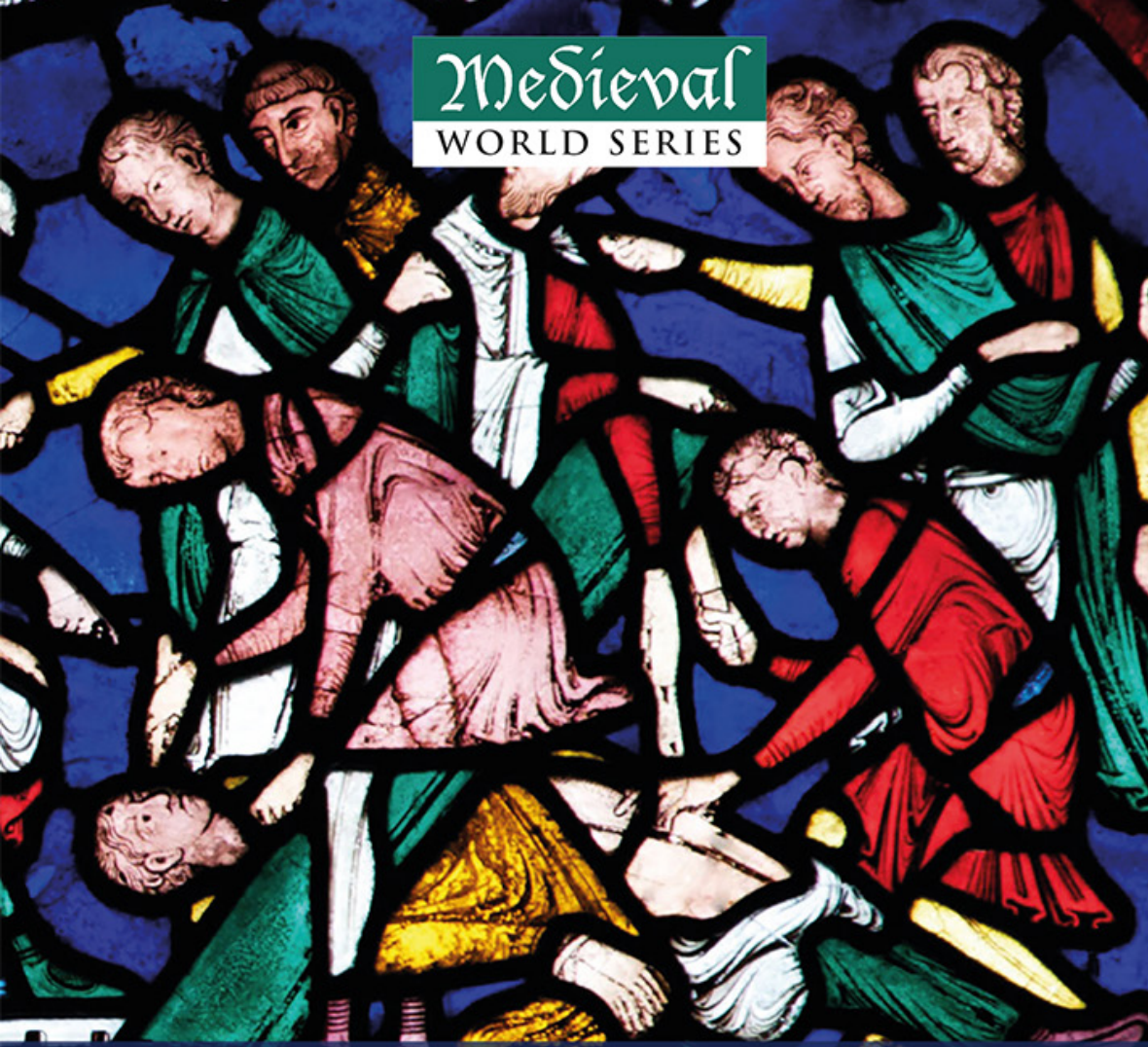

THE FORMATION OF THE ENGLISH COMMON LAW

LAW AND SOCIETY IN ENGLAND FROM KING ALFRED TO MAGNA CARTA

SECOND EDITION

JOHN HUDSON

ROUTLEDGE

THE FORMATION OF THE ENGLISH COMMON LAW: LAW AND SOCIETY IN ENGLAND FROM KING ALFRED TO MAGNA CARTA

The Formation of the English Common Law provides a comprehensive overview of the development of early English law, one of the classic subjects of medieval history. This expanded second edition spans the centuries from King Alfred to Magna Carta, abandoning the traditional but restrictive break at the Norman Conquest. Within a strong interpretative framework, it also integrates legal developments with wider changes in the thought, society, and politics of the time.

Rather than simply tracing elements of the common law back to their Anglo-Saxon, Norman or other origins, John Hudson examines and analyses the emergence of the common law from the interaction of various elements that developed over time, such as the powerful royal government inherited from Anglo-Saxon England and land-holding customs arising from the Norman Conquest.

