2 Bartolus and Family in Law

> The greater surprise for us, in an age when so many things are acquired, consumed, and then disposed of, should not be how little emotion early moderns invested in their children, but rather how much they invested in their property.[1]

Inheritance of family property was the social and economic motor of late medieval Italy. People poured time and attention into arrangements for settlement of their estates. It was property that would serve to link the generations of a family over the years into a sort of transcendent entity. Property, however, is a legal concept, not just an economic fact, and it was necessary for the law, the *ius commune*, based on Roman and canon law and elaborated in the universities, to conceive of property in a manner that would facilitate the aspirations of families to achieve that transcendence.

2.1 Bartolus and *Familia*

In fact, the meaning of *familia* in civil law was a complicated matter, made worse by imprecision in language.[2] At its origins, *familia* referred to the permanent assets one held; and by extension, as those assets could include slaves, it came to mean the group of slaves subject to one master. The assets of one farm were also termed a *familia*, so one master could have several *familiae*. As a family house, the term came to refer to the people who lived there, free or slave. *Familia* was also a term denoting relationships, so it came to be extended to agnate and cognate relations, the former distinguished by the fact of traceable links of paternal power

[1] Nicholas Terpstra, "Real and Virtual Families: Forms and Dynamics of Fostering and Adoption in Bologna's Early Modern Hospitals," 147.

[2] For a discussion of issues regarding *familia* in Bartolus's time, see Kuehn, *Family and Gender in Renaissance Italy*, 28–52.

(*patria potestas*). In other terms, those in a household subject to one *potestas* were *familiae iure proprio*, while wider kin descending from a prior *potestas* were *familiae iure communi*.[3] *Familia* could also be seen in legal procedural terms as all those for whom a *pater* spoke in law, for whom he was liable.

In Rome *familia* did not originate in marriage but in civil liability. The family in Roman law was not a creation of marriage and descent only.[4] It arose in civil liability, which was made most apparent in cohabitation. The *lex Pronuntiatio* "stated that a single person had a *familia* and that a woman who managed her own business had a *familia* on her own, independent of that of her husband."[5] When the male head of household (*paterfamilias*) died, his *familia* ended, resulting in a number of new *familiae* around his children and wife. Whereas the *paterfamilias* had been the sole source of liability and legal actions, now each child in turn had to see to constituting and managing his or her own, although sons might also opt to maintain communal living arrangements and pool their resources, at least for a while.[6] Even the wife acquired her own *familia*, though she was its sole member as both its head and its termination.[7] Only men could perpetuate a link to future *familiae*.

The medieval canon law and academic jurisprudence came to conceive of family as an entity arising in the marital union of two people (becoming one flesh by the teaching of canon law and moral theology), though the husband would retain the position of sole administrator as *paterfamilias*.[8] Against this sense of family, then, there was some room to claim a continuance of household in the surviving spouse and a legitimacy resting on birth for heirs (not on cohabitation with the deceased). But there were conceptual limitations to confront before acceptance of such continuation could be achieved. Yan Thomas studied one thirteenth-century gloss that had great difficulty comprehending a fiction by which an incorporeal legal quality, here *proprietas* (ownership), could be said to continue in inheritance. Such continuation was said to occur between *paterfamilias* and *filiusfamilias*, but it could only be termed a fictive continuation (*quasi continuatio*) because incorporeal rights, unlike corporeal things, ceased to exist when the holder of them died or the situation they

[3] Carlos Amunátegui Perelló, "Problems Concerning *Familia* in Early Rome."
[4] Laurent Waelkens, *Amne Adverso: Roman Legal Heritage in European Culture*, 129, 248, 395.
[5] Laurent L. J. M. Waelkens, "Medieval Family and Marriage Law: From Actions of Status to Legal Doctrine," 108.
[6] Waelkens, *Amne Adverso*, 193–256.
[7] Waelkens, *Amne Adverso*, 195–96; "Medieval Family," 108.
[8] Waelkens, *Amne Adverso*, 199–200.

suited came to an end.[9] To that point there was as yet no allowance for throwing blanket terms like *familia* and *substantia* at the issue.

As Laurent Waelkens has noted, "intestacy had to do with the ending of a family and realisation of its assets; so when family was established by matrimony, it was no longer established by cohabitation."[10] The transmission of blood – the sharing of a lineage of blood over time, rather than transmission and sharing of liabilities – became a defining feature of family relationships. The *arbor consanguinitatis* could be conceived on that basis.[11] In parallel David Herlihy put forth the idea of households as commensurable units, compiled into medieval manorial surveys with known quantities of labor and rent due to the manorial lord and prerogatives in the communal agricultural cycle.[12] Continuation of blood, ownership, and productive residence had shifted legal debates. By the fourteenth century the time was ripe for a legal recasting of *familia*.

The crucial figure in adapting medieval senses of family, property ownership, and so much more, to the realities of life in Italian communes, was Bartolus of Sassoferrato (1313–57).[13] To Bartolus the civil law was a living device with myriad social implications. What Bartolus sought was a grasp of underlying premises – points of clarification and insight that went beyond and made sense of ambiguous rules.[14] Perhaps need of such insight was nowhere more pressing than with regard to inheritance and family. Family was, after all, "'more than family': it was the structural morpheme of society of which kindreds and other associations were mimetic extensions."[15]

Historians are well aware of the definition of family Bartolus offered: *familia accipitur in iure pro substantia*.[16] It was a definition that would resonate in subsequent jurisprudence.[17] Rarely, however, has anyone

[9] Incorporeal things, in addition to *proprietas*, were such things as servitudes, succession, guardianship, and usufruct. See Yan Thomas, "Les artifices de la verité en droit commun médiéval," 122.

[10] Waelkens, "Medieval Family," 124.

[11] These themes are addressed by Christiane Klapisch-Zuber, "The Genesis of the Family Tree"; Simon Teuscher, "Flesh and Blood in the Treatises on the Arbor Consanguinitatis (Thirteenth to Sixteenth Centuries)."

[12] David Herlihy, *Medieval Households*.

[13] Waelkens, *Amne Adverso*, 105, credits him with seeing Roman law as "a practical system for the administration of justice that could be mixed with local norms."

[14] See the essays of Kees Bezemer, "The Infrastructure of the Early *Ius Commune*: The Formation of *Regulae*, or Its Failure," and of James Gordley, "*Ius Quaerens Intellectum*: The Method of the Medieval Civilians."

[15] Marco Dotti, "Famiglie, istituzioni e comunità," 115, 122.

[16] Romano, *Famiglia, successioni e patrimonio*, 1; Julius Kirshner and Anthony Molho, "The Dowry Fund and the Marriage Market"; Manlio Bellomo, *Problemi di diritto familiare nell'età dei comuni: Beni paterni e "pars filii"*, 36–40.

[17] As Paolo di Castro, to D. 28.2.11, *Commentaria in Digestum infortiatum*, fol. 56ra: "Nam illud verbum 'familias' ponitur pro substantia." Also Jason de Mayno, to l. Suggestioni,

looked closely at the portion of his commentaries in which the definition occurs. The one exception, the legal historian Manlio Bellomo, was engaged in an important examination of the problems of ownership, inheritance, and penal liability between fathers and sons.[18]

Specifically, Bartolus was commenting on the *lex In suis*, in the Digest title *De liberis et posthumis* (D. 28.2.11). *In suis* was an interesting snippet from the Roman jurist Paulus that said:

> In one's own heirs there most evidently appears a continuation of ownership to carry forward, such that it seems there were no inheritance, as if these [heirs] were owners who even during the father's life are considered owners in some way [quodammodo domini].

