Regarding Untimeliness: Medieval Legal History and Modern Law

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Abstract

This essay offers an account of the task of medieval legal history, suggesting that its importance lies in its ability to recognize and explain the most alien features of our legal past. In so doing, the discipline of medieval legal history makes what is alien intelligible while preserving its essential differences. It is the delicate and difficult task of engaging with our past without judging the past by the needs of the present, without taking our own limited perspective to be universal, but also without relegating our past to a mere object of antiquarian curiosity, thus cutting off the possibility of understanding the relation of our past to ourselves.

I. Introduction

One of the most important tasks for historians of medieval law is to account for legal practices which, while perhaps prevalent long ago, no longer have a place within our understandings of law—those estranged and alienated things which are no longer intelligible to us as law and which may even strike us as evidence of historical irrationality or injustice. Such a task requires attention to points of disruption in our legal past and an explanation of the significance of such disruptions. Such a task also opens the possibility of understanding law in ways that may be foreclosed to us by the ordinary conditions of thought that shape and limit how we think about law in our everyday world. The challenge in this task is two-fold: to avoid the temptation to relativize our legal past, judging past practices solely by the needs and anachronistic moral assumptions of the present; and to avoid making medieval legal history into a mere realm of antiquarian curiosity, an untimely world cut off from our understandings of ourselves and our own legal world. This essay is a meditation on how the discipline of medieval legal history recognizes and measures the distance between our world and an alien one, and in doing so helps us find things otherwise hidden from sight.

In a fascinating letter composed in 1252, Roger Bacon, by then a Master in the Arts faculty at Oxford, wrote wistfully about certain prayers that were ordained by God and the angels and instituted by righteous men of old. Such prayers, Bacon believed, were still spoken in many regions of Christendom under the authority of the Church and its prelates. When performed upon glowing hot iron or blessed water, these prayers, he explained, could prove innocence or condemn guilt. Bacon was describing the priestly administration of the judicial ordeals of hot iron and water. These ordeals, which are

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among the most recognizably alien features of the medieval legal tradition, were employed in many parts of Europe from roughly the early ninth century until the early thirteenth century, and required a suspected criminal to carry hot iron or be submerged in blessed water so that his body would reveal his guilt or innocence. For his part, Bacon understood the judicial ordeal to be an extension of an Old Testament practice specifying that a wife might be made to drink a “water of purgation, by which it is proved whether she is an adulteress or faithful to her husband.” 1 Bacon was moved to raise examples of these prayers that could affect natural elements and reveal righteous judgment because he wished to make a counterpoint within a lengthy condemnation of the sorts of vain and irrational incantations he thought were taught in his day by some magicians. Bacon offered the ordeal as an example of a singularly righteous form of prayer, different in kind from the magic formulas and superstitious rites that he condemned in his letter. 2

II. Untimeliness

There are many remarkable aspects to this passage, not least of which is that the judicial ordeals Bacon described so approvingly had been effectively eliminated in Europe by papal policies instituted nearly forty years earlier. In 1215, Pope Innocent III had convened the Fourth Lateran Council in order to implement a wide-ranging set of institutional and legal reforms for the Church. Among the most important and transformative of these was Canon 18, which forbade clerics from bestowing “a rite of blessing or consecration on a purgation by ordeal of boiling or cold water or of the glowing hot iron.” 3 The canon

1 Roger Bacon, Fr. Rogeri Bacon Opera Quaedam Hactenus Inedita, Vol. 1 Containing I. Opus Tertium, II. Opus Minus, III. Compendium Philosophiae 526 (J.S. Brewer ed., 1859). The key passage of Bacon’s letter reads:

There are certain prayers, however, that were instituted in antiquity by men of truth, or rather ordained by God and the angels. And these are such that they are able to retain their own original strength. Thus, in many regions even now certain prayers are made upon glowing iron, and upon the water of a river, and likewise, in which innocents are proven, and a guilty one is condemned. And this is done by the authority of the Church and the prelates. For those priests make exorcisms on blessed water, just as in the old law it is read concerning the water of purgation, by which it is proved whether a woman is an adulteress or faithful to her husband . . . .

In the original Latin:

Sunt autem quaedam deprecationes antiquitus institutae ab hominibus veritatis, aut magis a Deo et angelis ordinatae; et hujusmodi virtutem suam primam possunt retinere. Sicut in multis regionibus adhuc quaedam orationes fiunt super ferrum candens, et super aquam fluminis, et similibus alia, in quibus innocentes probantur, et rei damnantur; et auctoritate ecclesiae fiunt et praelatorum. Nam et ipsi sacerdotes exorcismos faciunt in aqua benedicta, sicut in lege veteri de aqua purgationis legitur, qua probatur adultera vel fidelis viro suo . . . .

