READINGS IN LEGAL HISTORY

History 320.01
Duke University
Fall Term, 2006
Office Hours: Thurs., 1-3
Thursday, 6:00-8:30, Languages 08

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This graduate readings course furnishes an overview of the leading approaches to legal history -- law and society/social identity; legal culture/ideology; and law and economy, particularly in the context of modern capitalism. Central interpretive concerns include: the extent to which legal institutions and rules retain autonomy from other social, political, intellectual, and economic domains; the evolution of popular understandings and use of law; the role of law in buttressing, or challenging, social hierarchies and structures of authority; the impact of legal categories and rules on social and economic change; and the dynamics of conflict and cooperation between contending legal systems and cultures. Nearly half of the readings grapple with law in the Anglo-American world, with the remainder considering legal experience in other parts of the globe; most (though not all) of the readings examine legal history since 1750.

REQUIRED BOOKS FOR PURCHASE (Available at The Regulator Bookshop, on 9th St.)

A copy of each of these books will be also available on reserve at Lilly Library. Other readings are available through e-reserves, through links on the course web page, or through databases accessible through the library homepage.

Jeremy Adelman, *Republic of Capital: Buenos Aires and the Legal Transformation of the Atlantic World* (Palo Alto: Stanford University Press, 1999)
Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (New York: Cambridge University Press, 2001).
Natalie Zemon Davis, *The Return of Martin Guerre* (Cambridge, Mass.: Harvard University Press, 1984)
James Goodman, *Stories of Scottsboro* (New York: Vintage Books, 1995)
John Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime*, 2nd ed., (Chicago: University of Chicago Press, 2005)
Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (New York: Cambridge University Press, 2003)

In addition, I strongly recommend that you purchase R. W. Kostal's *Law and English Railway Capitalism, 1825-75* (New York: Oxford University Press, 1994), through a used book website.

BOOK RECOMMENDED FOR PURCHASE

Lawrence Friedman, *A History of American Law*, 3rd ed. (New York: Touchstone, 2005)

COURSE REQUIREMENTS

In addition to active participation in seminar discussions, seminar members are responsible for the following assignments:

1) EITHER:

a) *a 1000 word book review of a legal history monograph*, as if for *Law and History Review* (you may choose a book assigned for the class or another volume that you propose and I agree to); OR

b) *a 1000 word op-ed piece*, written for History News Network or a newspaper, drawing on a week's or several weeks' readings, and placing some legal issue of contemporary relevance in its longterm historical context.

This assignment must be completed in the first six weeks of the term. You will have a chance during the second week of classes to sign-up for a due date (though you need not choose your preferred format until you actually begin work on the assignment). Please submit the review/op-ed piece to the relevant discussion board **by 8:00 p.m. on the Tuesday evening before that week's class.**

2) EITHER:

a) *a 1000 word research prospectus*, flowing out of a given reading or set of readings, in which you identify a particular research question, discuss its historiographic significance, indicate how you would go about answering that question, and sketch the specific sources you would use in your research. In developing an idea for research, you might:

- test the conclusions/interpretations of a particular article/monograph, through reconsideration of the evidence on which it draws and/or examination of other pertinent evidence;
- challenge the typicality of a given case study, either by considering legal developments in another city/region/country/continent;
- test the applicability of a given theoretical approach in a specific historical setting; or
- probe either the "prologue" or the "epilogue" to a given historical narrative, considering the legal dynamics either before or after the period considered by that narrative.

OR b) *detailed outline/notes for a lecture* on some aspect of legal history that you would deliver to an upper-level undergraduate class. The imagined class need not be on "legal history" (though of course it might be) -- it could be a course on modern European social history, or American cultural history, or Latin American political history, or the Anthropology of Law (that takes history seriously). But the lecture should tackle a theme or set of issues that are sufficiently broad in terms of chronology, geography, and subject matter to engage juniors and seniors. A lecture on "The Law of American Slavery" would certainly fly, as would "Criminal Law and the Working-Class in Industrializing England," or "Legal Culture in Twentieth-Century Latin America," or "Comparative Approaches to Anti-trust in the Post-WWII World." Your notes should also indicate an argument of some kind, about the nature of legal change/continuity, periodization, causal explanation, etc. I would expect students taking this option to choose a topic linked to their historiographic essay (see below).