For that reason, after the father's death, sons did not seem to take possession of an inheritance but rather simply to obtain free management of the property, of which they had been a sort of owner already.[19] Paulus here postulated only that some vague legal capacity, a sort of *dominium*, was shared between father and son that could account for the immediate emergence of the *filiusfamilias* as heir to the *paterfamilias* over the same property (or an appropriate share of it). In inheritance there was acquisition not of possession, which in a sense the son as heir already had, but of legal managerial control. Paulus's attention was on the father–son relationship, not on *familia*.

It was in this seamless transition from father to sons that Bartolus found a key to understanding family and inheritance, as ownership persisted in the sons as heirs and there was thus no new inheritance.[20] He continued:

C. De verborum significatione, *In secundam codicis partem commentaria*, fols. 160vb–161ra.

[18] Bellomo, *Problemi*, 36–40. He also mentions Bartolus's introductory remarks calling attention to D. 28.2.11, but in a different context (31).

[19] The classical edition of the *Corpus iuris civilis*, ed. T. H. Mommsen, W. Kroll, P. Krueger, and R. Schoell, 3 vols.

[20] Bartolus to D. 28.2.11, *Opera omnia*, 10 vols. (Venice, 1615), vol. 3, fol. 90va: "In suos heredes dicitur continuare dominium, non nova hereditas obvenire, licet possit exhaeredari. Et sciatis quod audivi bis istum librum sine alia immistione, et nunquid audivi istam legem et Ac<cursius> Doc<tores> et scrib<entes> siccopede eam transeunt, sed ut mihi videtur non posset iste titulus stare sine ista lege. . . . Primum dictum est quod in suos heredes dicitur continuari dominium, non nova hereditas obvenire. . . . Secundum dictum in quo probatur primum est quod filii et caeteri sui, vivo patre dicuntur quodammodo domini, cum ergo efficiantur heredes, non possunt habere dominium novum, cum ipsi ante haberent. Tertium dictum probat illud quod dictum est supra hoc modo: Familia accipitur in iure pro substantia, l. nam quod ' fin. infra ad Treb<ellianum> [D. 36.1.14–15,8] et l. pronuntiatio de ver<borum> sig<nificatione> [D. 50.16.195]. Sed in usu loquendi et etiam in iure dicitur paterfamilias et filiusfamilias. Est ergo pater istius substantiae dominus, et filius istius substantiae dominus, et sic substantia aliquid tribuit ut<ri>que aequaliter, sed per hoc nomen pater et filius discernitur ut genitor a genito. Quartum dictum est quod ex predictis sequitur verum esse dictum quod nova

"and you should know that I heard this book [taught] twice without any comparison [with others], and never did I hear this law, and Accursius, other doctors, and scribes consistently pass over it, but it seems to me that this title [De liberis et posthumis] cannot stand without this law." The sharing of assets behind the pretended singular title of the *pater* had perhaps been so presumed that no one, by Bartolus's testimony, had bothered to remark on it.

The first two of the six *dicta* he found in Paulus's text simply reinforced the immediate and direct transmission of title to sons who had already been owners "of a sort." So there could be no new ownership by inheritance. It was the third *dictum* that contained Bartolus's singular insight:

> The third dictum proves what is said above in this manner: family is taken in law for substance. . . . But in common speech and also in law there is the father of the family and [there is] the son. Therefore the father is owner of this substance and the son is owner of this substance, and so substance concedes something to both equally, but by this term father is distinguished from son as sire from offspring.

The substance that was family continued, making possible the continuity, persistence, and overlap between father and sons (legitimate, it should be stressed). They shared it. This in turn led to the fourth *dictum*, that there was not a new inheritance but provision of direct management by the son(s), which was not the case while the father was alive. It also fed into the fifth *dictum* that filial inheritance was direct on intestacy, even though, in the absence of a testament, the son was not expressly nominated as heir (instituted). Bartolus was comfortable with the legal fiction that extended continuity of *proprietas* from father to son, unlike Yan Thomas's thirteenth-century glossator.

Bartolus had to dedicate concentrated effort to explaining the sixth *dictum*, how it was possible to disinherit a son, as disinheritance "runs counter to that entire matter in law." There was no possibility of denying the existence of disinheritance in the law, so reconciliation of willed

> hereditas non dicitur obvenisse filio sed magis administratio libera quam ante non habebat. Quintum dictum est ut ponat illationem ex predictis, quod licet filii non sint instituti, tamen ab intestato domini sunt ex continuatione dominii. Sexto respondet cuidam obiectioni hoc modo. Si filius est dominus vivo patre ergo pater non potest eum exheredare, et sic contra totam istam materiam. Ad hoc respondet, non est mirandum si patri licet eum exheredare et privare bonis: quia eum licebat etiam occidere h.d. Opp. quod duo non possunt esse domini in solidum l. si ut certo ' si duobus vehiculum supra commo. Sol. dicitur filius dominus improprie vivo patre, ut patet ex tex. qui dicit quodammodo. Et hoc est quod dicit glo. quod hoc dominium filii consistit in nudo et puro intellectu, q.d. magis est in imaginatione quadam quam in veritate. . . . Quaero, que est ratio, quod preteritio materna habetur pro exheredatione? Respondeo: quia cum dominium a persona matris non continetur in filium, cum non sit suus, non est necesse quod exheredet filium, id est extra dominium ponat, sed si eum pretereat, facit contra officium pietatis, ideo datur querela."

disinheritance of ownership, when it otherwise continued so immediately, had to be worked out.

The conceptual difficulty behind this substantial tie of father and son lay in the legal fact that

> two cannot be owners entirely [of the same property]. . . . The solution is the son is said to be owner in an improper manner while the father lives, as it appears in the text, which says "of a sort." And this is what the gloss says, that this ownership of the son consists in a plain and pure conception, which says it is in a type of imagination rather than in truth. The gloss has a similar [finding] about husband and wife, because although the husband is said to be owner, yet the wife is owner [of her property]. . . . But this is not a true equivalent, because in the wife ownership in a thing is said to transfer [to her husband], in the son it is said to be continued, as here.

Bartolus thus posed in close contrast the central relationships in a family – the generational link to children and the marital link to spouses. And he made clear that the sharing of ownership was different in each. It did not apply to the property a wife brought to a marriage, as it did in the patrimony father and sons shared. Along those lines Bartolus continued to draw the contrast between paternal and maternal testaments with regard to the omission of a son from its terms. The father's ties with his son were so close that he could not disinherit his son by a simple omission. He had to expressly, by name and for cause, disinherit. Mere omission of a son from a will meant the son could easily contest the paternal testament and have it judicially voided. With the mother, in contrast, "because ownership is not continued from the person of the mother to the son, as he is not hers, it is not necessary that she disinherit the son, that is place him beyond ownership; but if she should omit him, she acts against the duties of kinship, and so he is given a right to dispute her will."

With the mother too there was a sharing relationship, and though the son was not hers in the way he was his father's child, their relationship deserved legal acknowledgment even to end it, and should not be left simply in oblivion. A son was always his father's, even after emancipation from *patria potestas*, whereas his legal (and possibly residential) tie to his mother ended with the end of the marriage.