Containing a new chapter and further sections charting the Anglo-Saxon period, as well as a fully revised Further Reading section, this new edition is an authoritative yet highly accessible introduction to the formation of the English common law and is ideal for students of history and law.

John Hudson is Professor of Legal History at St Andrews University, UK, and William W. Cook Global Law Professor at the University of Michigan. His previous publications include *F. W. Maitland and the Englishness of English Law* (2008), *The Oxford History of the Laws of England, Volume II 871–1216* (2012) and *Papers Preparatory to the Making of English Law: King Alfred to the Twelfth Century, Volume II: From God's Law to Common Law*, ed., with Stephen Baxter (2014).

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EDITOR'S PREFACE TO THE FIRST EDITION

England's history is unique for the development at a very early date of a unified system of law, which is normally described as the English common law. This common law was duly exported to many parts of the globe in the baggage train of the British Empire, and remains highly significant, for example in North America. In a broad context, the historical foundations of the common law have also remained utterly central to all discussion of the distinctive historical identity of a major European nation and to our understanding of the early phases of English and European state-building. Anyone who seeks to understand English identity must very rapidly focus attention on the formation of the common law. Likewise, anyone who seeks to understand the development of the medieval English monarchy and its relations with the kingdom's localities must also focus their attention on the development of the common law.

John Hudson's book therefore inevitably takes its place in an important historical tradition. The influence of F. W. Maitland (1850–1906), the intellectual giant, not just of early English legal history, but of social history as well, set an agenda which has exercised a profound influence over all who have followed. Maitland's central thesis was that the reforms of Henry II's reign, set out for all to see in the law book known as *Glanvill*, marked a decisive phase of legal creativity and organizational centralization. The period between 1154 and 1189, to all intents and purposes, saw the creation of the common law. Many distinguished scholars have followed Maitland; and, while there has been a tendency, developed in the works of the likes of R. C. van Caenegem and Lady Stenton, to trace origins back into the Norman period, the basic lines of Maitland's arguments held until the 1970s. Then, a difficult, but very important, book, S. F. C. Milsom's *Legal Framework of English Feudalism*, broke sharply from Maitland's approach by questioning the whole sociological and jurisprudential framework on which Maitland had constructed his ideas.

It also doubted the innovatory character of Henry II's reforms, which became no more than devices to facilitate the legal workings of a feudal society already well established. Their results, almost accidentally, were the processes which brought a common law into existence in the thirteenth century; the formation of the common law owed as much to pressure from suitors and the devices of lawyers as to the centralizing efforts of government.

John Hudson steps with assurance into this complex historiographical discussion. The author of a distinguished book entitled *Land, Law, and Lordship in Anglo-Norman England*, he brings to the subject a much deeper knowledge of the early charter evidence than any of his predecessors. His framework, like Maitland's and Milsom's, sets legal development within the context of social structures and social change, but his view of Anglo-Norman society is very different from either Maitland's or Milsom's. Anglo-Norman society possessed much of the conceptual, social and institutional framework which made possible the formation of the common law. The importance of Henry II's regime is greater than Milsom allowed, but it should be seen as a crucial period in an evolving process. John Hudson focuses on all the essential themes of royal power, the central and local courts, crime, dispute-settlement and customary law. His book is a very welcome and necessary contribution to a subject which has become exceptionally technical over recent decades. His analysis, which is both clear and original, is an excellent addition to the Medieval World series.

David Bates

AUTHOR'S PREFACE TO THE FIRST EDITION

This book is an introductory essay. As an essay, it has an argument: that the common law was formed from a variety of elements during the period 1066–1215. I am not searching for the 'origins' of every element of that law, but rather examining the process whereby they cohered. It is introductory in that it attempts to explain what is assumed in many other works on the subject. My reliance on secondary literature is clear at many points. Except briefly in Chapter 1, I have deliberately eschewed extensive discussion of historiography, but hope that this book will encourage readers to move on to the classics of the subject, most notably Maitland's *History of English Law*. Equally clear will be the omission of many important subjects, for example law relating to status, the forest, urban and ecclesiastical law, and legal learning. I seek to present not a textbook account of the law of the period, but a stimulus to thinking about the workings of law within society. Rather than aim for completeness, I have provided more extended analyses, most notably of disputes. I shall often examine law from the perspective not of a legislator or judge but of a party in a transaction or dispute. Through such contextualization I hope to overcome the sense of unreality that often arises in students of the subject when approaching 'legal history'. Instead, law is taken as a way of entering into the history of power and everyday thought.