This assignment must be completed between week 8 and week 12 of the semester. You will have a chance during the second week of classes to sign-up for a due date (though you need not choose your preferred format until you actually begin work on the assignment). Please submit the prospectus or lecture outline/notes to the relevant discussion board **by 8:00 p.m. on the Tuesday evening before that week's class**.

3) *A 20-25 page historiographic essay on some area of legal history writ large*. Comparative analyses, overviews of legal history within a particular world region or society, or, in the case of societies with particularly rich legal historiographies, more focused assessments of scholarship, are all possibilities. Examples might include: a comparative examination of urban working-class or peasant attitudes toward "law" in selected countries either before or during industrialization; a comparative consideration of legal professionalization in the nineteenth-century; a comparative investigation of the law of criminal justice or personal dispute resolution in colonial Latin America or colonial Africa; the significance of longterm demographic changes on pre-Republic Chinese law; the impact of American law on the development of the modern corporation; or the influence of western civil rights movements on postwar WWII European law. Another option would be to consider the impact of cultural anthropology on legal history in western (or non-western) societies, or to assess the strengths and weaknesses of longitudinal studies of trial courts in a number of countries. Whatever the subject matter, students should aim for the kind of historiographic review essay occasionally published in journals like *Reviews in American History*, *William & Mary Quarterly*, *SlavicReview*, *Past and Present*, and *Law and History Review* (see the selected bibliography appended to the syllabus). For Duke Ph.D. students in the history department who are interested in pursuing a legal history-related field, this essay should, with suitable revisions and extensions, serve as the centerpiece of their portfolio submissions in this field.

An initial bibliography and a one-page discussion of your interest in the topic must be submitted to the appropriate coursesite discussion board **by 5:00 on Wednesday, Oct. 11**.

A 10-12 page rough draft, which ought to comprise pages from the body of the essay, framed as necessary by an outline of unwritten sections, must be submitted to the appropriate discussion board by **8:00 on Tuesday, Nov. 28, or Dec. 5,** depending on when you sign up for a due date**.**

GRADING

The grading for this course will breakdown as follows:

Class Participation (including engagement with the written work of other seminar members):	30%
Book Review or Op-Ed	10%
Prospectus or Lecture Outline/Notes	10%
Historiographic Essay -- First Draft	15%
Historiographic Essay -- Final Draft	35%

COURSEINFO WEBSITE

This course has a Blackboard Courseinfo website, which is integral to the class. On it you will find:

* a copy of the syllabus;
* links to some of the readings; and
* a mechanism for posting your papers.

You can gain access to the site through the main Duke Courseinfo page, at: https://courses.duke.edu/

Week One, Aug. 31: Some Parameters of Legal History

Lawrence Friedman, "Legal Culture and Social Development," *Law and Society Review* 4 (1969): 29-44 [JSTOR]

Robert Gordon, "Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography," *Law and Society Review* 10 (1975): 9-55 [JSTOR]

Sally Merry, "Legal Pluralism," *Law and Society Review* 22 (1988): 869-96 [JSTOR]

Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings Law Review* 38 (1987): 805-53 [HEIN ONLINE -- be sure that you call up the main article, not just the introduction to the English translation]

Alan Watson, "Legal Change: Sources of Law and Legal Culture," *Pennsylvania Law Review* 131 (1983): 1121-26, 1134-57 [JSTOR]

Michael Grossberg, "Social History Update: Fighting Faiths and the Challenge of Legal History," *Journal of Social History* 25 (1991):191-201 [Academic Search Premier]

Week Two, Sept. 7: Macrohistory -- Law, Empire, and Colonialism

Benton, *Law and Colonial Cultures*

Richard Ross, "Legal Communications and Imperial Governance in Colonial British and Spanish America," forthcoming in *The Cambridge History of American Law*, eds. Christopher Tomlins and Michael Grossberg (Cambridge University Press, 2007) [COURSESITE]