Disinheritance caused Bartolus some conceptual problems. As a legal device it was, in fact, resorted to rarely and was only allowed for causes such as the son becoming a heretic or, worse, attempting to kill his father.[21] The son had a firm guarantee in law, moreover, of realizing at least a fractional legitimate portion (*legitima portio*) from the patrimony on

[21] Cf. Julius Kirshner, "Baldus de Ubaldis on Disinheritance: Contexts, Controversies, *Consilia*," *Ius Commune: Zeitschrift für Europäische Rechtsgeschichte*.

which he "shared" ownership of *substantia* with his father. And that portion supposedly passed to him immediately, without a formal acceptance (*aditio*) of the estate, although such a formality might be well advised. What Bartolus essentially found behind these guarantees was *substantia*. Whatever all that indistinct term encompassed, it centered on the legal father–son relationship in all its dimensions of sharing.

By effectively, almost literally reifying the family as *substantia*, Bartolus "sacralized" it as an enduring institutional composite of property, as a corporate entity, analogous to the church in all its institutional expressions, and to communes and guilds and other associations.[22] In calling attention to the automatic and immediate passage of *substantia* from father to son(s) as *quodammodo domini*, Bartolus was locking into a sense of family as a quasi-institutional, generational continuity of shared resources. That was the sense of family that would underwrite the later widespread use of fideicommissary entails by wealthy and powerful lineages throughout Italy and beyond.[23] That in turn was based on a social and, thanks to Bartolus, legal sense of family as a set of persons sharing each other's lives.[24]

It is worth noting that the son's inheritance from his father, while seamless, was not without actual problems, attested to in the legal archives of Italy's cities. But it is the conceptual issues with which Bartolus wrestled that require elucidation. The conceptual problem in law lay not only in the fact that a continuation of ownership (*dominium*) in the son, and the implication that father and son both had ownership of the *haereditas*, flew in the face of the legal maxim that individualized ownership: *duo non possunt esse domini in solidum*. It also raised problems in that the *pater* held his *filius* in his *potestas* as long as he lived (barring emancipation), and while *in potestate* the son lacked the capacity to own or do most anything in law.[25] De facto sharing of assets confronted de iure concentration of ownership in a single pair of hands. Here was the great paradox about *familia* in law. The sharing of all the various elements of its *substantia* by all its members was obscured behind the singularity of

[22] Jens Beckert, *Inherited Wealth*, 117, says that entails sacralized feudal noble families, alongside the church, as property owners.

[23] Rather than rehearse a vast and growing body of work in this area, I direct the reader to the following recent studies as starting points: Stefano Calonaci, *Dietro lo scudo incantato: I fedecommessi di famiglia e il trionfo della borghesia fiorentina (1400 ca.–1750)*; Maura Piccialuti, *L'immortalità dei beni: Fedecommessi e primogeniture a Roma nei secoli xvii e xviii*; Anna Bellavitis, *Familles, genre, transmission à Venise au xvi^e siècle*.

[24] The idea of sharing in each other is at the core of Marshall Sahlins's definition of kinship in *What Kinship Is and Is Not*.

[25] Cf. esp. Bellomo, *Problemi*, 4–7, 9–14. On property law in general the indispensable works are those of Paolo Grossi, *Le situazioni reali nell'esperienza giuridica medievale* and *Il dominio e le cose*. On emancipation, see Kuehn, *Emancipation in Late Medieval Florence*.

ownership and control by the *paterfamilias*. *Substantia* was a term suited to encompassing that paradox. There were inevitable distinctions among members of a household, otherwise sharing that very substance that was the essence of *familia*. *Substantia* held people together, though not necessarily strongly; it was malleable and even perishable. One could gain a sense of one's separate self from the situation of sharing with others, though it was a self limited by the demands of others.[26] *Familia* in Bartolus's terms did not ascend to the level of a corporation, with *pater* in the role of CEO, in the manner of the abbot of a monastery.

Bartolus opened a new way to theorizing about family by recognizing, as his teachers twice had not (so he said), the utter centrality of the text of *In suis* to the entire issue of inheritance and children.[27] Bartolus managed to conflate father and son into one substance – which was the essence of family. He confronted historical changes in the law of paternal prerogatives and conceded that the conflation of generations, while having real effects in the law of inheritance, rested on a fiction – *imaginatio*. The substance that was family thus ended up in his treatment as both tangible and imaginary. In that fashion it was on a par with Aristotelian substance, to which different forms of accidents or qualities adhered.[28] Yet there remains something inchoate and imprecise about terms like *substantia* (and *prudentia*, as we will see later) that makes them work so well. How, then, did Bartolus hit on the term?

The text of *In suis* itself did not suggest the term *substantia*, leaving one to suspect Bartolus's own imaginative leap was behind it. The Roman jurist Paulus only posited the continuation of *dominium* in the son as heir, saying that the father's death yielded not a *haereditas* but rather a free administration of the property. Bartolus himself referred to two other texts: *lex Nam quod* (D. 36.1.14–15,8) and *lex Pronuntiatio* (D. 50.16.195). Neither of these used the word *substantia*. They both used *res*. The second, a passage from the third-century jurist Ulpian (d. 228), posed that family "is taken variously as it is deduced both in things and in persons." It further addressed various meanings of *familia* in terms of *personae*. In strictly legal terms, Ulpian had said that *familia* denoted the different persons "who are subject under the power of one by nature or law." The *paterfamilias* then was "he who has things in a house (*domo*)," even if he did not have a son. In a more common mode of speaking, *familia* was legally all the agnates, for, though on the *pater*'s death each

[26] Thomas Widlok, *Anthropology and the Economy of Sharing*, 25, on how sharing copes with inequalities and distinctions.
[27] Widlok, *Anthropology and the Economy of Sharing*, 52.
[28] Cf. Lodi Nauta, *In Defense of Common Sense: Lorenzo Valla's Humanist Critique of Scholastic Philosophy*, 13–21.

subject to him thereafter had his own *familia*, "yet all who were under the power of one rightly will be said to be of the same family, who were *proditi* from the same house and people." The link here was the *dominium* still, not a sense of descent.[29]

These texts thus gave Bartolus an opening to put family in terms of possessions, but not the term he settled on. Nor in his commentaries on these texts did Bartolus find occasion to use the term *substantia*. In regard to the *lex Nam quod* he noted only a distinction between a specific item in an estate and the entirety (*universitas*) thereof.[30] The *lex Pronuntiatio* gave rise to an interesting and more obviously related issue of the status of illegitimate children in the house and family. Yet, while the issue of illegitimacy was largely a matter of inheritance rights, Bartolus's commentary to *Pronuntiatio* did not raise that dimension of the matter and did not even use the term *haereditas*, much less *substantia*.[31]