Those who, like me, attended Paul Hyams's Oxford lecture courses on medieval law will know how much this book owes to him; on occasion I have felt as if I were merely his amanuensis. Three select groups of St Andrews students opted to take my Special Subject on 'Law and Society' rather than more immediately appealing options: they contributed greatly to what follows. The coincident presence of Rob Bartlett, Lorna Walker, and Steve White in 1993–94 made St Andrews the ideal place to be working on this book. Thanks are also due to various people for allowing me access to their unpublished work: Joseph Biancalana, Robin Fleming – who thereby helped greatly in remedying my ignorance of Domesday Book – and in

particular Patrick Wormald. David Bates first suggested that I write the book, and he and Rob Bartlett have read and commented upon the entire typescript. Help has also been gratefully received from Bruce O'Brien, Dan Klerman, Ros Faith, Hector MacQueen, George Garnett, Paul Brand, and Patrick Wormald. I hope that students will learn from this book, and I hope that I learnt some of the skills of communication so admirably displayed by my own tutors, James Campbell and Harry Pitt: to them I dedicate whatever is of value in this study.

AUTHOR'S PREFACE TO THE SECOND EDITION

The opportunity to produce a second edition of this book, twenty years after its first appearance, has been extremely welcome, in particular as an opportunity to broaden the chronological coverage. The first edition began in 1066 in part because of my own then area of expertise, in part because Patrick Wormald's fundamental work on the Anglo-Saxon period was yet to appear. Since 1996 Patrick's main work has been published, and my own researches have taken me back into the late Anglo-Saxon period. If the chronology has broadened, however, the book retains its form as an interpretative essay, not aiming for full thematic coverage: for further discussion of women and law, debt, the Forest, status, and so on, the reader can turn to my volume of the *Oxford History of the Laws of England*.

Besides the chronological extension, a few corrections and a few shifts in interpretation have been added: for example, slightly more emphasis on the changed nature of the administration of justice from the 1170s. Very largely, however, the post-1066 and still more so the post-1135 parts of the the book have been left unchanged. There has been some updating of footnotes and bibliography, but neither notes nor bibliography are meant to be exhaustive. The guide to further reading continues to include only sources available in English.

Many of those thanked in my preface to the first edition have contributed greatly to the intervening work – especially Rob Bartlett, Paul Brand, and George Garnett – whilst new debts have been incurred. Dick Helmholz has made me question my thoughts on many issues, and wrote a review of the first edition, which particularly helped me when approaching the second. Two most highly valued friends acquired since 1996, Bill Miller and Kimberley Knight, have read and commented upon the new sections, to ensure that I have maintained my efforts to appeal to a varied and intelligent audience. And I have benefited not only from my old setting, the Department of Mediaeval History at St Andrews, but also from the new Institute of Legal and Constitutional Research at St Andrews and from my attachment to

the Law School at the University of Michigan. Particular thanks go to my students at Ann Arbor since 2010, for deciding that a course on The Formation of the Common Law was a worthy part of their legal training; I have learnt enormously from them.

LIST OF ABBREVIATIONS

Af	*laws of Alfred*.
ANS	*Anglo-Norman Studies*.
As	*laws of Æthelstan*.
ASC	*Anglo-Saxon Chronicle*.
Atr	*laws of Æthelred II*.
Bartlett, *Trial*	R. J. Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Oxford, 1986).
Borough Customs	M. Bateson, ed., *Borough Customs* (2 vols, Selden Soc., 18, 21, 1904, 1906).
Bracton, Thorne	*Bracton De Legibus et Consuetudinibus Anglie*, ed. and trans S. E. Thorne (4 vols, Cambridge, MA., 1968–77).
Brand, *Legal Profession*	P. A. Brand, *The Origins of the English Legal Profession* (Oxford, 1992).
Brand, *Making*	P. A. Brand, *The Making of the Common Law* (London, 1992).
Cn	*laws of Cnut*.
CRR	*Curia Regis Rolls* (in progress, 1922–present).
Dialogus	Richard Fitz Nigel, *Dialogus de Scaccario*, ed. and trans C. Johnson, rev. F. E. L. Carter and D. E. Greenway (Oxford, 1983).
Eg	*laws of Edgar*.
EHD	*English Historical Documents, i, c. 500–1042*, ed. D. Whitelock (2nd edn, London, 1979); *ii, 1042–1189*, ed. D. C. Douglas and G. W. Greenaway (2nd edn, London, 1981).
EHR	*English Historical Review*.
Em	*laws of Edmund*.
Ew	*laws of Edward the Elder*.