Roger Horowitz, "International Law and State Transformation in China, Siam, and the Ottoman Empire During the Nineteenth Century," *Journal of World History* 15 (2004): 445-486 [PROJECT MUSE]

Virginia Martin, "Kazakh Oath-Taking in Colonial Courtrooms: Legal Culture and Russian Empire Building," *Kritika: Explorations in Russian and Eurasian History* 5 (2004): 483 -514 [PROJECT MUSE]

Week Three, Sept. 14: Microhistory I -- Law, Society, and Culture through the Prism of the Early Modern Trial

Davis, *The Return of Martin Guerre*

Robert Finlay, "The Refashioning of Martin Guerre," *American Historical Review* 93 (1988): 553-71 [JSTOR]

Natalie Zemon Davis, "On the Lame," *American Historical Review* 93 (1988): 572-603 [JSTOR]

Russell Zguta, "Witchcraft Trials in Seventeenth-Century Russia," *American Historical Review* 82 (1977): 1187-1207 [JSTOR]

Antony E. Simpson, "Popular Perceptions of Rape As a Capital Crime in Eighteenth-Century England: The Press and the Trial of Francis Charteris in the Old Bailey, February 1730," *Law and History Review* 22 (2004): 27-70 [HEIN ONLINE]

Week Four, Sept. 21: Microhistory II -- Law, Society and Culture through the Prism of the Modern Trial

Goodman, *Stories of Scottsboro*

Week Five, Sept. 28: The Evolution of Legal Institutions I -- "Internalist" Perspectives

Langbein, *Torture and the Law of Proof*

Jonathan Ocko, "'I'll Take It All the Way to Beijing," *Journal of Asian Studies* 47 (May, 1988): 291-315 [JSTOR]

Dan Klerman, "Jurisdictional Competition and the Evolution of the Common Law: A Hypothesis," 8 *Australian Journal of Legal History* http://www.austlii.edu.au/au/journals/AJLH/2004/

Richard Wortman, "Russian Monarchy and the Rule of Law: New Considerations of the Court Reform of 1864," *Kritika: Explorations in Russian and Eurasian History* 6 (2005): 145 -70 [PROJECT MUSE]

[Note: The reading is on the light side this week; it's a good time to get some preliminary work done on your final paper]

Week Six, Oct. 5: The Evolution of Legal Institutions II -- "Externalist" Perspectives

Willrich, *City of Courts*
Lawrence M. Friedman and Robert V. Percival, "A Tale of Two Courts: Litigation in Alameda and San Benito Counties," 10 *Law & Society Review* (1976): 267-301 [JSTOR]
Sally Folk Moore, "History and the Redefinition of Custom on Kiliminjaro," in Starr and Collier, *History and Power in the Study of Law*, 277-301 [E-RESERVES]

Week Seven, Oct. 12: Varieties of the Historiographic Essay Presentations of Final Paper Topics

Read at least three of the historiographic essays listed at the end of the syllabus, only two of which can focus on British/North American law, or on law outside those regions. Also read all of the paper proposals submitted to the class discussion board.

Week Eight, Oct. 19: Law and the Evolution of Modern Capitalism I -- The Industrializing Anglo-American World

Morton Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1976): 31-62 [E-RESERVES]
Kostal, *Law and English Railway Capitalism*, entire book, skimming chs. 6 and 8
Peter Karsten, "A Recognizable Law & Economics Jurisprudence?: How Much 'Wealth' - and 'Welfare' - Maximizing Took Place in the Courts, Legislatures, and Customs of Eighteenth and Nineteenth-Century Common-Law Domains?" Australia Journal of Legal History (2004): 21-60 http://www.austlii.edu.au/au/journals/AJLH/2004/2.html
R. W. Ferguson, "Commercial Expectations and the Guarantee of the Law: Sales Transactions in Mid-Nineteenth Century England" in G. R. Rubin and David Sugarman, *Law Economy, and Society, 1750-1914: Essays in the History of English Law* (Abington, Oxon., 1984): 192-209 [E-RESERVES]

Week Nine, Oct. 26: Law and the Evolution of Modern Capitalism II -- Views from Post-Revolutionary Argentina, Imperial Germany, and Colonial Uganda

