

PRIESTS OF JUSTICE:  
CREATING LAW OUT OF ADMINISTRATION  
IN THIRTEENTH-CENTURY ENGLAND

A Dissertation

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by

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In the modern world, we tend to naturalize the idea of law. But law as we understand it today—as a separate sphere of activity with its own norms and discourses—is far from being natural. Law is a cultural construct, an artificial lens through which we view the world. In this dissertation I show that the justices of the English royal courts began to construct a separate legal sphere out of a *mélange* of Roman law and administrative practice in the thirteenth century. I read the plea rolls, the administrative records of the English royal courts, as evidence that the justices of the courts were beginning to think of the work that they did as something qualitatively different from and better than the work performed by other parts of the royal administration; they were beginning to think of it as law. In the middle of the thirteenth century we see, for the first time, people reading these terse and dull administrative texts for general rules and doctrines rather than for the administrative facts that they were designed to convey. The justices of the royal courts transformed these texts from administrative documents into legal literature and, in the process, transformed themselves from servants of the king into priests of justice.

## BIOGRAPHICAL SKETCH

Thomas McSweeney graduated from the College of William and Mary in Virginia with a B.A. in history and government, *magna cum laude*, in 2002. He subsequently attended Cornell Law School, where he received his J.D. and LL.M., *cum laude*, in 2005. He was admitted to the bar in New York in 2006. He was awarded his M.A. in history by the graduate school at Cornell University in 2009. In his time at Cornell, he has been awarded fellowships by the Mellon Foundation and the Huntington Library, and has received three awards for his teaching. After he completes the requirements for his Ph.D. in the summer of 2011, he will be beginning a position as a visiting assistant professor at Cornell Law School.

To Abby, *ma gentil oisur*

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I could not have completed this dissertation without the generous support I have received for my archive research. The Huntington Library in San Marino, California, provided me with a grant to spend a month working with their legal manuscripts. The Graduate School at Cornell University, the Mario Einaudi Center for International Studies, and the Bibliographical Society of America sent me to England for a fruitful summer in the archives, the results of which will be apparent in this dissertation. The staff at Cambridge University Library, the British Library, the National Archives in Kew, the Wren Library at Trinity College, Cambridge, and Lincoln's Inn Library in London all gave me valuable access to their collections, and for that I am extremely grateful. The master and fellows of Trinity Hall Cambridge, in addition to giving me access to their collections, have given me permission to use images of one of their manuscripts in this dissertation. The Anglo-American Legal Tradition project of the O'Quinn Law Library at the University of Houston has also been a wonderful resource.

I cannot claim full credit for the ideas in this dissertation, since it has been written in dialogue with many friends and colleagues. I have to thank the participants at the various conferences where I have presented portions of this dissertation in progress—the Charles Homer Haskins Society Conference, the International Congress of Medieval Studies at Kalamazoo, the International Medieval Congress at Leeds, and the American Society for Legal History Conference—for their questions and critiques. Several scholars whose work I admire offered to comment on parts of this dissertation, particularly Paul Brand, Richard Helmholz, and Ken

Pennington, and their comments have made their mark on chapter three in particular. The Medieval Studies Student Colloquium and the European History Colloquium at Cornell have also been excellent venues for trying out my ideas.

Academic work can be rather solitary, but the good friends I have made at Cornell have made it decidedly less so. I have been a part of two wonderful writing groups, one of which was generously provided for by the Society for the Humanities at Cornell, and my friends in both of those groups—Eliza Buhner, Abigail Fisher, Sarah Harlan-Haughey, Ada-Maria Kuskowski, Guillaume Ratel, and Melissa Winders—have given me wonderful feedback. I have learned much about writing good scholarship while reading their tales of late medieval disability and theories of cognition, the criminal networks of early modern coiners, nature in English outlaw literature, the world of the *coutumiers*, the construction of truth in southern French courts, and aristocratic courtesy in the Welsh march. I have to say, I also had a lot of fun.