I am grateful to Nick Jacobson for bringing this passage to my attention, and for his insights regarding it. All translations are my own unless otherwise indicated. The ordeal of bitter water to which Bacon referred is described in Numbers 5:12.

2 The letter is entitled “De secretis operibus artis et naturae, et de nullitate magiae” [On the secret works of skill and nature, and the nullity of magic] and is found in Bacon, supra note 1, at 523.

3 A. García y García ed., Constitutiones Concilii quarti Lateranensis una cum Commentariis glossatorum, 2 Monumenta Juris Canonici, Series A: Corpus Glossatorum ch. 18 (1981) (“nec quisquam purgation...
against ordeals and its role in the emergence of learned law in medieval Europe have been the subject of much excellent scholarship, though Bacon’s rousing and untimely defense has been little noticed. Bacon’s warmly nostalgic account of the ordeal was quite out of step with the predominant legal thought of his day, attributing to the ordeal an efficacy that most of the leading intellectuals of his day stridently denied to it. In this light, Bacon’s defense of the ordeal provides us with an opportunity to examine a point of disruption in our legal tradition, a moment where a venerable practice was abandoned and replaced by important legal innovations. Bacon’s unexpected nostalgia for the ordeal provides us with a vantage point from which to assess a turning point in medieval legal history.

Even among scholars who disagree on how to understand the motivations behind the papal prohibition in 1215 on priestly participation in the ordeals, there is general agreement that the Fourth Lateran Council marked the definitive end of ordeal practice in medieval Europe. Thus, it is not quite clear what one should make of Bacon’s remarkable assertion in 1252 that “in many regions even now” these prayers instituted by “men of truth” were still being employed to discern guilt or innocence. In Bacon’s native England, the King’s Council, prompted by the reforms of the Fourth Lateran Council, issued instructions in January 1219 commanding royal justices to abandon the ordeal and find other methods for establishing proof in criminal trials. The solution swiftly adopted by English justices expanded the jury’s accusatory role to include a duty to pronounce on the guilt or innocence of the accused by means of a binding verdict, thus initiating one of the foundational features of the common law tradition, the criminal jury trial. Bacon was probably born around 1214, though his birth may have been as late as the early 1220s, so it is not entirely clear that he ever witnessed an ordeal before it ceased to be a part of the English common law. And while it is certainly possible that the ordeal practice survived in

\[\text{aquae ferventis vel frigide seu ferri candentis ritum cuiuslibet benedictionis aut consecrationis impendat}\]; see also S. Kuttner & A. García y García, A New Eyewitness Account of the Fourth Lateran Council, 20 Traditio 115 (1964).


5 2 Councils and Synods with Other Documents Relating to the History of the English Church: A.D. 1205-1313, at 49 (F.M. Powicke & C.R. Cheney eds., 1964); see also Anne J. Duggan, Conciliar Law 1123-1215: The Legislation of the Four Lateran Councils, in The History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX, at 318 (Wilfried Hartmann & Kenneth Pennington eds., 2008).

some regions of Europe after 1215, there is little evidence that it did. It is also highly unlikely that Bacon had witnessed an ordeal in Paris, the city in which he lived and lectured in the late 1230s and 1240s. The ordeal had been employed in French lands since at least the time of Charlemagne, whose legislative insistence that “everyone believe the ordeal without any doubt” suggests that there was more than a little doubt about the matter. Most French cities, like urban communities elsewhere on the Continent, had tended to seek royal exemptions from the ordeal practice as soon as they could. Indeed, even before 1215, urban areas of Europe had eagerly begun adopting the inquisitorial legal procedures that had been developed in the law schools and that would form the basis of the Continent’s emerging *ius commune*. But regardless of whether Bacon ever witnessed an ordeal, and whether or not he was correct that men of truth were still relying on ordeals anywhere in Christendom a half century after the Church effectively abandoned the practice, he offered a striking defense of a legal practice whose demise had been mostly welcomed by theologians, jurists, and local communities across Europe.

