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Book Review (reviewing Paul R. Hyams, Kings, Lords and Peasants in Medieval England: The Common Law of Villeinage in the Twelfth and Thirteenth Centuries (1980))

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The political theory of medieval canonists lays snares for its analysts, who must supply connective tissue to render it intelligible to modern readers. Terms like "dualism" and "two swords" and anachronisms like "state" and "Crusade" make the task of interpretation difficult. When Hehl claims that unjust acts committed in a just war did not render the war unjust (p. 193 and n. 749), he is supplying connective tissue not in the texts; when he says that Huguccio claimed ecclesiastical jurisdiction over warfare in spite of his dualism (p. 254), he is indulging in the sort of anachronism that he seeks to avoid. The structure of his presentation might have been clearer had he been able to analyze the thirteenth-century canon law commentaries where many of the issues he raises were somewhat more clearly resolved.

In sum, Hehl has produced a worthy examination of some major problems of the medieval church's stance regarding warfare. He shows how hard it was to base political theory and canon law on a judgment of the individual's inward moral disposition and how persistently the canonists sought to harmonize theory with contemporary practice. Many canonists and other churchmen remained fundamentally ambivalent about the church's involvement in violence, perhaps because they felt that such involvement was, in spite of their efforts, morally tainted or at least unseemly. Hehl shows conclusively that Erdmann's Crusade became more broadly applicable and that the just war, with its overtones of settlement, became an all-purpose tool in the hands of both spiritual and temporal rulers. Hehl's work on the twelfth century prepares the ground for the thirteenth, and should prove valuable for the discussion of many issues; it is to be hoped that he will carry his researches on the infrastructure of church thought on war into the thirteenth century and beyond.

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PAUL R. HYAMS, *King, Lords and Peasants in Medieval England: The Common Law of Villeinage in the Twelfth and Thirteenth Centuries*. (Oxford Historical Monographs.) Oxford: Clarendon Press; New York: Oxford University Press, 1980. Pp. xxii, 295. \$49.50.

THE BIRTH and growing pains of the English common law of villeinage furnish the subject of this useful monograph. During the common law's formative period it was early decided, or at least assumed, that royal justice should not extend to all men and all land; servile tenements and persons of servile status would be treated differently from their free counterparts and would enjoy more restricted access to the royal courts. The question lay in deciding how sweeping the prohibitions should be. On the one hand were several factors calling for limited royal jurisdiction: the pervasiveness of lordship, the powerlessness of the tillers of the soil, the Roman law doctrine that the *servus* and all his chattels belonged to the lord, and the practical reluctance to open royal courts to every petty dispute. On the other hand, several forces pulled in the opposite direction: the existence of long-recognized customary rights by villeins, the inconsistency between Roman law doctrine and the undoubted physical control of lands and chattels by men of unfree status, and the immediate relationship between the king and his unfree subjects for many purposes. Adding complexity was the possibility of separation of tenure from status. Free men held land by unfree services; unfree men held land by free services.

This book traces the way legal principles emerged from the conjunction of these forces. It treats the rights of villeins to sue and be sued in real and personal actions, their ability to control property at death, the relative rights of lord and villein to protection of tenure in land, the supposed *favor libertatis* of the common law, and the action of *naifty* which was developed to determine questions of status between lords and persons claimed as villeins. Running throughout the sections of narrative is the testing of legal theory by actual case law. And beyond this the author goes on to suggest what the legal rules must have meant for the realities of rural life. The book therefore deals with more than legal theory. Dr. Hyams consistently draws the reader's attention to the practical difficulties men encountered in enforcing abstract rights.

Although it is impossible to sum up adequately a diffuse body of law under a single theme, it can be said that by the late thirteenth century the common law had arrived at the settled position known as "relativity of villeinage." Against his lord, the villein had no rights, or few. Against everyone else he was treated as a free man. This basic principle seems simple, though even in its developed form it left room for complexity. However, before this position was reached there was much hesitation and inconsistency. The merit and the contribution of this book is to show the continuing uncertainty and the abuses possible under the early case law. Thus, for example, the author shows the existence of a current of opinion that would deny villeins access to the royal courts against all men, not just their lords. Many of Bracton's arguments in favor of relativity of villeinage are not supported by the earliest cases, and the views of the *De legibus* are as often as prescriptive as they are descriptive of past practice. They are statements of the way the law ought to be.