Garnett and Hudson, *Law and Government*	G. S. Garnett and J. G. H. Hudson, eds, *Law and Government in Medieval England and Normandy: Essays in Honour of Sir James Holt* (Cambridge, 1994).
Glanvill, Hall	'Glanvill', *Tractatus de Legibus et Consuetudinibus Regni Anglie*, ed. and trans G. D. G. Hall (Edinburgh, 1965).
HEA	*Historia ecclesie Abbendonensis*, ed. and trans J. G. H. Hudson (2 vols, Oxford, 2002, 2007).
Holt, *Magna Carta*	J. C. Holt, *Magna Carta* (2nd edn, Cambridge, 1992; 3rd edn, with new introduction by G. S. Garnett and J. G. H. Hudson, Cambridge, 2015).
Hudson, *Centenary Essays*	J. G. H. Hudson, ed., *The History of English Law: Centenary Essays on 'Pollock and Maitland'* (*Proceedings of the British Academy*, 89, 1996).
Hudson, *Land, Law, and Lordship*	J. G. H. Hudson, *Land, Law, and Lordship in Anglo-Norman England* (Oxford, 1994).
Hudson, *Oxford History*	J. G. H. Hudson, *The Oxford History of the Laws of England, volume II: 871–1216* (Oxford, 2012).
Hurnard, *Pardon*	N. D. Hurnard, *The King's Pardon for Homicide* (Oxford, 1969).
Hyams, 'Ordeal'	P. R. Hyams, 'Trial by ordeal: the key to proof in the early Common Law', in M. S. Arnold, T. A. Green, S. A. Scully and S. D. White, eds, *On the Laws and Customs of England: Essays in Honor of S. E. Thorne* (Chapel Hill, NC, 1981), pp. 90–126.
Hyams, 'Warranty'	P. R. Hyams, 'Warranty and good lordship in twelfth century England', *Law and History Review* 5 (1987), 437–503.
Lawsuits	R. C. van Caenegem, ed., *English Lawsuits from William I to Richard I* (2 vols, Selden Soc., 106, 107, 1990–91).
LHP, Downer	L. J. Downer, ed. and trans, *Leges Henrici Primi* (Oxford, 1972).
Liebermann	F. Liebermann, ed., *Die Gesetze der Angelsachsen* (3 vols, Halle, 1903–16).
Lincs.	D. M. Stenton, ed., *The Earliest Lincolnshire Assize Rolls, A.D. 1202–1209* (Lincoln Record Soc., 22, 1926).
Milsom, *Legal Framework*	S. F. C. Milsom, *The Legal Framework of English Feudalism* (Cambridge, 1976).

ns	new series.
O'Brien, *God's Peace*	B. R. O'Brien, *God's Peace and King's Peace: The Laws of Edward the Confessor* (Philadelphia, 1999).
Orderic	Ordericus Vitalis, *The Ecclesiastical History*, ed. and trans M. Chibnall (6 vols, Oxford, 1969–80).
PKJ	D. M. Stenton, ed., *Pleas before the King or his Justices, 1198–1202* (4 vols, Selden Soc., 67, 68, 83, 84, 1952–67).
Pollock and Maitland	Sir Frederick Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I* (2 vols, 2nd edn, reissued with new introduction by S. F. C. Milsom, Cambridge, 1968).
PR	*Pipe Roll*.
PRS	Pipe Roll Society.
Royal Writs	R. C. van Caenegem, ed., *Royal Writs in England from the Conquest to Glanvill* (Selden Soc., 77, 1959).
RRAN	H. W. C. Davis, C. J. Johnson, H. A. Cronne and R. H. C. Davis, eds, *Regesta Regum Anglo-Normannorum, 1066–1154* (4 vols, Oxford, 1913–69).
S	*Anglo-Saxon Charters: An Annotated List and Bibliography*, ed. P. H. Sawyer (London, 1968), rev. S. E. Kelly, adapted S. M. Miller www.esawyer.org.uk/about/index.html.
SSC	W. Stubbs, ed., *Select Charters and Other Illustrations of English Constitutional History* (9th edn, Oxford, 1913).
Stenton, *English Justice*	D. M. Stenton, *English Justice between the Norman Conquest and the Great Charter* (Philadelphia, PA, 1964).
Stenton, *First Century*	F. M. Stenton, *The First Century of English Feudalism, 1066–1166* (2nd edn, Oxford, 1961).
Surrey	C. A. F. Meekings, ed., *The 1235 Surrey Eyre, vol. 1* (Surrey Record Soc., 31, 1979).
TAC, Tardif	E.-J. Tardif, ed., *Le Très Ancien Coutumier de Normandie* (Société de l'Histoire de Normandie, Rouen and Paris, 1881).
TRHS	*Transactions of the Royal Historical Society*.
Wormald, *Making*	P. Wormald, *The Making of English Law: King Alfred to the Twelfth Century: I Legislation and Its Limits* (Oxford, 1999).
Wormald, *Preparatory*	P. Wormald, *Papers Preparatory to the Making of English Law volume ii*, eds S. Baxter and J. G. H. Hudson (2014): www.earlyenglishlaws.ac.uk/reference/wormald/.

1

INTRODUCTION

Like modern film audiences, those listening to literature in the Middle Ages enjoyed nothing better than a good courtroom drama, preferably spiced with some sex or violence:

> Perrot, who devoted his cunning art to putting into verse the deeds of Reynard and his dear crony Isengrin, left out the best part of his matter when he forgot about the lawsuit brought for judgment in the court of Noble the lion concerning the gross fornication perpetrated by Reynard, that master of iniquity, against Lady Hersent the she-wolf.[1]

In the same period, legal metaphors structured or were incorporated within writings on many subjects, human and divine.[2] Participation in legal matters was widespread. A significant proportion of the male population participated in court decisions, a much larger proportion was involved in the maintenance of law and order.