It is possible, of course, that Roger Bacon’s anachronistic faith in the judicial ordeal should be understood simply as an aspect of his other intellectual idiosyncrasies. For example, Bacon’s writings on astrological determinism and alchemy, arguments which ran counter to orthodox teachings on free will, were probably among those that were condemned by the Church in 1277, and they may even have been the cause of his apparent imprisonment shortly thereafter. Bacon’s defense of the ordeal was resolutely out of step with the juridical and theological currents of his own day. Even in its heyday, the judicial ordeal had a long and uneasy association with rustic traditions, and its place within Church law had been long contested. As John Baldwin showed half a century ago, in the century leading up to 1215, learned opinion at the University of Paris and elsewhere concerning the ordeal ranged from suspicion to outright hostility. The opposition to the ordeal came from many quarters. Theologians had become increasingly concerned that the ordeal was an inappropriate “tempting of God,” a presumptuous attempt to place divine intervention at the beck and call of human legal processes. Caught between categorization as either a miracle (and thus unfit for reproduction in everyday mundane judgments) or a sacrament (for which its biblical and theological pedigree was insufficient), the ordeal had by the twelfth century lost its place among the theologically

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7 Bartlett, supra note 4, at 34.
8 Baldwin, supra note 4, at 614.
11 Baldwin, supra note 4.
12 Bartlett, supra note 4, at 70.
acceptable wonders of the Christian world. The new jurists of the twelfth and thirteenth centuries had their own reservations about the ordeal. Inspired by the renewed attention to the texts of ancient Roman law that resurged in Italy in the late eleventh century, medieval jurists grew suspicious of a practice that had no sanction in the classical Roman texts and was so clearly at odds with the codified use of witness testimony (and the torture sometimes used to elicit it) in the Justinianic corpus. Even the proof-text of the Old Testament ordeal by bitter water that Bacon cited was considered by the jurists of Bacon’s day to have been abrogated.\(^{13}\) The ordeal also seemed, as Richard Fraher’s careful studies have shown, in considerable tension with the emergent ecclesiastical program to identify heresy and clerical misconduct, and to consistently punish them.\(^{14}\) The ordeal was unruly and entirely unreliable as a tool for the consistent enforcement of institutional norms through judicial processes. The jurists of the twelfth and thirteenth centuries had put considerable energy into constructing an inquisitorial system of judgment that relied upon literate judges and a system of non-supernatural proofs, and it was this system that the papacy embraced at precisely the moment it abandoned the ordeal.\(^{15}\)

Even outside the universities and the papal curia, however, enthusiasm for the ordeal appears to have been declining in the twelfth and early thirteenth centuries. Paul Hyams demonstrated that the intellectual opposition to the ordeal in the universities and at the papal curia followed in the wake of waning enthusiasm for the ordeal in local communities in the twelfth and thirteenth centuries.\(^{16}\) The ordeal, as I also argued some years ago, belonged to an older world, a world in which God revealed moral truth through penitential prayer and the elements of nature—a world that had not yet come to see judgment as a matter of subsuming empirical facts under a sovereign legislator’s positively enacted rules.\(^{17}\) By the twelfth and thirteenth centuries, that older world had begun to fade, eclipsed by a new world with very different expectations about how law was made and how it might govern human communities.

We might then understand Bacon’s curious affection for the ordeal as nostalgia for a former age, a bygone epoch that he imagined was more attuned to divine will and more populated by godly men who knew how to use fervent and effectual prayers to summon moral truth from iron, water, and the body of an accused. Such a view is certainly bolstered by attention to Bacon’s utter disdain for the new legal learning that swept

\(^{13}\) Baldwin, supra note 4, at 619 n.48.


\(^{15}\) Fraher, IV Lateran’s Revolution, supra note 14, at 98.

\(^{16}\) Hyams, supra note 4, at 126.

through medieval universities like wildfire in the twelfth and thirteenth centuries. Here too, Bacon longed for the good old days when the papacy “was ruled by God’s wisdom.” In his day, fretted Bacon, the Church’s authority structures had been ruined by legal pronouncements derived from lay emperors. Likewise, learned men neglected the sacred page, and yet when they made mundane commentaries on the laws of long dead Roman emperors they “received more praise than a master of theology.”

Bacon’s disdain for the new legal learning, and the men devoted to it, can be understood as a potent mix of professional jealousy, a feeling of intellectual superiority, and a certain nativist suspicion of legal texts promulgated by an assortment of ancient Italian emperors that included some notable pagans.