Still, Bartolus did not invent use of the term *substantia* from whole cloth. He could have found the equation of *familia* and *substantia* readily to hand in two locations in the *Corpus iuris civilis*, neither of which he cited in his commentary to *In suis*. A fragment of the jurist Paulus, the initial and defining text in the *Digest* title *De usu fructu* (D. 7.1.1), told him that "usufruct is a right in others' goods of use and enjoyment, save the substance of the things." Here *substantia* carried a simple meaning of the material nature of something, and it was that which was subject to *dominium*, not mere use.[32] That passage at least equated *substantia* with the rights of the owner, as opposed to the usufructuary, and thus was consistent with Bartolus's use of the term in relation to ownership by father and son. Owner and holder of usufruct shared rights over the same thing. More to the point perhaps was the Justinianic decree embodied in the *lex Suggestioni* in the *Codex* title *De verborum et rerum significatione*, where in the third subsection (C. 6.38.5,3), Bartolus would have found the simple statement that "yet in other cases the term family should be understood for substance, because both slaves and other things are reputed to be in the patrimony of a single person."[33] Substance here refers to assets that can be owned. So while the connection between substance and family was overt, it was still a sense of family as the holdings of a singular owner. There was no sense that this substance was shared

[29] Waelkens, *Amne Adverso*, 203.
[30] Bartolus to D. 36.1.14–15,8, *Opera*, vol. 4, fol. 143v.
[31] Bartolus to D. 50.16.195, *Opera*, vol. 6, fols. 247vb–48ra.
[32] Waelkens, *Amne Adverso*, 381.
[33] That is, "in aliis autem casibus nomen familiae pro substantia oportet intelligi, quia et servi et aliae res in patrimonio uniuscuiusque esse putantur." For a discussion of various medieval meanings of family, see Herlihy, "Family."

with others of the *familia*, as father and son did in Bartolus's definition. A more immediate source of authority in law for Bartolus was also at hand. Oldrado da Ponte (d. 1335), one of Bartolus's teachers, in commenting on *In suis* (which seems to give the lie to Bartolus's claim that his teachers neglected it), drove a distinction between *substantia* that bound *pater* and *filius* together and an *adiectio* (addition) that made father and son different.[34] The son might increase the holdings left him. Bartolus used *substantia* in the same sense: it is what bound father and son to each other; but he also used it in a more expansive sense as that of which they were equally owners, the patrimony, which was distinct from what a son might add to it in his lifetime.

As Bartolus must have known, the distinction between those terms, *paterfamilias* and *filiusfamilias*, was otherwise precisely not one of biology but of law. The father had the son in his *potestas* by birth from his legal wife, or by adoption, or legitimation, while illegitimate sons were not in *potestas* and not called *filiusfamilias*, nor technically were they emancipated sons.[35] Bartolus himself elsewhere posed that bastards were unworthy of any substance ("filii spurii sunt indigni omni substantia") in civil law.[36] In canon law and local statutes such a situation of illegitimacy might be mitigated.[37]

By turning to *substantia* Bartolus was both returning to an old equation of family and assets and yet passing over the ending of *familia* in the putative continuity of ownership of *substantia* between father and son, who were also linked by marriage/generation. A pragmatic lack of certainty surrounded the term family, but Bartolus was bringing back into it the primacy of property and more. Blood and honor, a family name and coat of arms, were also inherited from father to son, and shared between them before inheritance arose. Bartolus offered a new definition of ownership (*dominium* as a subjective right to goods), as the right to dispose of physical objects within the limits of the law,[38] which was implicated at the heart of his commentary to *In suis*. He was also giving a new cast to *familia*, both as something one had a membership right to by birth and as

[34] His statement in a gloss is "unde quantum adiectionem notantem dominium: in substantia non est differentia." Quoted and analyzed in Bellomo, *Problemi*, 34–35 and n. 53. On his teaching Bartolus, see Anna T. Sheedy, *Bartolus on Social Conditions in the Fourteenth Century*, 13, 15, 32, 34.

[35] On these issues and Bartolus's positions regarding them, see Kuehn, *Emancipation*, 11–18, 28–32, and *Illegitimacy*, 33–46.

[36] Bartolus to authentica *Ex complexu*, C. *De incestis nuptiis*, *Opera omnia*, vol. 7, fol. 160vb.

[37] Cf. Kuehn, *Illegitimacy*, 42–43; Lodovico a Sardis Ferrariensis, *Tractatus de naturalibus liberis*, fol. 32rb.

[38] Waelkens, *Amne Adverso*, 294.

something that continued – that could be and was preserved in the passage of property from father to son.

Succession, it should be noted, was the essential element in corporate identity (for monasteries, guilds, and other entities) for Bartolus and other medieval legists or theologians, like Thomas Aquinas. The king was dead but the kingship went on.[39] One mark of perpetual corporation, at least of church and Empire, is that its property was inalienable and imprescriptible ("dead hand").[40] That quality would be given to family property with the elaboration of perpetual trusts (fideicommissi) in law, but there would always be the problem that patrimony changed hands, despite the immediacy of continuity from father to son.

If it is the case that property law is about means and ends, then Bartolus's choice of the term *substantia* was inspired.[41] It focused not on ownership (*dominium*) per se but on the continuity and sharing of the underlying substance, which remained when the son became heir and owner. In Bartolus's eyes it was *substantia* that lay at the heart of family continuity. It made real, in law, the mysterious commingling of fathers and their sons as *quodammodo domini*. *Substantia* encompassed the real and the incorporeal, but leaned on the side of the corporeal, thus getting around the thirteenth-century gloss's uneasiness with the idea of a continuation of incorporeal things.

It is worth considering for a moment what Bartolus did not (but might have) used to define family:

- Familia accipitur in iure pro patria potestate.
- Familia accipitur in iure pro agnatione.
- Familia accipitur in iure pro sanguine.
- Familia accipitur in iure pro honore.
- Familia accipitur in iure pro domo.
- Familia accipitur in iure pro patrimonio/haereditate.

Any of these would have made some sense to him and his contemporaries, and all of them pointed at elements of sharing, but none would have been as effective in expressing continuity across generations. Actions could result in failure; biological continuity could be lost as family lines died out; a particular *domus* could be lost or even just traded off. It was property writ large, as a substance, that would best endure. Yet as *substantia* the property potentially included not just what one inherited from parents or other ancestors; it could also include what was acquired during one's lifetime. The combination of *patrimonium* and acquisitions would become

[39] Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 309–10.
[40] Kantorowicz, *The King's Two Bodies*, 176–77.
[41] Cf. Annelise Riles, "Property as Legal Knowledge: Means and Ends."

in turn *haereditas* to the next generation. Or, in the wake of an unfortunate generation, *substantia* might end up being less of a *patrimonium* than before. Nor need *substantia* amount to the entire *haereditas*, let alone things gained in life; it could be just the vital, symbolic, family-identifying pieces of property. And it was real, it was not merely symbolic, for all that symbolic dimensions of property could have real effects.