Law operated in a society that combined various communities with strong hierarchic forces. Communities included the hamlet or village, the family, the hundred and shire, the lordship. Within the smaller of these, all members knew one another, and much of each other's affairs; within the larger, this was true of the more important members of the community. Disputants, members of courts, participants in transactions, were unlikely all to be strangers. In such circumstances, one's status, honour, and capacity for forceful action, mattered greatly. The potentially dangerous had to be restrained, deference maintained, support for retribution mobilized. Any idyll of the small community as always one of peaceful, egalitarian self-regulation should be rejected. It could be rumour ridden or dominated by a few individuals.

1 *The Romance of Reynard the Fox*, trans D. D. R. Owen (Oxford, 1994), p. 5.
2 See e.g. below, pp. 97, 113.

Moreover, lordship and kingship were as much part of the setting for law as were local communities. And it was often through local communities that royal and seignorial authority was exercised. Kings, particularly before *c.* 1166, commonly dealt with areas through resident local officials, rather than with a multiplicity of individuals through officers temporarily dispatched from central government. Compared with today or the nineteenth century, tenth-, eleventh-, twelfth-, and even thirteenth-century England was a country very little governed from the centre. Compared with much of contemporary Europe, however, it was heavily governed, by a combination of lordship, increasingly bureaucratized royal administration, and the exercise of local self-government. Such a combination of the local and the royal was to be essential to the emergence and form of the English common law.

The concept of law

Medieval historians have been usefully influenced by the writings of anthropologists, including some who deny the applicability of the concept of law to the societies they study. However, there can be no doubt that people in Anglo-Saxon and post-Conquest England wrote, spoke, and thought in terms of law and laws.[3] It would be hard for any Christian people whose learned members placed great emphasis upon the Bible to do otherwise, and both English and Normans were also aware of the legacy of laws from their own pasts.[4]

Let us look more closely at vocabulary. Unlike English, many modern languages distinguish between written laws (*lois* in French) and law generally (*droit*). What of medieval usage? Let us here concentrate on the twelfth century, as a good period in which to explore possibilities and complexities.[5] Our texts reveal a division similar to that just mentioned, in vocabulary but not in sense. Most of our sources are in Latin, and the first word of obvious interest here is *lex*, in the English or French of the time generally *laga* or *lei*.[6] This can mean written laws, as in the key law for Christians, the Bible and especially sections of the Old Testament.[7] It can also mean learned law, canon and Roman, or texts such as the *Leges Edwardi Confessoris*.[8] It is sometimes used

3 Note the stimulating discussions in W. I. Miller, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland* (Chicago, IL, 1990), ch. 7 and Brand, *Legal Profession*, ch. 1. My concern in this section is with the attitudes of the bulk of those involved with law, not with notions based on book-learning (for the latter, see e.g. R. Sharpe, 'The prefaces of "Quadripartitus"', in Garnett and Hudson, *Law and Government*, pp. 148–72). The primary concern of Chapters 2–9 is with activities and ideas contained within this not very tightly defined concept of law; extra-legal activities, such as the cultivation of favour, do not get such extensive treatment for their own sake.

4 See e.g. the Introduction to the Laws of King Alfred, Liebermann, i 27–46, reproduced in part in *EHD*, i no. 33.

5 On the Anglo-Saxon vocabulary, note Wormald, *Making*, pp. 93–5; Hudson, *Oxford History*, pp. 244–5.

6 See e.g. *ASC*, s.a. 1100; *Song of Roland*, l. 611; *Leis Willelmes*, Prol., 42, Liebermann, i 492–3, 516. See also A. Kiralfy, 'Law and right in English legal history', *Journal of Legal History* 6 (1985), 49–61.

7 See e.g. *LHP*, 72.1e, 75.4a, Downer, pp. 228, 234; Orderic, i 135, ii 250. *Lex* is also used to describe the basis of good living according to God's instruction, e.g. in the Psalms in the Vulgate. Orderic, ii 46 uses *lex* for the Rule of St Benedict.

8 See e.g. *Lawsuits*, no. 327; on the *Leges*, see below, pp. 212–13.

of a specific law, sometimes a new law, as when a chronicler wrote that Henry I made a law that anyone caught in theft be hanged.[9] But *lex* can also mean all Law or laws, written or unwritten. It may refer to the laws of England or the good old law of Edward the Confessor. It is thus not clearly differentiated from custom.[10] A closely related use comes in phrases such as 'according to law', 'against law', or 'compelled by law', employing 'law' to indicate in a general sense what is lawful or what is considered correct procedure.[11] 'Law' is also contrasted with 'agreement', thus giving legal activity confrontational connotations.[12] Sometimes, though, it seems to mean the terms of an agreement.[13] Lastly, 'law' is used in a more technical sense to mean proof, as when a man has to 'make his law', thereby showing that he is a lawful man.[14]

