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The Medieval Idea of Law

**AS REPRESENTED BY
LUCAS DE PENNA**

**A Study in Fourteenth-Century
Legal Scholarship**

Walter Ullmann



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With an Introduction by
Harold Dexter Hazeltine



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W. U.

AUTHOR'S PREFACE

LAW is that expression of civilization which most closely approaches perfection. Nowhere is the spirit of an age better mirrored than in the theory of law. The spirit of the Middle Ages as revealed in theological, political, and social writings has frequently been made the subject of modern inquiries. Yet the medieval theory of law, which is one of the most significant symptoms of medieval civilization, has received but scanty consideration. This book, therefore, attempts to reconstruct the theory of law as it took shape in the mind of one of the most impressive and striking figures of medieval scholarship, whose work has, to all intents and purposes, been forgotten for several centuries. During the fourteenth and fifteenth centuries medieval legal science was in its heyday in the Italian universities, and for at least three centuries was destined to mould the outlook of generations of jurists, and often the law itself. The truly amazing neglect of medieval legal scholarship is indeed difficult to understand. Although our own science of the law was first created by the medieval Italian jurists, and although—if it were only on account of their ancestral character—the knowledge of their theories is bound to contribute to a better understanding of present-day problems, the modern scholar's neglect of his mental forefathers is singularly unjustifiable. Nevertheless, the history of the idea of law and of the evolution of legal thinking is part and parcel of the history of civilization. History of civilization is history of the human mind. The modern idea of law is essentially and substantially the offspring of the medieval idea of law.

The purpose of the present thesis is to reconstruct the main doctrines of the Neapolitan scholar, Lucas de Penna, whose fascinating personality and eminent juristic scholarship will emerge, it is hoped, in the course of the book. His was a mind which harmoniously combined law with philosophy. It is precisely this harmony which makes him so attractive and which enabled him to penetrate into the utmost profundities of the law. It is in this context that the strongly marked English influence emerges in a particularly interesting light and opens up new sidelights on the influence of medieval English philosophic thought. In more than one respect Aristotle and Cicero recede into the background in favour of John of Salisbury. The English philosopher found in the

Neapolitan doctor one of his most ardent and confident adherents, two centuries after he had written his *Policraticus*. John's biting criticisms of existing institutions were readily applied by his Neapolitan admirer to the changed and changing conditions of the mid-fourteenth century; and John's shrewd observations of the perversities, follies, and vices which made twelfth-century scholarship a mockery were eagerly snatched at by his Neapolitan alumnus: like John, he did not mince words in his fierce condemnations of the perversities, follies, and vices which had corroded legal scholarship at *his* time; from John he inherited his aversion to dialectics, in whose network he was never engulfed. It is no exaggeration to assert that, as far as the fundamental principles of social ethics go, Lucas's edifice was largely erected upon the foundations which John set forth in his *Policraticus*. More than that: in the sphere of legal scholarship Lucas's work marks the dawn of the humanistic epoch, and it may well be that it was under John's influence that the first humanistic commentary of law came to be written.

Scholarship owes a debt of gratitude to two Italian writers who have directed our attention to Lucas de Penna in recent years. In 1925 M. M. Wronowski published a lengthy essay entitled *Luca di Penna e sua opera*, giving a survey in very general terms of Lucas's doctrines, whilst the other contribution is written by Professor Francesco Calasso in the *Rivista di Storia del Diritto Italiano*, 1932; this essay is a purely methodological investigation. What has not been attempted is a thorough, systematic investigation of Lucas's theories. An investigation of this kind—which is naturally beyond the scope of the limited space of an essay—necessitates an outline of the legal and philosophic background upon which Lucas worked. In particular, the originality of his modes of legal thinking, together with the uncanny cleverness of his arguments—which resulted from his unparalleled command of the huge bodies of civil and canon law—and the nature of his incomparably rich mental equipment—which he owed to his profound study of the philosophic literature available at his time—merit an exposition for which the length of an essay must necessarily prove insufficient. Above all, the often astonishing grandiosity of his conceptions has entirely escaped notice. Many vitally important theses of Lucas de Penna, often hidden behind the curtain of unassuming phraseologies, have either not been recognized at all in their proper significance, or have been presented in a somewhat perfunctory way. To take only a few obvious instances. Lucas's truly progressive penological ideas, his conceptions of the function of the legislator and of the administrator

