

Book Review

James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*. Chicago: University of Chicago Press, 2008, pp. 607, \$49.00.

Reviewed by Emily Kadens

James Brundage, the Ahmanson-Murphy Distinguished Professor Emeritus of History and Law at the University of Kansas, has made important contributions to the history of medieval canon law, focusing in particular on laws concerning marriage, family, and sexual relations. With this book, his tenth, he turns to another of his specialties, the history of the legal profession. The work is the culmination of decades of research among the primary printed and archival sources and demonstrates an encyclopedic knowledge of the secondary literature. It goes a long way toward addressing the lack of accessible, English-language surveys of the history of Western legal development and as such will be a valuable reference for many years.

In the early 12th century, trained lawyers were a rarity in Western Europe, but by the mid-13th century they had not only proliferated expansively but also formed a recognizable professional group. Brundage's aim is to explain how this metamorphosis occurred. To organize his description of the emergence of a legal profession he borrows from modern definitions and categories. The term "profession," he explains,

applies to a line of work that is not only useful, but that also claims to promote the interests of the whole community as well as the individual worker. A profession in addition requires mastery of a substantial body of esoteric knowledge through a lengthy period of study and carries with it a high degree of social prestige. When individuals enter a profession, moreover, they pledge that they will observe a body of ethical rules different from and more demanding than those incumbent on all respectable members of the community in which they live (2).

This definition obviously describes modern lawyers, and, Brundage demonstrates, fits those of the later Middle Ages as well.

He begins his story with two chapters of background. In the first, he explains how the lawyers of the Roman Empire met the requirements of a profession. The legal experts of the Republic consisted essentially of one group of self- or

Emily Kadens is a professor of law at the University of Texas at Austin. Her research focuses on pre-modern European legal history.

apprenticeship-trained jurists who dispensed legal advice largely as a public service, and a second group of advocates, such as Cicero, who argued in court but who concerned themselves more with rhetoric than with law. Later, during the early centuries of the Common Era, the Roman Empire witnessed the appearance of a body of men formally trained in law at law schools according to an increasingly determined curriculum and mastering an increasingly defined body of law. They performed work recognizable to modern lawyers, were paid for their labors, were required to be admitted to the bar by the judge before whom they wished to practice, and were held to certain ethical standards as regulated by magistrates.

Both here and later in the book, Brundage emphasizes the significance of procedural change as cause and effect of the professionalization of lawyers. As lawyers were called upon to resolve problems and to address issues of fairness and efficiency, procedure became more complex. As it did so, litigants had a greater need for lawyers to navigate the system for them. As lawyers became more indispensable, they also became more aware of their identity as a special, trained class. Brundage returns to this process again in his discussion of the 12th and 13th centuries.

Though this is a minor quibble, Brundage is somewhat less discriminating in his use of the term “legal profession” when he speaks of the Roman world than he is when referring to the Middle Ages. He allows for a legal profession during the Late Republic (23)—a time when judges were not professionals, legal education was still informal, advocates who argued in court often had little or no legal training, a legal literature had only begun to emerge, and trial procedure was relatively simplistic. The same factors apply nearly equally to the 12th century, a period when Brundage believed that no legal profession yet existed. Such inconsistency, however, has little impact on the larger thesis because Brundage’s purpose in telling the story of the Roman lawyer is presumably to establish the broader, enduring characteristics of the legal profession in Western history.

In the second chapter, Brundage describes the early Middle Ages as a time without lawyers. While some law continued to exist, of course, and therefore while some men inevitably had greater knowledge and expertise in it than did others, the pillars that had supported the Roman legal profession’s edifice largely disappeared in Western Europe between approximately the 5th and the 11th centuries. The West had no law schools, no sophisticated procedure, no trained judges (outside of the Irish and Scottish lands), no lawyers’ organizations or standards of legal ethics. The Catholic Church, the inheritor of Roman legal and administrative institutions, continued to produce a steady trickle of collections of canon law texts, but on the whole, this half millennium was a world that did not need lawyers. Respected men of the community could handle matters of customary law in a simple oral procedure using such “truth”-finding techniques as the ordeal and oaths, and governmental administrative machinery was rudimentary at best.

This long period without lawyers is precisely what makes the next stage in Western legal history so dynamic and exciting. The sudden reappearance of the trained lawyer between the end of the 11th and the middle of the 12th centuries is one of the most stunning, and most difficult to explain, phenomena of Western history. Brundage refers to three factors that played a role in this development. First, he mentions the rediscovery of Justinian's *Digest*, the most intellectually sophisticated part of the codification of Roman law, produced in mid-6th-century Byzantium on the order of the Emperor Justinian. Second, he points out the separation of canon law from theology and the former's establishment as a legal discipline. This process was significantly aided by the appearance around 1140 of the *Decretum* of Gratian, an innovative textbook designed to teach canon law. With the *Digest* and the *Decretum* around which to organize instruction, identifiable schools began to form, first in Bologna and later elsewhere in Italy, France, and England, to teach students the law in a formal, if not at first rigidly-structured, fashion.

