CHAPTER 1

Lawyers and the Civil Law Tradition

LATIN AMERICAN lawyers feel that they are the heirs of a grand tradition, Roman law. We study it from the first year of law school and are staunchly taught that the Romans who lived twenty centuries ago formulated our fundamental principles and concepts. But is this really the case?

The Rome that stirs our admiration is *classical Rome*, or Rome in the classical period. This era lasted roughly from the century before the birth of Christ until two centuries after it (100 B.C.–250 A.D.).[1] It was the period when Rome blossomed from a large village headed by a minor king into the capital of a world empire. The city was spectacularly transformed. Great public works were erected in stone and marble, the ruins of which we still admire today. During this period, the city of Rome had one million inhabitants and became an active commercial center where people, cultures, and products converged from all over the known world. It was also a city ravaged by epidemics and fires (Friedländer, 1947). This great capital of the ancient world, seen through the eyes of a modern-day tourist, would seem only a foul-smelling, medium-sized city. So how could it be that these ancient Romans could have framed the law for a continent that was not even known to exist at that time? How is it that we have seemingly not been able to add anything substantial to that law in twenty centuries?

Roman jurists of the classical period made an immense contribution to their society. They had the creativity and intelligence to adapt the law of their day to the enormous social changes resulting from the world's first wave of globalization. But it is not at all certain that today's idea of law is the same as that of ancient Rome, nor that our lawyers resemble such figures as Mucius Scaevola, Papinian, or Cicero in either their daily work or their social role.

The notion of classical Roman law as a set of logical, ordered principles and rules is in large part a modern myth. Moreover, the idea that the Roman jurists created a geometrically ordered system of law in the style of Euclid, as was commonly thought between the sixteenth and eighteenth centuries, has been discredited by historical research. This work will not enter into a discussion of the difference between the law of the Rome of Augustus and the mythic law of classical Rome. Instead, our theme concerns the Roman jurists, those who knew the law and worked with it. It is inevitable, however, that we tackle the question of what was considered law and how it was studied in each era, because that is crucial for understanding the knowledge and work of the jurists. Thus it is important to emphasize from this point forward that the expression *Roman law* actually stands for many very different realities in the more than twenty centuries of its history.

Jurists, Lawyers, and Orators

Who were the Roman jurists and lawyers of the classical period? How were they trained? In fact, two types of jurists had pivotal roles relating to the legal system, both of which correspond to today's notion of lawyers. The *advocati*, or *causadici*, aided others in public courts. The *jurisconsulti*, or *jurisprudenti*, advised judges, functionaries, litigants, and lawyers in legal matters. They answered inquiries about the content of the law and possible actions to take and also could draft lengthy documents. Neither type bore a specialized title or attended an institution charged with transmitting legal knowledge—that is, a law school such as those we know today.

A striking difference separated these two types of jurists: *jurisconsulti* (jurisconsults) were of distinguished social origin, had a deep knowledge of the law, and were at the same time *prudent*, meaning they dealt with the practical, general knowledge needed for conducting both public and private matters (Cicero: *De oratore* 3.133–35). The first jurisconsults held the highest religious positions (pontifex and pontifex maximus). In fact, the opinions that first began to shape the teachings that today we call law came from the pontifices.[2] One characteristic of the classical period, as opposed to the Archaic period, is that people of high social standing, with practical knowledge (or "prudence," in the proper sense of the term) and familiarity with the rituals and complexities of the law, began to issue opinions; and these opinions began to circulate in writing. These possessors of juridical knowledge were the only legitimate jurists of that time. They frequently held high political positions, and their status as jurists aided them in their election. Later, in the imperial period, jurists held even more exalted positions, including that of advisor to the emperor (Schulz, 1946; Bauman, 1983, 1985, 1989).

In contrast to the high-birth qualifications of the jurisconsults, it was easy to become a lawyer. According to Cicero, one could do it in only three days, if desired (Cicero, *Pro Murena*, 28–29). This is probably an exaggeration—Cicero made the statement in a polemic work—but note that advocates, or lawyers (*advocati*), did not need to know law; most had only the most rudimentary legal knowledge and needed to know just enough to be able to pose questions to the jurisconsults. Nor was there any professional body or public entity that examined them. Lawyers did not have high social standing or come from the best families. But occupational divisions in Rome were less marked than in our day. There was a certain continuity between the tasks of the jurisconsult and the lawyer; the former generally advised the latter (as well as the judges) and sometimes assumed some of the lawyer's roles, such as when a matter involved a friend or a prestigious person or case.