David M. Trubek, "Max Weber on Law and the Rise of Capitalism," *Wisconsin Law Review* (1972): 720-53 [JSTOR]
Adelman, *Republic of Capital*, entire volume, skimming chs 2-4
Michael John, "The Peculiarities of the German State: Bourgeois Law and Society in the Imperial Era," *Past and Present* 119 (1988): 105-131 [JSTOR]
Joan Vincent, "Contours of Change: Agrarian Law in Colonial Uganda, 1895-1962," in June Starr and Jane F. Collier, eds., *History and Power in the Study of Law: New Directors in*

Legal Anthropology (Ithaca: Cornell University Press, 1989), 153-67 [E-RESERVES]

Week Ten, Nov. 2: Law as a Buttress for Social Hierarchy

Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 57-125 [Lexis-Nexis]

Douglas Hay, "Property, Authority, and the Criminal Law," in Hay, Peter Linebaugh, John G. Rule, E. P. Thompson, and Cal Winslow, *Albion's Fatal Tree: Crime and Society in Eighteen-Century England* (London, 1975): 17-63 [E-RESERVES]

John Langbein, "Albion's Fatal Flaws," *Past and Present* 98 (1980): 96-120 [JSTOR]

John Mason, "Hendrik Albertus and His Ex-Slave Mey: A Drama in Three Acts," *Journal of African History* 31 (1990): 423-45 [JSTOR]

A. G. Roeber, "Authority, Law, and Custom: The Rituals of Court Day in Tidewater Virginia, 1720-1750," *William and Mary Quarterly* 37 (1980): 29-52 [JSTOR]

Eugene Genovese, *Roll Jordan, Roll* (New York: Vintage, 1976): 25-48 [E-RESERVES]

Vivien Ng, "Ideology and Sexuality: Rape Laws in Qing China," *Journal of Asian Studies* 46 (1987): 57-70 [JSTOR]

Arlene Diaz, "Women, Order, and Progress in Guzman Blanco's Venezuela, 1870-1888," in Ricardo Salvatore, Carlos Aguirre, and Gilbert Joseph, eds., *Crime and Punishment in Latin America: Law and Society since Late Colonial Times* (Durham: Duke University Press, 2001): 157-82 [E-RESERVES]

WEEK ELEVEN, Nov. 9: The Search for Legal Consciousness -- Popular Conceptions of Law Within and Outside Formal Legal Systems

Paul Hyams, "Nastiness and Wrong, Rancor and Reconciliation," in Warren Brown and Piotr Gorecki, eds., *Conflict in Medieval Europe: Changing Perspectives on Society and Culture* (Burlington, Vermont, 2003) [E-RESERVES]

Hendrik Hartog, "Pigs and Positivism," Wisconsin Law Review (1985): 899-935 [JSTOR]

John Philip Reid, *Law for the Elephant: Property and Social Behavior on the Oregon Trail* (Berkeley: University of California Press), 127-56, 251-64, 285-304 [E-RESERVES]

Gareth Popkins, "Code versus Custom? Norms and Tactics in Peasant Volost Court Appeals, 1889-1917," *Russian Review* 59 (2000): 408-424 [JSTOR]

Pablo Picato, "*Cuidad con los Rateros*: The Making of Criminals in Modern Mexico City," in Salvatore, Aguirre, and Joseph, eds., *Crime and Punishment in Latin America*, 233-72 [E-RESERVES]

Sally Merry, "Going to Court: Strategies of Dispute in an American Urban Neighborhood," *Law and Society Review* 13 (1979): 891-925 [JSTOR]

John French, *Drowning in Laws: Labor Law and Brazilian Political Culture* (Chapel Hill: University of North Carolina Press, 2003), 1-9, 97-121 [E-RESERVES]

Sandra Burman and Wilfried Scharf, "Creating People's Justice: Street Committees and People's Courts in a South African City," *Law and Society Review* 24 (1990): 693-744 [JSTOR]

WEEK TWELVE, Nov. 16: Law as a Weapon of Social Movements

G. B. Warden, "Law Reform in England and New England, 1620 to 1660," *William and Mary Quarterly*, 3rd Ser., 35 (1978): 668-690 [JSTOR]