I have been fortunate in having four committee members who have been deeply invested in seeing me succeed. Bernadette Meyler has opened my eyes to the poetic side of the law, Duane Corpis has pushed me to think about what my work might give back to the theory of history, David Powers has shown me how judges shape their identities in Arabic, as well as in Latin and Old French, and of course Paul Hyams, my *Doktorvater*, has believed that I could be a successful scholar right from the beginning and has given freely of his time to make that happen. They have all poured a lot of energy into reading my work and into writing letters on my behalf. I hope I prove to be worthy of the faith they have placed in me.

As a native of the Finger Lakes region, I have been lucky to have the support of my family through the trials and tribulations of graduate school. My parents in particular have given me their support through law school and graduate school and it has been wonderful to be a mere forty-minute drive away for the last nine years. And finally, I have to thank the most important person in my life, my wife, Abby, who thought she was marrying a soon-to-be lawyer almost seven years ago, but who has patiently stood by me and given me her love and support as I followed my dream.

David Powers once told me about an Islamic text that began with a disclaimer that the author owed anything that was right and good in his work to God and anything that was wrong and bad to the devil. I would modify this slightly and say that I owe anything that is right and good in this dissertation to all of those people I have listed above and the many I was not able to list. These are the family, friends, and scholars who have shaped me and helped me to become what I am. Of course, anything that is wrong or bad is still the devil's fault, not mine.

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## LIST OF ILLUSTRATIONS

Illustration 1: Trinity Hall, Cambridge MS 9, f. 39, Manuscript of *Bracton* 249

## LIST OF ABBREVIATIONS

- BDL Bratton, Henry de, attributed. *Bracton on the Laws and Customs of England*. Translated by Samuel E. Thorne and edited by George E. Woodbine. 4 vols. Cambridge, MA: Belknap Press, 1968-1977.
- BNB Maitland, Frederick William. *Bracton's Note Book*. 3 vols. London: C.J. Clay & sons, 1887.
- CM Paris, Matthew. *Chronica Majora*. Edited by Henry Richards Luard. 7 vols. London: Longmans & Co., 1872-1883.
- CRR *Curia Regis Rolls Preserved in the Public Record Office*. 20 vols. London: Her Majesty's Stationary Office, 1922-2006.
- GDL Glanvill, Ranulph de, attributed. *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*. Edited and translated by G.D.G. Hall. Oxford: Clarendon Press, 1965.
- EHR English Historical Review
- ODNB Oxford Dictionary of National Biography
- TI1 Samuel E. Thorne. Translator's Introduction to *Bracton on the Laws and Customs of England*, attributed to Henry de Bratton, Vol. 1., vii-xlvi. Translated by Samuel E. Thorne and edited by George E. Woodbine. Cambridge, MA: Belknap Press, 1968.
- TI3 Samuel E. Thorne. Translator's Introduction to *Bracton on the Laws and Customs of England*, attributed to Henry de Bratton, Vol. 3., xiii-lii. Translated by Samuel E. Thorne and edited by George E. Woodbine. Cambridge, MA: Belknap Press, 1977.

## Introduction

### Law, History, and the Legal Sphere

The author of the thirteenth-century treatise *De Legibus et Consuetudinibus Angliae* (*On the Laws and Customs of England*), commonly called *Bracton*,<sup>1</sup> speaking of and to his fellow justices of the king's courts, said

*Ius* (law, right) is derived from justice and is used in a number of different senses. For it is sometimes used for the art of what is fair and just (*ars boni et aequi*) itself, or for the written body of *ius*. It is called the art of what is fair and just, *of which we are deservedly called the priests*, for we worship justice and administer sacred rights.<sup>2</sup>

The author of this passage borrowed it from the Roman law scholar Azo of Bologna, who was