It is not easy to get to the bottom of what it meant to be a lawyer in classical Roman days. For example, we consider Cicero a lawyer, but he defined himself as neither jurisconsult nor advocate, but rather as an orator. Today much of his work could be qualified as a lawyer's arguments, but in Cicero's time, Roman law was under the influence of Greek thought, especially in rhetoric. This had the effect of bringing together rhetoric, in the Greek-classical sense (which today we would call argumentation theory; see Perelman and Olbrechts-Tyteca, 1958), and the law. Oration was a stratified occupation, with positions in the hierarchy for very distinguished orators, such as Cicero (106–43 B.C.) and Pliny the Younger (61 or 62–*c.* 113 A.D.), as well as for others of lower class.

Another aspect of Roman law that might be surprising to contemporary lawyers is its rejection of the idea of representation. Litigant parties had to be present at the trial and personally perform in them (Rasi, 1957). This is in stark contrast to today's idea of what it means to be a lawyer.

Undoubtedly, there was legal training in classical Rome, as what distinguished the jurisconsults was their knowledge of the law. In the republican period the training took the form of an apprenticeship. A youth would stay at a jurist's home and share his family life. He would accompany him to the court and hear the cases presented and the jurist's responses. At night they probably discussed the cases that had been presented that day. But formal training was beneath the *dignitas* of a jurist. "Schools" did arise in the imperial period, but we do not know what they were like. We do know that two rival schools of thought prevailed: the *Sabinian* and the *Proculian*. Undoubtedly scholars and students met and discussed texts and cases, but without a fixed locale. A teacher's house or public place could serve as a meeting place (Schulz, 1946). There was also a didactic literature, of which the greatest surviving example from the classical period is Gaius's *Institutes* (Villey, 1964).

No official recognition or title applied to jurists during the imperial period. Augustus granted the distinction of *jus respondendi ex auctoritate principi* to a small number of jurisconsults, the significance of which has been debated. It may have signified his approval, though it did not exclude those without the title from also giving advice. In any case, later emperors did not impart such distinctions and had no known connection to legal education. But there is no doubt that the schools referred to earlier, albeit informal, allowed the number of jurisconsults with important functions in the high bureaucracy to multiply. Jurisconsults reached their peak in the third century.

A highly valued form of knowledge in ancient society was rhetoric, or the art of argumentation and persuasion.[3] The art of rhetoric was developed considerably by the Greek philosophers, including Aristotle, and entered Rome with great force in the last century of the republic, justly called the Hellenistic period of Roman legal science because of its Greek influence (Schulz, 1946).[4] Rhetoric was a skill that was closely associated with law; it was used in pleading on behalf of one party in case of a conflict to be decided by a third party. The teaching of rhetoric in Rome was considered part of a young citizen's education. In fact, legal learning changed during the classical period as a result of the influence of rhetoric. Examples from the law were frequently used in rhetoric, thus allowing citizens to gain a basic legal education.

In *De oratore*, Cicero expressed the desire to establish law as an *ars*, or an ordered, methodical body of knowledge. Gaius's *Institutes* demonstrates that this sort of ordered reasoning had already developed by the second century, though that book hardly resembles a modern legal code or handbook. Roman law is more casuist, or case-centered, and Gaius's *Institutes* is more an orderly presentation of cases than of principles and rules contained in modern civil law books.

The underlying point here is that Roman jurisconsults, advocates, and orators were not the equivalent of lawyers today. They did not constitute a social group with a certified knowledge, nor did their occupation provide them with sufficient income to maintain a particular social level. There was no regulating body that concerned itself with supervising their work and activities, and they lacked an identity within their own collective imagination. In other words, law did not constitute a profession, nor did the elements for the formation of a profession exist.