Gregory J. Massell, "Law as an Instrument of Revolutionary Change in a Traditional Milieu: The Case of Soviet Central Asia," 2 *Law & Society Review* (1968): 179-228 [JSTOR]

Szobar, Patricia, "Telling Sexual Stories in the Nazi Courts of Law: Race Defilement in Germany, 1933-45," *Journal of the History of Sexuality* 11 (2002): 131-63 [JSTOR]

Michael Klarman, "How *Brown* Changed Race Relations: The Backlash Thesis," *Journal of American History* 81 (1994): 81-114 [JSTOR]

Marc Galanter, "Missed Opportunities: The Use and Non-use of Law Favourable to Untouchables and Other Specially Vulnerable Groups," in *Law and Society in Modern India* (Delhi: Oxford University Press, 1989): 208-33 [E-RESERVES]

Neil J. Diamant, "Pursuing Rights and Getting Justice on China's Ethnic Frontier, 1949-1966," *Law & Society Review* 35 (2001): 799-840 [JSTOR]

Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1993), 269 [E-RESERVES]

Stephen Meili, "Cause Lawyers and Social Movements: A Comparative Perspective on Democratic Change in Argentina and Brazil," in Austin Sarat and Stuart Scheingold, eds., *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: Oxford University Press, 1998), 487-522 [E-RESERVES]

THANKSGIVING BREAK

WEEK THIRTEEN, Nov. 30: Discussion of Historiographic Essay Drafts

WEEK FOURTEEN, Dec. 7: Discussion of Historiographic Essay Drafts

Final Paper Due: Dec. 14, 5:00

Selected Bibliography of Historiographic Overviews in Legal History

Essays on Law in the U.S., Canada, and Britain

Norma Basch, "The Emerging Legal History of Women in the United States: Property, Divorce, and the Constitution," *Signs* 12 (1986): 97-117

Blake Brown, "A Taxonomy of Methodological Approaches in Recent Canadian Legal History," *Acadiensis* 34 (2004): 145-155

Robert J. Cottrol, "Liberalism and Paternalism: Ideology, Economic Interest and the Business Law of Slavery," *American Journal of Legal History* 31(1987): 359-373.

Cornelia Hughes Dayton, "Turning Points and the Relevance of Colonial Legal History," *The William and Mary Quarterly* 3rd Ser., 50 (1993): 7-17 [JSTOR]

Daniel Ernst, "Law and American Political Development, 1877-1936," *Reviews in American History* 26 (1998): 205-19 [Project Muse]

Margot Finn, "Law's Empire: English Legal Cultures at Home and Abroad," *Historical Journal* 48 (March 2005): 295-303 [Cambridge Historical Journals]

Michael Grossberg, "Crossing Boundaries: Nineteenth-Century Domestic Relations Law and the Merging of Legal and Family History," *American Bar Foundation Research Journal* (1986): 899-

Douglas Greenberg, "Crime, Law Enforcement, and Social Control in Colonial America," *American Journal of Legal History* 26 (1982): 293-325 [JSTOR]

Ron Harris, "The Encounters of Economic and Legal History," *Law and History Review* 21 2003): 297-346

Cynthia Herrup, "Law and Morality in Seventeenth-Century England," *Past and Present* 106 (Feb., 1985): 102-123 [JSTOR]

James Willard Hurst, "The State of Legal History," *Reviews in American History* 10 (1982): 292-305

Joanna Innes and John Styles, "The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth-Century England," *Journal of British Studies* 25(1986): 380-435 [JSTOR]

David Konig, "A Summary View of the Law of British America," *William and Mary Quarterly* 50, 3rd Series (1993): 42-50

Janet Loengard, "Legal History and the Medieval Englishwoman: A Fragmented View," *Law and History Review* 4 (1986): 161-78

Greg Marquis, "Law, Society, and History: Whose Frontier?" *Acadiensis* 21 (1992): 162-174

John McLaren, "In the Northern Archives Something Stirred: The Discovery of Canadian Legal History," *Australian Journal of Legal History* 8 (2003)

