

MEDIEVAL CHURCH LAW AND THE ORIGINS OF THE WESTERN LEGAL TRADITION: A TRIBUTE TO KENNETH PENNINGTON. Edited by Wolfgang Müller & Mary Sommar. Catholic University of America 2006. Twenty-six scholarly articles in four languages. Pp. approx. 400. \$79.95. ISBN: 0-813-21462-9.

One of the most striking characteristics of contemporary canonical historical research is that it is being carried on almost entirely by historians, not by canonists. Discounting some civilians such as Senior Circuit Court Judge John Noonan (who is, by the way, self-trained in canon law), the number of lawyers, specifically *canon* lawyers, engaged in serious historical canonical research is quite small. But canonists *qua* lawyers must be wary lest they suffer the same fate that befell priests *qua* homilists in the heyday of post-conciliar Biblical studies: the profundity of the discoveries presented by Biblical historians left those charged with preaching wary of trying to draw any practical conclusion from those discoveries. The more one came to know about the Bible, it seemed, the less one read it, let alone prayed it. The result was that some treated Scripture as a technical domain reserved for those who could read six languages, while others plumbed the Bible for little besides inspiring sentiments. Canonistics face a similar danger.

The codification of canon law in the early twentieth century forced ecclesiastical lawyers, who after all still had a major Church to run, to focus almost exclusively on a wide range of practical and administrative canonical issues. Ready resort to the canonical history embodied in the works of past thinkers, which was common for many centuries under decretist and decretalist law,¹ became an esoteric art among canonists, so much so that even the techniques of that kind of research were all but lost with each passing decade. The result is that today, the incredible flowering of canonical (and civil) legal history that is going on remains, it seems, almost completely unutilized, even unrecognized, by daily practitioners of canon law. The volume reviewed here, however, *Medieval Church Law*, makes some headway in bridging the gap that has grown up between canonical courts and academe in recent decades.

1. Decretist law focused on the application of Gratian's magnum opus after c. 1140, and decretalist law dominated canonistics following the appearance of Gregory IX's *Liber Extra* in 1234.

Medievalist Kenneth Pennington, at Syracuse University for some thirty years but since 2001 at The Catholic University of America (host of the only pontifical faculty of canon law in the United States), is one of the finest legal history scholars in the world. In addition to his own prodigious output as a writer, editor, and lecturer, he has inspired and encouraged two generations of legal scholars to explore the contributions of Catholic canon law to the formation of the European *Ius Commune*. His timing could not have been more fortuitous, particularly as Europeans struggle to identify the essential characteristics uniting them, after centuries of self-destructive attention to their differences. In any case, one need only glance at this festschrift in Pennington's honor, *Medieval Church Law and the Origins of the Western Legal Tradition*, to see ample evidence of the personal and professional esteem in which he is held.

The essays in this work are loosely grouped around the theme, one of the origins of the Western legal tradition. Given the nature of a festschrift, of course, the book is not a comprehensive presentation of that development. (Persons interested in that topic still need to consult such seminal works as Harold Berman's *Law and Revolution* or R.H. Helmholz's *The Spirit of Classical Canon Law*.) Rather, one finds here some two dozen closely researched snapshots of that tradition as it developed, loosely grouped around periods. Provided, therefore, that one already has a decent grasp of the highlights of that overall development, these essays are a delightful sampling of the sophistication that scholars from around the world are bringing to this area. Several of these essays will make fascinating reading for canonical practitioners who see the value of staying in touch with the development of their science over the centuries. Wolfgang Müller's opening essay delivers a sort of "state of the studies" description of current Western legal historical research. While his remarks are too brief to orient those with no background in canonical or ecclesiastical history, his essay is an excellent way for those with a basic background in canonistics or the history of the *Ius Commune* to "get up to speed" on the major areas of research being pursued today. It certainly merits careful reading by anyone one hoping to visit other essays herein.