In fact, Bacon’s understanding of the divine ordeal, in which the prayers of “men of truth” might cause the natural elements to make divine knowledge accessible to human reason, was probably as much a defense of Bacon’s theology of prayer as it was a defense of the ordeal. Even if Bacon had never seen an ordeal, it is possible that he had seen Carolingian or Anglo-Saxon-era ordeal legislation, and had recognized that the ordeal laws, or “formulae” as their nineteenth-century editors would name them, were really codified prayers, designating the words by which God and the iron or water should be implored to reveal judgment. This would have caught Bacon’s notice because Bacon believed that the words uttered in prayers contained a physical force that multiplied through the medium of the air until they landed upon their object, inhering and, at least potentially, transforming their object according to the words’ intention. The ordeal was then only one way such prayers demonstrated efficacy in the natural world. Interestingly, Bacon’s belated defense of ordeal prayers was not at all consonant with the scattered defenses of the ordeal that had been proffered while the ordeal was still a contested part of Church law. These defenses had tended to stress the ordeal’s acceptance with the authoritative pronouncements of ancient popes, or its sacramental resemblance to baptism or communion. Bacon’s defense of the ordeal, on the other hand, was a clever fusing of the Christian concept of a divinely creative intellect with the new approach to the natural sciences stimulated by the recent reception of Aristotle’s treatises in the medieval universities. Bacon’s longing for the old legal practices, in fact, masked a great deal of contemporary innovation. But de-


19 Bacon, supra note 1, at 84.


21 Nick Jacobson has produced an excellent study of Bacon and his “jurisprudence of naturalism” in Nick Jacobson, Leges Communae Naturae and Iura Philosophica: Roger Bacon’s “Laws of Nature” and Judicial Naturalism (2012) (unpublished paper). Jacobson recognizes the similarity between Bacon’s theory of prayer and his theory of optics. There is not, to my knowledge, a study that compares Bacon’s and John Austin’s accounts of language in the context of legal judgment, though perhaps there should be.

22 Baldwin, supra note 4, at 619.
spite the fact that Bacon was thoroughly steeped in the new learning, he cast his eyes backward toward an outmoded legal process that he probably knew was part of a lost past, but which he credited with moral and spiritual superiority.

For purposes of this essay, I want to situate Bacon’s nostalgia for the ordeal as a form of estrangement. Bacon lamented the loss of a world he believed to be characterized by righteous men who knew and uttered judicially efficacious prayers. He lamented the rise of lawyers who, in his view, had transformed the body of Christ into a bureaucratic institution, and had replaced the pastoral care of churchmen with legalism. The sun was setting and darkness was chasing the light. The old ways of knowing truth about men and the world had been abandoned. The possibility of a world in which nature itself revealed judgment to “men of truth” through the power of prayer had given way to Roman law and professional lawyers. Bacon recoiled from his world, finding comfort in a past he imagined as more spiritually attuned, more righteous, and less fallen than the one in which he lived.

Students of modern social theory might recognize in this particular framing of Bacon’s ordeal echoes of Max Weber’s disenchantment thesis. Weber, who began his scholarly career studying legal history, famously offered an explanatory account of the modern world in which one of its key characteristics was a loss of enchantment. The historical transformation in which the ordeal was replaced by learned legal processes in the thirteenth century fits well within this model in which mysticism, charisma, and religious ritual give way, though perhaps falteringly at times, to secularization, rationalism, and rule by bureaucratic institutions. Bacon, by defending the ordeal, might offer an early example of this sort of disenchantment. Perhaps.

In order to understand what is idiosyncratic and historically compelling about Bacon’s view of the ordeal, it is necessary to understand both the legal world that Bacon lived in and the one for which he pined. This is precisely the task of the historian, to make what is alien intelligible while at the same time preserving its essential differences. It is the delicate and difficult task of engaging with our past but without negating it. Such negation can occur when we judge the past by the needs of the immediate present, taking our own limited perspective to be universal, or when we relegate the past to a matter of merely antiquarian curiosity, cutting off the possibility of understanding the historical relation of our past to ourselves.

III. Recognition

While certainly not alone in this regard, medieval legal history is a field sharply concerned with legal changes that tend to highlight the differences, rather than the continuities, between the modern and pre-modern world. By focusing attention on these moments of rupture, the field of medieval legal history “allows us to recognize legal worlds that have been lost.”23 At the same time, as Shai Lavi has shown, medieval legal history is among

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those approaches to studying law that can tell us something about the contingencies that shape the legal world we live in today. It does this by exposing the sometimes hidden conditions of thought that, from time to time, support or abandon certain legal practices and understandings of law. In so doing, medieval legal history provides unique insights into the modern rise of scientific legal positivism, the mode of legal thinking that holds sway in our own world.\textsuperscript{24} I do not mean to say that medieval legal history enjoys a privileged place among the various techniques available for trying to explain what law is, but rather that it is a way of thinking about both how law has been and how law can be. This approach to the study of law serves in part not just to inform us about our legal past, but also to teach us the limits, and the impoverishments, that determine how we understand our law and ourselves. This approach seeks to understand what is alien, in order to say something as yet unrecognized about what is near.

