COURT CASES AND LEGAL ARGUMENTS IN ENGLAND, *c.*1066–1166

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THE relationship between law, the power of participants in disputes, and the structure of society and politics is always a complex one. It is also, not surprisingly therefore, controversial in writings on jurisprudence, modern law, and legal history. In this paper I argue for the importance of legal norms in the conduct of disputes in England in the period between the Norman Conquest and the early Angevin legal reforms. This importance is certainly related to the extent of Anglo-Norman royal power. However, in a wider context I shall argue against any necessary, simple, and direct link between political structure and the existence and influence of legal norms.

My arguments therefore run contrary to many recent treatments of mediaeval disputing, initially focusing on France but now stretching at least as far east as Poland and northwards to the British Isles and well beyond.[1] These emphasise activity outside court and involving force or

[1] See esp. G. Duby, 'The evolution of judicial institutions', in his *The Chivalrous Society* (1977), tr. C. Postan, 15–58, a highly influential article which concentrates primarily on jurisdiction and the administration of justice and on disputes and settlements. [Hereafter Duby, 'Judicial Institutions'.] F.L. Cheyette, '*Suum Cuique Tribuere*', *French Historical Studies*, 6 (1970), 287–99 [Hereafter Cheyette, 'Suum Cuique']; S.D. White, '"*Pactum ... Legem Vincit et Amor Iudicium*": the Settlement of Disputes by Compromise in Eleventh-Century Western France', *American Journal of Legal History*, 22 (1978), 281–308 [Hereafter White, 'Pactum']; P.R. Hyams, 'Henry II and Ganelon', *Syracuse Scholar*, 4 (1983), 22–35 [Hereafter Hyams, 'Henry II']; P.J. Geary, 'Living with Conflicts in Stateless France: a Typology of Conflict Management Mechanisms, 1050–1200', in his *Living with the Dead in the Middle Ages* (Ithaca, NY, 1994), 125–60; M.T. Clanchy, 'Law and Love in the Middle Ages', in *Disputes and Settlements: Law and Human Relations in the West*, ed. J. Bossy (Cambridge, 1983), 47–67 [Hereafter Clanchy, 'Law and Love']; P.H. Freedman, *The Diocese of Vic* (New Brunswick, NJ, 1983), ch. 5 on 'the informal system'; P. Gorecki, '*Ad Controversiam Reprimendam*: Family Groups and Dispute Prevention in Medieval Poland, c. 1200', *Law and History Review*, 14 (1996), 213–43. For related works, placing more emphasis on legal argument in court, see W.I. Miller, *Bloodtaking and Peacemaking: Feud, Law and Society in Saga Iceland* (Chicago, Illinois, 1990), esp. ch. 7 [Hereafter Miller, *Bloodtaking*]; S.D. White, 'Inheritances and Legal Arguments in Western France, 1050–1150', *Traditio*, 43 (1987), 55–103, esp. 84. [Hereafter White, 'Inheritances'] Note further the articles in *The Settlement of Disputes in Early Medieval Europe*, ed. W. Davies and P. Fouracre (Cambridge, 1986), although the overall conclusions of that volume pay rather less attention to types of norms which concern me here; their focus, e.g. at 218, is on procedural rules. [Hereafter *Settlement of Disputes*, ed. Davies and Fouracre.] For another article questioning the model laid out in this paragraph, see J.

mediation. Within court, they tend to stress the following points.[2] Apart from formal claims and denials, procedure and argument displayed considerable informality and flexibility. Personality and power, honour and shame came into play, implicitly or explicitly. Argument did not focus on legal rules; indeed the legal was not clearly distinguished, if distinguished at all, from the social or the religious. Disputes in general were settled by compromise, from which no one left empty-handed. Often, but not always, these various elements are seen as closely interrelated, for instance forming part of the so called *mutation féodale*. Implicit in many such analyses is a contrast drawn between the 'political' nature of early medieval disputing and a highly rules-based version of later law and disputing.[3]

The aptness of such views can be assessed in various ways. One might, for example, survey the conduct of disputes, in and out of court, from start to finish.[4] Here, however, I work outwards to the discussion of the nature of law and the practice of disputing from analysis of argument in courts in England *c.*1066–1166. More can be said of the nature and use of norms within such argument than has sometimes been believed, in ways that are revealing of the ideas and practices of

Martindale, ' "His Special Friend"? The Settlement of Disputes and Political Power in the Kingdom of the French (Tenth to mid-Twelfth Century)', *TRHS* 6th Ser. 5 (1995), 21–57. [Hereafter Martindale, 'Special Friend'.] I would like to thank Rob Bartlett, Paul Brand, George Garnett, Bill Miller and Esther Pascua for their comments on drafts of this article, and Dan Klerman for wide-ranging advice.

[2] See e.g. Hyams, 'Henry II', 27, 35; Duby, 'Judicial Institutions', 55, 58; Cheyette, '*Suum Cuique*', 288–9, 293; White, '*Pactum*', 283.

[3] The debate concerning the relationship of law and politics is made more problematic by the instability of both terms. Historians of mediaeval law and disputes have tended to use political in a particular sense: 'Early medieval court cases were political ... That is to say, they fitted into the network of local social relationships that preceded each case, and indeed succeeded it, slightly modified by the case itself' (*Settlement of Disputes*, ed. Davies and Fouracre, 233). However, other possible senses of political seem to underlie their writings, and these become apparent in theoretical writings on modern law. Some would categorise politics simply in terms of what politicians, as opposed to lawyers, do; e.g. R.A. Posner, *The Problems of Jurisprudence* (Cambridge, Mass., 1990), 130–1. Others would see politics as entering into law whenever a judicial decision is grounded on 'policy'; e.g. R.M. Dworkin, *Law's Empire* (1986). Others see law as inherently political because of the power and ideological bias inherent within society; e.g. M. Kelman, *A Guide to Critical Legal Studies* (Cambridge, Mass., 1987), 3–4, and ch. 9; D. Kennedy, *A Critique of Adjudication* (Cambridge, Mass., 1997), chs 3 and 4. [Hereafter Posner, *Problems*; Kelman, *Guide*; Kennedy, *Critique*] It is not therefore that a particular period or area is unusual in the existence of a mingling of law and politics; rather what must be investigated is the particular nature of that mingling.

[4] I adopted something of this approach in 'La Interpretación de Disputas y Resoluciones: el Caso Inglés, 1066–1135', *Hispania*, 57 (1997), 885–916, which included discussion of issues further developed here, and also, at p. 913, a brief consideration of the consequences outside court of my reassertion of the importance of the normative. [Hereafter Hudson, 'Interpretación'.]

participants in disputes. At the same time, the conclusions are important in explaining later legal development.

Some of these norms decided cases, others had more restricted influence. Some were precise, others general. Moreover, some can be classified as legal as distinct from being elements of common social practice or belief. For example, ecclesiastical insistence on life grants returning to the church clashed with lay social norms, which accepted the principle of inheritance. Sometimes churches caved in by allowing a succession of life-tenures, all granted with the specification that the church would take back the land on the tenant's death. Such instances show a clear and significant differentiation between law and social practice.[5] The Becket *miracula* demonstrate a related point. In the early 1170s, a certain Ailward faced trial by ordeal for theft. However, Ailward had been baptised on the eve of Whitsun and, according to popular opinion [*sicut uulgaris habet opinio*], in ordeal he could not go under water nor be burnt by iron; thus he was sure to be convicted by the former, acquitted by the latter. Popular opinion appears clearly distinguished from formal law on ordeal.[6]

It is important to note what I am not arguing. Factors other than norms, for example money and favour, often played an important part in disputes and court cases.[7] Contemporaries sometimes willingly employed these, sometimes saw them as a common part of court procedure, sometimes condemned them as corrupt. But it remains notable that such factors were distinguished from norms, particularly when litigants claimed that favour or antipathy produced injustice. The vindictive reeve's decision to ensure conviction by sending Ailward to ordeal by water is presented by the writer as an abuse of justice, not a legal act; it contradicted a broad norm: the accused should have some chance of success in making proof.

Records of disputes and of legal arguments survive in various sources, but certain immediate problems must be noted. We rely upon written records from a largely oral culture. The records are almost entirely Latin versions of largely vernacular proceedings. Except in Domesday Book or when the king was one party in the dispute, there are very

[5] See J.G.H. Hudson, 'Life-Grants of Land and the Development of Inheritance in Anglo-Norman England', *Anglo-Norman Studies*, 12 (1990), 67–80.