of the law, his notion of the omnipotence of the Ruler, his social and political conceptions, particularly his ideas of civil liberty and its protection, his thesis of the relationship between secular and ecclesiastical authority in general, and of the relationship between secular and ecclesiastical judge in particular, his criterion, for the first time employed in a fruitful and consistent way, for distinguishing between the temporal and the spiritual—and many other essential theses surely deserve a profounder treatment and investigation than that which they have received so far. It is the comprehensiveness, the logical and material consistency of his doctrines which warrant an examination for which an essay cannot provide sufficient space. In view of Lucas's unusual, not to say unorthodox, argumentation and way of reasoning, which resulted in the often lengthy discussion of apparently unessential topics, it is a very difficult, if not impossible, task to present and reconstruct his theories faithfully within the limits of an essay. But apart from these deficiencies from which the two above named essays suffer, their treatment of the biographical and bibliographical material is in many points inadequate. No mention has been made of Lucas's remarkable influence on jurists of his own time. Nor apparently has it been observed that the high esteem and reputation which he enjoyed in later times spread far beyond the frontiers of his own land, and that sixteenth-century secular and canonistic scholarship held him in great esteem.

The scope of the present work is determined by the consideration that, in a wider sense, the idea of law also embraces its political manifestation; and, in view of the vast output of Lucas, the range is limited to the exposition of the fundamentals of his theory. However much his views resemble modern ideas, and however tempting it is to present his theories as modern rather than medieval, I have taken due care not to yield to this temptation. The present investigation is exclusively historical, and the modernization of medieval ideas would have amounted to a falsification and distortion of them: in all likelihood Lucas himself would have been most surprised to see his theories unrecognizably attired in a modern garb.

Two points deserve special mention. In the first place, with regard to the question of Latin quotations, I have been in a dilemma similar to that of the late C. N. S. Woolf when he wrote his *Bartolus of Sassoferrato* (1913). For several reasons the transcription of the Latin text seemed to me imperative. The comparative inaccessibility of fourteenth-century writings renders it extremely difficult to check the statements made in the course of the book. I believed that the free quotation of the original text might be partial compensa-

tion for the difficulty of obtaining access to the sources. In some places quotation of the original Latin appeared to me advisable, in order to establish my points. A mere translation would have destroyed the liveliness, the incisiveness, and the individual flavour of Lucas's statements. "What men say is not the only important thing; often it is equally important to know, how they have said it", is a very profound dictum of Woolf (p. xi). It is true that Lucas's Latin suffers from typical medieval corruptions, but it is suffused with an unmistakable personal note. In more than one respect his Latin and his style are that of the humanists of the sixteenth century. Whenever possible, I have transcribed the quotations in the footnotes, which thereby have become very numerous and lengthy.

This brings me to the second point. The copiousness of the footnotes is due not only to the quotations from Lucas's commentaries, but also to those from the writings of his contemporaries. For I have tried to set Lucas's ideas against the background of the scholarship of his time, so that we may be in a better position to evaluate his achievements, his deficiencies, and, above all, his independent and detached mind. Our interest is evoked not so much by the man Lucas de Penna, however attractive a figure he may be, as by the ideas which the jurist and scholar Lucas de Penna propounded. For this reason I have always attempted to link up his ideas with those of preceding and contemporary scholarship. My intention was to present a rounded whole of fourteenth-century legal scholarship, Lucas de Penna being the central figure. Some of the prejudices which modernism entertains against medievalism, especially the prejudice against medieval modes of thinking, may be shattered by exposing Lucas's independence of thought. But if, upon all points of doctrine, I had tried to draw comparisons between Lucas and his contemporaries, the book would have grown to an unwieldy size. As a general rule I have therefore selected only points of major importance which, in my opinion, justified such a comparison. But in certain points of minor importance and yet of some interest I have, nevertheless, given the views of his contemporaries in the footnotes. It would be more than presumptuous, however, to claim that justice has been done to all medieval scholars, whose works, set forth in tomes covered with dust and cobwebs, contain sufficient wealth of legal and political material to make them worthy of more systematic and extensive research. This treatise marks a modest beginning and suffers from all those defects which are characteristic of a work primarily concerned with the exploration of untrodden ground.