Before moving off the term *substantia*, we should take account of its resonance outside the law in Bartolus's day. Florentine merchants, for example, used the term *sustanza* to mean more or less the capital of a business, "le sustanze del traffico."[42] But mainly people knew *sustanza* as what was left them by their fathers. Giovanni Rucellai, a Florentine in the fifteenth century, thanked his good fortune "because from the little substance that was left to me I have grown and multiplied it, as today I find myself with nice wealth and with ease and great credit and good faith."[43] Lapo Niccolini, a fellow Florentine, handed to his emancipated son in 1418 that part of his *sustanze* that constituted an appropriate share as a premortem inheritance.[44] Behind that act, given the same son's later financial difficulties, lay the awareness that, in contrast to Rucellai, who had added to his *sustanza* in his life, there were those like this son and like Paolo Morelli, another Florentine, who consumed it.[45] In either case, *sustanza* stood in contrast to but alongside *onore* (honor), a substantial asset next to a symbolic one (mirrored in the placement of a family crest on the facade of a house).[46] From these vernacular senses as well, the term also entered into statutory law, as in an enactment of Florence, for example, that deplored the deleterious effect of merchants' bankruptcies on the *substantia* of its citizens.[47]

It was an imprecise term, but it carried some distinction from other terms applied to kinship and household. In discussing patrimonial ties between mothers and sons, or brothers and sisters, as opposed to fathers and sons, for instance, Bartolus did not use *substantia* but referred instead to the *familiaritas* that bound them.[48] They might thereby come to expect

[42] *Giovanni Rucellai e il suo Zibaldone*, vol. 1: *Il Zibaldone quaresimale*, 19. In the vernacular narration in a Florentine *consilium* about a firm's bankruptcy, the basic agreement is depicted "come di sustanza fralli strani" (ASF, Carte strozziane, 3rd ser., 41/2, fol. 437r).

[43] Rucellai, 117: "chè di poche sustanze che mi furno lasciate l'ò acresciute e multiplicate, e al dì d'oggi mi truovo bella richezza chon bello aviamento e chon gran credito e buona fede."

[44] Lapo Niccolini, *Il libro degli affari proprii di casa di Lapo di Giovanni Niccolini de' Sirigatti*, 143.

[45] Giovanni Morelli, *Ricordi*, 144.

[46] Morelli, *Ricordi*, 167, speaking of "quello che richiede e quello che può in quanto all'onore e alla sustanza del tuo valente."

[47] *Statuti della repubblica fiorentina* (1999), 2 vols., vol. 1: *Statuto del capitano del popolo degli anni 1322–25*, 121.

[48] Bartolus to l. *Qui iure fam.* (D. 41.2.41), *Opera omnia*, vol. 5, fol. 88rb.

some access to food and shelter but could claim no immediate right to inheritance or any prerogative in management of resources. Bartolus's employment of *substantia* allowed him to bridge the ever-widening gulf between local laws and the "common" law to which he was wedded by education and profession. He could use terms like *substantia* to keep them both in some sort of single system of law.

A city such as Florence or Perugia, where Bartolus lived, could legislate for itself, as Rome had. But to Bartolus and others Roman law was a living legacy and a standard of reason and justice. Civic statutes that looked to the inheritance of property by males in agnatic relationship (ideally) had to be brought within the ambit of Roman law. Bartolus found a device to that end with *substantia*.

Where he otherwise gave some consistent treatment to *substantia* was in his unfinished treatise on witnesses and testimony. There he followed the scholastic distinction between substance and accidents, the latter being laid out in nine categories. Bartolus, in fact, dealt with substance and only two accidents, quantity and quality (never getting to complete the others). While this organization and definitions he gave show that Bartolus was well versed in the scholastic, even nominalist, treatment of substance, as Susanne Lepsius points out, he was only interested in those dimensions of *substantia* that could come across the notice of judges or jurisconsults.[49] So Bartolus quickly passed over the category of incorporeal substances for corporeal: "a corporeal thing is comprehensible to the senses, so about these it is possible to speak, although a jurisconsult also subdivides corporeal things into many types: yet those subdivisions regard rather the qualities of things than the substance."[50] In the context Bartolus was intent on laying out what and how witnesses knew of the substance of things, beyond their ability to know a negative (that is, to know that something was not wood or a horse, for example).[51] His main concern was with what would persuade a judge to accept a particular fact as such, as when witnesses swore to the identity of person. To Bartolus this meant the witness had seen the person's face, for as the Roman jurist Paulus had said, we recognize someone by his appearance (*imago*).[52] Substance was intimately bound up with qualities (*accidentia*). One can

[49] Bartolus, *Tractatus de testibus*; but one must employ the unrivaled edition of Susanne Lepsius, *Der Richter und die Zeugen: Eine Untersuchung anhand des* Tractatus testimoniorum *des Bartolus von Sassoferrato, mit Edition*. Relevant here are her observations, 116–19.

[50] Lepsius, *Der Richter und die Zeugen*, 245–46.

[51] Lepsius, *Der Richter und die Zeugen*, 133–34.

[52] Lepsius, *Der Richter und die Zeugen*, 255: "Si testis dixerit Titium fuisse illum, quia vidit, satis est, idem si dixerit, quia vidit faciem eius, satis exprimit. Nam Paulus respondit, quod per eius imaginem recognoscimur."

see this extended to the substance of the family, its patrimony, unchanged in the flux of different members coming and going over the years. In view of the fact that substance kept father and son linked, and in view of the fact that they were also at times equated as "one flesh," that was in effect the father,[53] Bartolus was placing *substantia* at the heart of *familia*. One did not encounter substance without form. Here, one did not find substance without *familia*. But just as substance mystified the central liturgical moment of the mass (transubstantiation), it mystified what was (ex)changed when ownership changed hands from fathers to sons (that there was no *nova haereditas*).

Another feature, grammatical this time, of Bartolus's use of *substantia* in his commentary to *In suis* is that the word is singular. That a family's patrimony was in fact constructed out of numerous elements was elided into a single entity. Yet not only were there different sorts of assets in any family's wealth – lands and buildings, animals, tools, furnishings and clothing, debts and credits – there were also different provenances and destinations. Bartolus quietly conceded that there would or could be divisions of the *substantia* on the death of a *pater*, but he did not address the differing contributions from a wife/mother or from children to what family could claim and use. Nor did he mention a distinction, familiar and meaningful in other contexts, between goods transmitted in inheritance and goods gained by one's commercial or agricultural activities. *Substantia* was a neat shorthand, but like all such it was much more than that and not so simply grasped in practice.

Bartolus's formulation seems to have been so sensible as to not need frequent recapitulation by all those who followed him. His contemporary, Alberico da Rosciate, in his formulation that "familia, id est substantia," agreed that father and son were so close as to be a single substance and the son could be termed owner (*dominus*) while his father was alive.[54] But Alberico also found defining features of *familia* in the terms *memoria* and *dignitas*, which were preserved for families by keeping *divitiae* within a *proles masculina*.[55] This was Rosciate's formulation of the rationale behind numerous civic statutes that limited the inheritance rights of daughters to what they had been given as dowry at the time of their marriage (*exclusio propter dotem*).[56] Preservation of family and agnation

[53] Cf. Kuehn, *Emancipation*, 22, 59, 146.
[54] See his text in translation in Osvaldo Cavallar and Julius Kirshner, eds., *Jurists and Jurisprudence in Medieval Italy: Texts and Contexts*, 605–8.
[55] Giovanni Rossi, "I fedecommessi nella dottrina e nella prassi giuridica di ius commune tra xvi e xvii secolo," 176–77; Kuehn, "*Memoria* and Family in Law."
[56] Cf. Kuehn, "Intestate Inheritance as a Family Matter: Ius Commune, Statutes, and Cases from Florence."

served as the rationale to expansive, as opposed to restrictive, readings of such statutes. It is interesting that Bartolus's most famous student, Baldo degli Ubaldi (1327–1400), in his commentary on *In suis*, and in the expanded *repetitio* on that text, did not repeat the equation of *familia* and *substantia*. He expended his considerable efforts instead on the consequences of emancipation on sons' inheritance claims and on the requirements for and results of disinheritance.[57] His brother Angelo (1323–1400) and later Paolo di Castro (ca. 1360–1441) followed Alberico da Rosciate's formulations and linked the perpetuation of family *dignitas* and *memoria* with preservation of property and its transmission to sons or other agnates.[58]

Around the end of the fifteenth century, the authoritative Milanese jurist, Giason del Maino (1435–1519), found three meanings of *familia*: as a group of relatives, as a collection of servants, and as *substantia bonorum*.[59] In a calculated move of almost perverse dimensions, Filippo Decio (1454–1535) defended the effective disinheritance of more distant agnates (not one's sons) resulting from legitimation of bastard sons with the thought that, had he wanted, the legitimating father could have deprived those agnates by simply tossing all his wealth into the sea.[60] Decio's statement called attention to something Bartolus overlooked in his commentary on *In suis*, namely the conscious management of property; but that was not an issue Bartolus needed to raise in the context of stressing the immediacy of transmission from father to son. It was not the directive hand but the communion of goods among multiple hands, even over time, that was his focus. Shared usage, not strategic management, was the essence of the *familia*.