Other relevant words are *ius* and *rectum*, both of which are the equivalent of the Old French *dreit* or of words based on the Old English *riht*.[15] *Ius* is best translated as 'right', as in phrases such as 'the land belonged to him by right'; 'by hereditary right'; 'rights of the church'.[16] Very occasionally in the Anglo-Norman period *ius* is best translated as 'law', and such usage later became more common, probably under the influence of Roman and canon law.[17] *Rectum*, on the other hand, is usually best translated as 'justice', as in phrases such as 'do him justice' or 'for lack of justice'.[18] On occasion, we do see *ius* being used where one might expect *rectum*, and vice versa.[19] In general, however, usage suggests that when people spoke of *dreit* or *riht*, they were capable of employing them not in a vague and general fashion, but specifically and in more than one way.

People thus were sensitive to the vocabulary of 'law', and they were also well aware of a category of affairs that we can best term legal. Men might be categorized as peculiarly expert or learned in law, as 'lawful' or 'law-worthy',[20] or as 'outlaws'.[21]

9 *SSC*, p. 113; see also Orderic, iii 26 on decrees of council of Lillebonne; Domesday lists of customs referred to as *leges*, e.g. Chester, *Domesday Book*, i 262v.

10 See e.g. 'Ten Articles of William I', c. 7, Henry I Coronation Charter, c. 13, *EHD*, ii nos 18–19. Canonical collections, of course, made clearer distinctions.

11 See e.g. *Domesday Book*, i 298v; *LHP*, 7.7, 43.1, Downer, pp. 100, 150; *Royal Writs*, no. 72 on a man leaving 'sine judicio … et sine laga'; also Holt, *Magna Carta*, pp. 111–12 (3rd edn, pp. 115–16). See also more specific usages such as the right of pillage 'hostili lege', Henry, archdeacon of Huntingdon, *Historia Anglorum*, ed. and trans D. E. Greenway (Oxford, 1996), p. 738. Note other terms for customary behaviour, such as *mos;* e.g. *Lawsuits*, no. 204.

12 E.g. *LHP*, 49.5a, Downer, p. 164.

13 See e.g. *RRAN*, iii no. 272; E. Searle, ed. and trans, *The Chronicle of Battle Abbey* (Oxford, 1980), p. 80.

14 Note e.g. *Lawsuits*, nos 123–5; *LHP*, e.g. 9.6, Downer, p. 106.

15 See e.g. *Song of Roland*, ll. 2747, 3891; *Leis Willelmes*, 47, 52, Liebermann, i 518–19; *ASC*, s.a. 1100; F. E. Harmer, *Anglo-Saxon Writs* (Manchester, 1952), no. 61. See also *Song of Roland*, l. 1015 for 'dreit' in the sense of right as opposed to wrong.

16 Note also *Lawsuits*, no. 226 using 'in jus militare' to describe land-holding by military service.

17 For possible Anglo-Norman instances, see e.g. *Lawsuits*, no. 226, 'iuris peritiores'; this is an ecclesiastical text, perhaps canonically influenced. For the later period, see J. C. Holt, 'Rights and liberties in Magna Carta', in his *Magna Carta and Medieval Government* (London, 1985), pp. 203–15.

18 *Royal Writs*, nos 3, 4, etc.

19 E.g. *Lawsuits*, no. 326; cf. e.g. *Royal Writs*, no. 196, for a clear distinction between the terms.

20 See below, p. 8; e.g. *RRAN*, ii no. 1516.

21 See e.g. *II Cn*, 13, Liebermann, i 316, *EHD*, i. no. 49.

Certain bodies had a legal function, and were created for that special purpose.[22] Some men were criticized as excessively active in lawsuits, particularly litigious:[23] such people made common what should have been unusual, for legal matters differed from the day to day. Legal customs were different from mere habits: the legal obligation to provide one's lord with a hawk every year was qualitatively different from the habit of going hawking. Also, whilst clearly we are dealing with a society permeated by the Church and religion, some distinction could be drawn between legal and religious matters: there were punishments and there were penances; there were law books and there were penitentials, although these might be bound up together in manuscripts. The distinction may have grown as our period went on: in the late 1180s the author of the law book known as *Glanvill* could state that a mortgage 'is unjust and dishonourable, but is not forbidden by the court of the lord king, although it deems it a type of usury', usury being a sin.[24] Law was also differentiated from various forms of self-help and violence, although parties in a dispute might differ as to which forms of the latter were lawful.[25] The violence of disputing outside court is clearly distinguishable from the formalized fighting of the trial by battle, or even the rough and ready treatment meted out in an *ad hoc* court to the wrongdoer caught red-handed.[26]

In part, what made law special was its relationship to some authority, especially an external authority. We can sometimes see medieval men and women 'going to law' rather like characters in a nineteenth-century novel. For several years in the mid-twelfth century, Richard of Anstey had to spend heavily and travel as far as southern France in pursuit of his inheritance case.[27] Travel to various authorities and appearance in various courts took litigants and their business outside the usual course of social life.[28] In these settings, some activities could be distinguished as 'legal', and contemporaries reflected this in the categorization of certain court activities as *placita*, 'pleas'. Moreover, whilst court proceedings might involve much exercise of influence and presentation of a wide variety of argument, they also usually included some distinctive and formulaic elements, indicating the existence of a register of language that could signify legal affairs.[29] This is true also of legal activity other than courtroom disputes: for example, the drawing up of a charter in Latin had its own special phraseology.