[6] *English Lawsuits from William I to Richard I*, ed. R.C. van Caenegem (2 vols., Selden Soc. 106, 107; 1990–1), no. 471; see also below, p. 97. For the sake of brevity, where possible, I cite non-Domesday cases by reference to *Lawsuits*, whilst sometimes modifying translations and referring to additional material.

[7] For appearance or reputation, see e.g. *Lawsuits*, nos. 204, 416; for money, see *Lawsuits*, no. 390; also Richard Fitz Nigel, *Dialogus de Scaccario*, ed. and tr. C. Johnson, F.E.L. Carter, and D.E. Greenway (Oxford, 1983), 120, arguing against the king's detractors that payment was to hasten, not to purchase, justice.

few recorded cases where both litigants were laymen. The need to draw upon all the meagre evidence risks neglecting variation between types of court or change within the period. Models of court proceedings drawn from a limited type of disputes, particularly those unusually problematic cases which left some of the fullest accounts, can mislead.[8] It is impossible to answer quantitative questions, for example what proportion of cases were settled by judgment or by compromise, let alone to make quantitative comparisons between countries or periods.

Collections of norms, be they urban customs in Domesday, other urban collections, or the various sets of *Leges*, are instructive as to some men's thinking concerning law, but they are of limited scope, and are not clear and direct indications of the nature of argument in court.[9] Whereas studies of disputing in France have been written from charters which contain long narratives of disputes, English charters tend to be more formulaic. However, many English cases were recorded in monastic chronicles, such as those of Abingdon, Battle, Ely, and Peterborough, devoted in large part to the estates of the house. Amongst these chronicles, the prevalence of those combining charter and narrative is peculiar to twelfth-century England. However, they do raise difficulties. The most useful texts are from abbeys with close ties – historical, institutional, and sometimes personal – to the king, and are from southern and central England. Moreover, they are of course ecclesiastical texts, displaying, for example, the influence of canon law. They therefore need comparison with secular sources, and here Domesday reports a great mass of disputes and related legal material. The procedures used in the Domesday inquest need not have been typical of all court cases, but they were not unique, and are certainly revealing of assumptions about law and disputing. However, its information is almost invariably highly compressed, and as Fleming has pointed out 'detailed descriptions are rare, but they do suggest that behind the more typically laconic accounts of disputes in Domesday lay angry argument and loud, heartfelt opinion'.[10]

In fact, with all our sources, we need to consider the varying significance of silences. The makers of records, the recounters of stories, were less interested in forms of pleading and reasons for decisions than

[8] See further Hudson, 'Interpretación'.

[9] For a positive assessment of the value of the *Leges Edwardi Confessoris*, see B. O'Brien, *God's Peace and King's Peace: the Laws of Edward the Confessor* (Philadelphia, Penn., 1999); for a negative assessment of the *Leges Henrici*, see J.G.H. Hudson, *The Formation of the English Common Law* (1996), 249–50. [Hereafter O'Brien, *God's Peace*; Hudson, *Formation*.]

[10] R. Fleming, *Domesday Book and the Law* (Cambridge, 1998), p. 1 [Hereafter Fleming, *Domesday*]; see also P. Wormald, 'Domesday Lawsuits: a Provisional List and Preliminary Comment', in C. Hicks, ed., *England in the Eleventh Century* (Stamford, 1992), 61–102. [Hereafter Wormald, 'Domesday'.]

in the subject of the dispute, the form of proof, and the outcome of the case.[11] They favour the sensational over the routine. Their case narratives are not modern law reports; in many ways they more resemble newspaper stories, and their form and content is of considerable consequence for analysis.

Cases were heard by courts made up of suitors, presided over by a lord or official. They began with a formal accusation or claim, followed by a formal denial. Wider-ranging pleading followed, citing evidence, using a variety of arguments, and drawing implicitly or explicitly on a variety of norms.[12] At the same time other considerations could play a part: the relative power of the parties or their supporters; their reputations; the attitude of the court president.[13] If the case was not terminated during such pleading, there followed a 'mesne judgment' as to the form of proof. There might then be a pause in proceedings, before proof was made by one or both parties, and lastly a final judgment was reached on the basis of that proof.

The pattern of disputing and court procedure was likely to vary with the type of case and the status of those involved. So one must distinguish the easy case from the difficult, difficult because of some problem of law, or a lack of available evidence, or the antagonism of the parties, or blocked access to the usual sources of justice.[14] In addition one should distinguish between disputes concerning offences against the person, moveable goods, or land. Historians tend to have a preconception that regular courts would spend their time hearing in full a series of significant cases, for example a lord's court would have a

[11] Note how the two accounts of the case of Bricstan differ in the amount of space devoted to court proceedings, the version in the *Liber Eliensis* showing how easily details might be omitted; *Lawsuits*, no. 204 – cf. pp. 169 and 173. For likely abbreviation of pleading, see also *Lawsuits*, no. 286 ('et alternatis rationamentis utentes.') For pleading involving the retelling of past events, see e.g. *Lawsuits*, no. 223. For a record of pleading concentrating on the claim and offer of proof, see e.g. *Lawsuits*, no. 15.

[12] Note *Lawsuits*, no. 135: Lanfranc 'opened his case with an introductory statement which to everyone's surprise seemed far removed from the matters which had been or were to be dealt with, [but] proceeded thus that he utterly demolished what had been said against him on the previous day and showed them to be without substance, with the result that henceforth for the rest of his life no one would stand up and say a word to oppose him.'

[13] See e.g. above, fn. 7.

[14] See e.g. *Chronicon Monasterii de Abingdon*, ed. J. Stevenson (2 vols., 1858), II, 37–40 (part of which is printed as *Lawsuits*, no. 147); note that the earliest surviving version of the chronicle dates from the 1160s, although this probably should not lead one to conclude that the phraseology is anachronistic for William II's or Henry I's reign. [Hereafter *Abingdon*.] The mockery of Bricstan of Chatteris's appearance might not have occurred, or have been ruled improper, had the royal officials in the court not been against him; *Lawsuits*, no. 204 (p. 169).

steady supply of land claims to settle. Yet such disputes may well have been untypical; an occasion when three land cases were dealt with in one day stands out as unique in the Abingdon *Chronicle*.[15]

The frequency with which certain questions arose could determine the clarity and influence of relevant norms. It is therefore plausible that norms were clearest and most influential in matters of procedure, in the type of routine business which was later to be so evident on the royal plea rolls. Some such norms concerned people other than the litigants, for example those regarding suit of court or the carrying of summons.[16] Others concerned those linked to the litigants, for example their sureties.[17] Others still concerned the litigants themselves. Some would be general – as against hasty judgment *in absentia*[18] but others much more specific. For example, norms concerning essoins, whilst not necessarily standardised between courts, may at least have been routine within courts. The law would be clear, the problem would lie in the matter of fact: was the person making the essoin really ill? A man whose opponent in a land case had failed to answer a proper summons was to enjoy seisin of the disputed land, but had the opponent received such a summons?[19]

Another set of procedural norms concerned jurisdiction and financial benefit from court proceedings. These feature in the urban customs preserved in Domesday: 'If a thief is captured in Dunwich, he shall be judged there. Corporal justice shall be made in Blythburgh, and the adjudged's goods shall remain to the lord of Dunwich.'[20] Such norms

[15] *Lawsuits*, no. 164.

[16] *Domesday Book*, ed. A. Farley (2 vols., 1783), I, 179r, 269v; II, 312r. [Hereafter *DB*.] See also below, pp. 102–3, on hearsay.

[17] See e.g. *Lawsuits*, nos. 204, 209. For bail being provided 'more patrio', see *Lawsuits*, no. 350; on the giving of pledges for ordeal, *DB*, II, 207v–208r.

[18] See e.g. *Lawsuits*, no. 321 at p. 270; for this widespread principle, note also e.g. Beroul, *The Romance of Tristan*, tr. A.S. Fedrick (Harmondsworth, 1970), 67. For some such general principles, the first explicit written record is Magna Carta, or the grants to specific beneficiaries which are precursors of some of its clauses; see J.C. Holt, *Magna Carta* (2nd edn; Cambridge, 1992), esp. ch. 3. For enforcement of legislation by Henry II against individual accusation by archdeacons, see *Lawsuits*, no. 371.

[19] In later law it may only have been in the case of essoins for bed-sickness that there was any real interest in ascertaining the facts, as opposed to concern with more free-standing rules, for example concerning whether essoins had to be warranted; I owe this point to Paul Brand. For early evidence of the essoin of illness, see *DB*, II, 449r; for summons, see e.g. *DB*, II, 423v–424r. There may also, for example, have been set procedures for dealing with the handing over of a man's goods to the king (see e.g. *Lawsuits*, no. 204).