Richard J. Ross, "The Legal Past of Early New England: Notes for the Study of Law, Legal Culture, and Intellectual History," *William and Mary Quarterly* 3rd Ser., 50 (1993): 28 -41 [JSTOR]

David Sugarman, "Simple Images and Complex Realities: English Lawyers and Their Relationship to Business and Politics, 1750-1950," *Law and History Review* 11 (1993): 257-301 [JSTOR]

Christopher Tomlins, "Why Wait for Industrialism? Work, Legal Culture, and the Example of Early America: An Historiographical Argument," *Labor History* 40 (1999): 5-34

John Wunder, "What's Old about the New Western History? Part 3: Law," *Western Legal History* 10 (1997): 84-116

Essays on the legacy of James Willard Hurst in *Law and History Review*, Spring 2000 [JSTOR]

Essays on Law outside North America and Britain, or on Methodological Approaches

David A. Bell, "The Public Sphere, the State, and the World of Law in Eighteenth-Century France," *French Historical Studies* 17 (1992): 912-934 [JSTOR]

Erhard Blankenburg and Ralf Rogowski, "German Labour Courts and the British Industrial Tribunal System: A Socio-Legal Comparison of Degrees of Judicialisation," *Journal of Law and Society* 13 (1986): 67-92 [JSTOR]

Warren Brown and Piotr Gorecki, "What Conflict Means: The Making of Medieval Conflict Studies, in the United States, 1970-2000, in Brown and Gorecki, eds., *Conflict in Medieval Europe: Changing Perspectives on Society and Culture* (Burlington, 2003), 1-36

William W. Fisher, III, "Texts and Contexts: The Application to Legal History of the Methodologies of Intellectual History," *Stanford Law Review* (1997): 1065- [HEIN ONLINE]

Robert Gellately, "Situating the SS-State in a Social-Historical Context: Recent Histories of the SS, the Police, and the Courts in the Third Reich," *Journal of Modern History* 64 (1992): 338-365 [JSTOR]

Joshua Getzler, "Theories of Property and Economic Development," *Journal of Interdisciplinary History* 26 (1996): 639-669 [JSTOR]

Michele Graziadei, "Comparative Law, Legal History, and the Holistic Approach to Legal Cultures," accessible at: http://mail.jus.unitn.it/cardozo/Critica/Graziadei.htm

Stephen Jacobson, "Law and Nationalism in Nineteenth-Century Europe: The Case of Catalonia in Comparative Perspective," *Law and History Review* 20(2002): 307-347 [JSTOR]

Melissa Macauley, "A World Made Simple: Law and Property in the Ottoman and Qing Empires," *Journal of Early Modern History* 5 (2001): 331-352

Oleg Omel'chenko, "The System of State and Law in Eighteenth-Century Russia and the Political Culture of Europe: Some Historical Interactions," *Slavonic and East European Review* 80 (2002): 217-233

Ming-te Pan, "Confucianism and the Chinese Legal Tradition: Recent Scholarship on Chinese Legal History and Jurisprudence Studies," *Chinese Historical Review* 11 (2004): 223-241

Filippo Raneiri, P. S. C. Lewis, transl., "From Status to Profession: The Professionalization of Lawyers As a Research Field in Modern European Legal History, *Journal of Legal History* 10 (1989): 180-90

Reiner Schulze, "European Legal History: A New Field of Research in Germany," *Journal of Legal History* 13 (1992): 270-95

Reiner Schulze, "Das Recht Fremder Kulturen -- Vom Nutzen Der Rechtsethnologie Fur die Rechtsgeschichte ["The law of foreign cultures: uses of ethno-legal studies in legal history"] *Historisches Jahrbuch* 110 (1990): 446-470

Harriet Rudolph, "Rechskultur in der Fruhen Neuzeit: Perspectkiven und Erkenntnispotentiale Eines Modischen Begriefs" [Translation -- "Legal Culture in the Early Modern Period: Perspectives and Heuristic Potential of a Fashionable Concept"], *Historische Zeitschrift* 278 (2004): 347-374

R. Bin Wong, "Formal and Informal Mechanisms of Rule and Economic Development: The Qing Empire in Comparative Perspective," *Journal of Early Modern History* 5 (2001): 387-408