Medieval legal history provides easily recognizable examples of alien legal practices. The divine ordeal whose demise Roger Bacon lamented is only one such historical practice, one that rested on radically different understandings of law, judgment, and truth than our own. A number of legal phenomena present us with opportunities to measure the distance between our world and our medieval past: legislation, crime, violence, sovereignty, sex, marriage, punishment, trials, judgment, torture, and pardon, to offer only a preliminary and entirely non-exclusive list. My own recent study of medieval sanctuary laws was an attempt to understand a legal practice that allowed criminals to escape punishment by virtue of nothing more than being able to reach the sacred precincts of a church before they were apprehended or killed. Such sanctuary laws were replete in the medieval world, attested to in royal, ecclesiastical, and customary law from the end of the Roman Empire until the early modern age. Indeed, sanctuary and asylum practices were among those that the influential legal reformers of the Enlightenment era, such as Cesare Beccaria, made into targets of their withering scorn.\textsuperscript{25} When Beccaria bemoaned the bad effects of “obscure commentators” and their “ill-digested tomes” he was laying waste to a set of venerable legal practices that included sanctuary, a practice he dismissed as one that “invites crime more than punishment influences against it.”\textsuperscript{26} In this regard, Beccaria’s contemporaries shared his tastes. Medieval sanctuary laws were generally considered


“pregnant with an infinite deal of evil and mischief.” Sanctuary laws were held up as among the worst and most irrational practices of the medieval legal world. But as William Jordan insightfully notes, it is important not to understand the institution of medieval sanctuary only through the early modern assault on it.

For the medieval millennium in which sanctuary laws thrived, the “evil and mischief” attributed to the practice by later jurists were not much noticed, or at least not much complained about. Rather, the self-evident appropriateness of granting fugitive criminals protection within churches was frequently displayed in the Middle Ages. For example, when in the twelfth century monks at Battle Abbey forged charters to secure privileges against the English crown, they did so by making William the Conqueror pronounce the privileges in the form of a sanctuary grant for thieves and murderers. In other words, a generous grant of sanctuary to the worst sorts of criminals made the forgery plausible. In a similar vein, the English King Henry I justified his military invasion of France to Pope Calixtus II by explaining that he invaded because he had heard reports that sanctuary rights in France were being violated. In the medieval sources, chroniclers commonly showed good kings defending sanctuary rights and bad lords violating them. Even where we can be rightfully suspicious of a medieval chronicler’s account of a sanctuary claim or violation, the moral template remained consistent. Granting sanctuary to criminals and respecting claims of sanctuary was a mark of pious strength, and one of the central modes of projecting power in the medieval world. That sanctuary laws had the consequence of interrupting the mundane work of capturing and punishing wrongdoers was of secondary importance. The logic of punishment as a deterrent to crime was relegated to a matter of ancillary concern in the face of the powerful expectation that the best sorts of kings would demonstrate pious mercy and permit the Church to facilitate the penitential reconciliation of wrongdoers.

At the same time, medieval sanctuary laws provided a platform for individual penance and for the resolution of feud-related hostilities. In Anglo-Saxon legislation, fugitives who fled to churches were expected to use the respite provided by sanctuary to repent of their crimes and to negotiate, and potentially reconcile, with their enemies. The early medieval sources are particularly illuminating on this point, situating sanctuary claims as an

27 Samuel Pegge, A Sketch of the History of Asylum, or Sanctuary, 8 Archaeologia 1 (1787).
28 See Karl Shoemaker, Sanctuary and Crime in the Middle Ages, 400-1500, at 1-4 (2011).
29 William Chester Jordan, A Fresh Look at Medieval Sanctuary, in Law and the Illicit in Medieval Europe 17, 17-20 (Ruth Mazo Karras et al. eds., 2008).
aspect of both penitential intercession and feud resolution. By the late twelfth century, some of the penitential aspects of sanctuary had begun to fade slightly, but even so, sanctuary rights were firmly and deliberately domesticated within the processes of the nascent common law. The records of English royal justice demonstrate that sanctuary claims provided frequent and socially accepted outcomes to crimes that would otherwise have resulted in a felony prosecution and the possibility of execution. Sanctuary fit comfortably within the structures of English criminal law for three centuries, granting respite to sanctuary-seekers even as other suspects were subjected to the processes of royal law.

