

## Law and Kinship in Thirteenth-Century England

**Review Number:** 998

**Publish date:** Monday, 1 November, 2010

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**ISBN:** 9780861933051

**Date of Publication:** 2010

**Price:** £50.00

**Pages:** 200pp.

**Publisher:** Boydell and Brewer

**Place of Publication:** Woodbridge

**Reviewer:** Jason Taliadoros

Can we conceive of a peculiarly ‘late medieval’ notion of family? That is to say, was Alan MacFarlane correct when he said that the English had in the present day ‘roughly the same family system as they had in about 1250’?<sup>(1)</sup> And, as a corollary to this, do the late Middle Ages confirm what we know of the post-Conquest period, that is that the clan or corporate kinship system no longer operated in England? Dr. Sam Worby’s book, *Law and Kinship in Thirteenth-Century England*, seeks the answer to these questions. The significance of this inquiry into family relationships needs no better illustration than the two important ways that understandings of kinship dominated late medieval England: first, they determined whom one might marry, an issue decided according to canon law principles; and second, they determined from whom, and if at all, one could inherit, a matter decided at common law. Two further questions form the backbone of this book, for which Worby holds up kinship as a convenient lens. One is the extent of the interaction of the English common law with the Roman-canonical legal system of continental medieval Europe (also called the *ius commune*, European Common Law, or ‘learned law’) in the later Middle Ages. The other is the difference between ‘theory’, namely notions of kinship set out in legal treatises or ‘formal’ legal sources, and ‘practice’, that is how kinship notions were applied in the courts. I will return to these three themes.

Worby begins by methodically examining kinship structures through their representation in ‘formal’ sources, that is textbooks and treatises, of canon law (chapter one) and of common law (chapter two) respectively, before positing the ‘dominance’ of the former (chapter three). An analysis of how these theoretical formulations of canon law and common law kinship were applied in secular and ecclesiastical litigation follows (chapter four). The author then sketches ‘patterns’ that emerged in each sphere and across both spheres in terms of informal or formal understandings of kinship (chapter five). The conclusion confirms the uniqueness of 13th- and 14th-century conceptions of kinship: they were distinct from any pre-Conquest ‘quasi-corporate or clannish’ systems (p. 142) and, although ‘not unfamiliar’ in their resemblance to the modern nuclear family, remained distinct due to their inter-connectedness with other hierarchical structures that ‘mattered in practice at vital milestones such as at marriage, divorce or inheritance’ (p. 145).

The book takes an anthropological, rather than a linguistic or legalistic, approach to defining kinship. For Worby, kinship is not confined to ‘descent’, as is commonly posited. Rather, kinship is conceived of in terms of ‘relations of exchange between units’, such as bonds of marriage, following the pioneering French anthropologist Claude Lévi-Strauss (p. 4). Therefore, the book deals with the concept by way of ‘kinship

systems', that is 'a way of thinking about and narrating bonds between people in terms of a recognised biological connection or analogy with biological connection' (p. 5). This methodology enables the troublesome words consanguinity ('blood kinship'), affinity ('kinship through marriage or sex'), and *parentela* ('a person's descendants') to be used with greater appreciation of their cultural and historical contingency (p. 6).

From this structural hermeneutic of kinship, Worby provides a close reading of 13th- and 14th-century sources on kinship, from treatises and visual representations of the marital prohibitions of consanguinity and affinity, to scattered court records on marriage, divorce, and inheritance. In the case of court records, the author is heavily dependent on the recent recovery of these sources by Paul Brand and Charles Donaghue, Jr. In the case of treatises, Worby's research is truly original and bears the hallmarks of research done as part of her doctoral dissertation, completed in 2005 at University College London, with Professor David d'Avray. Indeed, the first appendix contains her re-collation of the key manuscripts of the much-criticised edition by Ochoa and Díez of the *Quia Tractare Intendimus*, the canon law treatise composed on kinship in about 1235 probably by the canonist Raymón de Penyafort. Worby also provides transcriptions of three little-known but significant treatises composed by common lawyers on kinship that occur in manuscripts of the treatise attributed to Bracton: a part of the introduction to the anonymous *Sciendum est*, composed after 1234; *Quibus modis*, an adaptation of the Portuguese Johannes Egitanensis's *Lectura* on consanguinity, made around the end of the 13th century; and *Triplex est*, another adaptation, this time of the consanguinity section of Raymón de Penyafort's *Summa de matrimonio*, probably made around the end of the 13th century as well. [\(2\)](#) The appendices alone, therefore, provide a significant service to scholarship on medieval kinship.