[20] *DB*, II, 312r–v. Cf. the customs referred to at the trial at Penenden Heath, *Lawsuits*, no. 5, and in the enquiry concerning customs of York cathedral, *Lawsuits*, no. 172; also no. 167. Such matters of procedure and privilege also characterise the type of knowledge Hervey de Glanville displayed in the shire court of Norfolk and Suffolk in Stephen's reign; *Lawsuits*, no. 331; see also *Lawsuits*, no. 135.

may not have been followed in every case, but deviation from them would require some reason.[21] Changes to practice, notably at the start of Henry II's reign and for example concerning the transfer of cases between courts, would have heightened awareness of procedural norms.[22]

The other main concern of the Domesday customs was offences against the person or concerning moveable goods. These customs were usually very concrete in their form, specifying offence, penalty, and recipient of any fine: thus if anyone in Wallingford killed a man in the king's peace, he forfeited his body and all his property to the king.[23] Occasionally they are more general, notably the prohibition that no one except the king could restore peace to an outlaw. In York, a further significant distinction is drawn: if anyone is outlawed according to the law, only the king shall give him peace. However, if the earl or sheriff shall have expelled anyone 'from the province [*de regione*]', they can if they wish recall him and give him peace.[24] Norms also occasionally appear explicitly in other texts, suggesting what must elsewhere be hidden. Thus the Abingdon chronicler recorded that a thief should have lost both his goods and his life, 'by custom of the judgment of England [more judicii Anglie].'[25]

Throughout the medieval period, the easiest case involving criminals concerned those caught red-handed. These were dealt with by summary trial, and were unlikely to develop any very sophisticated law. However, certain norms do emerge which may have governed these and other cases. A man accused of homicide could plead a simple form of exception, that he had indeed killed the victim, but that it was an accident or in self-defence.[26] The value of goods stolen determined the seriousness of theft. One aspect of such a distinction appears in Huntingdonshire Domesday, where the sokemen of Broughton claimed thefts up to 4d, whilst allowing the abbot of Ramsey forfeitures for thefts of larger amounts. In the early 1170s the persecutors of Ailward, mentioned above, had to heap further goods upon him beyond the penny's worth he had taken, since so small a theft would not lead to mutilation. In the thirteenth century, *Bracton* would state in notably general terms, 'if a thief has been convicted, depending upon the kind

[21] See below, p. 109, on default setting. On the need for precision as to the financial beneficiaries of legal rights, note also the *Battle Chronicle*'s account of the law of wreck in the first half of the twelfth century; *Lawsuits*, no. 303.

[22] See *Lawsuits*, no. 420; also below, p. 103, on the need to prove seisin at Henry I's death or after.

[23] *DB*, I, 56v; see also e.g. *DB*, I, 56v, 262v, 268r.

[24] *DB*, I, 298v; cf. *DB*, I, 262v, 280v, 336v. See also J. Goebel, *Felony and Misdemeanor* (New York, 1937), 419–23.

[25] *Lawsuits*, no. 192; note also *DB*, II, 7r.

[26] *Lawsuits*, no. 139.

of thing stolen and its value let him either be put to death or abjure the realm or the *patria*, the county, city, borough or vill, or let him be flogged and after such flogging released.'[27]

More difficult cases generally presented the most interesting material for narratives. Take the case of the alleged thief, usurer, and concealer of treasure-trove, Bricstan of Chatteris.[28] Bricstan was contemplating entering the abbey of Ely as a monk, but was accused of the aforementioned offences by a malicious royal official, Robert Malarteis. He was tried before a royal justice, Ralph Basset, in the shire court, which was meeting 'as the custom is in England [*ut mos est in Anglia*]'. His denial was rejected, his wife's offer of ordeal made no difference, and he was mocked by his persecutors. He was handed over to royal custody, and only saintly intervention saved him. Particularly given that the detailed recording of the case may owe something not just to its miraculous outcome but also to Ely's desire to defend its privileges, the case certainly illustrates the impact of power and personality.

However, it is also notable that on the key issue of whether Bricstan was a usurer, the two surviving versions differ. According to one, he had slipped into a life of usury; according to the other, he merely retained pledges from his debtors because of the untrustworthiness of men. One account may simply be lying. Alternatively there may have existed

(i) a factual problem as to what Bricstan actual did;
(ii) conflicting perceptions of his actions;

or, perhaps in addition,

(iii) a legal difficulty as to the difference between usury and the taking of sureties.

In any of these ways, his may have been a difficult case, and hence especially open to the influence of a wider range of considerations.

Some general principles and legal norms underlie court arguments and judgments, as well as other transactions, concerning land. For example, at the most general end of the scale is King Arthur's statement of principle in reaction to Roman aggression: 'Nothing which is acquired

[27] See *DB*, i, 204r; *Lawsuits*, no. 471; 'Henry de Bracton', *De Legibus et Consuetudinibus Regni Anglie*, fo. 151b, ed. and tr. S.E. Thorne (4 vols., Cambridge, Mass., 1968–77), ii, 427–8; note also T.A. Green, *Verdict According to Conscience* (Chicago, 1985), 60–1.

[28] *Lawsuits*, no. 204. One account was preserved in Normandy at Saint Evroul by Orderic Vitalis in his *Ecclesiastical History*, the other at Ely in the *Liber Eliensis*. The Ely account is the one which makes Bricstan guilty of usury, and also omits some of the procedural material.

by force and violence is justly possessed by anyone.'[29] Somewhat less general, more specifically legal is the distinction drawn between inheritance and acquisition: the latter was more freely alienable in relation to the tenant's kin, if perhaps also more tightly bound to his lord. And certainly by Henry II's reign, a distinction between property and possession, seisin and right, was informing some arguments and judgments in court.[30]

The Norman settlement itself must have stimulated comparison of land-holding practice, and hence thinking about norms.[31] Domesday describes few customs concerning land-holding,[32] but it records a multitude of disputes. Sometimes we have a formal accusation and denial, together with offer of proof, but little further indication of arguments used:

> Count Alan claims these bovates [in Kesteven, Middlesex], and his man Algar has given the king's barons a pledge to confirm through ordeal or through battle that Aethelstan was not seised of these fourteen bovates in the time of King Edward. Against this, Aelfstan of Frampton Guy [de Craon]'s man, has given his pledge that he has been seised of this land with sake and soke, and that Guy was seised of them from the time of Ralph the staller until now, and that he holds them now.[33]

This may be all that was said, or just the limited information that Domesday supplies. On other occasions the basis of the claim was made clear in terms of justified descent or transfer of land; the dispute might turn on a matter of fact, for example the existence or non-existence of a royal writ and seal.[34] Elsewhere we have parties pleading

[29] *The Historia Regum Britannie of Geoffrey of Monmouth, i. Bern, Burgerbibliothek MS 568*, ed. N. Wright (Cambridge, 1985), 114. For relevant mentions of force in Domesday, see below, fn. 85.

[30] Inheritance: acquisition: see J.G.H. Hudson, *Land, Law, and Lordship in Anglo-Norman England* (Oxford, 1994), esp. chs 6 and 7; [Hereafter Hudson, *Land, Law, and Lordship*] *Abingdon*, II, 39; property/possession: see e.g. *Lawsuits*. no. 393; M. Cheney, '"Possessio/Proprietas" in Ecclesiastical Courts in mid-Twelfth-Century England', in *Law and Government in Medieval England and Normandy: Essays in Honour of Sir James Holt*, ed. G.S. Garnett and J.G.H. Hudson (Cambridge, 1994), 245–54. [Hereafter *Law and Government*, ed. Hudson and Garnett.] Further on the principles underlying land-holding in the Anglo-Norman period, see G.S. Garnett, 'Royal Succession in England, 1066–1154', (Ph. D. thesis, Cambridge, 1987); S.F.C. Milsom, *The Legal Framework of English Feudalism* (Cambridge, 1976).

[31] See the suggestions of Hudson, *Land, Law, and Lordship*, 105–6, and Fleming, *Domesday*, 83–5.

[32] Note *DB*, I, 56v (relief in Wallingford), 262v (taking of land in Chester); see also below, fn. 51.

[33] *DB*, I, 377v; note also cases involving vouching a warrantor: esp. *DB*, II, 290v; *DB*, I, 1r, 111v, 132r, 137v, 227v, 276v, II, 6r–v, 18v, 31v–32r, 59v–60r, 103r, 110v, 125v, etc.