In the postclassical period, law became a field of knowledge that went beyond general prudence. The opinions of jurisconsults approached a special prestige or *auctoritas* (social legitimacy), and they became the basis of legal knowledge. Law schools arose—in the physical sense that we know them today—in Rome, Constantinople, and Bayreuth. Legal teaching was still unformed, consisting mostly of discussions of the main jurisconsults'

opinions, especially Labeo and Papinian. It is generally recognized that a lack of creativity characterized Roman law in this period, which also coincided with Rome's decline. The empire divided in two, and the western part was lost with the fall of Rome in the fifth century.

It was in this period, in the sixth century, that Justinian, Emperor of the Eastern Roman Empire, or Byzantium, made a lasting mark on Roman law. He ordered the opinions of the jurisconsults from the classical period to be compiled into a coherent order. Interpolations, or short explicative texts, were added to facilitate the transitions between different opinions and to aid coherence. The resulting work was the *Digest*, the realization in a tangible volume of the *ars* that Cicero had proposed. Moreover, its importance in the later history of law is incalculable.

Justinian was not only a compiler. In the *Codex* and the *Novels* he gathered legislative acts, including some of his own, subsequent to the initial compilation of the *Digest*. The *Digest*, *Codex*, and *Novels* were accompanied by a didactic work fashioned after Gaius's obsolete version of the *Institutes*, called the *Institutes of Justinian*. These works changed the content of teaching; it no longer centered on the opinions of Labeo and Papinian but began referring to the *Digest* (Archi, 1979). The entire collection of works was known as the *Corpus Juris Civilis*. To a certain extent, it was the grand compilation of Roman legal knowledge, realized in the twilight hours of the ancient world.

Justinian also tried to reunify the empire and managed to control part of modern-day Italy, especially the area called the Exarchate of Ravenna. His other military and political exploits were less successful. The expansion of the Arabs, Scandinavians, and Slavs restricted navigation in the Mediterranean and made land communication in Europe insecure. Commerce and economic activity declined radically during the early Middle Ages. Roman law did not disappear, but it was applied only locally. After the German invasions, as each group preserved its own ethnic law, Roman law survived as the law of the Romanized peoples and the church (Koschaker, 1955). Some Germanic kings promulgated works of Roman law and applied them to their subjects. Alaric published *Breviarium Alaricianum* in the year 506. In Italy, Justinian's work continued to be applied in Ravenna, Rome, Meridional Italy, and Sicily, though it was not widely known. The understanding of law was rudimentary and was studied as an aspect of rhetoric (Koschaker, 1955: 106; Calasso, 1954). As economic life decayed, the interest in law studies decreased proportionally.

A great change occurred at the end of the eleventh century in Bologna, with the rediscovery of the *Corpus Juris Civilis*. In the ancient world, books had been mere reminders of opinions, thus the medieval reverence of the knowledge contained in books was new in the history of mankind. The most

important of all books was the Bible, or the revelation of the truth by God himself. Justinian's works, in particular the *Digest*, came to have a similar role in medieval thought. Law (or justice, as there is no clear difference in Latin between the two words) was believed to be wholly contained in this fundamental work. Law studies began to constitute a crucial part of higher learning. Since its inception in the twelfth century, the university has preserved this fundamentally book-based character. The *Corpus Juris Civilis* was the body of work that contained the true knowledge of law and shaped all legal studies. In contrast to the Anglo-American tradition of *common law*, in which law training was essentially practical, lawyers from the *civil law* tradition received university training in law, primarily through study of Justinian's works.

This characteristic of the legal profession has endured to our own day. Hence we turn our attention to the role of professors and their relations with lawyers when examining the subsequent history of the profession.

Professors and Lawyers

The *Digest* was not an easy work to understand in the twelfth century. First, because it contained consolidated teachings elaborated over centuries. Second, by the time the *Digest* was again at the center of legal studies, the social, economic, and political circumstances had changed so much that many matters referred to had altered greatly. The fact that it was in Latin and was read in Latin in late medieval times made for a very misleading text, as the significance of many words had changed over time. In relative terms, present-day scholars would actually have fewer difficulties reading the *Digest*, despite our even more remote distance in time from the original text. We have the benefit of studies about the Roman economy and society that those reading in the twelfth century did not. Nor do we look to the *Digest* for enforceable rules, as they did then.

These difficulties did not discourage medieval scholars. They believed that the great books contained necessary knowledge and accepted that such works were difficult and required arduous work to interpret. The Gospels and the works of Aristotle were not transparent either, especially if one searches in such books for guidance. A professor was a person who was familiar with these great works and could explain them to others, his students. This was the task of the university at the time of its birth (Calasso, 1954, Stelling-Michaud, 1955).