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INTRODUCTION

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Laws of England in the University of Cambridge*

THE LEGAL AND POLITICAL IDEAS OF THE POST- GLOSSATORS

IN this treatise on the medieval idea of law Dr. Ullmann has made a notable contribution to the history of legal and political thought. One of the most valuable features of his book is the comprehensive and lucid exposition of the ideas of Lucas de Penna, the Neapolitan Post-Glossator of the fourteenth century who has long remained for the most part merely a name, nearly forgotten by modern scholars. In the fifteenth century, as Dr. Ullmann has shown us, Lucas's thought had exerted a striking influence on the ideas of Paris de Puteo and other legal scholars in the Sicilian Kingdom, while in the sixteenth century his legal and political ideas had found marked recognition in both Italy and France, where he was ranked as an equal of Bartolus, Baldus, Castrensis, Salicetus, and other eminent Post-Glossators of the fourteenth century. Since the sixteenth century, however, Lucas de Penna's former prestige has suffered from the failure of modern scholars to study his writings. It is true, as we shall see presently, that Savigny was familiar with Lucas's writings, that Gierke dealt briefly with his theory of the corporation, and that Professor Calasso has written a valuable article entitled 'Studi sul commento ai Tres Libri di Luca da Penna' (1932). But no scholar other than Dr. Ullmann has taken the pains to discover, analyze, and synthesize the social, legal, and political ideas embodied in Lucas de Penna's most important work, his Commentary on the *Tres Libri*—the tenth, eleventh, and twelfth books of Justinian's *Codex*.

Although, largely owing to past neglect, the place of this Neapolitan legist in the history of thought has been overshadowed by the fame of Cynus, Bartolus, Baldus, and certain other Post-Glossators, it is a matter of no little significance to observe that Savigny, the great Romanist of the first half of the nineteenth century, singled out Lucas de Penna from all the Post-Glossators for special praise. While in general severely critical of the methods and attainments of the Post-Glossators, Savigny remarked in his *Geschichte des Römischen Rechts in Mittelalter* that the one work which least displays the faults of the time is this comprehensive and detailed Commentary of Lucas de Penna on the *Tres Libri*. Lucas de Penna is important, Savigny said, because of this work ; and it is a work, he added in a vein of sarcasm directed at the dialectical method of the professorial Post-Glossators, written by a legal scholar who had never taught in a school. Lucas de Penna, declared Savigny, belongs at one and the

same time among the least-known and among the most noteworthy of all the legal scholars of the fourteenth century.¹

In choosing Lucas de Penna as the representative of Post-Glossatorial thought on the nature of law and government, Dr. Ullmann has done much, therefore, to redeem the neglect of past generations of scholars. Although he has devoted special attention to Lucas de Penna, he has not neglected the other Post-Glossators of the fourteenth century: far from it. For several years Dr. Ullmann has made the Post-Glossators the principal object of his historical and juridical studies, as his essays entitled 'Bartolus on Customary Law',² 'Baldus's Conception of Law',³ and some other essays⁴ bear witness. His present work is a study of the legal and political ideas of the Post-Glossatorial school of legists as represented by Lucas de Penna. While making this Neapolitan jurist the central figure in his picture, he has nevertheless, throughout his book, compared Lucas's ideas with those of the other Post-Glossators, such as Bellapertica, Cynus, Bartolus, and Baldus. In thus bringing the whole of the Post-Glossatorial school within the compass of his study, Dr. Ullmann has focused attention upon a juristic movement of the highest importance in the history of Western thought respecting law, justice, and government. The ideas of this fourteenth-century group of legists represented late medieval as opposed to ancient developments in law and politics. It was these medieval ideas of the Post-Glossators which left an indelible imprint on the structure of legal and political thought in the fifteenth and sixteenth centuries at the very time when the humanist civilians of the Renaissance were demanding the abandonment of medievalism and a return to the pure Roman Law of the classical jurists.

I

A conception of the true significance of the Post-Glossatorial school of legists in the history of medieval legal and political ideas can be gained only through a knowledge of the state of Romanic legal studies in the thirteenth century. It may be recalled, therefore, that the school of the civilian Post-Glossators, who are known also as the Commentators, had its beginning in the second half of the thirteenth century at a time when Accursius, almost the last and certainly the greatest of the civilian Glossators, was still in his ascendancy. The rise of the school of civilians who glossed the text of Justinian's codification had formed a part of the medieval revival

¹ See Savigny, *Geschichte des Römischen Rechts im Mittelalter*, vol. vi (ed. 2, 1850), pp. 22, 199, 203. Savigny mentions, in addition to the Commentary on the *Tres Libri*, three other works attributed to Lucas de Penna.

² (1940) 52 *Juridical Review*, pp. 265-83.