[34] See e.g. *DB*, I, 57v, 59r, 215r, II, 299r–v.

fuller explanations of what underlay their claims, and on occasion supporting this with strong evidence:

> Bishop Osbern showed his charters for [the manor of Crediton], which testify that the church of St Peter had been seised of it before King Edward reigned. In the time of King William, moreover, the bishop deraigned before the king's barons that this land was his.

Here we have a story composed of facts, but facts charged with a strong normative under-pinning.[35] Most notable are cases where rival claimants, and witnesses, told such stories:

> Another of the carucates outside Lincoln was attached to the church of All Saints in the time of King Edward, also 12 tofts and 4 crofts. Godric son of Garwine had this church and the church's land and whatever pertains to it. But he has become a monk, and the abbot of Peterborough holds [*obtinet*]. But all the burgesses of Lincoln say that he has them unjustly, since neither Garwine nor Godric his son nor anyone else could give them outside the city or outside their kin, except by grant of the king. Earnwine the priest claims this church and what pertains there by inheritance of his kinsman Godric.[36]

Land cases outside Domesday reveal a similar recounting of a brief history of the estate and the related claim in terms which appeal to underlying norms.[37] Let us examine one unusually extensive narrative in depth. As Grenta of North Stoke lay dying in *c.*1120, both his son-in-law Modbert and the monks of Bath cathedral priory were seeking his land in North Stoke, Somerset.[38] Soon after Grenta's death, Modbert may have made an initial and unsuccessful claim to the land in the bishop of Bath's court, but the source makes no mention of this. Rather, the recorded hearing opens with the reading of a royal writ in the bishop's court, composed of his 'friends and barons', assembled for the preceding day's feast of the Apostles Peter and Paul: 'William, the king's son, to John, bishop of Bath, greeting. I order that you justly seise Modbert of the land which Grenta of Stoke had held, to which he made him heir during his lifetime. Witness: the bishop of Salisbury.' The bishop's reaction displays an awareness of the detail of the written word and a desire for the matter to be settled by discussion in court; he would 'do what has been ordered by the son of my lord through

[35] *DB* I, 101v; see also esp. *DB*, I, 48v, 264r; also for stories *DB*, I, 43v, 80r, 83r, II, 62v, 187v.

[36] *DB* I, 336r. See also e.g. *DB*, I, 44v, II, 176v–177r, 185v.

[37] For an unusually lengthy telling of a story, see *Lawsuits*, no. 223.

[38] *Lawsuits*, no. 226. The account, from a Bath cartulary, favours the church's case. For further consideration of the dispute, see Hudson, *Formation*, 105–8.

this letter, if it is just. However, my friends and lords … I beg you to discuss what is more just in this matter.'

After taking counsel with the monks, the prior responded with the following arguments:

(i) 'It is agreed that this land … had been given from early days to the brethren of this holy house of the Lord for their own use and free possession and has never come under military right by the decision of any king, bishop or abbot.' By implication, 'military right' is equated with heritability.

(ii) Grenta on his deathbed had stated that 'This is the inheritance of the servants of the Lord, which I have been permitted to hold as long as I live for payment and not by law of inheritance.'

(iii) And Grenta concluded 'now that I am dying, I leave myself with the land to the brethren to whom it belongs by right.'

Thus the prior is arguing that Grenta neither could nor did leave the land to Modbert. He supported his argument with

(i) Lawful witnesses of Grenta's testament

(ii) a charter in the name of the Saxon King Cynewulf, with a ferocious curse against anyone harming his gift.

Modbert put forward counter-arguments:

(i) that 'he was married to the daughter of the deceased (who during his lifetime had adopted him as his son)'

(ii) that Grenta 'had held the land … freely and hereditarily'.

Various questions of fact and law had thus emerged: for example, if the land had been given in perpetuity to the church, could a later grant to a layman over-ride the earlier one? However, as in the Domesday cases above, the essential issue is presented as a choice between two arguments, each resting on a legally charged fact:

(i) the land was held for life;
or (ii) the land was held heritably.

The bishop resorted to the judgment of those known 'to be neither advocates nor supporters of the parties.' Distinguished by their age and legal learning [*majores natu et juris peritiores*], they weighed the arguments they had heard, and came to a judgment. Their decision was that Modbert must prove his claim 'by at least two free and lawful witnesses from the "familiars" of the church, who shall be named today and

produced within a week, or by a signed and credible cirograph. If he fails in either, he shall not be heard again.' Modbert's ensuing silence, as far as we can tell, meant that he abandoned his claim.

It may be that other elements entered into this dispute. Henry I later sent a writ to the bishop ordering that the monks hold the land to which they had proved their right against Modbert. This perhaps suggests that there were underlying problems between bishop and monks over the land. However, there was no recorded discussion of, say, Modbert's personality, of his worthiness as a potential tenant. The case as presented in the record suggests a concentration on legal argument and evidence.[39]

Such a combination of legal argument and evidence was common. Although parties to disputes were with some frequency prepared to offer proof by ordeal or battle, the actual performance of such proof seems largely reserved for cases which could be settled in no other way.[40] Elsewhere evidence was brought to support claims.[41] In disputes over lands or other rights, charters or witnesses might be produced and examined,[42] or an inquest made by a group of local men.[43] Further norms dealt with evidence and proof, as was particularly necessary since power and influence could be brought to bear here as well.[44] There are signs of attempts, perhaps through questioning, to assess the quality of evidence, for example differentiating hearsay from direct

[39] *Regesta Regum Anglo-Normannorum, 1066–1154* (4 vols., Oxford, 1913–69), II, no. 1302; alternatively simple concern lest Modbert revive the dispute may explain why the priory obtained this confirmation.

[40] P.R. Hyams, 'Trial by Ordeal: The Key to Proof in the Early Common Law', in *On the Laws and Customs of England: Essays in Honour of Samuel E. Thorne*, ed. M. Arnold *et al.* (Chapel Hill, NC, 1981), 90–126; R.J. Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Oxford, 1986); note the cautionary words of S.D. White, 'Proposing the Ordeal and Avoiding It: Strategy and Power in Western French Litigation, 1050–1110', in *Cultures of Power*, ed. T.N. Bisson (Philadelphia, Penn., 1995), 89–123, on the use made of offers of ordeal, aimed, for example, at persuading parties to settle; also Martindale, 'Special Friend', 47–9.

[41] For Domesday evidence of offers of ordeal being confronted by witnesses testifying, see *DB*, I, 336r, II, 213r, 332r. For physical proof, see e.g. *Lawsuits*, no. 415.

[42] See e.g. *Lawsuits*, nos. 3, 189, 226, 243, 377 at pp. 339–40; also no. 257 for a cirograph being shown to be false. For eloquent argument being insufficient without documents or witnesses, see *Regesta Regum Anglo-Normannorum: the Acta of William I (1066–1087)*, ed. D. Bates (Oxford, 1998), no. 39. [Hereafter *Acta of William I.*] For the written word's importance in disputes in Burgundy, see Duby, 'Judicial Institutions', 52.

[43] E.g. *Lawsuits*, no. 254; in this period such juries seem often to have been used in cases concerning a variety of rights, such as tolls, rather than in land disputes.

[44] See Fleming, *Domesday*, 17–28, on Domesday jurors. For an interesting example of witness intimidation from an early thirteenth century ecclesiastical court, see *Select Cases from the Ecclesiastical Courts of the Province of Canterbury c.1200–1301*, ed. N. Adams and C. Donahue (Selden Soc., 95; 1981), A12. [Hereafter *Canterbury Cases.*] For fear and testimony, see *Lawsuits*, no. 3; note also no. 19.

witnessing or assessing the value of documentary evidence.[45] Early in Henry II's reign it was established that an Englishman claiming right to land had to base his claim on his own or his ancestor's seisin on the day Henry I died or thereafter.[46]

The bringing of evidence or the use of an inquest focused attention on the particular facts of the case. In Domesday, testimony was generally a statement of the supposed facts, sometimes extending to a brief story, and on occasion revealing or raising questions concerning the normative underpinning of the facts:

> Concerning the six bovates of soke which are claimed between the bishop of Durham and Eudo [son of Spearhavoc] … the men of Wraggoe wapentake say that in the time of King Edward the two brothers – Harold and Guthfrith – held the soke equally and in parage, but in the year in which King Edward died, Guthfrith's sons had all of the soke, but they do not know for what reason they had it – whether through force or by gift of their uncle.[47]

The testimony therefore fails at the stage where the normative underpinning of the facts becomes important – had they gained the land illegitimately by force or legitimately by gift? In a few instances, the testimony is presented explicitly as a process of reasoning, the justification resting on the norms of land-holding and transfer:

> Alvred of Lincoln claims a carucate of land … against Count Alan. The men of Holland agree with Alvred, *because* [*quia*] it was his ancestor's and he was seised of it in the time of Earl Ralph.

