approaches they had previously dismissed out of hand. If the professor is open minded and gives the students plenty of time for open debate, most students will come to realize that each
philosophical approach contributes some good insights but is not without defects. Students will eventually acknowledge that an Aristotelian natural law approach might be best for one legal issue, while a Rawlsian liberal approach could be appropriate for another issue and a utilitarian approach preferable for a third issue.

Whether the lawyer is involved in lawmaking or merely assisting clients, an important part of her work is advising people about ends and not just means. One of the great advantages of a jurisprudence course is that it forces students to think about ends, about ultimate goals. What should be regarded as the proper goals or purposes of our legal system? Good lives for our citizens? Happy lives for our citizens? Maximum individual liberty? Maximum economic efficiency? Only a jurisprudence course can deal in depth with such questions and thus produce lawyers who are equipped to evaluate our present legal systems and identify external ideas that can be borrowed from foreign legal systems or the legal past and contribute to the improvement of our law. (An external idea that would frustrate the proper purposes of our legal system will not improve our law and should not be borrowed.)

2. Comparative law should be a required course.

All law students should be required to take a course in comparative law. Such a course exposes students to the diverse ways in which foreign legal systems approach legal problems. The student soon senses that the American approach may not always be the best approach. The study of comparative law thus facilitates law reform by encouraging our students to take a critical attitude toward American law.

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84 See KRONMAN, supra note 81, at 15 (asserting that the ideal lawyer “offer[s] advice about ends”); id. at 53-56 (suggesting that the lawyer-statesman must deliberate about both means and ends and make judgments about the relative importance of competing ends).

85 I am not suggesting that a jurisprudence course will enable lawyers to perceive the truth about the proper purposes of law. I am merely arguing that a jurisprudence course will enable lawyers to make more sophisticated judgments about the proper purposes of law.

86 See George P. Fletcher, Comparative Law as a Subversive Discipline, 46 Am. J. Comp. L. 683, 694-95 (1998) (asserting that comparative law affords a unique opportunity “to generate critical, [and] subversive” reflection about American law); see also KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 21 (3d rev. ed. 1998) (pointing out that “[c]omparative law
Whenever the need for law reform is recognized, foreign legal systems are obvious sources of external ideas that might be borrowed in order to improve our own legal system. The study of comparative law will make students more aware of these foreign sources. It should also result in a better understanding of these sources.

An additional reason for requiring the study of comparative law is that foreign law will often be applied to the international transactions of American clients. And even in international transactions in which international law or American law is applied, a foreign party will tend to interpret such law through the lens of her own legal system. Studying comparative law will not make our law school graduates experts in foreign law, but it should help them to identify some of the issues on which foreign law is apt to be very different from American law.

Some experts in comparative law suggest that the subject is best taught in a separate course. Others assert that comparative law is best taught by being integrated into our courses on American law. We should do both.

We should not rely solely on a separate course, because one course is not sufficient to get students into the habit of viewing American law with a critical eye and looking for alternatives in

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87 Zweigert and Kötz note that the different legal systems of the world can offer a greater variety of solutions to social problems than could be imagined by a lawyer whose perspective is limited to his own legal system. See Zweigert & Kötz, supra note 86, at 15. European lawmakers are aware of this and routinely survey relevant foreign law before presenting bills to legislatures. See id. at 16–17; see also Rudolf B. Schlesinger et al., Comparative Law: Cases—Text—Materials 9–10 (5th ed. 1988). Although lawyers seeking to reform the law of a particular state in the United States can find alternative solutions in the laws of sister states, these solutions are unlikely to be as numerous and diverse as the solutions offered by the laws of foreign nations.


foreign law. Such a habit develops slowly and only with reinforcement in a number of courses. Ideally, every course in the curriculum should assist in this habituation. In each of our courses, the professor should take a comparative approach to at least a few selected issues, comparing American approaches with a variety of foreign approaches.

But we also need a separate required course in comparative law. Unfortunately, we cannot rely on most professors to voluntarily integrate international comparative method into their courses on American law. We can therefore conclude that comparative law should be integrated into other courses and also taught as a separate course. Similar conclusions seem appropriate for jurisprudence and legal history.

3. Legal history should be a required course.

Legal history can be a fruitful source of ideas that might be borrowed in order to improve our contemporary law. We have seen that the extensive borrowing of ancient Roman law was a major factor in the success of medieval efforts to construct new legal systems. Today, American lawmakers have plentiful opportunities to borrow legal rules, principles, or institutions from the legal past. Although our historical borrowing will not be as extensive as the medieval borrowing of Roman law, it can be beneficial.

The fact that some legal rule or other idea was once in use but is no longer in use does not mean that it would be inappropriate today. There may have been good reasons why Alabama or Austria discarded the idea in some past century, but those reasons may not be relevant in our contemporary society, and the idea may once again be useful.

The study of legal history will not only provide some ideas suitable for borrowing, it will also enable students to better understand the pathology of legal change. Not every change in the law is an improvement. Some efforts at law reform turned out to be detrimental to society. The reforming lawmakers may have overlooked some social circumstances that prevented the new law from achieving its intended purpose or goal. Or the new law may have achieved its intended purpose but frustrated other, more important, social goals that the lawmakers ignored or undervalued. The study of legal history can help us understand why some past law reform programs went wrong and
thus alert us to mistakes that should be avoided in the future. Similarly, the study of past law reform movements that proved successful can help us see what we must do if our own efforts at improving the law are to be beneficial.\(^{91}\)

We should conclude that legal history ought to be a required law school course. But what should the course cover? American legal history? English legal history? European legal history? Islamic legal history? Chinese legal history? Some combination of these subjects? It probably does not matter how we answer the question. An extended survey of the legal history of any society or culture is likely to serve the educational purposes of a legal history course. The content of such a course must largely depend on the qualifications and interests of the professor who teaches the course. If faculty resources permit, two or three professors could each teach a different legal history course, and each law student would be required to choose one of them.