22 See below, pp. 53–5, on frankpledge.

23 See e.g. K. R. Potter, ed. and trans, *Gesta Stephani* (Oxford, 1976), p. 24.

24 *Glanvill*, x 8, Hall, p. 124.

25 See e.g. the case of William of St Calais, *Lawsuits*, no. 134; also Hudson, *Land, Law, and Lordship*, p. 2, citing, *inter alia*, Geoffrey of Monmouth distinguishing between violent and just acquisition of property. For permissible self-help, see also below, pp. 185–6.

26 See below, pp. 58–9, 64.

27 *Lawsuits*, no. 408.

28 On the nature of courts, see below, p. 19. For varying degrees of formality in legally related proceedings, note esp. the Fonthill Letter, S 1445, *EHD*, i. no. 102.

29 See below, p. 60, and for Anglo-Saxon oaths, Hudson, *Oxford History*, pp. 71, 81–4; out-of-court activity could also, of course, involve formulaic oaths.

Setting and language can thus distinguish the 'legal', and so too can appeal to norms, or what are usually referred to as customs. Customs are not simply neutral statements of what usually happens; rather they are prescriptions of established and proper action, prescriptions that carry authority.[30] Records of cases occasionally make explicit reference to the custom of the locality or the realm.[31] People at the time allowed a place within law for some exercise of discretion, particularly by one with power. However, they also regarded law as involving the tempering of will by custom, notions of reasonableness, advice, or court judgment.[32]

The categorization of certain affairs as legal does not make law at this time completely distinct from the rest of social life, nor give it as much autonomy as exists for modern or even later medieval law. Clearly the legal business of courts might have been hard to distinguish from their other activities, and not all arguments put forward in law cases were distinctively 'legal' in nature.[33] However, we shall discover that the category was becoming more discrete in the course of our period. Royal administrators, for example, came to specialize in either law or finance. Law came to have some systematic existence of its own, and experts were increasingly capable of manipulating it in order to obtain results distant from the social norms of the day.[34]

The functions of law

Law is one means whereby societies are regulated and whereby members of those societies achieve their ends. Law includes substantive elements, determining rights, claims, obligations; one example would be a custom that if an eldest son survives a land-holder, he will succeed to the whole of the inheritance. It also includes more managerial matters, concerning the process of succession, the drafting of a charter, and the paying of compensation. And it includes the administration of justice, for example the sending of writs, the holding of courts, the giving of judgments.

A first function of law, and the one that medieval, like modern, people might have identified most readily, was to keep the peace and restrain wickedness. In particular, in a society where violence was frequent, law should protect the weak, especially those lacking any more immediate protector. In such circumstances it was often necessary for law to be backed by its own violence, notably the punishment of offenders, both because it was felt that they deserved the penalty and also to deter others.[35]

30 Had I included an entry for custom in the glossary it might have read 'Custom: (i) a norm, questioning of which might draw the answer "well, that's how we do things here"'.

31 Note e.g. Asser's comments in the last chapter of his *Life of King Alfred; EHD*, i no. 7. See also e.g. below, p. 43.

32 See also below, ch. 9.

33 See also e.g. below, p. 43; also p. 107 on gifts to the Church. Of course, not all arguments put forward in modern law courts are distinctively 'legal'.

34 See below, pp. 198–200.

35 See e.g. below, p. 134.

The settlement of disputes, be it through punishment or other means, is another of the functions of law. The settlement may be achieved in or out of court but in either case law provides certain guidance and constraints that may aid the process, removing or channelling emotions that might perpetuate the dispute. Law should also help to ensure that the settlement sticks, for example through publicity or through coercive force. However, its success is far from guaranteed, for parties in disputes can employ law for their own ends. In the medieval period a particular problem was accusation through hatred. Unless the wrongful motive were identified, this might allow the accuser an official setting in which to fight his enemy and, if victorious, an authorized opportunity to inflict terrible punitive violence upon him.[36]

However, to concentrate upon courts, or even upon disputing more generally, is too narrow a focus. Law provides guidance for avoiding trouble or punishment, thereby assuring a more peaceful life and preventing disputes. Law also enables certain actions to be carried out, or reinforces those actions. A man may wish to make a gift to a church, which will last beyond his death. His capacity to do so is determined by a variety of factors, but it is greatly strengthened if such a grant is protected by law. Legal practice may also help by indicating the form to be taken by a document recording and hence protecting the gift. Law thus provides authority and protection for a party acting according to its norms, making his or her action a legal act.