> They testify that all of Asa's land ought to be Robert Malet's, because she had her land separate and free from the lordship and power of her husband Beornwulf, even when they were together, so that he could make neither a donation nor a sale of land, nor a forfeiture.

[45] Hearsay: see e.g. *DB* I, 208r–v. Such a distinction is clearly drawn in ecclesiastical cases, in a way that suggests questioning of the witness; see e.g. *Canterbury Cases*, nos. A.4, A.10. The Domesday case just cited suggests that such procedure may also have occurred in secular courts. For further evidence from ecclesiastical courts of common-sense assessment of evidence, of a type which was probably common to all courts, see *Canterbury Cases*, no. A.6 (p. 22), on a witness who 'seemed to speak lukewarmly, and not constantly, and to offer a premeditated speech'. On documents, see above, fn. 42. One should, however, compare these norms with the development of much more detailed rules discussed by T.P. Gallanis, 'The Rise of Modern Evidence Law', *Iowa Law Review*, 84 (1999), 499–560. [Hereafter Gallanis, 'Evidence Law'.]

[46] See Hudson, *Land, Law, and Lordship*, 256–7.

[47] *DB* I, 375r. For briefer statements of fact, see e.g. *DB*, I, 203r, 208r, 376v; also the Yorkshire *clamores*, *DB* I, 373r ff. Note also e.g. *DB*, II, 124v, a hundred rejects a claim that land had belonged to the claimant's *antecessor*. For examples of conflicting testimony in Domesday, see *DB*, II, 285v, 337v, 338r–v, 392v–393r.

> After their separation she withdrew with all her land and possessed it as lord [*ut domina*]. All the men of the county, moreover, saw William seised of all her land until the castle was attacked.[48]

At the very least, therefore, the records reveal a distinction between, on the one hand, testimony as to facts and, on the other, the claims and arguments which rest heavily on normative ideas of proper practice: these are respectively the *testes* and the *rationes* whereby Lanfranc triumphed at Penenden Heath.[49]

Let us look more closely at the form in which appeal was made to norms. The reasoning is not presented as a syllogism, as modern legal reasoning sometimes can be: rule, instance, claim/outcome.[50] Rather, the first two elements are combined in what I earlier called a 'legally charged fact'. In Domesday, we do not have arguments in the form that

(i) land held in alms was inalienable,
(ii) the land concerned had been alms, and therefore
(iii) it should not have been alienated.

Rather we have statements such as 'Neither of them could sell because their lands always lay in alms in the time of King Edward and all of his ancestors, so the shire testifies.'[51] The reasoning in Modbert's case was presented in a similar fashion, and this is true of many other records of Anglo-Norman cases.[52] It was probably their skill in constructing such arguments which made so valuable men such as the priest Alfwi, *causidicus* of Abingdon abbey. His knowledge was not simply factual, he was no mere witness; rather, the abbey's chronicler characterised him

[48] *DB* I, 377v, 373r respectively; see also *DB* I, 62r, 377v.

[49] *Lawsuits*, no. 5B; see also no. 12 ('rationatione et plurimorum testimonio sapientum'). For words based on *ratio* being used elsewhere for arguments in court, see *Lawsuits*, no. 286 – both sides produced their 'rationamenta'; also no. 5H 'ualida ratione subnixa'; 303 'ratione usus premeditata'. Note also the last element of no. 164: the tenant restores land 'which abbot Reginald had unjustly given him, because [*quia*] they were of the demesne'.

[50] Posner, *Problems*, 42; but see below p. 108.

[51] *DB* I, 137v; note also *DB*, I, 209r. A similar norm underlies *DB*, I, 212r, land which had been the abbey's 'of their supplies TRE. [*de uictu eorum*]' Note also *DB*, I, 210r, implicit appeal to the norm of inheritance; *DB*, I, 216v, failure to pay rent justifies forfeiture. See also the interesting instance of a carucate in Plumstead, Norfolk, *DB*, II, 199r: after 1066, Bishop Æthelmær annexed [*invasit*] it for a forfeiture, because the female tenant married within a year of her husband's death; it is unclear to us, although probably not to people at the time, whether this records a just action based on breach of a norm, or an unjust seizing, as is suggested by the word *invasit*. For appeal to other norms, without their being stated in the abstract, see e.g. *DB*, I, 77r, 211r, 211v, 218v.

[52] Note also *Lawsuits*, no. 18D, where a writ of William I asks a litigant 'quomodo eam reclamat', that is upon what legally charged fact is his claim based.

by his memory of past events, his eloquence concerning worldly matters, and his knowledge of the laws of the land.[53]

How conscious were courts and disputants of norms in the abstract? How far is it justified to unwrap the 'legally charged fact' into abstract rules of law and matters of fact to which such rules should be applied?[54] The extreme rarity of cited abstract norms in case records and dispute accounts arises for various reasons, some to do with our surviving evidence, some to do with the issues of disputes and practice in court. As already noted, the nature of the sources is an initial problem. A helpful analogy is with modern reporting on sports which certainly have authoritative rules. Domesday's minimalist accounts may resemble the cryptic form of the slightly expanded cricket score-card which appears in some newspapers: 'England batsman X, lbw Australian bowler Y, 0; played no shot to ball outside off stump.' Or turn to the narrative sources. Just as a soccer report states simply that 'X was offside', or more allusively that 'Y was on his own when the linesman's flag was raised', rather than stating the rules of offside, so too might a dispute record state simply that 'X held the land unjustly' or more allusively that 'Y was deprived of his land, which he and his family had held for longer than any could remember'. These analogies of course do not *prove* the existence of acknowledged underlying norms, but do show the difficulty of writing from sources not designed with the legal historian in mind.

Secondly, in many cases argument concerning norms was not central. Perhaps particularly in the period shortly after 1066 many land cases were likely to turn on straightforward questions of fact; 'had the land been granted to Robert or to William?'; 'did an English freeman belong to one fee or to another?'[55] And cases of offences against the person or involving moveables were always likely to be of this type; not 'did Thomas's deed constitute theft', but 'was it Thomas who had taken the stolen goods?' Even in some more complicated cases, the parties may simply have assumed knowledge of norms, or not cited them because the parties agreed upon them. If a case arose, for example, over who was the closest heir to an inheritance, it may simply have been a

[53] *Abingdon*, II, 2 (= *Lawsuits*, no. 4), 27.

[54] Such a distinction is clearly made in some ecclesiastical disputes in England, and also occasionally appears in French documents; Eadmer, *Historia Nouorum in Anglia*, ed. M. Rule (1884), 45; White, 'Inheritances', 78 fn. 113. Note also S.F.C. Milsom, 'Law and Fact in Legal Development', in his *Studies in the History of the Common Law* (1985), 171: 'This essay is about the beginnings of the common law as an intellectual system, and its premiss is that legal development consists in the increasingly detailed consideration of facts.' [Hereafter Milsom, 'Law and Fact'] See also White, 'Inheritances', 86 fn. 150, and 97; I perhaps lay greater significance than White does on the effect of the nature of the record in obscuring the role of norms and the capacity to distinguish norm and fact.

[55] *DB* II, 447r.

question of fact, based on a shared view of inheritance custom. In such instances, explicit statement of norms need not have formed part of pleading, but their implicit role remained. Compared with the complexities of modern law and society, such must have formed a greater proportion of cases in earlier periods.

Yet people could obviously think and speak in terms of abstract norms, as is apparent from records of law-giving such as Henry I's Coronation Charter or the *statutum decretum* of the 1130s requiring inheritances to be divided between heiresses.[56] Orderic wrote of treason that 'English law punishes the traitor by beheading, and entirely deprives his whole progeny of their just inheritance . . .' whilst Earl Roger 'was judged according to the laws of the Normans, and condemned to perpetual imprisonment after losing all his worldly inheritance'.[57] Some norms were alluded to in judgments in more ordinary cases. The Abingdon chronicler says the following of a man who had failed to serve his lord, the abbot, in the king's army: 'it had been decided according to the law of the country [*lege patrie*] that he deservedly ought to be deprived of the land'.[58] If such law determined judgments it must at least have formed arguments, and may well have been explicitly referred to within them. However, the clearest evidence of all comes from a letter of John of Salisbury concerning the famous Anstey case early in Henry II's reign.