I now return to the two key themes in the book that I referred to above. First, how convincing is Worby's assertion that canon law notions of kinship dominated over common law understandings? To evaluate this, one needs to understand kinship at canon law, namely the reckoning of consanguinity or affinity between intending marriage partners, a topic with which Worby deals at length in chapter one. Consanguinity prohibited marriage between blood relations. Following the Fourth Lateran Council of 1215, no one could marry someone related to them by blood up to the fourth 'degree', that is if they shared a common great-great-grandparent. Affinity prohibited marriage between persons related by marriage, or sexual intercourse. Therefore, one could not marry another related to in this way up to four degrees. This canon law kinship system in the 13th century elaborated itself in three genres of text, Worby asserts, all of which were linked to Raymón de Penyafort. One was the 'books of authority that set out the canon law' (p. 30), namely the 12th-century *Decretum* of Gratian, both a teaching text and practitioners' handbook, and the *Liber extra*, a collection of papal decretals or letters on legal issues made by Raymón in 1234 at the request of Pope Gregory IX. Another was the 'academic texts that discussed the canon law in more detail' (p. 30), namely the glosses that adorned manuscripts of the first genre and that were standardised in the *Ordinary glosses* to those two texts, and various *summae*, notably Raymón's c. 1235 treatise on marriage. The third genre was the 'beginners' texts' (p. 30) comprising short treatises, such as the *Quia Tractare Intendimus* attributed to Raymón, which often contained commentary on the images of the 'tree' of consanguinity or affinity. The key significance of this third genre of canon law kinship text was its accessibility and its utility in filling the 'gap' between the other two genres. This textual tradition elaborating the canon law kinship system, Worby argues, was not the 'maze of flighty fancies and misapplied logic' that F. W. Maitland would have us believe (p. 38).

Common law kinship concerned itself with issues of inheritance of land and property, as chapter two makes clear. Its rules determined such issues mostly on the basis of 'parentelic inheritance', that is the most proximate descendant or heir. Like the canon law kinship system, considerations of common parentage, lines, and degrees were important. But, significantly, the common law distinguished legitimate from illegitimate descendants (the former being entitled to inherit, while the latter did not), a matter that the canon law did not take into account. Further, the common law, when considering who was the most proximate heir, preferred males over females, first-born over later-born siblings, and other factors that seem arbitrary in comparison to the orderly and schematised canon law system. These common law rules appeared in some textbooks, such as *Britton*, an Anglo-French abridgement and updating of the more famous 13th-century

treatise attributed to Bracton, composed c. 1291–2. Unlike the three genres of canon law treatises, such texts were not ‘academic’, but closely tied to patterns and rules governing the issuing of court writs (p. 48).

Despite this difference, Worby argues in chapter four, canon law ideas of kinship dominated in 13th- and 14th-century England. This is not to say, however, that canon law determined matters of inheritance, a legal context outside its remit. The parentelic system of common law kinship still applied (p. 68). But, the canon law kinship system was ‘widespread and known among the learned including some common lawyers in thirteenth- and fourteenth-century England’ (p. 68). Worby points to several pieces of evidence to make her case for the dominance of canon law: the copying of introductory treatises on canon law (including canon law ‘trees’) into late-13th- and early-14th-century common law manuscripts of the treatise attributed to Bracton and English statute books; references to canon law language and concepts in common law texts, for example the 13th-century common law *Summa on bastardy* that listed canon law grounds for ‘divorce’, Britton’s use of the canon law four-degrees kinship limit to restrict a claim in inheritance, and the *Mirror of justices* treatise (1285–90) that applied canon law concepts of consanguinity and affinity to define the limits for bringing accusations of murder; adaptations of canon law material to fit common law patterns, typically the variations on trees of consanguinity in Britton manuscripts to illustrate the canon law manner of counting degrees of kinship; and the theologian Robert Kilwardby, whose treatise on kinship, *Ad arborem*, inspired by canon law learning, made its way into a Bracton manuscript. The author here could have made more of recent scholarship by Richard Helmholz, Anne Duggan, and others on the influence of the *ius commune* on the formation and development of English common law in certain areas, and how her work is another significant addition to that line of argument. But this is to criticise the author’s modesty rather than her findings.