Law schools created lawyers, and the resulting proliferation of legally-trained men across Europe changed the course of Western history. Brundage spends the bulk of the book discussing this development during the period between the mid-12th and mid-13th centuries, but the outlines of the story can be briefly summarized. By the late 11th century, Western Europe was in the midst of a dramatic socio-economic upheaval. Population was increasing for the first time in about half a millennium. Some of that excess population moved to cities as improved agricultural techniques created a surplus that could feed town dwellers. With the growth of cities came the growth of commerce, as merchants traded ever longer distances to supply the desires of the growing number of people with money to spend.

A more sophisticated and complex urban society required a more sophisticated and complex law than the existing Germanic customs that had for centuries governed the small, stable rural villages. Such a law appeared in the form of the rediscovered *Digest* of Justinian. In keeping with the spirit of intellectual inquiry that characterized the so-called Twelfth Century Renaissance, a few masters in Bologna began to study and then teach the Roman law. This in turn influenced the development and teaching of the canon law, which soon got its own textbook in Gratian's *Decretum*. By the second half of the 12th century, the study of both civil and canon law was established in Northern Italy, Southern France, Paris, and Oxford, as students came to learn under famous masters. By the first third of the 13th century, these centers of study had coalesced into degree-granting universities.

In a society peopled by merchants, artisans, peasants, and soldiers, educated men were an anomaly. At first, most of them joined the administrative ranks of the Catholic Church, which was in the midst of a period of great reform and growth. Some entered the service of secular princes, who were beginning to consolidate their power and form administrative and judicial bureaucracies. Eventually even cities came routinely to hire professional clerks and judges. A large percentage of these educated men had obtained some legal training,

and as all lawyers know, training in the law changes how one thinks. Many new lawyers may have returned to practice in customary-law courts, but they brought with them the vocabulary, legal categories, and legal analysis of the Roman law. More lawyers bringing their esoteric learning with them into courts and into the councils of kings, princes, popes, and bishops began a snowballing process of legalization. The law, in the form of Roman and canon law, became a widely-agreed vocabulary of courts, administration, and diplomacy, especially (at first) in the Church. Bishops needed not only an increasing knowledge of law to govern their flocks but also a growing entourage of professional lawyers to act as judges to deal with the rising tide of litigation engulfing the Church courts. Already by the 1150s, a significant proportion of the College of Cardinals had some legal training, and the number of lawyers among cardinals and bishops would soon outpace the number of theologians.

By the second quarter of the 12th century, the ever-growing docket of ecclesiastical courts motivated Church authorities to search for an improved procedure. Around 1140, Pope Innocent II's chancellor, Cardinal Haimeric, asked the leading civil law master at Bologna, Bulgarus, to prepare a guide to civil procedure. Naturally, Bulgarus looked to Roman law as his guide. By the end of the century, the Church courts were employing a hybrid Roman-medieval process that came to be known as Romano-canonical procedure and that forms the foundation of modern civil law procedure. The more established and the more complicated Romano-canonical procedure became, the more necessary and entrenched lawyers became. As Brundage explained, "[b]y 1200, only a foolhardy litigant would choose to initiate a lawsuit or to defend himself against an accusation before a canonical court without some help and guidance from a person who had either formal training in the learned laws or considerable practical experience in the courts" (151-52). As more litigants delegated the task of pursuing their suit to lawyers, the judges, too, needed legal training. The more legal training the officers of the court had, the more they expected that law to be applied in court. As a consequence, over the course of the 12th to 14th centuries, ecclesiastical and then secular courts evolved toward an increasingly formalized procedure and the increasing indispensability of lawyers.

The growing prominence of lawyers in 13th-century society had two echo effects. As lawyers took over the role of court advocates and legal advisors, they also gained a sense of their own corporate identity. For the first time since the fall of the Roman Empire, late 12th- and early 13th-century lawyers began to be required to obtain admission to practice before courts; they had to swear oaths, called calumny oaths, to use good practices; they had to join professional organizations; and they had to adhere to a set of ethical rules. These final steps, added to the law schools, the new procedure, and the increasing dominance of university-trained men among advocates and judges, combined to make lawyers the first recognizable profession in medieval Europe.

The second echo effect of lawyerization was less romantic but probably inexorable. With lawyers came lawyer jokes. That is, the more important lawyers became in society, the more control they had over the dispensing of justice, the more power they had in government, and the more economically successful they became, the more other people resented them. Then as now, the services of lawyers were not inexpensive and litigation was not expeditious, and the litigants at the mercy of their attorneys complained bitterly about the sale of justice.