In the twelfth century, Bologna was the home of the first university to center largely on legal studies. Irnerius and later Ugo, Rogerio, and Azo, among other great instructors, read and explained the *Digest*. Gratian's *Decretum* and other canonical legal works also were read. The *Institutes*, an intro-

ductory text of lesser importance than the *Codex*, may have been read and taught by graduate students (*bachilleres*). Of course, before the invention of the printing press instructors could not simply send their students over to the university bookstore to buy books. They probably dictated the text, perhaps stopping after each paragraph for a more careful reading and commentary to aid in comprehension. This was the *lectio*, the origin of the Spanish word *lección* and the English word *lecture*; however, in no way should it be confused with today's classroom-style lecture. The importance of the text and the difficulty of getting copies of it created a tendency to memorize it, a habit that was criticized as early as the mid–thirteenth century by Odofredo (Stelling-Michaud, 1955: 75). The professors also wrote comments in the margins, and these texts became the commented versions that marked the era.

Reading texts generated difficulties, because one text might be contradicted by another that enjoyed the same degree of authority. This converted the subject into a *questio*—in which students argued pro and con—and the teacher's role was to make the *determinatio*, or appropriate interpretation, that would resolve the problem (Stelling-Michaud, 1955). At night, students would discuss cases in *disputationes* determined a week in advance by the professor. The structure was similar to that of the *questio*, but the teacher had a less central role (Cavanna, 1979: 109; Stelling-Michaud, 1955). When we read a *questio* (or a collection of them in a *summa*), we can imagine the atmosphere of the discussion in a medieval university. It is a very different literature from the handbooks and treatises commonly used today in the world of civil law, which do not reflect any discussion.

Who were the law students? Remember that Europe was largely rural and illiterate, with poor means of communication. Those who could read and write in Latin and were able to withdraw from economic activity long enough to dedicate themselves to the interpretation of arcane texts could not have been more than a very limited number. If we think of the enormous costs of moving from one place to another without organized transportation, renting a place to live, buying manuscripts, and paying the professors—we know that the students must have had considerable wealth at their disposal or must have relied on the institutional support of the church. They were frequently nobles, prebendaries, or sons of wealthy merchants (Stelling-Michaud, 1955). Their social status was such that they frequently traveled with a personal servant, and the richest traveled with a secretary.

What did the students who went through this training learn? In the first place, they became very familiar with the *Corpus Juris Civilis* and the fundamental texts of the law canon. They learned the great Roman jurists' language and approaches. In the second place, they received good training in making conceptual distinctions and delimitations, and in analyzing the relevance of arguments about specific interpretive cases or problems. Besides

teaching specific knowledge, the universities offered certification in the form of a degree. In a world of nascent bureaucratization, holding such certification was of the greatest importance—not only were those who possessed it accredited, but also those who did not possess it were discredited as ignorant.

In spite of the high cost of moving to and living in Bologna for five years or longer, more than a few students were attracted to the new legal studies. The number of students had already reached one thousand in the time of Azo (1150–1230) at the beginning of the thirteenth century, and fifteen hundred by midcentury (Stelling-Michaud, 1955: 39, 77). Students came from all over Europe and were grouped in "nations," essentially by linguistic affinity.

It comes as no surprise that the graduates who returned from Bologna had knowledge and skills that were highly appreciated at this moment when Europe was flourishing in economic and intellectual terms and political forces were in the process of rearrangement. The university as an institution had achieved great importance. In the politically polycentric world that was the Middle Ages, universities were protected by persons of power, who in turn sought reciprocal benefits. The Pope, the emperor, the kings, and the cities all began to grant privileges to universities, which in turn gained status as important institutions (Stelling-Michaud, 1955). Universities with legal studies flourished in all of Europe. The Bologna model multiplied, and Roman law became a truly European law (Koschaker, 1955; Cavanna, 1979; Calasso, 1954).

