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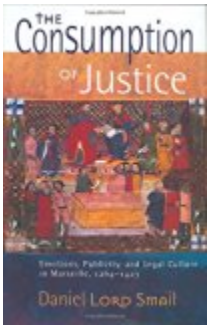
Daniel Lord Smail. *The Consumption of Justice: Emotions, Publicity, and Legal Culture in Marseille, 1264-1423.* Ithaca: Cornell University Press, 2003. xii + 277 pp. $49.95 (cloth), ISBN 978-0-8014-4105-9.



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Why Did Medieval People Go to Court?

At first blush, the answer to this question might seem obvious: to get justice. But a moment's reflection reminds us that very different motivations may be at work when someone goes to court, at least in the present-day United States: using the threat of litigation to induce an opponent (of a real-estate development scheme, for example) to back down, or calculating that it is cheaper to pay a lawyer than to pay a claim, or other reasons that have little enough to do with either a concrete or an abstract desire for justice and much to do with pure business calculations or simple harassment. Such reflections remind us that although the history of law has traditionally been one of legal doctrines and institutions, neither the former nor the latter would exist unless people decided to go to court. The story of why they did so is therefore as fundamental to the history of law as the traditional doctrinal and institutional topics, and especially important for the late medieval/early modern period, which was surely as litigious an age as our own. It is a story, however, that until now has been little explored.

The reason for this neglect is not that sources are rare. Quite the contrary, as Daniel Smail demonstrates, by the late Middle Ages they are so voluminous that sampling becomes the only reasonable research procedure (and the archives of Marseille are surely not unique in this regard). The problems in using those sources, however, are twofold. First, imagining what questions to ask, and locating where in the complex procedural records to look for the answers. Second, understanding the larger context of social relations in which those court records fit, the "legal anthropology" of the time and place. Solving these problems are at the heart of Smail's deeply researched, intensely argued, and profoundly satisfying book. His answers should not only suggest equivalent avenues of research to be pursued elsewhere in cities, towns and regions where requisite records survive but, more importantly, urge all historians concerned with late medieval/early modern ("Renaissance") states to reconsider some of their common generalizations about those states and the role of law and the courts in creating them.

The legal anthropology of fourteenth- and fifteenth-century Marseille is Smail's primary subject matter. The theme is announced in one of the epigraphs to the book's introduction–Leon Battista Alberti's remark, "Lawsuits are types of enmities." The richness of this statement will be readily understood by any reader of Benvenuto Cellini, Machiavelli's *Florentine History*, or Italian diaries from the period. Smail is fully conversant with the studies of honor and status, enmity and friendship, that have explored the social world assumed by Alberti's remark, studies not only of the late medieval/early modern Mediterranean world, but of Antiquity, medieval and early modern Great Britain, Scandinavia, Russia, Africa, and Asia. From them he has absorbed what is most useful for his project without getting trapped in some of their theoretical underbrush. Though informed by this anthropological and historical literature, his text nevertheless gives the impression that he is just leafing through the judicial records and telling us the stories they contain. That is one of the many pleasures of reading the book:

the hard work is well hidden and the argument seems to flow directly from the sources.

In the introduction, Smail presents his central question, the one I have used as a title for this review, though he phrases it in a way that seems better to fit the artisan and merchant population of the city, asking, "Why did people invest in litigation? " From court and notarial records he makes a "crude estimate" that litigants in the city spent between 2860 and 4400 royal pounds per year on litigation in the middle decades of the fourteenth century, or, to personalize the investment, an ordinary laborer earning 2 s. per day might spend 22 pounds, the wages of 220 days, to pursue or defend a case in court. Why was this an "investment" and not just a necessary evil? Not because of the money to be made or lost, for relatively few cases ever continued to judgment; in those cases both plaintiffs and defendants lost their court costs. It was rather because the object of litigation, both civil and criminal, was to pursue grudges, to protect or gain status, honor, and "good name." It was an investment in emotional satisfaction and social position.

