

Law and the Illicit in Medieval Europe

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This book is dedicated to Edward M. Peters, well known to medievalists for his wide-ranging work in many fields, often closely related the law and the illicit. The editors set out the focus of the book in the first paragraph of their preface: 'law, both as practice and as intellectual discipline, occupied a central and privileged place in medieval culture ... This deep respect for law and legal procedures cut across geographical and chronological boundaries, but a number of developments occurring over the late eleventh and twelfth centuries greatly accelerated the pace of legal development. The chapters that follow provide various perspectives on the dynamic process of legalization that both characterized medieval society and was instrumental in transforming it' (p. xi). This chronological argument is then developed by Edward Peters himself in his 'Introduction: The Reordering of Law and the Illicit in Eleventh- and Twelfth-Century Europe.' He concludes with the very interesting suggestion that the 11th and 12th-century changes had a deeper and more lasting effect than Carolingian efforts at reform, because they 'provided ways to invent the means of their own communication throughout Christian society and thus their continuity for centuries to come.' (p. 14).

Part one of the book is entitled 'Legal Systems'. William Chester Jordan adds possible parallels from the 18th century and later to the work of Gervase Rosser and others in order to provide 'A Fresh Look at Medieval Sanctuary.' R. I. Moore provides an analysis of heresy trials which subtly examines the impact of political context, although only to a limited degree does he look at any possible changes in treatment of heresy by canonists. James A. Brundage's contribution is a sparkling essay on 'Legal Ethics: a Medieval Ghost Story', to which I shall return later in the review. James Muldoon examines colonisation and law, an

area also treated, for example, in Robert Bartlett's *The Making of Europe* (1) but here given a comparative aspect with early modern America. Part two of the volume deals with 'Writing the Law.' Robert Somerville's essay is the only one closely concerned with a manuscript text, in this case part of the *Decretals* of Pope Gregory IX. It is a fascinating study, although one which only at its very end directly engages with the core theme of the book. Patrick Geary examines 'Judicial Violence and Torture in the Carolingian Empire.' His proposal that ordeal may not only have been succeeded after 1215 by increased use of torture, but also preceded by its use is an interesting one, but the evidence is not sufficient to prove it. At times the essay might have distinguished more sharply between testimony and confession, procedural torture and punishment, but is of considerable value in its treatment of physical punishment in the Carolingian period. Stephen D. White looks at ideas of treason in law and literature in the Anglo-French world c. 1150–1250, arguing for a multiplicity of competing views of treason. At the same time, he exposes the dangers of historian's reliance on the *Song of Roland*, and demonstrates the need to understand relationships between literary texts before using them to construct models of social behaviour or legal culture. John van Engen's case study of Friar Matthew Grabow is of considerable interest, although without entering deeply into questions of the nature of law. Ruth Mazo Karras's essay on 'Marriage, Concubinage, and the Law' does engage more fully with these. In particular, like White she finds beyond the 12th century a lack of a single fixed position on an important legal question. Unfortunately the form of the volume does not allow such convergences of findings to be brought together in order to test the overall chronology sketched in the preface and introduction.

Part three is entitled 'Cases and Trials.' Jessalyn Bird's essay on crusader privileges is one of the essays that stands out by asking core legal questions, about law and politics, conflicts of jurisdiction and strategic choice of court, access to legal remedies, legal learning and legal regulation, and about law as a framework around which negotiation may take place. Likewise Alan M. Stahl's examination of 'Coin and Punishment in Medieval Venice' discusses the relationship between statute law and severity of punishment. William J. Courtenay examines the role of Parisian masters of Theology under Philip the Fair, although without really analysing whether there was a significant distinction between the theologians' processes of reasoning and those of canon lawyers. Part four is entitled 'Law beyond the Law', although unfortunately neither the essays within it, nor the preface or introduction, give any extended discussion of the implications of this phrase. Alex Novikoff's study of 'Licit and Illicit in the Rhetoric of the Investiture Contest' provides a very useful summary of his subject, written primarily within the tradition the historians of political thought. Susan Mosher Stuard's essay on Maria of Venice succeeds in her aim of contextualising a saint's life in regard to laws and economic conditions. Her case involving a woman taking on a religious life without her husband's permission, however, raises the general question of whether ecclesiastical regulations were intended to be applied to the letter or were even in the later middle ages – at least in hard cases – a set of guidelines that should be applied with discretion, in this case because the husband had abandoned the wife. The last two essays, by Henry Ansgar Kelly and Joel Kaye both deal with the subject of magic, although Kaye's starting point seems to be that magic was considered 'illicit knowledge' (p. 225) whereas Kelly begins by telling us that 'Natural magic was considered a legitimate science in the Middle Ages' (p. 211).

We have, then, a variety of essays, many of which are specific case studies, particularly those concerning the later Middle Ages. This may be inevitable given the brevity that was obviously required. Starting with a case can work very well, but problems do arise. The first obviously is typicality, a point made most tellingly by White's examination of the trial of Ganelon; historians' and literary scholars' prioritisation of the *Song of Roland* has not sufficiently questioned its typicality. Had she had space, Stuard would have been able to examine other instances of contested marriage and female choice of the religious life, thereby being able to suggest how far Maria's case was determined by a particular view of law. Especially in the early Middle Ages, the only cases for which evidence is plentiful are atypical, almost by definition. They are likely to be cases where law was either intrinsically indeterminate, or where issues of power conflicted with legal norms. Illuminating as they may be, any model of the ordinary workings of law derived from such disputes is likely to mislead; hard cases can produce bad legal history. A further problem is the limitation even of the later medieval sources. Historians' favouring of close examination of particular cases derives in part from the influence of the anthropologist Max Gluckman's extended case method. The anthropologist could watch a

dispute or series of disputes develop, set them in the context of social and cultural relations, and investigate their connections to underlying conflicts. The medieval historian very rarely has access to sources that allow any such study over a considerable period of time; at most the sources will reveal those few peaks of the dispute that were considered worth recording in writing.