Brundage's treatment of legal ethics and of the dislike of lawyers demonstrates two of the most interesting lessons of the book for modern readers. The ethical dilemmas and criticism attorneys face today are nearly identical to those faced by Roman and medieval lawyers. The very nature of the lawyer's job—representing clients who may or may not be in the right and taking a fee for helping people get their day in court—creates what appears to be universal and perhaps inevitable conflicts. Such modern problems as over-crowded dockets, lawyers engaging in procedural delay tactics, excessive appeals, and poor people needing to be provided with legal representation free of charge also plagued the Roman and medieval legal systems. This, in turn, suggests that for all the hand-wringing that occurs today over high fees, the inaccessibility of the legal system to people of modest means, long waits for trials, and ethical lapses, some problems are inherent in our legal system. If we choose to continue to bemoan them, then we might be well advised to learn from our predecessors about the supposed solutions that did not work rather than continue along the same well-worn but ineffective path.

The second lesson Brundage's book offers lawyers today is that, despite the fact that everywhere lawyers become integral they encounter sometimes virulent criticism and dislike, they have played an extremely important role in the development of Western society. Beginning in the 12th century and continuing unabated to today, lawyers have come to the fore in administration, justice, and diplomacy because their training has given them a unique set of skills that other members of society have not had. Knowledge of the law and the ability to apply it to solving problems have meant that lawyers have simply been better than most other educated men at running governments, both lay and ecclesiastical, and resolving disputes, whether through negotiation, arbitration, or litigation.

The book, masterful though it is, is not without its weaknesses. Brundage's decision to use a modern definition of profession seems somewhat arbitrary and anachronistic for the transition period of the late 12th century. After completing a discussion of the increasing number and prominence of lawyers, the growing sophistication of procedure, the lawyers' fee structure, the chorus of criticism of legalization, and the spread of law schools, he then claims that the legal profession did not exist yet. Apparently, until the legal community could tick off the entire—modern—list of characteristics, especially admission to a professional body, it could not be called a profession. Obviously Brundage

needed some sort of framework around which to organize his story, but the framework ought not to impose a rigidity that the evidence may not warrant.

The other criticisms stem from the organization and limits of the book. Brundage chose to explain the history chronologically, but this resulted in a certain amount of repetition. He sometimes uses identical examples to make the same point for different periods, and discussions of issues such as fees, the structure of the legal community, and professional etiquette occur two or three times in the body of the book, though often with differing levels of detail. The advantage of this approach, however, is that the book can be used for reference, with each chapter being a self-contained unit. Unfortunately, too, Brundage deals almost exclusively with canon law courts and lawyers. He discusses the civil law most thoroughly in his chapter on the universities, but his treatment of secular courts is limited, and he almost completely ignores the English legal system. His reason for this gap is his belief, expressed briefly in the Introduction, that church courts led the way in creating a legal profession (3). It is true that the English were comparative laggards in this regard, but his evidence about bar admissions, the use of trained judges, and the creation of professional organizations seems to suggest that a few secular courts reached these milestones slightly before or simultaneous with the ecclesiastical courts. The absence of much discussion on England is rather disappointing, for the English experience would have made a fascinating counterpoint. The legal profession developed there along a quite different path and yet reached most of the same ends. However, Brundage may have felt that the book was long enough and that sufficient other literature existed in English covering that history.

The final criticism takes the opposite position. Rather than decrying that the author did too little, it asserts that he did too much. A more accurate title for the book might have been "The Medieval Origins of the Legal System." Brundage treats the reader to detailed and useful descriptions of such matters as medieval procedure, the recusal of judges, the fee structure and attire of lawyers. All of this is wonderful and rich, but the profusion of information and the detours along paths that relate only slightly to the main thesis occasionally threaten to obscure the thread of the story about lawyers becoming a profession.

Finally, in light of Brundage's important contribution to the small library of survey books in English on Western legal history, I will end with a plea. Brundage has written, quite intentionally, an essentially institutional history. He informs his reader about the steps in the procedure or the structure of the law school curriculum, but neither he nor anyone else has written a book that tells the story of what the lawyers and judges of the past did. We have no books that translate and discuss the legal texts—such as the university *summae*,

the opinions of counsel (*consilia*), the notarial contracts, the courtroom briefs, or the judicial decisions—that constituted the day-to-day creation of the law. We have nothing yet to teach modern, non-historian readers how the thinking and working of lawyers and judges, especially in continental Europe, evolved over time. Now that, thanks to Brundage, we know who the lawyers were and how the legalization of the West occurred, we need an equally weighty study of how all those lawyers and judges used all that law.