Smail's demonstration is indirect but robust. Along the way he explains a number of characteristics of late medieval litigation that have long puzzled researchers, including: the apparent "powerlessness" of courts [1]; the rarity of final sentences in court records (among the many topics in chapter 1); the apparent confusion (in modern eyes) of public punishment and private vengeance; the preference (even in criminal cases, *pace* Foucault) for distraint of goods rather than physical punishment (among the subjects of chapter 4); and the continued preference for the testimony of witnesses rather than written records, despite the plethora of records being kept (the subject of chapter 5). The evidence he finds primarily in a subsidiary part of the procedural records– the "exceptions" that plaintiffs and defendants made to their opponent's witnesses and the court inquiries into those exceptions. One of the several reasons that Roman/Canon Law (the procedure followed by the courts of Marseille) allowed for rejecting a witness's testimony was hatred for the person against whom he or she was testifying. As a result, the emotional attitude of witnesses to the disputing parties, or to an accused offender was a standard research item on the courts' agenda. In these "exception inquests" Smail discovers a "vernacular sociology," a large vocabulary of what he calls "scripts" (following Stephen D. White), not only words to express emotions but a large vocabulary of gestures and actions through which people acted out their loves and especially their hatreds.[2] The judges' questions and the witnesses' replies show people "keeping track [of emotional relationships, their own as well as others'] in much the same way as they kept track of credits and debts" (p. 92). Indeed, the flow from love and hatred to credit and debt ran in both directions: the emotions were talked about in the language of finance and financial transactions and litigation over them was most often determined by the making and breaking of emotional ties (the subject of chapter 3). Loves and hatreds were "like clothes, rich in significance, worn on the outside of the body for all to see, easily changed" (pp. 92-93). Among the "scripts" that expressed these was litigation, which from the perspective of litigants and observers was the rough equivalent of insulting, brawling, or taking vengeance with a weapon.

This emotional context and Smail's detailed knowledge of the factions in late medieval Marseille (a city as divided, and apparently as given to violence, as any contemporaneous Italian city) allow him to read the purposes behind many of the lawsuits and criminal accusations whose stories he recounts. They explain why men of little means spent what must have seemed to them to be a fortune pursuing neighbors or fellow artisans in court and then, having shown their hatred, let the matter drop. They explain why friends might help those accused of crime to escape to sanctuary in the city or safety beyond the reach of the sub-viguier (the city's constabulary). In the same way they help explain the other conundrums mentioned in the previous paragraph.

The lessons Smail draws have rich implications for students of medieval and early modern law everywhere in Europe. At the very start of the book he critiques older explanations of why European societies became increasingly litigious in the later Middle Ages, making law courts one of the major institutions of the nascent Old Regime. There is no sign, in the records he has read, that the users of those courts preferred "muscular justice" or a "rationality" of decision-making that they could not find elsewhere. Nor did litigation replace "self help" in the form of insults, street fights, murder, or seizure of property; it merely added another tool to the kit. No one was coerced into using the courts, and no one, officials or users, imagined that the courts or their agents had or claimed a monopoly of violence. And finally, the Angevin treasury earned little from this litigation, in comparison with the money made by the legal professionals, from messengers to notaries to procurators. To replace these older models, Smail suggests thinking of courts in terms of a marketplace (where in fact the city courts assembled): justice–whether royal, ecclesiastical or urban–was offered as a service to those who wished

to pursue a grudge or to save or enhance their good name. It was another stage for the game of honor.

The market metaphor is striking and suggestive. In this setting some of the most important categories in the old story of the "origins of the modern state" vanish: sovereignty, centralization, bureaucracy, all those formal structures so central to the consecrated "Whig" narrative. What looks so wayward when viewed in that context–the confused and overlapping hierarchies of late medieval and early modern governments, the effective irresponsibility and ineffectiveness of their officials, the apparent irrationality of their organizations, and their inherent orientation towards status rather than achievement–are not a "set-back [to] the process of state building" [3], but rather exactly what one might expect of a government offering its services and trying to extract income within the emotionally inflected society that Smail describes. Following out his metaphor, Smail, in a long look forward, discovers the "civilizing moment" in the story of Old Europe not in the repression of emotions by "rational" justice but only in the eighteenth century when the game of status and honor shifted to the conspicuous display of the material goods people consumed. Are we here at the inception of a new master narrative?

Notes

[1]. Bernard Guene, *Tribunaux et gens de justice B la fin du Moyen Ã? ge* (Strasbourg: FacultÃ© des Lettres de l'UniversitÃ© de Strasbourg, 1963), pp. 280 ff.

[2]. Stephen D. White, "The Politics of Anger," in *Anger's Past: The Social Uses of an Emotion in the Middle Ages*, ed. Barbara Rosenwein (Ithaca: Cornell University Press, 1998), pp. 142-152.

[3]. J. R. Strayer, *On the Medieval Origin of the Modern State* (Princeton: Princetion University Press, 1970), p. 59.

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