> Richard, kinsman and nephew of William de Sackville, instituted a claim of inheritance to obtain his uncle's goods. In reply, Mabel, William's daughter, asserted in the court of secular judges where the suit was being tried, that a daughter must be preferred to a nephew for her father's inheritance. Richard denied that she had any hereditary right, since she was not born of a lawful marriage, but was the child of an adulterous union.[59]

[56] See J.C. Holt, 'Feudal Society and the Family in Early Medieval England: (iv) the Heiress and the Alien', *TRHS*, 5th Ser. 35 (1985), 1–28 at 9–14; for an alternative interpretation, see J.A. Green, 'Aristocratic Women in Early Twelfth-Century England', in *Anglo-Norman Culture and the Twelfth Century Renaissance*, ed. C. W. Hollister (Woodbridge, 1997), 81–2. At approximately the same time, the *Leges Edwardi Confessoris* can persuasively be taken as an attempt to abstract generalities from practice: see O'Brien, *God's Peace*.

[57] *Lawsuits*, no. 7; cf. William of Poitiers, *Gesta Guillelmi*, ed. and tr. R.H.C. Davis and M. Chibnall (Oxford, 1998), 42, on the Norman 'lex transfugarum'. Note also William I's legislation concerning proof in cases between Englishmen and Frenchmen: *Acta of William I*, no. 130.

[58] *Lawsuits*, no. 164. Note also *Abingdon*, II, 118 on an offence 'contra legem consuetudinariam'; *Lawsuits*, no. 421 on Becket's trial at Northampton in 1164: 'all his moveable goods were quickly declared to be confiscated unless by chance royal clemency was willing to mitigate the judgment, i.e., as the popular saying goes, he was judged to be in the king's mercy for all his moveable goods'.

[59] *Lawsuits*, no. 408B.

Here we have a claim, a counter-argument stating a general point of inheritance law, and further argument as to why the general point did not apply to this particular case. Thus even prior to Henry II's reforms, we have court arguments involving abstract norms, or at the very least arguments which a John of Salisbury could recount in abstract fashion for the benefit of the pope.

So norms were both consciously held and influential. How far did their form, use, and influence differ from later periods? There is certainly a danger of exaggerating the difference between the early and later middle ages. If a case went contrary to certain decisive norms, participants were aware that the case was not being decided according to law, and the disappointed party might look to the king to correct such a 'default of justice'.[60] Furthermore, the use of norms in pleading continued sometimes to be implicit rather than explicit. The following are later thirteenth-century pleadings, in the form of legally charged facts:

> The prior says that he cannot answer them on this writ because someone else holds half an acre which is part of the appurtenance of this land.

> Henry readily acknowledges that the charter is the deed of his father Henry but says that he is not obliged to warranty by that charter because the charter was made while his father was kept in chains in Roger's prison.[61]

This was also true of, for example, thirteenth-century ecclesiastical courts, which operated against a background of considerably more extensive written law.[62] Very general principles, too, entered into arguments put forward by litigants or justices.[63] And when records beyond the official plea rolls recount later medieval disputes, they

[60] See *Leges Henrici Primi*, 10.1, ed. and tr. L.J. Downer (Oxford, 1972), 108 [hereafter *Leges Henrici*, ed. and tr. Downer]; also e.g. Hudson, *Formation*, esp. 114.

[61] *The Earliest English Law Reports*, ed. and tr. P.A. Brand (2 vols., Selden Soc. 111–12; 1996), nos. 1268.1, 1276.4 (Plea roll). [Hereafter *Law Reports*, ed. Brand.] Note also the form of count and defence presented in *Brevia Placitata*, ed. G.J. Turner and T.F.T. Plucknett (Selden Soc. 66; 1951). [Hereafter *Brevia Placitata*.] Moreover, Milsom, 'Law and Fact', 180–3 argues that after the thirteenth century there was a move away from the type of examining of facts which stimulates legal development; 182, 'the lawyers have retreated from the facts by going back to the ancient pattern of law-suit'.

[62] For a case where rules are not explicitly cited, but where they clearly play a crucial implicit role, see *Canterbury Cases*, no. A6; note also e.g. nos. A1, A5, and introduction p. 53. See further *Canterbury Cases*, no. A15, which mixes an at times notably rhetorical telling of a story with references to the *ordo judiciarius* and allusion to canon law.

[63] See e.g. the justice's remarks in *Law Reports*, ed. Brand, no. 1275.3.

reveal the continuing importance of, for example, favour, money, and reputation.[64]

Some comparisons with modern law are also instructive. Writers on jurisprudence have developed ideas on the nature of legal rules with notable resonance for historians, and which may soften, although not deny, the contrast between mediaeval and modern law. Rules do not provide certain answers for all cases; they have an 'open texture'.[65] Some writers even argue that in routinely decided cases, rules are only producing regular rather than definitive answers.[66] Not all legal reasoning works syllogistically; cases uncertain enough to reach decisive litigation may require more general forms of argument and reasoning.[67] Most obviously, in cases perceived as difficult by the parties and courts involved, a variety of considerations beyond defined legal rules are likely to intrude explicitly, for example general considerations of morality or of policy.[68]

Particularly notable are certain rules, sometimes referred to as standards, which use terms and notions such as 'reasonable', 'negligent' or 'significant'.[69] These notions demand the involvement in legal argument and decision-making of ideas, customs, and practices which are in no discrete sense 'legal'. Moreover, the ideas and customs thereby involved are generally unwritten, just like the mass of early mediaeval custom. Reliance on the unwritten can encourage greater flexibility. Such notions, and such norms, may have been more widely prevalent, more influential in the workings of mediaeval courts, but the modern parallel does raise the question of how far the distinction between the mediaeval and the modern is quantitative, how far qualitative.

Likewise, much modern disputing goes on against a background of legal rules, and sometimes through the use of legal rules, but not in the

[64] See esp. M.T. Clanchy, 'A Medieval Realist: Interpreting the Rules at Barnwell Priory, Cambridge', in *Perspectives in Jurisprudence*, ed. E. Attwooll (Glasgow, 1977), 176–94.

[65] E.g. H.L.A. Hart, *The Concept of Law* (Oxford, 1961), 121–32, esp. 124; also e.g. Kelman, *Guide*, 50. Hart's argument rested on linguistic analysis, which distinguished a core of certainty from a less certain penumbra. The relationship of core to penumbra is affected by the oral or written nature of the rule; for brief comment on this relationship, see below, p. 110.

[66] E.g. Kelman, *Guide*, 3–4, 12–13, 258; Kennedy, *Critique*, 159–60.

[67] Posner, *Problems*, 73, 78.

[68] For one controversial version of this argument, see the works of Ronald Dworkin; R.M. Dworkin, 'Is Law a System of Rules?', in *The Philosophy of Law*, ed. *idem* (Oxford, 1977), 38–65 provides easy access to some of his ideas; for a fuller and more recent view, one must look e.g. at his *Law's Empire*.

[69] Note Posner, *Problems*, 44; Kelman, *Guide*, ch. 1, esp. pp. 15–16; Kennedy, *Critique*, 39, 61. On writing and precision, see e.g. M.T. Clanchy, *From Memory to Written Record* (2nd edn.; Oxford, 1993); J. Goody, *The Logic of Writing and the Organization of Society* (Cambridge, 1986).

form of court cases being determined by legal rules. William Miller has drawn an analogy between modern American commercial law and mediaeval Icelandic law which can apply just as well elsewhere. Using the metaphor of computing he states that such law acts as 'a default setting that would govern unless the parties to the transaction preferred to bargain out of the ambit of the rule.'[70]

One must not, however, jump to the simple assumption that the role of norms in eleventh-or twelfth-century courts was very similar to their later mediaeval or modern equivalents, if not as clear cut, efficient, or effective. First, I have sought to reveal the workings of some of the strongest Anglo-Norman norms.[71] Others, whilst significant in court, were less clear or less powerful. An issue might be complicated by different parties seeing different norms as representing correct practice in a case. Take the question of succession to castles. It may well be that the king felt they were his to give at will, whereas custodians saw them as their own hereditary property. Similar conflicts of perception might exist over inheritance of land by distant relatives. In the absence even in England of a routine appeal system to a royal court enforcing one interpretation of custom, such divergent views might long survive. When there was no single generally accepted norm, power could obviously intrude as the parties strove to have their version of law accepted.[72]

Secondly, to return to modern rules: jurisprudence does not describe the typical workings or the typical perception of the role of rules in the most common cases; rather it usually focuses on appellate jurisdictions, difficult cases, and the 'true nature' rather than the general perception of rules. But for historians such routine cases and common perceptions are very important. It therefore remains significant that in the majority of modern cases, rules play a much more explicit role, are seen as much more definitive than in all but a few early mediaeval ones. Rules are more numerous and cover more areas.[73] Despite the importance of the 'standards' referred to above, many modern legal rules are more precise, so the scope for other considerations routinely to become involved is more restricted.