The second key theme of Worby’s book is her explanation of the gap between the formal and legalistic theories of kinship, and their application in practice. By ‘application’, the author means how the secular and ecclesiastical courts interpreted kinship in the cases before them. As Worby herself concedes, the application of the law in the court is by no means the whole of the picture; moreover, these cases were themselves ‘constructions’ in the sense that the litigants devised narratives of their circumstances to fit into the rules that applied (p. 92). Chapter four attempts to provide an account of how the two kinship systems were applied in the courts of England in the 13th and 14th centuries. Contrary to Maitland’s assertion that ‘almost any marriage could be dissolved on grounds of kinship’ (p. 97), Worby finds, first, that there were few cases concerning canon law kinship at all and, second, that the cases involving kinship dealt with the issue of affinity to a greater extent than that of consanguinity. Her sample of cases is drawn from Donahue’s works. (3) The explanation for the relative paucity of canon law kinship cases is that the system operated in practice to discourage litigation since it was accepted and known about by the population at large (p. 97). Further, juridical practice and the treatises insisted on primary, rather than hearsay evidence, thus making kinship difficult to prove. As for the greater incidence of affinity claims, Worby concludes that this was most likely a combination of people obeying the consanguinity rules more so than the affinity ones and more litigants falsely alleging affinity (p. 102). The difference between textbook depictions of kinship at canon law differed to some extent from its application in practice; judge Richard de Clyve’s rigid textbook approach becoming more flexible during the course of his circuit as he became attuned to community expectation in the late-13th-century providing a clear example of this.

Worby arrives at different conclusions on the application of common law kinship in practice. The parentelic structure was applied widely in the secular courts. The issue of evidence, unlike canon law cases, was not as acute since advocates were more concerned about pleadings and exceptions to establish their client’s case. The cases she draws on are those edited by Paul Brand. (4) Further, common law textbooks closely mirrored practice, at least to a greater extent than the canon law texts did. Significantly, Worby observes that this intersection of rules and practice illustrates that although canon law kinship in no way displaced the common law parentelic structure in determining inheritance, it subtly influenced common law kinship thinking. The four-degree limit on consanguineous or affineous marriages at canon law came to be used as a limit in instances of *maritagium*, entails or gifts, local statutes, or ‘resort’. So too did the canon law method of counting degrees find its way into common law textbooks’ reckoning of descent. Why? Again, Worby

asserts, such canon law notions were matters of ‘common knowledge’ (p. 112).

Drawing on these findings of similarities and difference between theory and practice, Worby’s chapter five explores the ‘patterns’ of kinship that emerged in this late medieval period. By patterns, she means the anthropological sense of the extent of ‘knowledge of kinship ... among non-experts’ or society at large, a matter determined by examining ‘behaviour underlying interaction with the law’ (p. 115). Yet, her sources for this examination are court records – almost, but not quite, identical to the sample explored in the previous chapter. No explanation is provided for this. Indeed, the findings on ‘patterns’ mirror closely Worby’s findings on kinship laws in practice. In terms of canon law kinship patterns emerged that: a) people were more likely to obey the rules on consanguinity, especially in the 14th century; b) the conception of kindred was narrower than that of the fourth degree posited by the canon law system; and c) the high number of affinity cases indicated that people regarded marriage as creating a genuine bond, not sexual intercourse (pp. 119–20). The first and third of these endorse the conclusions of the previous chapter. In terms of common law patterns, Worby finds that the case sample indicates that a ‘three-generation sense of family’ (p. 124) (i.e., up to a common great-grandfather) prevailed as the ‘regular extent for family memory’ (p. 123). Indeed, combining the evidence from both the canon and common law cases, she draws the same conclusion: ‘the greatest sense of family was with people related within three-generations’ (p. 125). This contrasts with the four-degree limit on kinship identified as important in the previous chapter, a difference Worby describes as ‘especially interesting’ (p. 129).

