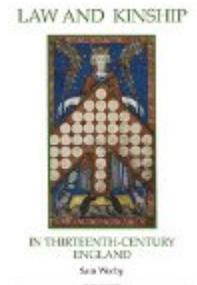


Sam Worby. *Law and Kinship in Thirteenth-Century England*. Woodbridge: Royal Historical Society/Boydell Press, 2010. 198 pp. \$95.00 (cloth), ISBN 978-0-86193-305-1.

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When Kinship Matters: Law Encountering Family in Medieval England

Sam Worby's fine contribution to the historical literature articulates and analyzes the medieval English understanding of kinship from not only the perspectives of canon law and common law treatises, lawyers, and judges, but also from the participation of the people who either brought their cases into the courts of these two jurisdictions or found themselves summoned to defend themselves in prosecutions.

The relatively short text of Worby's monograph consists of five chapters framed by an introduction and conclusion, and is followed by four appendices that contain transcriptions of some of the treatises important among her sources. The short introduction properly sets forth the purpose and parameters of her study, discusses terminology and definitions, invokes historiography, and presents the medieval English context in which the canon and common laws operated and affected the lives of most of the population. Immediately in the first paragraph she sets forth her central conclusion that the canon law "was the foremost kinship system" in medieval England by the thirteenth century and that "[e]ven the common law ... was touched by canon law ideas" (p. 1).

To construct her argument, the first chapter, "Canon Law Kinship Structures," begins with an explanation of kinship's importance in the canon law, specifically as an impediment to marriage, but quickly moves into one of the most original parts of her work: a discussion of the most popular treatise in thirteenth- and fourteenth-century England that dealt with kinship in canon law,

Quia tractare intendimus, written by Raymón of Penyfort in about 1235, which she has edited and provided in appendix 1. Worby carefully defines the three types of kinship that affected whom a person could marry under canon law: kinship by blood (consanguinity), kinship by affinity, and spiritual kinship. Her discussion of consanguinity explains the structure of the *arbor consanguinitatis*, the diagram that identified the blood relatives within the four degrees of kinship that a person was prohibited from marrying under canon law as established by the 1215 Fourth Lateran Council (p. 12). She compares this tree of consanguinity with Raymón's discussion of the four degrees of affinity, created by "fleshly joining" through marriage or illicit sexual intercourse, and within which marriage was also prohibited. Worby's analysis of the manuscripts in which Raymón's and the other brief treatises pertaining to kinship survive in England argues that their number and variety support their importance and usefulness both as textbooks and references. The rest of the chapter presents the rationale, history and enforcement of the rules for prohibiting marriage within the degrees of consanguinity and affinity. Worby emphasizes the complexity of the canon law's kinship structure, how it was formed by biological connections or by "an analogy with that connection" (p. 37), as well as the clear limits it established in determining whom a particular person could marry. She recognizes the distinction between marriages within the closer degrees of kinship that were "more scandalous" and explicitly forbidden in the Bible and the third and fourth degrees for which papal dispensations might sometimes be obtained (p. 26). The rules

and their implementation, she argues, were taken seriously in the protocol for creating marriage and by the courts that judged them.

Chapter 2 presents kinship from the perspective of the concerns of common law that primarily—but not exclusively—dealt with inheritance of property and the determination of rights in land. The chief differences between the two legal systems' concept of kinship, Worby points out, was that in common law kinship was established only by blood relationship and theoretically extended indefinitely, but explicitly excluded members who mattered very much in the tree of consanguinity in canon law. Whereas the central figure in the kinship structure of canon law was “Ego,” and his or her relationship to the prospective spouse, the central figure in the common law kinship was the person who died and the purpose was the discovery of the nearest heir. Blood relationship was a means of transmitting the right to property that ended up in the hands of a specific heir or heirs. Common law excluded all who were not born of parents whose marriage had already been solemnized by the church. Thus, while the blood relationship between an illegitimate son and his legitimately born brother was significant in the eyes of canon law, in common law the former was regarded as a “foreigner” (p. 67). Common law understanding of kinship in thirteenth-century England was consciously shaped by the parentelic system and had arisen as a result of the Norman Conquest which incorporated male primogeniture, but also privileged the division of property among female descendents over collateral males.