The author finds this disparity surprising and even disheartening. He likens the common law to "a fairly sophisticated fruit machine" (p. 201) that left the rights of villeins unclear and uncertain. Lacking accepted definitions, the common law courts could not ensure villeins even the limited protection some judges were willing to accord them. There was too much room for argument and chicanery. Perhaps, however, the author has here expected too much of a legal system, particularly in its early years of development. The law responds to the limitless variety of human relationships by classifying them. But the relationships seldom fit neatly. They resist classification, and they change so as to spill over. There are always loose ends, anomalies, and contradictions. For example, work-service obligations and customary payments to lords were not made with the purpose of defining villeinage tenure. The common law seized upon them in order to distinguish villeinage from freehold tenure when the necessity of adopting jurisdictional rules required a definition. But the infinite variety of obligations and payments were not always easy to fit within categories, and there was bound to be uncertainty about whether or not a particular obligation fell on the servile or the free side of the line. A new question was being asked, one which they were not designed to answer. This left room for disagreement and consequent room for manoeuvre by the clever or the powerful. Hyams finds this unfortunate, and perhaps it is. But experience certainly shows how very often it happens that the law fails to create a "well-ordered, logical system" (p. 81) out of human life. The law must take human life as it exists.

This fact may detract from a few of the author's conclusions. It does not negate the value of the book. Its primary contribution, as noted above, is to show in detail the slow growth of the common law of villeinage. But Dr. Hyams provides much besides. He has read widely and brings out new material from unprinted sources as well as

shedding new light on old material. He is willing to take chances to open up fruitful lines of inquiry. He is particularly interesting in dealing with Bracton and the role of the civil and canon law in English legal history. He shows, for example, that Bracton (or whoever wrote the *De legibus*) took many of his ideas from contemporary civilian and canonist discussion of the status of the *ascripticius*. On the subject of villeinage, the treatise is more Romanist and reformist than has been thought.

The monograph's text itself has flaws. The proofreading is spotty. The argument of the so-called Toronto school — that the reality of legal rights of villeins must be sought in the records of local, not royal, courts — is dealt with unconvincingly. And the author's analysis occasionally lacks the clarity of exposition that is the sign of a thoroughly mastered problem. But this is a useful and an interesting treatment of an important subject, one that should be welcomed and widely read.

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GERT KAISER, ed., *Gesellschaftliche Sinnangebote mittelalterlicher Literatur*. Mediaevistisches Symposium an der Universität Düsseldorf. (Forschungen zur Geschichte der älteren deutschen Literatur, 1.) Munich: Wilhelm Fink, 1980. Paper. Pp. 160. DM 48.

THESE conference proceedings consist of three papers, which were circulated in advance to participants, and of transcribed discussions. The central topic of the conference was the validity and limits of textual analysis for the determination of societal function and communicative potential in medieval German literature (p. 7); the notion was to juxtapose three approaches to this problem, represented by the three presenters (Jan-Dirk Müller, Hedda Ragotzky, Bernd Thum). Remarkably, the book does not state when the conference took place or how the participants were chosen.

Müller's paper treats the *aventure* in late medieval epic with the general thesis that social change and literary change are related and with this general result: "Die gewandelte Funktion des ritterlichen Abenteurers im Ganzen des jeweiligen Geschehens . . . weist insgesamt auf die nicht mehr einholbare Distanz der in hochmittelalterlicher Epik angelegten Handlungs- und Verhaltensmuster. Das Situations- und Handlungsmodell der *aventure* verliert seine Kraft, gesellschaftliche Erfahrungen zu binden" (p. 28). Ragotzky presents a very close analysis of the argumentation in two *bispele* by Der Stricker with *milte* as their theme. Her analysis is conducted on a theoretical basis derived from Habermas and concludes that *milte*, as a necessary form of aristocratic self-realization, served to legitimate the artists dependent on it because of their role as social critics: "*milte* als wesentliche Form adeliger Selbstrepräsentation ist ohne Öffentlichkeit undenkbar, sie ist Medium rechtmäßiger Geltungsansprüche, und sie bedarf der öffentlichen Bestätigung im Sinne der Zuerkennung oder der Verweigerung solcher Geltungsansprüche" (p. 91). Thum presents a theory and certain results in the area of behavioral "Elementarformen," identified by "geschichtliche Verhaltensforschung." His ambition is to contribute to the study of fundamental attitudes and forms of response in medieval German society which presumably condition its literature, but he acknowledges the exploratory character of his investigations: "der Anspruch meiner hier vorliegenden Beiträge [ist] . . . die Sicherung von Möglichkeiten . . . mit Hilfe geschichtlicher Verhal-