The Iberian Peninsula was especially fertile ground for new universities. The University of Salamanca began to function in the 1200s, and by the mid-1400s six universities were in operation in Castile and Aragon. By the late 1500s, some 15,000 university students resided in Castile alone. Note, however, that Spain boasted the highest education rate in all of Europe. This figure allows us to calculate that around 3,000 students were admitted each year, or more than 5 percent of the eighteen-year-old male population, according to Kagan's calculations (1974: 200). Approximately one-third of them studied law, and a smaller number actually graduated. Pelorson (1980: 105ss) estimates the number of graduates with bachelor's degrees in law to be about 500 per year from 1570 to 1610, which allows him to calculate that between 10,000 and 20,000 law graduates lived in Castile around 1610. The lower figure is the more probable because of the emigration of jurists to other regions and to the American colonies, though he does not count the graduates from Bologna, where Spanish students were always numerous.

It is important to observe that not all jurists actually became lawyers or were interested in practicing law, as other career possibilities existed. On the other hand, prior to the sixteenth century, legal studies were not required for the practice of law as a profession. For example, in the era's definitive

legislative work, *Siete Partidas* (*Partida* III, *Titulo* VI), a lawyer was described as "todo ome que fuere sabidor de derecho, o del fuero, o de la costumbre de la tierra," or, any man with legal knowledge; and it was up to the judges to decide who could act as lawyers and to keep a registry. Naturally, in court those lawyers with limited intellectual training could not possibly defeat those trained in the universities, who were familiar with the canonical law books and had superior reasoning capacity. Because of this difference, university law studies began to be demanded of lawyers in Spain around 1495 (Kagan, 1981: 63).

The number of lawyers grew rapidly. Kagan (1981: 65) estimates that there were more than a thousand lawyers in Castile in the sixteenth century, but Pelorson (1980) offers much higher numbers. Kagan's figure is based on the registers in the tribunals and consequently does not count judges, notaries, and other personnel with legal training. This does not imply that lawyers had a monopoly over the proceedings in the tribunals. There also existed *procuradores* and *solicitadores*, who generally lacked university law training. Each functioned in some capacity as lawyers, but the former were recognized by the courts and the latter were not. They were in charge of initiating the trials in the labyrinth of slow proceedings and of paying whomever had to be paid. Lawyers, who had superior status, intervened only in the decisive parts of the trial at the moments in which it was necessary to design a strategy or argue in public (Kagan, 1981).

Castilian society was notably litigious in the sixteenth century. Kagan (1981) and Pelorson (1980) have both documented the considerable increase of lawsuits in the various courts from the early 1500s through the mid-1600s. The royal tribunals had the distinction of being the highest court in the land, with sufficient authority to limit the jurisdictions of the lords and to rein in the power of the nobles. The period also corresponds to an era of material prosperity and intellectual production referred to as the *siglo de oro* (golden century). What today is seen as a clear link between prosperity and greater litigiousness was not a consideration at the time. Instead, lawyers were faulted for generating the lawsuits along with the lies and crimes associated with them (Quevedo y Villegas, 1951[1622]). In the mid-1600s royal power and material prosperity declined in Spain, and the number of law students, lawyers, and lawsuits also fell.

Litigation was not always the principal occupation of those trained in the law. During the Middle Ages, government officials were nobles whose everyday duties involved fighting wars and training for war. In contrast to our modern notion of "nobles," they bore scars on their faces and bodies and their clothes were covered in patches. As the modern state developed and bureaucracies were formed, the rulers were no longer men on horseback, but rather men at desks. They were pale, scrawny men with clothes

worn away at the elbow from leaning so much on the desks. Jurists were especially in demand to occupy these positions, as they were able to maneuver easily in that world of rules and written documents (Maravall, 1972). The demand for jurists for government tasks and for the highest judicial positions began weakly in the thirteenth century, but by the sixteenth century they were already a strong, consolidated presence.

If the jurists trained in the universities were socially and politically important, we can well imagine the status of the professors. They were unrivaled as the most learned, those who best knew the arcane texts. Note that the definition of their role did not demand that they produce new ideas or publish, simply that they know flawlessly the books of knowledge. Their preeminence was such that powerful figures solicited their opinions on important matters. Many of those consultations dealt with themes of great political interest and pertinent theoretical problems. Writings by the professors began to circulate as independent works, generally following the literary model of the *questio*, and ultimately became an important source of the law itself. The collection of writings based on Roman law became the European *jus commune* or common law—not to be confused with English common law, which is fundamentally law based on judges' decisions without reference to Roman law.