But by the fifteenth century it is possible to find a chorus of voices in opposition to sanctuary. Petitions to the English Parliament lodged by London merchants, for example, began to complain that sanctuary provided inappropriate immunity for thieves and brought the law into disrepute. Jurists likewise began to chip away at the venerable practice, questioning whether sanctuary could find its legislative paternity in the commands of Christian legislators or whether it had been secreted into Christian practice by pagan laws. When these debates began to occur, the venerable practice of sanctuary began to lose its claim to a place within law. Within a relatively short period of time, at least in comparison to the millennium in which they were given an honored place within legal practices, sanctuary rights were restricted or abrogated outright throughout Christian Europe over the course of the sixteenth and early seventeenth centuries. These attacks on sanctuary bear particular notice because they reveal the emergence of a new way of thinking about law, questioning sanctuary’s legitimacy by simultaneously interrogating its authorizing legislative sources and by evaluating the propriety of sanctuary in terms of its inability to reduce crime. Sanctuary was poorly suited to meet the demands of rulers and communities who wanted punishment to deter potential criminals—criminals who might commit crimes with the hope of reaching sanctuary. Such concerns go the heart of issues about punishment and the state that are rather familiar to us today. It is illuminating, however, to see that such concerns gained prominence alongside a new way of thinking about law in the early modern period, and were in sharp contrast with the thinking that had made sanctuary an esteemed legal practice throughout Christendom from the end of the Roman Empire until the dawn of the early modern age. The linking of sanctuary’s illegitimacy to


34 On other features of the English common law that retained pious and salvific purposes, see Thomas McSweeney, The King’s Courts and the King’s Soul: Pardoning as Almsgiving in Medieval England, 40 Reading Medieval Stud. 159 (2014).
the claim that sanctuary had pre-Christian legislative origins is particularly interesting, not only for its unsurprising privileging of Christian legislators over pagan ones, but also for its assumptions about the relationship of legislation to lawfulness. The assumption that the legitimacy of a legal practice depended upon the legitimacy of its authorizing source was not limited to concerns with ancient sanctuary laws of course. Indeed, this way of thinking about law emerged with considerable urgency in the early modern world. It was a new phenomenon.

IV. Difference

By resting the legitimacy of sanctuary law on its sovereign source, early modern critics of sanctuary were making demands of legislation that their medieval predecessors had not. This claim requires some explanation, since the issuing of law through written codification might appear to be a phenomenon of continuity within the Western legal tradition. Indeed, ancient Roman imperial legislative practices did cast a long shadow over medieval and modern legislation. The prologue to an eighth-century legislative text demonstrates full awareness of the Roman precedents for codifying law. Combining biblical lawgivers with ancient Roman rulers into a unified legislative tradition, the prologue explained: “First of all, Moses of the Hebrew nation explicated in sacred letters the divine laws.” Then, tracing a line of ancient lawgivers that included the Athenian and Spartan legislators Solon and Lycurgus, the largest portion of the prologue highlighted the crucial importance of Rome as a legislative model:

Numa Pompilius, who succeeded Romulus in the kingdom, first gave laws to the Romans. Then, when the people were no longer able to bear the seditious magistrates, they chose the decemviri to inscribe the laws, who set forth the Twelve Tables translated into the Latin tongue. . . . Then Caesar began to institute laws, but was killed before he could. New laws were begun by Emperor Constantine . . . but they were mixed up and disorganized. Afterwards, Theodosius II, in a manner similar to Gregory and Hermogenius, set forth a code of constitutions from the time of Constantine under a special title for each emperor which he called by his name, the Theodosianus.35

This list, copied nearly verbatim from Isidore of Seville’s early seventh-century Etymologies, stopped short of listing Justinian’s Codex because the split between the eastern and western halves of the Roman Empire had rendered the Codex Theodosiani as the preeminent example of Roman lawgiving, and relegated Justinian’s major legal reform to relevance almost entirely in the eastern Roman empire until the eleventh-century revival of Roman law in Italy. In the early medieval period, ancient Roman legislation provided an example that found purchase with a substantial number of the peoples who inherited the crumbling remnants of the Roman Empire. The Franks, the Visigoths, the Ostrogoths, the Lombards, and the Anglo-Saxons all produced law codes in the name of their respective

35 See Lex Baiuwariorum c. 1.7, in 5 Monumenta Germaniae Historica: Legum sectio 1 (Ernst Schwind ed., 1926); 1 Isidori Hispalensis Episcopi Etymologarium sive Originum ch. 5.1 (W.M. Lindsay ed., 1911). An important discussion of this prologue to the Bavarian Laws can be found in 1 Patrick Wormald, The Making of English Law: King Alfred to the Twelfth Century 43 (1999).
kings, or in some cases in the name of the people generally. Some aspects of those early medieval codes are understandable in a manner analogous to modern law making; the articulation of a sovereign command backed by the threat of force. “The puzzle,” as Patrick Wormald sagely observed, “is that much is not.”