³ (1942) 58 *Law Quarterly Review*, pp. 386-99.

⁴ (1939) 17 *Revue d'Histoire du Droit*, pp. 34-73.

of Latin learning, the so-called 'Lesser Renaissance', which culminated in Dante. The school of the Bolognese Glossators, founded by Irnerius in the last years of the eleventh and the first years of the twelfth century, and later represented by such eminent civilians as Bulgarus, Martinus, Bassianus, and Azo, had been inspired by a double purpose: to discover the exact meaning of the Justinianean texts and to introduce into medieval practice the pure Roman Law contained in those texts. During the progress of the work of the school, however, this original policy was largely displaced by the growth of a vast Glossatorial literature in which the sources of the pure Roman Law of Justinian were increasingly adapted to the current practice of the courts. The Glossators, moreover, gradually included in their writings many medieval elements drawn from the legal development of the centuries that had passed since the time of Justinian. In the wealth of its details respecting Justinianean and medieval law, and even more in the variety of the juristic opinions which it embodied, this accumulated Glossatorial learning of a century and a half became confusing not only to practitioners and judges, but also to teachers and students. What was needed, therefore, was a comprehensive and orderly collection of the glosses in which the whole mass should be clarified by a master's hand. The writing of such a work was the great achievement of Accursius. His Gloss, known as the *Accursiana*, which supplanted in the courts and in the schools alike all the other glosses, was held by the courts to be the law itself: this dominance of the *Accursiana* was expressed by the saying '*Quidquid non agnoscit glossa nec agnoscit curia*'. The *Accursiana* was, in fact, proof that the Glossatorial school, having accomplished its work, was already in process of decline; and it was a clear indication, moreover, that the pure Roman Law had been supplanted by a medieval civil law, which, although based on the Justinianean texts, embodied also other elements derived from medieval legal development.¹

The rise of the school of Post-Glossators, or Commentators, represented a strong reaction against the authority of the *Accursiana* in the practice and the teaching of law. Originating in France, where during the twelfth and the first half of the thirteenth centuries the exegetical method of the Italian Glossators had been adopted by a certain number of civilians and canonists, the Post-Glossatorial school was founded in the second half of the thirteenth century by

¹ For short historical accounts of the Bolognese school of civilian Glossators, accompanied by bibliographies, see Vinogradoff, *Roman Law in Medieval Europe* (ed. 2, de Zulueta, 1929), chap. ii: 'The Revival of Jurisprudence', and my 'Roman and Canon Law in the Middle Ages' (*Cambridge Medieval History*, vol. v, 1926, pp. 697-764, at pp. 729-38) and 'Glossators' (*Encyclopaedia of the Social Sciences*, vol. vi, 1931, pp. 679-82). Special attention may be drawn to *Studies in the Glossators of the Roman Law: Newly Discovered Writings of the Twelfth Century* (1938), edited and explained by the late Hermann Kantorowicz with the collaboration of Professor W. W. Buckland.

Jacques de Revigny (Jacobus de Ravanis), philosopher and theologian as well as legist, professor at Toulouse and later at Orléans. Jacobus de Ravanis, who was born between 1210 and 1215 and died about 1296, applied to the law the method which St. Thomas Aquinas had used in theology, the dialectics of scholasticism; and he was followed by many disciples, notably Pierre de Belleperche (Petrus de Bellapertica), likewise professor at Toulouse and Orléans, who died in 1308.¹

When the great reputation of these French jurists had awakened an interest among the civilians of Italy, Cynus de Pistoia (c. 1270-c. 1337) came to France to study the new method of legal dialectics as taught by Bellapertica: it was Cynus who introduced this method into Italian legal studies. Bartolus of Sassoferrato (1314-57), unquestionably the greatest and most influential of the Italian Post-Glossators, studied under Cynus; Baldus de Ubaldis (1319 or 1327-1400), the pupil of Bartolus, was the most distinguished of his successors. By borrowing the developed scholastic method of deduction from the school of French legists, notably Petrus de Bellapertica, the Italian Post-Glossators, such as Cynus, Bartolus, Baldus, Albericus de Rosate, and Lucas de Penna, were able, therefore, to go beyond the Accursian Gloss and to combine the Roman legal texts with the sources of medieval law as practised in the courts, thus initiating the *usus modernus Pandectarum* as the common law of Italy. In the hands of Cynus and his successors the scholastic method co-ordinated the diverse legal materials, partly Roman and partly non-Roman, under the rule of *ratio iuris*.²