A further issue is revealed by the very title of the volume, the contrast of the legal and the illicit. Some, although far from all, of the writers seem simply to assume that the two terms are a pair of opposites, slipping between use of illegal and illicit, and thereby failing to explore the relationship of legal and licit. In contrast, writers in the Middle Ages were well aware of this problematic relationship, particularly in the field of marriage law. A further, connected issue is that of fields of law where different views of what was legal coexisted and competed, a point well made by White and Byrd. Such difficulties are hinted at in various essays, but most of the writers do not seek to address through sustained legal reasoning the issue of the nature of law, and changes in that nature over time (for an example of such reasoning, see pp. 93–4).

Methodological issues are raised most clearly by the editors' preface to the volume, where they outline their approach in terms deliberately distinct from, in some ways opposed to, the terms used by those whom they refer to as legal historians: 'Several of the chapters are by legal historians; most, however, are by historians whose main field of research is not the law but who fully recognize its central place and importance in medieval life. The consequence of this recognition, developed over the last half century, is that other older boundaries separating legal history from "other" histories – social, religious, political, intellectual, even literary – have been blurred, if not thoroughly dissolved. We, the editors and contributors to this volume, believe that this blurring of boundaries properly reflects the complexity of the historical picture' (p. xii). One wonders what F. W. Maitland would have thought of their statement that it was the late 20th century that discovered that court rolls and notarial documents are 'an extremely right trove of data for the social historian' (pp. xi–xii), let alone the somewhat creedal tone of the last sentence of the passage just quoted, far from his view that 'an orthodox history is a contradiction in terms'. A problem in the execution of the types approach favoured in the editors' preface is that the writers tend to make use of the work of secondary literature that reinforces their new orthodoxy. In looking just at the secondary literature cited on British matters, the relative absence of works by such significant writers as Wormald (very relevant e.g. at p. 79 on physical punishment), Brand, MacQueen (relevant to Jordan's piece on sanctuary), and Milsom is very striking.

The approaches proposed can add to the understanding of the functioning of law, particularly if the approach is informed not just by processual and functional models drawn from anthropology but also by subtle consideration of the historical implications of various forms of jurisprudence, as best demonstrated by Chris Wickham's *Courts and Conflict in Twelfth-Century Tuscany* and William Ian Miller's *Bloodtaking and Peacemaking: Feud, Law and Society in Saga Ireland*.⁽²⁾ The danger, however, is that the concentration on disputes and their conduct leads to a neglect of other important questions. What the editors describe as the 'older yet still vital tradition' is important not just with respect to institutions, an aspect that the editors mention (p. xiii), but on other issues too. What functions did law have apart from prohibition of certain actions and beliefs or the influencing of dispute settlement? What of the enabling functions of law, for example the securing of property dispositions? Certain topics here receive much attention – law as ideology, violence, marriage, magic – but others are strangely neglected. In particular, there is little treatment of property law, in particular law relating to land, the core resource in what Peters calls 'agroliterate societies'. Nor is there much extended analysis of what can be referred to as 'fundamental legal ideas', such as 'wrong' or 'ownership', analysis of the type that features illuminatingly in David Ibbetson's *Historical Introduction to the Law of Obligations* and most stimulatingly in S. F. C. Milsom's *Natural History of the Common Law*.⁽³⁾ Such ideas may or may not be consciously held by people at the time, but are of importance in understanding long-term changes in the nature of law, the driving forces of legal development, and the relationship of law to society, themes that are professed to be central to the overall argument of the volume. And such insights may give legal history, or historical jurisprudence, a role in thinking about legal development in the present day, as suggested by Harold J. Berman in *Law and Revolution*.⁽⁴⁾ As Brundage writes at the close of his essay on the 'ghost story' of the 12th-century revival of Roman Law, 'the ethical

questions that medieval lawyers confronted have not gone away. ... As a historian I am struck by how closely the solutions that the legal profession in our own day prescribes to meet those challenges resemble conclusions that their opposite numbers in the Middle Ages arrived at by following the directions signalled by their still earlier counterparts in late antiquity. The ghost story, it seems, still continues.'

The editors are grateful for this thoughtful review and do not wish to respond.

Notes

1. Robert Bartlett, *The Making of Europe: Conquest, Colonization, and Cultural Change, 950-1350* (Princeton, NJ, 1993). [Back to \(1\)](#)
2. Chris Wickham, *Courts and Conflict in Twelfth-Century Tuscany* (Oxford, 2003); William Ian Miller, *Bloodtaking and Peacemaking: Feud, Law and Society in Saga Ireland* (Chicago, 1990). [Back to \(2\)](#)
3. David Ibbetson, *Historical Introduction to the Law of Obligations* (Oxford, 1999); S. F. C. Milsom, *Natural History of the Common Law* (New York, NY, 1993). [Back to \(3\)](#)
4. Harold J. Berman, *Law and Revolution: the Formation of the Western Legal Tradition* (Cambridge, MA, 1983). [Back to \(4\)](#)

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