Further, early medieval case records do not reveal other elements

[70] Miller, *Bloodtaking*, 228.

[71] On standardisation between courts, see below, p. 114.

[72] On inheritance of castles, and by distant relatives, see Hudson, *Land, Law, and Lordship*, ch. 4. The fundamental treatment of the multiple perceptions of custom is S.D. White, 'The Discourse of Inheritance in Twelfth-Century France: Alternative Models of the Fief in *Raoul de Cambrai*', in *Law and Government*, ed. Garnett and Hudson, 173–97. For arguments which would make this a characteristic less peculiar to early mediaeval law, see Kennedy, *Critique*, Kelman, *Guide*.

[73] For very stimulating analysis of developments in a later period, see Gallanis, 'Evidence Law'.

characteristic of modern legal discourse: the interplay of norm and fact through argument based on precedent; rules being explicitly contrasted, incompatibilities pointed out in court. These difference may simply be a product of the evidence, but there is certainly no sign, for example, that if one rule were preferred to another, the latter might lose its validity.[74] Nor were secular courts recorded creating new, explicit rules to justify their judgments, as modern courts sometimes do.

Thirdly, developments of this type are apparent in the later middle ages. Evidence even from the later thirteenth century shows norms being of a more technical nature, being stated more explicitly, and being applied with greater strictness.[75] Whilst manuals such as *Brevia Placitata* generally present pleading in terms of legally charged facts with reference to particular instances, they also contain some statements of general rules.[76] The very increase in the use of writing, in legal educational works and in statutes, could produce greater rigidity in norms. Records reveal more judgments being stated in a reasoned fashion, with distinct reference to law and fact:

> Because William [II] the son of Simon [I] had entered the tenements after the death of his uncle Nicholas [I], on whose seisin the claim was brought, and had held them all of his life and died in seisin of them without bastardy ever having been alleged against him and Nicholas [II] had asserted in his count that Simon [I] had died without issue and no proof of this was admissible as under English law and custom no one can be bastardised after their death, it is adjudged that Simon [III] hold the land quit of the claim of Nicholas [II] and his heirs in perpetuity etc.[77]

Legal thinking could increasingly work according to its own logic, through subtle and technical development, as Milsom argues in his analysis of legal thinking outstripping legal form in the case of debt and detinue.[78] The types of argument used in Anglo-Norman courts were likely to be comprehensible to all members of that court, the rationale of norms explicable if necessary in everyday terms. In the professionalised law of the later middle ages, at least in some areas of

[74] Note also White, '*Pactum*', 306–7, who argues that a 'later medieval court would have formally taken into account some … obligations but not others, because it would have regarded only some of them as legal obligations arising out of legal rules. Second, in the event that some of those having legal force pointed towards different ways of deciding the case, the court would have normally had at its disposal some accepted way of deciding which rule should take priority and control its decision in the case.'

[75] See e.g. *Law Reports*, ed. Brand, no. 1272.1.

[76] See the general rule given in a rubric concerning the writ *praecipe in capite* in *Brevia Placitata*, 11, in a form contrasting with that of writ, count, or defence.

[77] *Law Reports*, ed. Brand, no. 1276.5.

[78] Milsom, 'Law and Fact', 176–9.

law, the development of technicalities and related language meant that this was no longer the case.[79]

Was England before the Angevin reforms peculiar in the importance of norms and in the nature of disputing more generally?[80] Here I shall limit myself to a few comments, beginning with a comparison of the image of disputing presented by three mid-twelfth century texts concerning abbeys enjoying strong royal links: Suger's description of his administration of St Denis, Henry of Blois' account of his resumption of Glastonbury's lands, and the Abingdon chronicler's history of the church and its abbots.[81] Certain differences are immediately noticeable. In Suger's story oppressive lords are the predominant opponents; at Abingdon and Glastonbury, they are recalcitrant tenants, grantees of earlier abbots or custodians of the house, or covetous royal officials.[82] Henry of Blois and abbots of Abingdon, most notably Henry I's physician Faritius, generally responded to challenges by starting court proceedings, and at Abingdon in particular the chronicle also often records the associated royal writ. Outside the reign of the Conqueror direct forceful action by abbots was rare. Suger more frequently looked to use the influence of his many connections, or to buy off his oppressors, or to confront them forcefully, for example by building defences or – to the disquiet of his conscience – by military action. Even when the king became involved on Suger's behalf, it was not in disputes involving the abbey's ordinary tenants.[83] Most notably, Louis VI operated militarily against oppressors of the church such his brother Philip and

[79] Cf. the development, certainly by 1217, of legal devices being used to circumvent the rules of law in order to achieve desired ends; see Magna Carta (1217), c. 43.

[80] I here treat England as a realm with common practices; in fact, patterns of disputing may have differed in certain areas, for example the borders with Scotland.

[81] Suger, *Œuvres Complètes*, ed. A. Lecoy de la Marche (Paris, 1867); see also L. Grant, *Abbot Suger of St-Denis* (1998), 220–5. [Hereafter Suger, *Œuvres Complètes*; Grant, *Suger*.] Henry's account appears in Adam de Domerham, *Historia de Rebus Gestis Glastoniensibus*, ed. T. Hearne (2 vols., Oxford, 1727), II, 305–15, [hereafter Adam of Domerham] and *English Episcopal Acta, VIII: Winchester, 1070–1204*, ed. M.J. Franklin (Oxford, 1993), 205–11; see also N.E. Stacy, 'Henry of Blois and the Lordship of Glastonbury', *EHR*, 114 (1999), 1–33. [Hereafter Stacy, 'Henry of Blois'.] For further signs of contact with the king in disputes, see also the charters noted in Suger, *Œuvres Complètes*, 366, 371, 373; also Grant, *Suger*, 212, 221. I emphasise that I am looking at the *image* of disputing presented by these texts, rather than analysing in full the disputes partially revealed by the texts.

[82] Also amongst Henry's opponents was Roger, bishop of Salisbury; see Adam of Domerham, 312–13, Stacy, 'Henry of Blois', 8–9. For Suger and vexatious royal officials at Beaune-la-Rolande, see *Œuvres Complètes*, 175, Grant, *Suger*, 221; also *Œuvres Complètes*, 184 which concerns Normandy in the time of Henry I.

[83] Confronting opponents: *Œuvres Complètes*, 160, 172; charter at 350. Payment to opponents, e.g. *Œuvres Complètes*, 182. Royal involvement: e.g. *Œuvres Complètes*, 168, charter at 372; see Grant, *Suger*, 220; note also *Œuvres Complètes*, 171.

Hugh of le Puiset, whilst observing such forms as summoning his opponents to court.[84]

Other evidence confirms the impression that the use of force, which is a common focus of studies of disputing in areas of France, was relatively limited in Anglo-Norman England, except under Stephen. Domesday Book reveals few violent local conflicts which – had they existed – might well have been central to jurors' testimony.[85] Among historians, it is a common-place – and probably justified one – that private war was not permitted in Anglo-Norman England. Some may have ignored the prohibition, others known that the king would turn a blind eye. Disputants might use limited violence in order to escape it being classified as private war, whilst much which continental charters described as *guerra* could be presented as the vigorous exercise of distraint, the effective assertion of firm lordship. Yet such activities do seem distinct from many continental instances, and may not have differed very greatly from those used in the classic Common Law period after the time of Henry II.[86]

So at least in some aspects of the conduct of disputing England does seem to have differed from areas of France, for example. However, such limits of violence need not correspond to a greater importance of norms and normative arguments in disputing. Other countries too had a culture in which numerous and detailed legal norms played a very significant part.[87] Miller has written of Iceland that

[84] *Vie de Louis le Gros*, cc. 17–18, printed in *Œuvres Complètes*, 66–80.

[85] Note e.g. *DB*, I, 32r 'inimicitia'; for taking by force, see *DB*, I, 41v (half a virgate), 78v, 166r, 203r, 208r, 216r, 228r, 236v, 247v, 373r, 375r (where it is uncertain whether a party held by force, suggesting that any violence cannot have been sufficient to be notorious), 376v; cf. Harold's actions by force, *DB*, I, 30v–31r, 133r, or even violence, *DB*, I, 2r; Godwin's wife, *DB*, I, 136v–137r; Earl Gyrth, *DB*, II, 210r–v. Note also *Acta of William I*, no. 129, for sheriffs taking lands violently from churches. For disputes involving the abbey of Abingdon during Stephen's reign, see e.g. *Abingdon*, II, 200–3 (included in part in *Lawsuits*, no. 378). For the harassment of William of St Calais in 1088, see *Lawsuits*, no. 134 (p. 104). For mention of a man committing violence against a church, see *Lawsuits*, no. 163D. For a man 'by force' holding onto land which his opponent claimed had been granted for only one year, see *Lawsuits*, no. 220. For wrongfully received tolls being taken away 'violenter per justiciam; see *Lawsuits*, no. 254.