Driving home her thesis in chapter 3, “The Dominance of Canon Law Ideas,” Worby analyzes the important common law treatises dealing with kinship: the popular late thirteenth-century Britton, the treatise once ascribed to Henry de Bracton, *De Legibus et Consuetudinibus Angliae*, and the documents on kinship which were bound together with them in some manuscripts. Worby has rendered an important contribution to scholarship by making them available in her appendices. All three of these relatively obscure thirteenth-century works were written by common lawyers: “The Historical Introduction to Sciendum Est”; a transcription of *Quibus modis*, an adaptation of Johannes Egitanensis's *Lectura* on consanguinity; and *Triplex Est*, an adaptation of the section on consanguinity in Raymón de Penyafort's *Summa de matrimonio*. She employs these and other sources to strengthen her thesis that canon law concepts of kinship dominated not only in the common law and significantly influenced its implementation, but also in the universities. Worby contends that “the

kinship of the canon law was in common currency especially among the literate” (p. 91). Scholars, common lawyers, as well as people outside the profession, she asserts, discussed relationships in the terms and general understanding expressed in canon law.

Chapter 4, “Kinship Laws in Practice,” investigates and analyzes cases in both jurisdictions that involved relationships of kinship. Worby's conclusion that each worked consistently toward its own purpose, but not necessarily as prescribed in the learned treatises, also points out that people manipulated common and canon laws in pursuit of their own agendas. It should come as no surprise to anyone acquainted with medieval legal records that litigants and their lawyers used the rules to construct “a narrative that would fit with the legal structures, if they wanted the best guarantee of success” (p. 114). In the canon law courts litigants relied on the laws of kinship as grounds for divorce and as a defense for their behavior. In common law courts, they constructed a particular narration of kinship to make their claims or to counter their opponents. All these claims were based on the parentelic system, yet the influence of canon law thinking was evident in the common law courts' reasoning in judging these cases. This is her most convincing argument for the direct influence of canon law ideas about kinship on the decisions of the courts of common law. The four degrees limiting marriage, were applied to common law actions of cosinage and possessory actions, to feudal services in *maritagia*, and to villein services in *naifty*. In addition Worby identifies how in Britton and the thirteenth-century treatise *Mirror of Justices* the fourth degree is invoked as a limit in claiming inheritances and in appealing murder. Other evidence for “dominance” of canon law kinship is Bracton's efforts to describe kin relationships and the frequent promise of a diagram of parentelic kinship that mirrors canon law treatises.

Worby argues in chapter 5 for several “Trends Underlying Legal Kinship Structures,” particularly that among the laity there was far less acceptance of the canon law rules regarding affinity created by mere sexual encounters than created formally and publicly by marriage. The sample of canon law cases on which she bases her conclusions extend beyond the thirteenth to the fifteenth centuries and are drawn from printed sources: *Law, Marriage, and Society in the Later Middle Ages: Arguments about Marriage in Five Courts*, by Charles Donahue (2007); *Lower Ecclesiastical Jurisdiction in Late-Medieval England: The Courts of the Dean and Chapter of Lincoln, 1336-134*, by L. R. Poos (2001); and *Select Cases from*

the Ecclesiastical Courts of the Province of Canterbury c. 1200-1301, edited by N. Adams and C. Donahue (1981). Her selected sample of “fifty-nine cases including sixty-two instances where some form of ‘incest’ was raised” is not large and is statistically unreliable, but is suggestive enough to support the general patterns she describes (p. 115). People appear to have accepted the canon law strictures against marrying blood relatives through the third degree and generally tried to obey them, but the fourth degree was sufficiently distant enough for most people to be unaware of their kinship. Incest by affinity was prosecuted more often in the lower degrees probably because of the scandalous nature of such a close relationship and because proximity made such encounters possible. The larger number of allegations of affinity created by sexual encounters rather than by marriage reflects that it was easier for litigants, Worby reasons, to make such a claim collusively when it suited their own purposes (p. 120). The greater number of cases comes from the fourteenth century, and the trends she offers for the fifteenth century are more tentative.