The importance given to professors is one of the characteristics of the civil law tradition (Merryman, 1985; Van Caenegem, 1987), but it seems to have reached its pinnacle in the 1400s and early 1500s at the final stage of the Middle Ages, or beginning of the modern era (Thieme, 1967; Wieacker, 1957: 112ss). To illustrate the extreme reverence of professors, one can point to the fact that Louis XII of France went to the University of Pavia to listen to a commentary on the *Digest* by Jason del Maino (Gilmore, 1963: 68); and Emperor Charles V sat on the uncomfortable benches of Salamanca to listen to Francisco de Vitoria (Torrubiano Ripoll, 1917[1557]).

The principal source of the *jus commune* were the collected opinions of the doctors of law, as the authors were called. Naturally, in this proliferation of divergent opinions and as the number of published writings multiplied, it often was difficult for readers to prioritize the works. The authors with the most prestige enjoyed the most authority, and sometimes political intervention worked to create a hierarchy of preferred authors' opinions—as Augustus legislated in Rome and the Catholic monarchy decreed in Spain.

The doctrinal construction of law, or interpretation of law through authors' opinions, was controversial. One famous dispute with enormous subsequent relevance arose in the fourteenth century regarding *mos italicus* versus *mos gallicus*—that is, the Italian scholastic method versus the French humanist method. The work of the glossators became more complex with the evolution of commentaries on commentaries. In Orleans and Montpellier, jurists

emerged who were interested in deducing principles and rules and applying them to cases (Stelling-Michaud, 1955: 74). The *mos italicus* school was continued by the Italian post-glossators, or commentators, of the fifteenth century (among them Bartolo de Sassoferrato). *Bartolistas*, as they were called, sprung up throughout Europe. In France the most important of these was Pierre Du Moulin. The *mos gallicus* school generated the creation of jurist-humanists, who were outraged by the corruption that Latin and the Latin texts had suffered in the medieval period. Their attacks not only were against Bartolo and the Bartolists but also included Justinian and especially his minister Tribonian, the editor of the *Digest*, whom they accused of corrupting the ancient texts out of lack of understanding. The central idea of the jurist-humanists was to return to or rebuild classical Roman law (Villey, 1968; Piano Mortari, 1980).

One of the new challenges confronting jurists and scholars of the sixteenth century was the "discovery" of America, particularly important in Spain. Were the "Indians" human beings? Would they have the right to keep their republics and their sovereignty? What right did the Spanish sovereigns have to make war against them? Would it be a just war? Could they be justly enslaved if they were defeated? The great jurists were called upon to express their opinions, and the quality of their discussion still amazes us today (Hanke, 1949). In this controversy we see a conflict between two viewpoints: the theories closest to the thought of Aristotle and Roman law as it was understood in the Middle Ages, in the work of Ginés de Sepúlveda (1490–1570; first published in 1951), and a much more individualistic and rationalist theory articulated by Francisco de Vitoria (on Vitoria's thoughts and his polemic with Sepúlveda, see Hanke, 1949). Sepúlveda wrote that Spain had the right to wage war on the barbarian tribes of America. If they were defeated they could be enslaved. In contrast, Vitoria supported the idea that Indians were people and their governments legitimate. Spain had the right to visit them, enter into commerce, and preach the true religion. If they did not recognize these rights, then war was justified, but they could not be enslaved. His theory, which anticipated modern international law, was called *jus gentium*, giving new meaning to the Roman expression for law applied to non-Roman citizens. Vitoria is one of the great names of the *Escolástica Española*, a powerful movement of Spanish theologians, political philosophers, and law scholars in the sixteenth century. His main works—short, written in elegant Latin, and published posthumously—were called *relecciones* (Vitoria, 1917[1557]). The structure and spirit of these works are fundamentally modern, similar to lectures today, yet the medieval *questio* is perceived in the way he treats the arguments.