The new juristic movement inaugurated by the Post-Glossators, or Commentators, meant a demand for greater independence in legal thought and practice; it was a movement which also called for a new synthesis in order that the law might be developed in harmony with medieval conditions of life. Although they followed a method essentially different from that of their predecessors, the Glossators, the Commentators nevertheless derived much from the accumulated learning to be found not only in the Gloss of Accursius, but also in the writings of the other great Glossators, such as Bulgarus, Martinus, Azo, and Placentinus; and, moreover, the Commentators took fully into account the manifold legal growths of the Middle Ages, such as the Canon Law as expounded by the canonists, Germanic and feudal customs, and imperial and town laws. Following the Glossators, the Commentators based their work on the Justinianean law; they gave, however, a far greater prominence than the Glossators had given to the medieval sources of law. The Commentators aimed at the production of methodical expositions, with divisions and subdivisions: their work was essentially con-

¹ See Savigny, *op. cit.*, vol. v (ed. 2, 1850), pp. 603-14, on Jacobus de Ravanis, and vol. vi (ed. 2, 1850), pp. 26-33, on Petrus de Bellapertica.

² See Professor de Zulueta's article on 'Cino da Pistoia' (*Encyclopaedia of the Social Sciences*, vol. iii, 1930, pp. 470-71).

structive, as opposed to the Glossators' main labour of interpretation. The great achievement of the Commentators, the Post-Glossators, was in fact the transformation of the Roman Law into a medieval Italian law. They created a literature on Romano-Italian law which not only possessed authority in Italy itself, but played a rôle of great importance in the legal and political life of Europe as a whole. Thus it was the living Romano-Italian law of the Commentators, and not the pure Roman Law of Justinian, which crossed the Alps into Germany in the age of the Reception.¹

During the progress of their work of transforming the Roman Law of Justinian into a medieval civil law both the Glossators and the Post-Glossators developed many legal and political theories. Although these theories were in general founded on the *Corpus Iuris Civilis*, they embodied also ideas drawn from Canon Law, Germanic and feudal customary law, and other medieval legal sources. Some of the principal theories of the Post-Glossators were a further elaboration of theories already developed by the civilian Glossators and the canonists before the close of the thirteenth century: included among such theories were those in regard to the nature of law, justice, and equity, the nature and authority of *ius divinum* and *ius naturale*, the nature of the corporation, the source of political authority, and the relations between the ecclesiastical and secular powers.²

This marked continuity in the development of legal and political theory may be illustrated by the history of the Romano-canonical theory of the corporation. To the glossatorial theory of the corporation as being the sum or aggregate of its individual members the canonists of the thirteenth century added an institutional element derived from the history of the Church. The canonists, moreover, advancing beyond the doctrine of the Glossators, invested the corporation with a personality of its own. It was this Romano-canonical theory of the corporation as *persona ficta*, the result of the combined studies of the Glossators and canonists during the twelfth and thir-

¹ On the school of the Post-Glossators, or Commentators, see Savigny, op. cit., vol. vi (ed. 2, 1850); Caillemer, 'L'enseignement du droit civil en France vers la fin du XIII^e siècle' (*Nouvelle revue historique de droit français et étranger*, 3rd ser., vol. iii, 1879, pp. 599-618); Flach, *Cujas, les glossateurs et les bartolistes*, 1883; Esmein, *Cours élémentaire d'histoire du droit français* (ed. 15, Génestal, 1925), pp. 723-35; Chénou, *Histoire générale du droit français*, 1926-29, vol. i, pp. 502-13, vol. ii, pp. 329-31; Woolf, *Bartolus of Sassoferrato: His Position in the History of Medieval Political Thought*, 1913. For brief historical accounts of the Post-Glossatorial school of legists, with bibliographies, see my 'Roman and Canon Law in the Middle Ages' (*Cambridge Medieval History*, vol. v, 1926, pp. 697-764, at pp. 738-41; bibliography, pp. 925-26) and 'Commentators' (*Encyclopaedia of the Social Sciences*, vol. iii, 1930, pp. 679-81).

² On the history of the legal and political theories of the civilian Glossators and the canonists down to the middle of the thirteenth century, see Carlyle, *History of Medieval Political Theory in the West*, vol. ii. On the theories of certain of the Post-Glossators, such as Cynus, Bartolus, and Baldus, and of certain of the later 'Bartolists', notably Bodin, see Carlyle, op. cit., vol. vi, *passim*.