At least two developments were fostered by such a substantial vision of family. On the one hand, the old Roman device of a trust, fideicommissum, would become a means of substituting heirs from agnate lines and providing continuity of descent in a sense. On the other hand, in future decades the prohibition on alienation of property (by gift, sale, or inheritance) *extra familiam* would constitute the centerpiece of the fideicommissum and would be upheld by jurists and courts, despite the rights of kin and creditors.[61] The *substantia* associated with family was not nebulous; it was the distinct set of holdings that made up the wherewithal of any given

[57] Baldo to l. In suis, *Commentaria in primam et secundam infortiati partes*, fols. 50va–b and 50va–55rb.
[58] On them and others, see Kuehn, "*Memoria* and Family in Law."
[59] Giason del Maino, to l. Suggestioni, C. De verborum significatione, fol. 160vb.
[60] On his remark, see Kuehn, *Illegitimacy*, 56 and n. 120.
[61] Mario Caravale, "Fedecommesso (storia)"; Luigi Tria, *Il fedecommesso nella legislazione e nella dottrina dal secolo xvi ai giorni nostri*; and Kuehn, "*Fideicommissum* and Family: The Orsini di Bracciano."

family and was not distinct from it. The fideicommissum would become, in essence, the very *substantia* of the family – what all its members shared in some way, even if *dominium* over it all resided legally in only one person.

There was still an open question. If *substantia* was lost, did family end? The fideicommissum rested on the desire that property not leave the family, which was implicitly also recognition that substance potentially could be lost. Family could persist only in reduced circumstances, if at all. Here one must take note of an idea that arose in the fourteenth and fifteenth centuries of the "shamed poor" (*poveri vergognosi*). These were not people who were destitute. They had some property, but they lacked enough of it, as Baldo degli Ubaldi conceded in his treatment of the matter, to meet social expectations. They could not repay their debts or accumulate suitable dowries for their women. These people were to become the objects of charitable relief that would deny or at least mitigate the downward social mobility experienced by elite families in all communities. Here, then, was admission that *substantia* had to be substantial.[62]

2.2 Practical Law

Doctrines of commentators like Bartolus were devised with an eye to statutes and actual forensic problems. It is interesting to examine how Bartolus and others handled statutes in various surviving consilia. It was this genre of legal writing that was truly coming into its own in this era.[63] It was a genre of expanding use and complexity parallel to the contemporaneous development, by Bartolus and his contemporaries, of academic treatises (*tractatus*).[64]

A first example comes from the pens of two near contemporaries of Bartolus – Tommaso Corsini (d. ca. 1357) of Florence and the fairly obscure Ricco da Muraro. Corsini was the first professor of law hired in the new Florentine *studium generale* in 1349, after the commune was unable to lure Bartolus from Perugia.[65] Corsini had a voice to be heeded, both in law and in the governing bodies of Florence. His son Filippo

[62] Richard C. Trexler, "Charity and the Defense of Urban Elites in the Italian Communes"; Giuliana Albini, "Declassamento sociale e povertà vergognosa: uno sguardo sulla società viscontea."

[63] Cf. Franz Wieacker, *Storia del diritto privato moderno*, 1:112–15; Luigi Lombardi, *Saggio sul diritto giurisprudenziale*, 130–31; Adriano Cavanna, "Il ruolo del giurista nell'età del diritto comune."

[64] Cf. Manlio Bellomo, *I fatti e il diritto: tra le certezze e i dubbi dei giuristi medievali (secoli xiii–xiv)*, 562–63, 596–604. On Bartolus's consilia see Mario Ascheri, "Bartolo da Sassoferrato: il 'suo' *tractatus* consiliare e i suoi *consilia*."

[65] Corsini appears among the faculty of the Florentine Studio for 1357–8 but not thereafter, although his sons Piero and Filippo do (hence the dating of his death: see Katherine Park, "The Readers of the Florentine Studio according to Communal Fiscal Records (1357–1380,

(1334–1421) would follow in his father's footsteps as the most prominent native-born legist of Florence in his day.[66] They addressed precisely the problem of the nature of the direct and instantaneous inheritance of a son, though their consilium may well have been composed before Bartolus drew up his commentary to *In suis*. These two jurists began with the *regula* that an estate not formally accepted could not be transmitted to an heir's heir (*haereditas non adita non transmictetur*). Similarly, an heir who had not taken possession (*inmisceat*) could not be called heir. But a son was not just an heir, so the jurists also quickly asserted "in contrarium videt veritas." They determined there was a continuation immediately from father to son, and they cited *In suis* to that effect, but not Bartolus himself. Indeed, they never invoked his name at all. Not that they left jurisprudence out of account. In the course of their consilium they found reason to mention the Glossa ordinaria, Odofredo (d. 1265), Dino del Mugello (d. 1303?), Azzo (d. ca. 1230), Jacopo Buttrigari (d. 1348) several times, and Jacopo de Belviso (1270–1335), not to mention various "magni doctores."[67] Bartolus was seemingly as yet too young or new to claim much *auctoritas*.

In the Florentine case infant heirs had died without formal acceptance, leaving as next in line their maternal uncle Antonio. Corsini and Muraro noted that many jurists had maintained that such deceased infants did transmit their father's estate or the right to deliberate about becoming its heir.[68] But they also noted that there were many other authoritative figures, including Jacopo de Belviso, who took the opposite view: that there was no transmission from sons to an *extraneus* (an heir who did not come from the same *familia* as the deceased). They explored the clear difference between sons and *haeredes extranei*. It was these latter who could not transmit a *ius deliberandi* without accepting an estate left to them. Sons, even infants ignorant of their inheritance, necessarily transmitted it to others. The legal problem, however, rested in Antonio's act as tutor of the infants to accept the estate for them. The uncle Antonio in this case seems to have tried a proactive approach to secure the estate for himself through the sons, acting as a tutor to them. The jurists determined that he had no recourse; the estate did not go to him.[69] They were

1413–1446)," 253–54). Also on the Studio, Gene Brucker, "Florence and Its University, 1348–1434."