Among the great jurist-humanists in the sixteenth century were Cujas, Budé, Bodin, and Althusius; and in the seventeenth century, Domat. Their

task was to put the civil laws (meaning the legal rules found in the *Digest*) in their natural order, or ordered in a way that conformed to a geometric model of reason. This task was continued by the likes of Grotius, Pufendorf, Heineccius, Thomasius, and Wolf of the *Escuela del Derecho Natural y de Gentes* (School of Natural Law and of Peoples). Its founder, Hugo Grotius, also wrote in Latin but in a style that appears geometric or deductive. In the preface to *De jure belli ac paces [The law of war and peace]*, he declares his debt to the scholars of the *Escolástica Española* (Grotius, 1724). Grotius and the natural law doctrines were incorporated into law schools in the eighteenth century.

Law teaching in Europe and Spanish America continued to be heavily based on Roman and canon law during the 1700s, but greater emphasis was given to Justinian's *Institutes*, which had acquired the content of a rationalist work thanks to the commentaries of Heineccius and later Vinnius. The eighteenth century also incorporated the study of national law as important innovation. Arnaud (1969) carefully studied the doctrinal sources of the French civil code and found it derives from such natural law authors as Samuel Pufendorf and Robert Joseph Pothier. The teaching based on codes was a way to consolidate natural and national law.

Given the preeminence of jurists in the society and politics of sixteenth-century Spain, it is not surprising that universities and legal studies were created in the American colonies quite early. This will be the theme of the next chapter. This book will compare the development of Latin American lawyers and legal education with their parallels in Latin Europe. If we formulate the hypothesis that the ideology of Latin American jurists followed that of their European counterparts, one also could ask just how "Roman" they really are at the beginning of the twenty-first century. Here we can give a tentative answer: the intellectual training based on the study of legal concepts and codes has little to do with that of the jurists and lawyers of ancient Rome or the thirteenth-century Bolognese doctors of law. The modern concept of law in Latin American countries approaches the natural law theories of Vitoria or Grotius but is far from those of the learned Castilian lawyers of the seventeenth century, whose training was always imbued with the *mos italicus* method.

The social position of present Latin American jurists and their use of law also differs from that of their ancient, medieval, and Golden Age Castilian ancestors. These ideas will be developed in the following chapters. This point is stressed in disagreement with the common vision of the history of law that presents the Roman concepts as traveling through the ages without appearing to undergo any modification (for example, Watson, 1977, 1993, 2000). Similarly, we disagree with the idea that different populations—such as medieval Germans and native Latin Americans—adopted or received Roman

law because they realized its technical-juridical superiority or because a stronger force imposed it on them (Levaggi, 1994). One cannot receive or transfer a law in the same way that one can receive the books where the legal rules are contained. Identical legal texts are likely to be understood and used in different ways under different circumstances. Castilian law and its jurists acquired a new meaning once they were transplanted to the Americas.

These affirmations are not incompatible with the existence of a civil law tradition (Merryman, 1985) or with the fact that Latin Americans share this heritage. Nor does it necessarily follow that today's law resembles Roman law, but rather that a certain continuity has existed in the training of jurists and in their place in society. In this sense, the roots of Latin American legal tradition lie more in the academically sophisticated Bologna of Irnerius (1050–1130) than in the Rome of Papinian (*c.* 140–212), because law today is studied at the universities, it is mostly a knowledge contained in books, and professors are important legal actors. Papinian's Rome, in contrast, had no universities or law schools, experience and one-to-one learning was paramount, and law was not a bookish knowledge. On the other hand, Roman law, which was practically reinvented in each era, has provided today's lawyers with a basic conceptual design and a system of beliefs that is not historically true but which has undeniable practical value. It can be called an ideology in the sense that it maintains a consistent vision with cognitive support and justifies social action.

The identity of Latin tradition becomes obvious when we look at other traditions, like that of English-speaking countries. Oxford, among the oldest universities in Europe, has taught Roman and canonical law throughout the ages. Yet in the common law tradition, lawyers did not receive university law training, and because of that professors and scholars had limited prestige in the legal system. But that tradition has been transformed. Lawyers in the United States have received university training since the late 1800s—although not in Roman law. In England the trend toward university legal education came about later, in the latter 1900s. The frequency with which Latin American lawyers, and those from the civil law tradition in general, are obtaining postgraduate degrees in the United States and England has produced a mixing of traditions, as noted by Merryman (1981). The frequency of lawyers from different traditions working together in international business and projects leads in the same convergent direction. Legal traditions that started from different premises are today blending together. That will be one theme of this study.