These patterns throw further light on the difference between kinship in theory and practice. Worby notes that people’s ‘casual understanding of their own kinship and their place in it differed from the formal legal system under which they operated’ (p. 129). Thus, for example, there was discomfiture at the common law parentelic system because of the priority it gave to primogeniture that denied equal entitlement to brothers within the same generation; equally, under canon law rules of kinship, the idea that affinity could create ‘family’ or that ‘family’ could exist beyond the third degree were less acceptable. In support of these assertions of people’s own sense of values in relation to kinship that underlay the formal rules, Worby points to two examples: several interpolations in a *Bracton* manuscript and the romance *Fouke Fitz Warren* (c. 1330). Each offered a ‘popular’ understanding of kinship that differed from the more formal legal conceptions.

Further, such patterns confirmed the dominance of canon law in English understandings of kinship in the later Middle Ages. Worby attributes this to several fundamental factors (pp. 131–4). One was canon law’s near-universal application, that is to anyone wanting to marry, while common law was confined to anyone inheriting under feudal tenure, that is mostly elites. Second, canon law had enforcement mechanisms, such as the bans and the *ex officio* jurisdiction of ecclesiastical courts, which created an ‘external sanction’ that the common law lacked in its reliance on the parties to bring proceedings at their own initiative. Third, canon law rules were ‘simpler, more comprehensively framed and more closely articulated’ – at their core the ‘relatively simple negative rule that forbade marriage to anyone defined as a kinsman’ – than the common law system of reckoning the nearest heir ‘among numerous potential options and applying a suite of considerations such as legitimacy, age, gender’ and so on (p. 132). Fourth, this relative clarity in canon law kinship arose as a result of the drive for systematisation evident in the university texts, such as the *Decretum* and the *Liber extra*, while the common law texts emphasised system less and practice more. Fifth, canon law rules were established early, in 1215, in comparison to the parentelic system, which was less settled at this point. Sixth, canon law was able to utilise images, notably the *arbor consanguinitatis* and the *arbor affinitatis*, to aid comprehension, while the common law had no kinship image to compare.

Returning to the proposition outlined at the beginning of this review, Worby confirms family structures in Anglo-Saxon society were stronger and exhibited a more corporate and ‘wider sense of kinship’ (p. 136) than the ‘unusual degree of individualism’ (p. 134) that characterised post-Conquest England. This she attributes to the common law strictures of primogeniture and parentelic kinship that limited any pre-Conquest corporate kinship. By the mid 13th-century, then, when canon law kinship came to dominate, the individualistic common law system removed any move towards ‘any widespread residual clannish or

corporate kinship system' (p. 139). Ironically, it seems, that common law notions of kinship created a narrow field that the canon law could dominate.

This book makes an important contribution to the narrative of family in late medieval England and the inter-relationship of English common law and the *ius commune*. It is not an easy read, however. So, while it may impact on, and indeed add to, the specialist research by such figures as Brand, Donahue, Jr., Goody, Duby, Helmholz, Sheehan, and others, its richness may be lost to the non-specialist reader. To my mind, the introduction or first chapter may have benefitted from the historiographical and background material that appeared in chapter five.

## Notes

1. A. MacFarlane, *The Origins of English Individualism: The Family, Property and Social Transition* (Oxford, 1978), p. 158.[Back to \(1\)](#)
2. See further S. Worby, 'Kinship: the canon law and common law in thirteenth-century England', *Historical Research* 80, 210 (2007), 443–68, 455–6.[Back to \(2\)](#)
3. C. Donahue, Jr., *Law, Marriage, and Society in the Later Middle Ages* (Cambridge, 2007), chapter 11. [Back to \(3\)](#)
4. *The Earliest English Law Reports*, ed. P. A. Brand (cxi, cxii, cxxii, cxxxiii, London, 1996–2007).[Back to \(4\)](#)

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