Worby selects her sample of 130 common law cases that contain a count of family descent from the four volumes of Paul Brand’s *The Earliest English Law Reports* (1996-2007), and the *Roll of the Shropshire Eyre*, edited by Alan Harding (1981). Here also, she finds that a “three-generation sense of family” prevailed despite Bracton’s treatise model of six generations based on the civil law (p. 125). Although family memory could and did extend beyond the third generation when there was land at stake, the everyday understanding of kinship in the thirteenth century that Worby presents rarely reaches the fourth-generation limit of canon law.

Worby has developed strong arguments why the “ideas of the canon law held the field” (p. 131) in conceptions of kinship and that these concepts were well understood by the laity. First, the parentelic concept of kinship had limited application because common law rules of inheritance applied only to those who held land freely in fee simple by feudal or socage tenure. Canon law limiting marriage by the rules of consanguinity and affinity applied to all folks expecting to marry. Second, the necessity of banns reinforced these rules publicly and frequently in every parish. Third, the church courts actively pursued ex officio prosecutions in the community, whereas the common law courts enforced parentelic inheritance only sporadically when litigants brought their cases to court on their own initiative. Finally, canon law kinship, although complicated in practice, was simpler and more uniform than the parentelic. Taught in univer-

sities, systematically explained and visually illustrated by the *arbor consanguinitatis* in numerous treatises, canon law supplied a model that had Ego at the center and always took the same shape.

In one area Worby contends that the common law significantly altered the English sense of kinship. Worby compares the individualistic idea of family in thirteenth-century England articulated by Alan Macfarlane and Michael M. Sheehan with the more corporate concept of kinship that existed elsewhere in Europe and that prevailed earlier in Anglo-Saxon England. The parentelic emphasis on vertical lineage rather than horizontal ties of kinship promoted this sense of individuality, firmly established before the canon law (or Roman law and the *ius commune*) had its major impact. Yet, as she contends at the end of her conclusion, MacFarlane was mistaken in asserting that the thirteenth- and twentieth-century English families were much the same: the “everyday focus on the nuclear family and a three-generational normal family memory” common to both was in medieval England “overlaid and interwoven” with common and canon law’s “wider, more hierarchical kinship structures that mattered” (p. 145).

This is a valuable book. Worby’s thesis is well argued and I have little fault to find with her analysis of the evidence. She sets forth a significant thesis that challenges assumptions and some accepted ideas, and purposely states it in bold terms without hedging. Nevertheless, I am uncomfortable with her selection of the term “dominance” to describe canon law’s influence over common law regarding concepts of kinship. The everyday three-generational concept of kinship she reveals does not appear from her evidence to have been a consequence of the canon law, but despite canon law, and the result of human experience. She shows that it was the learned common lawyers—the writers of treatises, compilers of manuscripts, justices, and professional pleaders—who had some acquaintance with canon law that applied the four-degree canon law limitation to common law issues. It did not change or control the common law, but did make it more practical and reasonable to implement. This argues for a permeating influence and usefulness as a tool, not dominance, a term that implies power and authority. I have two other minor quibbles. One is that I wish that she had explained more clearly the role of legitimacy in determining consanguinity in canon law when she raised the issue (pp. 5, 74-75). The other slight dissatisfaction is that I found only one reference to the *ius commune*, yet her whole argument bears directly on the extent of canon and civil law relationship to En-

glish common law ideas and legal understanding (p. 30). This is a long and important discussion in the historiography, and Worby's book has much of value to add more explicitly to that conversation.

Despite the technical aspects of her topic and the necessary denseness of the text, Sam Worby's book is well worth the effort for anyone with an interest in medieval English kinship. Worby provides the reader with succinct

conclusions at the end of each chapter, summarizing the chief thrust of her argument. So although her primary audience is the scholar, even undergraduate students in upper-level medieval history courses can gain a clearer understanding of the difference between canon and common law definitions, their respective purposes and rules regarding kinship, the enthusiasm with which they were enforced, and the degree to which ordinary folk accepted or resisted, challenged or ignored them.

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