The “much that is not” bears attention. As Wormald shows, the history of law and the history of legislation in the Middle Ages are not the same thing. That is, the history of legislation must be treated separately from the history of its enforcement. As Wormald demonstrates, early medieval written legislation did not even circulate as specific textual collections of authoritative legal commands; they were embedded with other texts—such as res gesta, homilies, and penitential texts, and in texts that belonged more frequently to episcopal rather than royal scriptoria—and were thus part of a larger “ideological” program. Early medieval written legislation was intended or understood as sources of particular legal rules to be applied by the sovereign or the sovereign’s officials. Crucial here is that there is virtually no evidence from prior to the ninth century that these early medieval legislative texts were being used to apply rules of decision to legal disputes, even though such texts are attested to throughout northern Europe from the sixth century onward. One inference to draw from this fact is that proper kings of proper peoples possessed legislative texts, like the Romans had before. In this sense, one could say that early medieval legislation made kings as much or more than kings made legislation. When in the eighth century Bede described the written laws that King Aethelbert promulgated (in the vernacular) as produced “according to the examples of the Romans” he was not referring to the content of legislation as much as he was to the emulation of a certain kind of projection of authority. Like a coronation or a throne, a legislative code was a marker of kingship, but by no means was it a generally applicable body of norms. There is little evidence that even specific legislative norms were applied.

Early modern and modern editors of these early medieval laws tended to treat them as feeble imitations of Roman lawmaking, grouping them under the rubric leges barbarorum (laws of the barbarians) in order to emphasize their distance from their venerable Roman predecessors. From the standpoint of a professional lawyer schooled in the Roman law tradition, the content of early medieval legislation appears quite strange. Acts of violence called not for punishment but for compensation according to a schedule of tar-

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36 Wormald, supra note 35, at 6.
39 Illustrations of this can be seen by comparing the Anglo-Saxon kingdoms, who issued a lot of legislation, with the contemporaneous Ottonian kingdoms, which issued very little. See Laura Wangerin, Tenth-Century Governance: A Comparative Study of the Ottonians and Anglo-Saxons (2013) (unpublished Ph.D. dissertation, University of Wisconsin, Madison).
40 Bede also was probably not referring to the Romans, but to the Frankish peoples who had continued to emulate the Romans with their production of written laws, including the use of Latin. See Bede, Ecclesiastical History of the English People 2.5 (Bertram Colgrave & R.A.B. Mynors eds. & trans., 1969); see also Wormald, supra note 35, at 29-30.
iffs that depended upon a range of contingencies, such as the social status of the victim, the gender of the victim, and the nature of bodily violation or insult. Injuring a man’s thumb, for example, called for a steeper fine than injuring his small finger. Exposing bone required steeper compensation than a mere cut. Further, many of the texts seemed to accept the legitimacy of blood-feuding practices, attempting only to articulate limits on where or when such violence could be pursued. According to the laws of King Alfred, for example, if you besieged a man at his house you had to wait seven nights before you could attack him. If in the meantime he turned himself over to you, you had to take him hostage (keeping him safe) and parley with his kin. Even so, the prospect of violent resolution lurked just behind the text. Nothing could have been more alien to classical Roman legal practice, which did not officially contemplate such practices. Nor could these practices have been more objectionable to the early modern jurists who worked so hard to erect the institutions designed for the public prosecution of crime. More importantly for present purposes, there is little evidence that any of these injury tariffs or siege rules were ever applied as rules of decision.

Indeed, only in the middle of the ninth century did the laws that were written down begin circulating in a written form that lent itself to systematic consultation, or for use in rendering judgments. But even then there was no indication that these laws gained their authoritative force because they had been issued by a sovereign empowered to issue them. When, for example, in the eleventh century the German Emperor Henry III tried to assert his power to change an existing taxation agreement with the people of Bohemia, he did so by asserting his power to make new law because “he who rules the law is not ruled by the law.” He added colorfully that “the law has a nose of wax, but the king has a hand of iron and a long reach and can bend the law however he likes.” What the Bohemians heard was not so much a claim to lawmaking power, but rather a claim to break the law with impunity. Even so, the tax dispute was settled not by the raw assertion of power, but by a carefully reached compromise.

Henry III’s stark assertion was at odds with other prevailing modes of thought about the king’s relationship to the law. Perhaps the most notable medieval jurist to offer an opposing view of the relationship between law and sovereign was the author of the great thirteenth-century English legal treatise known as Bracton. It supplies the key medieval proof-text for the necessity that a king be under the law he enforces:

> The king himself must be, not under Man, but under God and the Law, because the Law makes the king . . . . For there is no king where arbitrary will dominates, and not the Law. And that he should be under the Law because he is God’s vicar, becomes evident through the similitude with Jesus Christ in whose stead he governs on earth. For He, God’s true

41 See, e.g., Massimo Vallerani, Medieval Public Justice (Sara Rubin Blanshei trans., 2012).

42 This exchange was recorded in the chronicle of Cosmas of Prague, Chronica Boemorum 93-94 (Bertold Bretholz & Wilhelm Weinberger eds., 1923) (“Regibus hic mos est semper aliquid novi legi addere anteriore . . . . Nam qui regunt leges non reguntur legibus, qui lex, aiunt vulgo, cereum habet nasum et rex ferreman manu et longam, u team flectere queat quo sibi placet.”). Interestingly, even Henry framed his power in terms of custom (mos).