Different ideological slants can be put on law, in part according to the position of the observer. It can be taken as a coherent system or as an incomprehensible intrusion into one's life, and can be regarded as a sign of the proper functioning of government, as a method of control, or as a tool of oppression. All such views were taken of the medieval kings and their use of law.[37] In these various ways, settling disputes, keeping the peace, punishing offenders, controlling or oppressing the people, restraining or restricting the ruler, guiding, enabling or reinforcing actions, law helped to make social life more predictable. Law and custom were intimately related; they were in part determined by common practice, but themselves, in turn, determined such practice.

Disputing and negotiating

The functions of law, the existence of a category of the 'legal', and their close integration with other social practices, will become apparent in many ways, but here I concentrate upon the processes of disputing and negotiating. A dispute has arisen: how are you to achieve your ends, or at least obtain the best possible settlement? The available means are diverse.[38] Courts are only one option, and other methods may be pursued instead or in parallel. Even if you have a good case, you may face many problems. Problems of communication may render potential sources of

36 See below, p. 149; also more generally P. R. Hyams, *Rancor and Reconciliation in Medieval England* (Ithaca, 2003).

37 See Holt, *Magna Carta*, p. 88 (3rd edn, p. 98); also e.g. J. Stevenson, ed., *Chronicon Monasterii de Abingdon* (2 vols, London, 1858), ii 298.

38 Note also e.g. Hyams, *Rancor and Reconciliation*.

justice, such as the king, very distant. Or the lands that your opponent is claiming to hold from you may be far from the centre of your power. Or he may be able to draw upon various sources of strength unavailable to you. He may be able to withdraw favour from you or your supporters. You may even have to decide that you cannot pursue your case, as the risks are too great or your chances of success negligible.[39] Moreover, you and your opponent are not the only people affected by and therefore involved in the dispute, and others may have different aims. The king or another great man may be most intent on maintaining the peace, asserting his own power, or gaining financially. The various communities of which you are a member have interests of their own, desiring perhaps to restore their peaceful functioning, perhaps to re-adjust the balance of power. All of these different interests may demand difficult decisions as to how to pursue your case.

Disputing within and outside court displayed many similarities. Disputes outside court obviously involved confrontation between the parties, and throughout our period the emphasis in court, too, was upon individuals starting cases conducted in an adversarial fashion: one party brought a complaint or accusation against the other. Certainly, judicial proceedings in court could be distinguished by particular formality at various stages. The party who had brought the case made his formal accusation, his opponent his formal denial. At least part of their statements might be highly formulaic and accompanied by oaths.[40] There were also formal judgments, first as to which party should produce proof of their claim, secondly as to the outcome of that proof. Proof could take many forms, for example the testimony of witnesses or documents,[41] ordeal by hot iron or cold water, or – after 1066 – trial by battle. Alternatively, a variety of forms of oath could be assigned to the party himself, to a representative, to the supporters of one or both parties, or to a body of important people, sometimes but not always the suitors of the court.[42] On occasion a group of local people, often but not always twelve in number, might be delegated to decide the case on oath; such was a decision by inquest or jury or recognition.[43]

39 Some anthropologists and anthropologically influenced legal historians with a liking for technical terms categorize such decisions as 'lumping it'.

40 See e.g. S 1445, *EHD*, i no. 102; *LHP*, 64, Downer, pp. 202–6; on the limits of the need to be word perfect in such statements, Brand, *Legal Profession*, pp. 3–4. For arguments concerning the limits of legal representation in court in the Anglo-Norman period, see ibid., pp. 10–13.

41 See e.g. S 1445, *EHD*, i nos 102, 135; *Lawsuits*, nos 3, 189 (Domesday Book), 226, 243, 257 (false charter).

42 See e.g. *II Cn*, 22, 34, 48, 65, Liebermann, i 324, 336, 344, 352, *EHD*, i no. 49; S 1211, F. E. Harmer, ed. and trans, *Select English Historical Documents of the Ninth and Tenth Centuries* (Cambridge, 1914), no. 23; S 1454, A. J. Robertson, ed. and trans, *Anglo-Charters* (2nd edn, Cambridge, 1956), no. 66; *Lawsuits*, nos 166, 193, 215, 280.

43 See e.g. *Lawsuits*, no. 298. I do not discuss questions concerning the Anglo-Saxon or Frankish 'origin of the jury' as I am convinced by Susan Reynolds' argument in *Kingdoms and Communities in Western Europe, 900–1300* (2nd edn, Oxford, 1997), esp. pp. 33–4, that decisions by sworn bodies of neighbours were common to early medieval law in many regions, and that the peculiarity of England comes from royal formalization of jury procedure, especially in the Angevin period; see below, Chapter 6. Juries in the Anglo-Norman period were often used for disputes concerning a variety of rights, rather than in land-holding cases, e.g. *Lawsuits*, no. 254B.