[66] Cf. Martines, *Lawyers and Statecraft*, 482. Tommaso Corsini took part in an important Florentine ambassadorial mission in 1347 and was on the Signoria of 1353 (Gene Brucker, *Florentine Politics and Society, 1343–1378*, 143, 147), but even as early as 1328 was involved in a crucial electoral commission (John Najemy, *Corporatism and Consensus in Florentine Electoral Politics, 1280–1400*, 100).

[67] Their consilium is in Biblioteca Apostolica Vaticana, Vat. Lat. 8069, fols. 193v–95v.

[68] Vat. Lat. 8069, fol. 194r. [69] Vat. Lat. 8069, fol. 195v.

enforcing the sense in which the inheritance after the sons did not operate as a continuous and immediate transfer. Though patrimony did indeed pass instantaneously from father to sons, it did not pass that way to the uncle as heir to the children. Instead a court, it seems, would have to determine who was next in line. There would be agnates to the father in all likelihood.

Bartolus's own consilia do not reveal a case precisely on point – a case of father-to-son succession in which the matter of coterminous ownership of family *substantia* arose. That is not so surprising. Father–son succession, even as Bartolus's terms made clear, was more or less automatic, conventionally expected, and unobjectionable. Trouble cases were what came to court and there met with juristic intervention. They typically involved situations in which the seamless transmission from father to son did not arise for some reason. A quick survey of three consilia will allow us, nevertheless, to see Bartolus handle limiting instances and judge how compatible his forensic conclusions were with his teaching.

1. *Exclusion of a dowered daughter.* Perugia, like most every other Italian commune, had an inheritance statute that excluded dowered daughters from inheriting with their brothers, agnate nephews, uncles, and so forth.[70] The statute rested on customs that ran contrary to the rules of civil law. Legal problems tended to arise when there were no male heirs or when a testament seemed to alter this statutory default. Bartolus faced a case in which a man by will left his *haereditas* to his son, who took and used it (*immiscuit*) until his death, when his will in turn directed the property to his wife, having no sons, while leaving his daughters set amounts (doubtless intended as dowry). His sister, Angela, then mounted a claim for half the estate which, she posed, was her father's, not her brother's. Bartolus denied her claim. Her argument rested on the fact that, as her brother was dead, she was no longer excluded by statute. But those who advanced such an argument, said Bartolus, "do not understand the meaning of the term until."[71] Angela had only shared in the patrimony up to the moment she gained her dowry. The estate transferred thereafter to her brother:

[70] See Kuehn, "Person and Gender in the Laws"; Manlio Bellomo, *La condizione giuridica della donna in Italia*; *Ricerche sui rapporti patrimoniali tra coniugi: Contributo alla storia della famiglia medievale*; Isabelle Chabot, "La loi du lignage: Notes sur le système successoral florentin (XIVe–XVe, XVIIe siècles)"; Anna Bellavitis, "Dot et richesse des femmes à Venise au XVIe siècle"; Julius Kirshner, "Materials for a Gilded Cage: Non-Dotal Assets in Florence, 1300–1500."

[71] Bartolus, *Opera omnia* (Venice, 1570–1), vol. 11, 1 *cons.* 20, fols. 8va–9ra, at 8va: "non intelligunt significationem dictionis quousque."

Moreover the son was heir of his father, and so by acceptance of the estate it ceased to be the estate of his father. It began to be merged with the estate of the son. So it is a question of the son's estate, not the father's . . . and so this daughter wants to enter her father's estate and she cannot because the estate left is that of another.[72]

The statutes of Perugia left the aunt no recourse. The crux of Bartolus's decision was that the wife received the property, though through her it might well pass later to her dowered daughters. He did so notably leaning on the prior, entirely normative, succession of son to father, but also playing up a discontinuity in transfer of the estate rather than some fictive continuation of ownership.

2. *Paternal liability for a criminous son*. It was in the context of paternal liability that Bellomo examined Bartolus's commentary to *In suis*. Bartolus dealt with such a case from Perugia. A ser Cardo saw his son, Bartolomeo, banned for abetting a murder. Bartolus denied that ser Cardo had to divide his property and hand over Bartolomeo's share to be "destroyed" (lost to the family by confiscation). As Bartolomeo's "confession" was fictive, in fact merely inferred from his contumacious placement under ban of the commune, it could only affect Bartolomeo and not anyone else. Nor could his property be subject to destruction, as "the possessive words mine, yours, his, are of present meaning," and at the time in question the property belonged to the father, not the son.[73] Here the substantial and coterminous tie between father and son was not asserted. Instead it was implied that death resulted in a change of ownership, not a continuity at all, beyond any "peculiar" property that may have belonged to the son.[74] Sharing faded into the background; distinct rights and titles took center-stage in order to set, and deny, liabilities. In any case, Bartolus was being consistent in limiting the father's damage from criminous behavior by his son.

3. *Rights of an illegitimate*. Inheritance claims of illegitimates were an element of one text Bartolus cited in support of the *substantia-familia* equation, namely *Pronuntiatio*. In a case from Gubbio, Bartolus encountered a situation in which Filippuccio Giacomelli left to his bastard grandson Marino (son of Francesco) "food, clothing, and shelter in the home of the

[72] Bartolus, *Opera omnia*, vol. 11, 1 *cons*. 20, fol. 8vb: "Praeterea filius masculus fuit haeres patris sui, et sic per aditionem desiit esse haereditas patris sui. Coepit enim esse unita cum hereditate filii. Est ergo de hereditate filii tractandum non patris."

[73] Bartolus, *Opera omnia*, vol. 11, 1 *cons*. 116, fol. 30va–vb, at vb: "ista nomina possessiva meum, tuum, suum, sunt significativa presentis temporis."

[74] A major feature of Bellomo's examination of a related *quaestio* of Bartolus in *Problemi del diritto familiare*, 148–55.

testator in the part belonging to his heir, Bartolomeo."[75] Following his grandfather's death in 1342, Marino lived in the house for six years, and then for another six years lived on his own and did not seek food or clothing from his half-brother Bartolomeo. Did Bartolomeo still owe Marino that sustenance, even in another location than the testator's home? Bartolus went to the wording of the will and asserted that the phrase "in domo" referred to the right to shelter, not the rights to food and clothing, and "that Marino be constrained to stay in the home in order to have support is an absurd reading" (absurdus intellectus).[76] There did not have to be a sharing of property in all regards. Rights between a father (or grandfather) and an illegitimate child were not so automatic as *In suis* pretended, but there were rights accorded by paternal testament and Bartolus enforced them.[77] The subjective belonging of the illegitimate Marino was not vitiated by lack of cohabitation. Right of membership trumped practices of sharing (from which Marino was seemingly excluded by his absence).

2.3 Concluding Thoughts

Bartolus's idea of a family *substantia* can fit well with the growing sense of blood-relatedness at the time, with its recourse to genealogical trees.[78] *Substantia*, though carrying much more the implication of property, could also easily stand in for blood. The family tree "has built into it the assumption that the essence of a person is received, by transmission, at the point of conception," and that essence precedes growth.[79] As James Leach argues, however, it is also possible to see land, for example, not as a mere container for life but as constitutive of identity for those living and interacting with it. Sharing, in other words. In Bartolus's consilia there was no sharing. One finds a dowered daughter no longer at home; an illegitimate son who had not stayed at home; and a criminous son who had deserted father and city.