Rather than comment on each of the articles collected by Müller and Sommar (several of them deal with areas outside of my specializations in any event) I want to highlight just some works that, as suggested above, best serve to remind modern practitioners of canon law of, or introduce them to, the historical roots of their discipline. For example, Greta Austin's essay on how Burchard of Worms wrestled

with the problem of feuds in the eleventh century might, at first glance, be overlooked as an historical curio with no relevance in an age when criminal law is controlled by the state. But that would seriously underestimate the worth of this essay because Burchard focused essentially on how to bring ecclesiastical discipline to bear on socially disruptive behavior when “both sides” could claim some rights in justice. His efforts in this area might well serve as a model for bishops who, in our times, must face similarly competing demands from constituencies that, in some respects, have equally plausible claims. Likewise, Charles Donahue’s study of Faventius on marriage could hardly have been more timely in that, even as I pen this review, an important Catholic opinion magazine is proposing a return to what (it at least believes) was the pre-Trent notion that matrimonial consent can be found in what we today call engagement ceremonies when they are followed by sexual intercourse.²

Anders Winroth’s short study of the marriage of unfree persons in Gratian is a fine example of this seminal scholar’s ability to pull together canon law, Roman law, and (here, French) theology to perform close textual analysis of passages in the *Decretum*. It is also a clear reminder that classroom hypotheticals can never equal the situations that real people forge in life, which will eventually come before a bar for adjudication. Speaking of Gratian, Sommar provides a fine description of the Bolognese master’s discussion of how canons on the removal of bishops occasioned fruitful clashes between scholars in the first decades following the release of the *Decretum*. Sommar also ably sketches, without becoming lost in the details of, the lively debate brought to a head by Winroth’s dual-recension (of the *Decretum*) theory. In like manner, Robert Somerville’s note on a fragment of the *Compilatio Prima* held by Columbia University sets out in but a few pages the current state of *Quinque Compilationes* manuscript studies.

Indeed, one might ask whether modern marriage cases are much more complicated than one posed in the fifteenth century by Ludwig Schmugge’s *Barbara Zymermanin’s Two Husbands* or whether a pope’s attempt to enlist the support of ambivalent bishops and priests in combating common heresies might be instructive today (Keith Kendall), or how modern lawyers (canon or civil) might draw ethical guidance on disclosures to, and coaching of, clients based on similar problems confronted by canonists five to seven hundred years ago (James

2. Michael Lawler & Gail Risch, *The Betrothal Proposal*, U.S. Cath. Magazine 18-22 (June 2007).

Brundage). And a fine little essay by the master Richard Helmholz sets out the evidence regarding St. Thomas More's degree of familiarity with the *Ius Commune* in general and with canon law in particular, and, by the way, confirms my hunch: More's grasp of canon law has been exaggerated by hagiographers.

Several essays are, I would imagine, especially close to Pennington's heart in that they deal directly with canonical aspects of the *Ius Commune* and early modern European civil law, including Mario Ascheri's examination of legal sources in medieval Siena and (Bp.) Péter Erdő's remarks on canonical contributions to emergent Central European law. Finally, Franck Roumy's essay *L'origine et la diffusion de l'adage canonique Necessitas non habet legem* was written in partial response to an observation by Pennington that, curiously, the history of the legal expression, "Necessity knows no law," which is so widely honored in western jurisprudence, had yet to be written. While few scholars claim to offer a comprehensive treatment of questions any more, Roumy's study of the ancient and medieval roots of this principle of the *Ius Commune* was, in short, excellent. Roumy finds the adage quietly sitting in Roman law (in the works of the forgotten jurist Publilius Syrus), sees it being applied by Pope Leo the Great, and finds it recognized by Gratian. Moreover, he shows the principle being honored not only in canon law, but in theological treatises, philosophical tracts, and even in liturgical law.

Roumy's study is an excellent note by which to summarize this review, because it epitomizes the high scholarship, clear writing, and ample documentation that characterizes these studies. These essays amply evidence the exciting, detailed attention that is finally being given to Western legal history around the world today, this work being undertaken in no small part thanks to the leadership and encouragement of Ken Pennington.

*Edward N. Peters**

* JD, JCD. Edmund Cardinal Szoka Chair, Sacred Heart Major Seminary, Detroit, Michigan.