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The Overly Familiar Treatise

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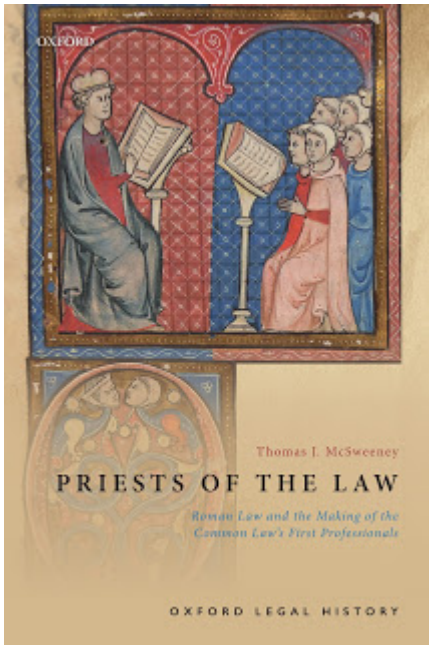

I'd like to thank Dan, Karen, and Mitra for inviting me to join them this month. I recently published my first book, *Priests of the Law*, which is about a group of justices in the English royal courts who, I argue, sought to fashion themselves as jurists of the civil law. The central piece of evidence for this contention is the *Bracton* treatise. I'd like to use this first post to talk a bit about *Bracton* and why I think it's such a fascinating text. *Bracton* is a legal treatise that was written over a period of about 30 or 40 years, between the 1220s and the 1250s, by a succession of justices working in the royal courts. *Bracton* is one of those medieval texts that modern lawyers have often heard of. It's cited in a Supreme Court opinion about once a year, usually to demonstrate that some rule or principle goes back to the very beginning of the common law, or very close to it. There are several reasons why people still turn to *Bracton*. As one of the earliest systematic treatments of the law of the English royal courts, it became part of the common-law canon. It was printed in 1569 and 1640. Our first professor of law at William & Mary, George Wythe, owned a copy. Thomas Jefferson waxed eloquent about its value as "the first digest of the whole body of law, which has come down to us entire," which, "gives us the state of the Common law in it's ultimate form, and exactly at the point of division between the Common and Statute law." *Bracton* even makes an appearance in the case *Pierson v. Post*, a mainstay of the first-year property course. *Bracton*'s accessibility doesn't hurt: a searchable edition and translation is available online. I think people also cite to it because it is a familiar type of text. We generally refer to it as a treatise, and that's a good enough description. It's a text that treats the law of the king's courts in a methodical way. The treatise is a genre of text we're familiar with today and it's a genre of text we're accustomed to turn to when we need answers about the law.

I think one of the problems of writing about *Bracton* is its very familiarity. The fact that the treatise is still a recognizable genre actually hampers our ability to understand a text like *Bracton*. Its purpose seems fairly obvious to us; it is designed to explain the workings of the king's courts in a methodical manner. When I started reading historians on *Bracton*, I saw a lot of very good discussion about when it was written, who wrote it, and whether it accurately represents practice in the royal courts of the thirteenth century. These are important questions, but I didn't see much writing on what I thought was the really big question: why did anyone think it was a good idea to

write this book? I think scholars have largely taken it for granted that they know what a treatise is and why people write them. But writing a treatise about the royal courts was not a terribly obvious thing to do in this period. The *Bracton* authors did have precedents. Jurists of Roman and canon law were writing treatises in the thirteenth century, and *Bracton* relies on one in particular, the *Summa on the Institutes* of Azo of Bologna. At least one other text that could be described as a treatise on the king's courts existed, the text known as *Glanvill*, written in the last decades of the twelfth century. *Glanvill* was an ambitious text in its own way, but it is a *much* shorter text than *Bracton*. *Bracton* is the length of roughly nine or ten *Glanvill*s. Once we start to think about the *Bracton* project as an oddity, a strange choice for this group of justices to make, that opens up a lot of interesting questions about the text. Why did these justices and clerks sit down to write this text? One of its authors claims that he worked "long into the night watches" writing it. The people who wrote it were justices and clerks of the king's courts, not exactly people with a lot of spare time on their hands, so they must have been committed to this project. When we start to think of writing a massive treatise not as a natural choice, but as a fairly strange one, we can start to look at *Bracton* as a cultural artifact and ask what role it played in the culture of thirteenth-century justices and clerks.

--Tom McSweeney

Posted by Thomas J. McSweeney at 9:30 AM