C. A Proposal for Curricular Reform

A majority of American law schools now offer at least one course in jurisprudence, a majority offer at least one course in comparative law, and a majority offer at least one course in legal history. Of the 184 law schools that paid fees to the Association of American Law Schools in academic year 2000–2001, however, twenty-five schools did not offer any jurisprudence course, fifty-one schools did not offer any course in comparative law, and sixty-four schools did not offer legal history.\(^{92}\) Furthermore, only ninety schools (less than half) offered courses in all three areas.

The statistics are even worse with respect to the number of law schools requiring students to take these courses. Of the 181

\(^{91}\) Whether a particular change in the law of some society was an improvement (a benefit to that society) may be a controversial issue. A law student can best resolve the issue in her own mind by applying some jurisprudential notions of the kind of society a legal system should promote. Whether she is evaluating a segment of the legal past or evaluating some aspect of a contemporary foreign legal system, the student needs the kind of philosophical and prescriptive criteria that can be obtained from a course in jurisprudence. Law students should therefore study jurisprudence before taking courses in legal history or comparative law.

\(^{92}\) My statistics are based on information contained in THE AALS DIRECTORY OF LAW TEACHERS 2000–2001 (2000). For each subject, I consulted the List of Law Teachers by Subject (id. at 1133–90) and noted the number of schools represented.
American law schools approved by the American Bar Association as of 2000, only eight required jurisprudence, only one required comparative law, and only two required legal history.\footnote{93} No school required all three courses.

I suggested above that law students be required to take each of these courses. It will be objected that there is not enough room in the curriculum for required courses in jurisprudence, comparative law, and legal history, and that such courses are luxuries which, if offered, need not be required. I hope that this article has shown why these courses should be required and not merely elective. The following proposed curriculum indicates that there is sufficient room in the curriculum for required courses in jurisprudence, comparative law, and legal history. The law student would take fewer elective courses than at present, but could still take enough electives to obtain a well rounded legal education.

Figure 1. *Proposed Law School Curriculum*
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<tr>
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<th>Fall Semester</th>
<th>Hours</th>
<th>Spring Semester</th>
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<td>3</td>
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<td>Contracts</td>
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<td>Criminal Law</td>
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<td>Trusts &amp; Estates</td>
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<tr>
<td>Legal Accounting or Elective</td>
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<td>Income Tax</td>
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<tr>
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<td>Commercial Law</td>
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<td>Legal History</td>
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<td>Third Year</td>
<td>Comparative Law</td>
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<td>Evidence</td>
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<td>Elective or Clinical Course</td>
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94 Our entering law students are not as well grounded as medieval students in the trivium of grammar, logic, and rhetoric. The Legal Writing and Research course is therefore vitally important. It should cover legal reasoning, legal writing and oral advocacy (with an emphasis on rhetoric), legal research, and legal citation form.

95 Constitutional Law would be a one semester course, but it would be a four hour course, and constitutional limitations on criminal procedure would be covered in the Criminal Law course (which would deal with substantive, jurisprudential, and procedural aspects of criminal law).

96 Business Organizations would cover agency and partnership law as well as corporate law. It would also provide a brief introduction to securities regulation.

97 Legal Accounting would be a required course for law students who had no pre-law course in accounting. Practice in most areas of law often involves accounting problems. Law school graduates should at least know how to read a balance sheet and an income statement. Students who had a pre-law course in accounting could take an elective in place of Legal Accounting.

98 Conflict of Laws should have become a required course long ago. Many clients will be involved in interstate or international transactions, and their
Elective courses should include administrative law, admiralty, antitrust law, securities regulation, law and economics, payment systems, secured transactions, bankruptcy law, employment law, environmental law, family law, estate and gift tax, corporate tax, public international law, international business transactions, and trial advocacy. Each student would be able to take seven, eight, or nine of these sixteen elective courses. The number of electives would depend on whether the student takes Legal Accounting and whether he takes a clinical course.

CONCLUSION

The medieval revival of ancient Roman law led to a vast improvement in the legal systems of Western Europe. What had been rather primitive bodies of law were transformed into modern and comprehensive systems, enlightened in their moral foundations and sophisticated in their practical details. In large part, this transformation was due to the skill with which medieval lawyers made careful and critical studies of ideas borrowed from legal history, comparative law, and philosophy. This skill was achieved by means of the curricular structure and teaching methods of the medieval law schools.

If American lawyers are to make significant contributions to the improvement of our own legal systems, our legal education must be reformed. American law schools should devote more attention to the teaching of certain intellectual skills: reading texts carefully, thinking analytically, thinking critically, and arguing persuasively. This will require the retention of the case

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99 Commercial Law would provide an overview of the Uniform Commercial Code and cover important issues in sales, payment systems, and secured transactions. For a more intensive study of one or more of these areas, students could take elective courses.

100 Ideally, a student would fulfill the requirement by choosing one of a number of legal history courses. However, faculty resources may not be sufficient to provide more than one or two such courses.

101 Ideally, every student should be required to take one clinical course in the third year, in either the fall or spring semester. If faculty resources do not permit this, students who cannot take a clinical course would take an extra elective course.
method and the reinvigoration of socratic method. Furthermore, every law school curriculum should include jurisprudence, comparative law, and legal history as required courses. This will entail a more rigidly structured curriculum with a shorter menu of electives. These reforms could help American lawyers develop the same skills and attitudes that enabled the medieval lawyers to work their wondrous feats of making law better.