

Can we write an ethical history of the early common law?

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The paper:

A better title for this paper might perhaps be: 'Can we write an ethical history of *judgment* in the early common law?'. It first sets out the state of the problem: while many twelfth- and thirteenth-century texts of moral theology discuss the measure of a 'good' judge, this literature seems to have very little connection to the early common law and its judges. It is a historiographical commonplace that the common law was the creation of pragmatic royal servants, with little or no concern for judicial morality; and that judicial regulation (and sustained thought about judicial behaviour) arrived late, and was only ever of secondary importance. This paper advances the argument that matters of judicial ethics were a focal point for discussion from the start of Anglo-Norman legal reforms. Judicial morality mattered, but it was understood as a matter of self-regulation rather than external enforcement. The framework of the law itself deliberately left space for the exercise of personal virtue. The paper then considers the example of one particular virtue, 'mercy' (*misericordia*), and how the exercise of mercy by judges was understood to be both an official duty and a personal necessity for the sake of the judge's soul.