Mercy, though having at His disposal many means to recuperate ineffably the human race, chose before all other expedients the one which applied for the destruction of the devil’s work; that is, not the strength of power, but the maxim of Justice, and therefore he wished to be under the Law in order to redeem those under the Law. For he did not wish to apply force, but reason and judgment.\textsuperscript{44}

As Ernst Kantorowicz explained with astonishing force over fifty years ago, this Christological account of medieval kingship was an attempt to account for a king just and powerful enough to submit to the law. Like Christ, the Christ-like king willingly placed himself under the law, even though presumably there were “other expedients” available to him. The radical proposition subsumed in the Bractonian account of kingship is that sovereignty was grounded not in the power to command but in willful self-sacrifice to law. Unlike later theories of divine right, which held that the sovereign ought to obey the law but was answerable only to God when he did not do so, the Bractonian account asserted that “there is no king” except where the sovereign has submitted, like Christ, to the law. As Kantorowicz showed, this Bractonian account of kingship was also in noticeable tension with the nearly contemporary legal reforms of Frederick II in Sicily. In a series of important legislative reforms, Frederick II carefully separated the Christological attributes of sacrificial kingship from the power to command. As a result, in Kantorowicz’s great lament, medieval kingship looked no longer to “the son on the altar,” but rather to the “Father in Heaven” for its model.\textsuperscript{45} As I have argued elsewhere, for Kantorowicz, this transformation was world-historical.\textsuperscript{46} The son on the altar represented gracious self-sacrifice and voluntary submission to law, while the Father in Heaven represented authority and omnipotence. Sovereignty, in Kantorowicz’s telling, abandoned its calling as a living sacrifice, and embraced instead the fantasy of an undying power to command. Still, in the twelfth century, a jurisprudence in which law would be “subordinated to an absolute or deified State” was still in its long infancy, though it had already made possible the eventual “hallowing of the status regis et regni, of state institutions and utilities, necessities and emergencies,” that Kantorowicz saw as the tragedy of modern positive law.\textsuperscript{47} Henry III and Frederick II were of course not the only medieval rulers to claim a power to remain free from the rule of law. As my colleague William Courtenay has shown, some canon lawyers, borrowing from the theological language of divine power (potentia absoluta and potentia ordinata) attributed to the pope the power to act outside the law.\textsuperscript{48} In fact, some canon lawyers asserted that the pope, like God, was only bound by the law by his

\textsuperscript{44} Ernst H. Kantorowicz, The King’s Two Bodies: A Study in Medieval Political Theology 156 (1997) (1957), quoting 2 Henry de Bracton, Bracton De Legibus et Consuetudinibus Anglie 33 (George E. Woodbine ed., 1922).

\textsuperscript{45} Id. at 143.

\textsuperscript{46} Karl Shoemaker, The King’s Two Bodies as Lamentation, 10 Law, Culture & Human. 1 (2014).

\textsuperscript{47} Kantorowicz, supra note 44, at 192 (a hallowing, one must add, that Kantorowicz thought only became complete when the state began to equate itself as a corpus mysticum, like the Church).

own benevolence, not by necessity or an obligation to display the Christ-like virtue of voluntary submission to the law. Attention to medieval legislation and theories of legislation reveals not simply the timeless exercise of power through the issuing of commands, but a deep questioning of whether the one who issued laws could be bound by the law. The odd facility with which jurists could come to assume that a duly authorized sovereign can only make and not break law is a phenomenon primarily associated with modern jurisprudence.\(^49\) Medieval legal history opens a way for seeing law’s other possibilities, even if they are lost to us.

V. Conclusion

The task of history, which might be undertaken in the modest attempt to understand the thought of men like Francis Bacon, or medieval sanctuary protections for fugitives, or the emergence of written legislation in medieval Europe, requires us to constantly recognize the difference between our own world and an alien one. But we must mark these differences without reducing them to irrational detritus of our traditions of thought, and without crystalizing them into a dead letter. Legal history calls us to engage with our past by measuring its distance from us, and in doing so to find hidden things nearer by.