It is one of the ironies of law, in its pretense to stand outside the culture it would regulate, that it calls attention to what it seeks to deny or obfuscate.[80] The term *substantia* argued for continuity, immediacy even,

[75] Bartolus, *Opera omnia*, vol. 11, 2 *cons*. 4, fol. 57va: "victum, et vestitum et habitationem in domo dicti testatoris in parte contingente Bartholomeo heredi suo."
[76] Bartolus, *Opera omnia*, vol. 11, 2 *cons*. 4, fol. 57va.
[77] Cf. Kuehn, *Illegitimacy*, 41–46.
[78] Christiane Klapisch-Zuber, *L'Arbre des familles*; Klapisch-Zuber, "Family Trees and the Construction of Kinship in Renaissance Italy."
[79] James Leach, "Knowledge as Kinship: Mutable Essence and the Significance of Transmission on the Rai Coast of Papua New Guinea," 187–88.
[80] Cf. Karen Crawley, "The Critical Force of Irony: Reframing Photographs in Cultural Legal Studies."

where in fact it was most tenuous and where a real discontinuity (of generations) was taking place. *Substantia* was a term for legal commentaries, for lectures in an academic setting, but it had less utility in litigation, even to the one who creatively employed the term in his lectures. *Substantia* used in connection to family called attention to property and elevated its formative role, as shared. It was when the sharing stopped, or rather when management failed or was at least contested, that the jurists showed up.

In an essay entitled "Family," David Herlihy examined the classical and Christian contributions to modern concepts of family. Herlihy found the classical contribution mainly in juristic texts, which embodied a sense of *familia* as "an authoritarian structure and hierarchical order founded on but not limited to relations of marriage and parenthood." The *potestas* of the Roman father was distinct from his status as *genitor* and it was not coterminous with household. A second sense of *familia* rendered it in terms of possessions. The Christian and medieval contribution gave a central role to *caritas*, seeing *familia* as a "domestic communion" that acquired and shared resources for the good of its members, "who were defined largely in terms of marriage and blood." In the late Middle Ages, the combination of plagues, wars and their accompanying taxes, and far-flung and complex markets made society as a whole seem threatening and, at least in Herlihy's estimation, Florence's families "seem to have developed a stronger sense of internal cohesion and seem to have found, or hoped to find, in their companionship essential rest and refreshment."[81] Perhaps then too it is not an accident that a bastard son of a prominent Florentine lineage, Leon Battista Alberti, would be the first to make *famiglia* the subject of a learned dialogue.

Our examination of Bartolus effectively supplements Herlihy's by returning to the legal heritage after Rome to see that the expansiveness of *patria potestas* and *dominium* had become the basis of an almost institutional continuity not envisioned in Roman sources. When Machiavelli famously advised his prince to contemplate murder, if need be, but to "refrain from seizing the property of others, because a man is quicker to forget the death of his father than the loss of his patrimony," he was not only questioning a moral certitude. He was also giving expression to the realities (dare we say, substance?) of family life for many in Italy, at least among the civic elites and nobility.[82]

Where the paradigm of father-to-son inheritance failed, there were daughters or more distant relatives seeking title to *substantia*. The overt connection between *familia* and *substantia* was broken, or at least murky.

[81] Herlihy, "Family." [82] Quotation is from *The Essential Writings of Machiavelli*, 65.

Bartolus's sense of family was such that separate residence did not cost even a bastard his rights to food, clothing, and shelter. But it was also a sense of family that strove to limit a father's liability for his son's acts, even in the face of statutes that mapped an extensive liability, especially before the commune's need for civic order. It asserted distinctive individual prerogatives so as to preclude loss of some of the shared resources. But it was also a sense of family that largely excluded the daughters dowered, married, and physically transferred (as or along with their "share") to other households. It was a sense of family open to, if not actively on its way to being, the encompassing patrilineage, rather than the more horizontally extensive consorterie that left their towers about the landscapes of the thirteenth-century communes.[83]

It may be just to say that Bartolus's approach to family through legal problems made "his picture of family life a partial and sharply circumscribed one."[84] But the legal approach necessarily put Bartolus at the nexus of persons and property. Bartolus was imaginative. While imagination was not truth, not even in law (as his use of the term in his commentary on *In suis* shows), it was useful to understanding, to integrating different persons and rights and actions into meaningful wholes, like *familia*.

Over half a century ago Ernst Kantorowicz, in his classic *The King's Two Bodies*, drew attention to the corporate theorizing of medieval civilians. The *universitas* was, of course, a fictive person, but as such it was its persistence in time that set it apart. "The *universitas* thrives on succession," Kantorowicz insisted.[85] Succession was a matter of private law in the first instance, and it was in the presumed continuity of father and son and the fictive continuity of the *haereditas*, as depicted in texts of the *Digest* and *Institutes*, that jurists found a basis to extend to the kingdom the substantial continuity of blood between king and his son (where it was the case that "the king is dead; long live the king").[86] The burgeoning absolutist states (that would have their greatest extent long after Bartolus) would make the most of family as a political metaphor. Paternal power would be reinforced; paternal control of property, career, and marital choices would be expected for the sake of family seen as a collective

[83] The pacts of Florentine tower societies were based on synchronous outreach and present purposes and embraced nonkin at times. See Robert Davidsohn, *Storia di Firenze*, vol. 4, *I primordi della civiltà fiorentina*, part 1, *Impulsi interni, influssi esterni e cultura politica*, 393–401.

[84] Sheedy, *Bartolus on Social Conditions*, 77. She does not discuss his commentary to *In suis*.

[85] Kantorowicz, *The King's Two Bodies*, 308.

[86] Notably D. 46.1.22, l. Mortuo, D. de fideiussoribus et mandatoribus: "quia hereditas personae vice fungitur"; and I. 3.1,3: "Et statum morte parentis quasi continuatur dominium."

enterprise. In his commentary to *In suis* Bartolus brought the growing sophistication of scholastic corporate theory back to these roots in the law and elevated *familia* to corporate status (of a sort). That status was not generally at issue in the cases we have examined, where a particular succession was in play, so Bartolus did not need to consider the corporate entity in his opinions. But he engaged in an imaginative extension of law that had an active future.

That said, we might end on an anthropological note, for it is intriguing that the term Bartolus applied to kinship, substance, has lately had great resonance in anthropologists' discussions of kinship. As used in David Schneider's analysis of American kinship, substance is equated with blood and biological matter and thus figures as immutable (substantial in that sense) in contrast to culture or conduct. His analysis ran on a powerful dichotomy of nature vs. nurture. More recently, Marilyn Strathern has deployed the notion of personhood (self and individual) and substance to break down such dichotomies. Instead her work and that of others has drawn out the transformations, conversions, continuities, and flows among previously dichotomous domains. As Janet Carsten has put it, "the analytic vocabulary of kinship apparently lacked a means to express mutability and relationality in terms of flows between persons or between persons and things, and substance neatly filled that gap."[87] Bartolus too was addressing flows between persons (mainly fathers and sons) and the transformation and continuity that both seemed to mark inheritance in direct agnatic line. He too found substance to be an appropriate term because it had a breadth of meanings to express the flow of objects and to stand for the relationships between persons. It was the shared something at the heart of *familia*. It carried continuities and it produced changes. It both destabilized the difference between generations and served to fix the agnatic family in relation to others. Bartolus seems to have been a good anthropologist, as well as jurist.

[87] This discussion relies on Janet Carsten, *After Kinship*, esp. 109–35, quotation 134.