

Book Reviews

Daniel Lord Smail, *The Consumption of Justice: Emotions, Publicity, and Legal Culture in Marseille, 1264–1423*, Ithaca: Cornell University Press, 2003. Pp. 304. \$49.95 (ISBN 0-8014-4105-6).

Daniel Smail has written a fine book about justice in medieval Marseille. Much of the book is an extended argument about the importance of emotions (such as vengeance, love, and hatred) and the “consumer’s” (rather than jurist’s) view of the law. Along the way, the book provides the most vivid account this reviewer has ever read of the romano-canonical procedure. Based on a thorough and perceptive reading of the extensive legal records of fourteenth-century Marseille, the author has constructed a detailed and informative analysis of the operation of the courts and their social context.

The first chapter describes the courts and their procedure. It also provides a wealth of quantitative data, including a breakdown of the types of suits (debt being the most common), the sex of the parties (women constituting about a quarter), the disposition of cases (only ten to fifteen percent reaching a sentence or judgment), and expenses (an average of twenty-two pounds per suit). As in the rest of the book, all points are also amply illustrated by vivid case excerpts. Chapter two focuses on the disqualification of witnesses. Enmity, friendship, dependency, and moral turpitude were all grounds for the exclusion of testimony. As a result, parties spent an enormous amount of time proving that particular witnesses were their enemies, their adversaries’ friends or dependents, or generally untrustworthy. The third chapter focuses on debt litigation and argues that debt should not be seen primarily as impersonal, commercial capital, but rather as friendly, neighborly transactions. The fourth chapter focuses on enforcement. The courts were ineffective in inflicting corporal or capital sanctions, because offenders usually fled. On the other hand, the machinery for seizing property to satisfy debts and fines seems to have been rather effective. The final chapter argues that, in an age before official registries of births, deaths, marriages, and property, a “legal culture of publicity” prevailed. New mothers summoned their neighbors to witness births and breastfeeding, and those neighbors (principally women) could be called upon to prove the birth, if necessary, in litigation. New owners of property worked the land publicly, so that, if a dispute arose, there would be witnesses to their possession. Although southern France was the “land of written law” and notaries recorded large transactions and the stages of lawsuits, most facts continued to be proved by “public fame” rather than written documentation.

One of Smail’s principal arguments is that litigation was not initiated to secure relief—money damages, possession of property, repayment of a loan, and so forth—but rather that lawsuits were “inimical gestures” by which persons or groups

inflicted humiliation and the burden of litigation upon their adversaries in order to gain "emotional satisfaction" (243). Two key pieces of evidence in favor of this proposition are the fact that so few cases terminated in a sentence (judgment) and the fact that litigation was very expensive. Nevertheless, each of these points is subject to other interpretations. Smail argues that the fact that only 10 to 15 percent of all cases ended in judgment indicates that "civil litigation failed more often than it succeeded" (87). On the other hand, as students of modern litigation know, low trial rates may indicate high rates of out-of-court settlement, and such settlements could result in legal success as ordinarily measured—monetary compensation, repossession of property, etc. In various places, the author assumes that settlements could be procured only through arbitration (62–64, 86–87), and thus that only 15 to 33 percent of suits ended in settlement. Perhaps this is correct. Perhaps out-of-court settlements had to be recorded in notarial books and thus would be known to Smail, if in fact they occurred. On the other hand, Smail never so argues, and the reader is left uncertain about this key point. Similarly, although Smail seems amazed that parties could run up litigation costs totaling a quarter of the sum being litigated (68), this percentage is also typical of modern litigation and thus not indicative that litigation was "an investment in emotional satisfaction" rather than "a rational calculation of economic benefit" (35).

Although the author was not particularly interested in comparative law, the book suggests a previously unappreciated advantage of the common law's reliance on juries. The romano-canonical civil law required witnesses to prove every fact, a need that was aggravated in many places by the practice of employing foreign judges. Although such judges had the advantage of being neutral in local factional conflicts, they had the disadvantage of being ignorant of the social landscape. As a result, they needed testimony proving facts that everyone else knew—who was married to whom, who was whose enemy, who owned what property, who was a prostitute, and so forth. As Smail extensively documents, proving these facts took enormous time and effort and made the courts stages upon which parties could defame their neighbors. In contrast, medieval English jurors were recruited from the locality of the dispute and thus did not need to be informed in court of such matters. In fact, they may not have needed any testimony at all. As a result, trials were much faster and perhaps less infected by the hatred and vengeance that Smail argues characterized litigation in medieval Marseille.

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D. Alan Orr, *Treason and the State: Law, Politics and Ideology in the English Civil War*, New York: Cambridge University Press, 2002. Pp xii + 229. \$55.00 (ISBN 0-521-77102-1).

Early modern England witnessed a phenomenal transformation in the conceptualization and employment of treason law as Parliament wrested sovereignty from the king in an effort to reshape public authority. D. Alan Orr has provided a sketch of