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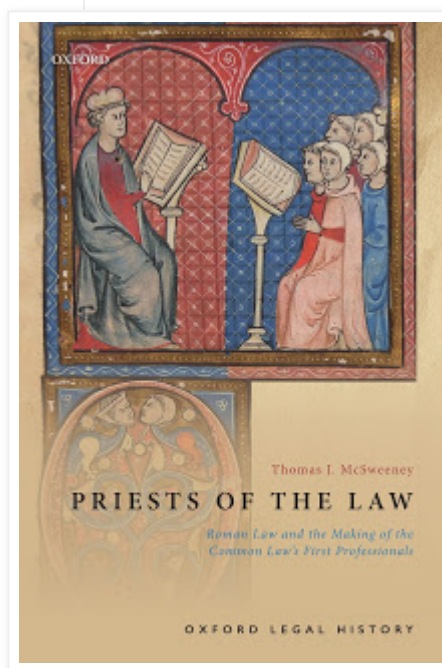
scholarship, news and new ideas in legal history

Monday, March 16, 2020

Who are the "We"?

In my last post, I discussed my approach to the *Bracton* treatise in *Priests of the Law*. I am interested in *Bracton* primarily for what it can tell us about the justices who wrote it and how they thought about their work in the English royal courts of the thirteenth century. *Bracton* presents us with a particular view of the royal justice and what he is, not so much through what it says, but in how it says it. Very close to the beginning of the treatise, one of the authors tells us that "law (*ius*).. is called the art of what is fair and just, of which we are deservedly called the priests, for we worship justice and administer sacred rights." There is an interesting assumption built into this sentence: the "we" seems to assume that both the author and the reader are part of some group with a shared identity. But the author does not explicitly define that group in this passage. Who did he mean to include in that "we"? There were professional or at least semi-professional lawyers working in the king's courts in between the 1220s and the 1250s. This is the period when we start to see the *conturs* or *narratores*, the lawyers who made oral arguments on behalf of clients in court (roughly equivalent in function to modern English barristers) coalesce into a recognizable professional group. We start to see professional or semi-professional attorneys, who handled the procedural aspects of litigation, around the same time. You would never know this from the *Bracton* treatise. The justices who wrote *Bracton* must have been familiar with the *conturs*, who they would have encountered regularly in their work, but they chose not to address them. The treatise does address the problems of judging and the concerns of the justices and clerks of the royal courts. In this period, service as a judicial clerk was often a path to the judicial bench. The authors of the treatise themselves had followed that path. Henry of Bratton, from whom *Bracton* takes its name, served as a clerk to William of Raleigh. William of Raleigh, probably the primary author of the treatise, served as a clerk to Martin of Pattishall. Martin of Pattishall, who may have begun work on the treatise, was clerk to Simon of Pattishall. In writing the treatise for justices and clerks, the authors of the treatise wrote it for people who were just like them.

It would seem that the *Bracton* authors defined that "we" in a fairly narrow way. The justices and clerks of the royal courts were, altogether, a few dozen people. In imagining the ideal reader of



the treatise, the authors excluded large groups of people who worked with law. Judging by the way they wrote the treatise, in a scholastic Latin that assumes quite a bit of knowledge of Roman law, that "we" looks even narrower, as it would have required a particular type of education, one not necessarily shared even by all of the justices and clerks, to fully understand it. The authors appear to have thought of this treatise primarily as an in-house text for a small group of people.

But there is also a sense in which the "we" is fairly broad. Although it excluded many people who worked with law right in the English royal courts, the people the authors would have encountered every day when court was in session, "Law... is the art of what is fair and just, of which we are deservedly called the priests, for we worship justice and administer sacred rights" connected the authors and their audience to other people across time and space. Although it is not marked as such in the treatise, it is actually a quotation. The authors probably took it from Azo's *Summa on the Institutes*, a treatise on Roman law produced by the preeminent jurist of Bologna, Europe's premier center for the study of Roman law, in the early thirteenth century. In Azo's text, the "we" refers to the jurists of Roman law working throughout the Latin West. Azo had himself taken the line from Justinian's *Digest*, the sixth-century compilation of the writings of jurists of the classical period of Roman law, where it appeared in an excerpt from the jurist Ulpian. For Ulpian, the "we" referred to the jurists of his own time, the 2nd to 3rd centuries C.E. The authors certainly knew the source of the quotation and, although I cannot prove this, I suspect they expected their readers to know it, too.

The justices who wrote *Bracton* seem to have felt little kinship with the people who were beginning to make a living practicing before them in the courts. But they felt a kinship with the jurists of Roman law teaching and practicing throughout the Latin West and possibly with their ancient Roman predecessors, as well. In an island kingdom which appeared on medieval maps, even maps made in England, on the very edge of the world, these justices imagined themselves as part of an international community of jurists of the civil law.

-Tom McSweeney

Posted by Thomas J. McSweeney at 12:30 AM