[86] For the continuing use of extra-legal methods of disputing and enforcement of custom well beyond the mediaeval period, see e.g. E.P. Thompson, *Customs in Common* (Harmondsworth, 1993).

[87] For some parallel uses of norms in western France, see White, 'Inheritances', 88–9. Note also the case of the county of Barcelona, where the influence of the Visigothic *Liber Judiciorum* had lasted into the eleventh century; in the twelfth century we have court records which contain parallels with written compilations of customary law, such as do not exist for Anglo-Saxon or Anglo-Norman England – see *The Usatges of Barcelona*, tr. D.J. Kagay (Philadelphia, Penn., 1994), 26, 115. Note the comment by Posner, *Problems*, 319, that heavy reliance upon norms by judicial authorities may in fact be a sign of strong social pressure towards a more personally, less rules-based justice: again advocacy

> Grágás' style and its bulk evidence a cultural predisposition for law and lawmaking. Some of the rules themselves display a rococo complexity that suggests sheer pleasure in the formulation of law almost as if it were for law's sake alone. The propensity for lawmaking, however, was not just the theoretical musings of juristically inclined people. The society backed its laws with courts to hear claims arising from their breach. And what is especially remarkable is that Iceland developed a legal system – courts, experts in law, rules clearly articulated as laws – in the absence of any coercive state institutions.[88]

At the same time Miller has much evidence of feuding; detailed norms need not be associated with an absence of violent disputing.

Likewise, it is very difficult to relate a preference for compromise to a prevalence of out-of-court disputing or a limited reliance upon norms.[89] In England, as elsewhere, out-of-court and compromise settlements continue into the later middle ages and to the present day, but both before and after *c.*1200 were shaped *inter alia* by norms. Similarly compromises were arranged in ecclesiastical courts, where the role of written law and specialist lawyers was more significant at an earlier date than in lay courts.[90]

Furthermore, decision and compromise co-existed in a variety of ways. One might succeed the other in the process of disputing, for example according to a party's tactical choice.[91] Concession over a specific incident might be outweighed by the victory in a matter of lasting principle.[92] Clearly, one must be very cautious in making any

of norms cannot be equated with a powerful state. For example, some Continental Peace and Truce of God legislation, including that issued under powerful lay authority, may present an attempt to impose a wide range of norms on a situation where authority may have been weakening; e.g. Comital peace assembly of Barcelona, 1064, in *Usatges*, 103–5.

[88] Miller, *Bloodtaking*, 224; see also 228, and, on legal experts, 226.

[89] For a position on compromise close to the one taken in this paper, see *Settlement of Disputes*, ed. Davies and Fouracre, 235–6; for further comments on settlement patterns, see Hudson, 'Interpretación'. Miller, *Bloodtaking*, 233 shows that the 'hyperlegalization' of Icelandic society could encourage disputing out of as well as within court. For problems of diplomatic, note also e.g. White, '*Pactum*', 294. See Wormald, 'Domesday', 69ff. for some statistics on Domesday disputes, or rather the stages of disputes recorded in Domesday. For some fifteenth-century English statistics, see E. Powell, 'Arbitration and the Law in England in the Late Middle Ages', *TRHS*, 5th Ser. 33 (1983), 49–67 at 51.

[90] See *Canterbury Cases*, Introduction, 55–6 for a preference for out of court and compromise settlements in ecclesiastical disputes, where a distinct body of law definitely was available.

[91] E.g. *Lawsuits*, no. 163; note also *DB*, II, 377r. For the co-existence of law and arbitration, see also Powell, 'Arbitration', 57. For courtroom and violent disputing co-existing, see e.g. Miller, *Bloodtaking*, 233.

[92] See e.g. *Lawsuits*, no. 12; note also cases of non-performance of homage and service, where the lord might have enforced forfeiture, but rather accepts the homage and service which had been his original aim: see e.g. *Lawsuits*, no. 164, 206; also *DB*, II, 383r, 385r–

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simple determinist connection between form of settlement and type or role of norms. Likewise, the continuation to the present day of the prevalence of non-judicial, and out-of-court, settlements precludes associating in any simple way a preference for settlements with any particular judicial or political system.

These points appear part of a wider crisis of explanation. The type of functionalist view which underlies many recent studies of disputing seems so riddled with exceptions – each individually admitted within the studies but not confronted collectively – that the underlying view must be questioned.[93] It is not that links do not exist, for example, between the nature and importance of norms, the form of judicial organisation, and the process of disputing. Rather, the relationships are complex, may well be particular to certain situations, and may include a variety of factors – notably cultural ones – which are too often excluded in functionalist analysis. Hopes of explanation need not be abandoned, nor need we have been looking in the wrong areas for them. But the combination of factors underlying disputing and legal development may be less necessarily inter-related than they have recently seemed.

In England, the period from Henry II's reign brought many developments which increased the number, variety, and role of decisive norms. Access to royal justice became more routine, making norms more rigidly enforceable. Royal justices played a greater role in controlling argument and deciding cases.[94] The centralised system of courts, intent on enforcing a single set of norms, a common law, ensured a standardisation of norms which did not occur when royal justice was extended in France, for example.[95] Formal and informal legal education

v; cf. Clanchy, 'Law and Love', 48. Note that decisions tempered by mercy or charity still could reinforce the norm on which the main decision was based.

[93] For criticism of such direct and causal links between the various elements, see e.g. Martindale, 'Special Friend', 24–5, 50; *Settlement of Disputes*, ed. Davies and Fouracre, 235–6; D. Barthélemy, *La Société dans le Comté de Vendôme* (Paris, 1993), 652–80; White, 'Inheritances'; C. Wickham, 'Property Ownership and Signorial Power in Twelfth-Century Tuscany', in *Property and Power in the Early Middle Ages*, ed. W. Davies and P. Fouracre (Cambridge, 1995), 222–3.

[94] See e.g. *Law Reports*, ed. Brand, nos pre-1273.2, 1276.7.

[95] See e.g. *Etablissements de Saint Louis*, ii 23, tr. F.R.P. Akehurst (Philadelphia, Penn., 1996), 143: 'When my lord the king orders his *bailli* to give a hearing to some plaintiff, he gives the order in this form: "We order that you give a good and speedy trial to the bearer of this writing, according to the custom of the area and the district" '; also ii 16 (p. 133): king's court reviewing judgments: 'if it is against the law, then he should have it annulled; and if it is not against the law, then he should have it executed and confirmed by the custom of the area'. Philippe de Beaumanoir, *Coutumes de Beauvaisis*, Prologue 7, tr. F.R.P. Akehurst (Philadelphia, Penn., 1992), 4: 'the customs of France are so varied that you could not find in the kingdom of France two castellanies which used the same

encouraged argument and decisions according to set norms.[96]

However, the importance of judgments, courts, and legal norms before the mid-twelfth century was essential to Henry II's reforms and the development of the Common Law. Most notably, at the core of the reforms, and one of their most popular elements, were the assizes, for example those of *novel disseisin* and *mort d'ancestor*. These worked in terms not of the explicit application of abstract rules, but rather of a set of questions posed to those making the recognition. The answers they were seeking were to take the form of legally charged facts: yes, William had died seised in demesne as of his fee, yes he had died since the king's coronation, and yes Henry was his closest heir.[97] Upon similar thinking rested pleading and other procedures in the Angevin courts. It was a collection of such procedures that *Glanvill* in the late 1180s could present as a body of law to rival the Romano-canonical tradition.

customs in all cases'. In England, matters concerning procedure may have shown particular variation beyond the Anglo-Norman period; this may be the meaning of 'Glanvill', *Tractatus de Legibus*, xiv 8, ed. and tr. G.D.G. Hall (Edinburgh, 1965), 177: 'thefts and other pleas belonging to the sheriff, which are heard and determined according to the varying customs of different county courts'. This does not mean that such norms could not have a decisive effect within that court, but does distinguish them from the greater proportion of standardised norms after Henry II's reign.

[96] P.A. Brand, *The Origins of the English Legal Profession* (Oxford, 1992).

[97] Hudson, *Formation*, 198–201. Note also the process whereby presenting juries sifted communal accusations: R.D. Groot, 'The Jury of Presentment before 1215', *American Journal of Legal History*, 26 (1982), 1–24.