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<sup>1</sup> The treatise is usually called *Bracton* after the royal justice Henry de Bratton, to whom it was misattributed as early as 1277. Bratton almost certainly worked on the treatise but, as Samuel Thorne has shown, could not have written the majority of the text, much of which must have been written in the 1220s and 1230s, before Bratton had begun his career as a clerk in the king's courts. It is more likely that William of Raleigh, clerk to Martin of Patishall, C.J., and later chief justice himself, was the author. Bratton had close connections to Raleigh, and was probably his clerk. The naming of the treatise is a difficult issue. While it is fine to call the work *Bracton* when talking about its uses in the late thirteenth century, since that was the name people in the legal establishment used for the treatise at that time, it is misleading to call it *Bracton* for our period, since the treatise was the work of several authors and Henry de Bratton was only the last of them. One way to solve this problem is to refer to the treatise as *De Legibus*, a convention which George Woodbine initially embraced, but then quickly rejected in favor of the traditional title, in the introduction to his edition of the treatise. George Woodbine, introduction to *De Legibus et Consuetudinibus Angliae*, attributed to Henry de Bratton, ed. George Woodbine (New Haven, CT: Yale University Press, 1915), 1:1. On the other hand, the Latin titles given to the treatise in many of the manuscripts, *De Legibus et Consuetudinibus Angliae* or *De Legibus et Consuetudinibus Anglicanis*, are almost identical to the conventional title given to the twelfth-century treatise that is commonly called *Glanvill*, which is *De Legibus et Consuetudinibus Regni Angliae*. It is also very similar to a Norman text written at about the same time, the *Summa de Legibus in Curia Laicali*. To avoid confusion with these other two texts and between the treatise and the justice, I will refer to the treatise as *Bracton* and to the royal justice to whom it was later attributed as Bratton.

The project of analyzing *Bracton* is complicated by the fact that the text had at least two authors, and possibly more, whose work is difficult to separate. I will therefore refer to the *Bracton* authors, rather than the *Bracton* author, throughout.

<sup>2</sup> "*Ius ergo derivatur a iustitia, et habet varias significaciones. Ponitur enim quandoque pro ipsa arte, vel pro eo quod scriptum habemus de iure, quod ius dicitur ars boni et aequi, cuius merito quis nos sacerdotes appellat. Iustitiam namque colimus et sacra iura ministramus.*" BDL, 2:23-4. I will generally follow Thorne's translation of the *Bracton* text throughout, although I occasionally modify the translation where I think there is a better reading.

writing about jurists in his own tradition.<sup>3</sup> While it was not unheard of for jurists in the Roman and canon law traditions to treat their colleagues as a special order, no one, as far as we know from the written sources, had ever imagined the justices of the English king as a cohesive group, an order akin to a second priesthood, before the *Bracton* authors. The people who had sat on the royal courts in the late twelfth century were drawn from many different backgrounds and sat on the court only occasionally and incidentally to the other duties they performed for the king. Being a justice was not the average justice's day job. By the 1240s, when this part of the treatise was probably written, the justices of the courts were a much more cohesive group. There was a core of justices who spent almost all of their time and most of their careers as either justices or clerks to justices. What this passage highlights, though, is not so much that the royal justices' career paths had changed by the 1240s, but that their *self-perception* had changed. In the collective "we" of the excerpt above, the author creates a sort of community with his reader, whom he assumes to be a justice. He also creates a particular kind of community, a special group of people, the priests of justice. He imagines the justices as operating in a sphere that was separate from the rest of the royal administration. Their work was not administrative or political. It was legal.

The story of the royal justices is a story about the beginnings of the English common law. This is not a story about new actions or writs. It is not a story about kings and their statutes. It is not a story about the people and their resistance to the claims of the crown. Rather it is a story about a small group of people—a textual community composed of justices and clerks who worked in the royal courts—who, in the early thirteenth century, rewrote their own history and imagined the set of institutions, people and practices that made up the king's courts to constitute a legal sphere, separate from the rest of the king's administration. As evidence of this shift in the

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<sup>3</sup> Azo, *Summa Institutorum* (Venice, 1610), 1.1, no. 3.

justices' perception of themselves and of the work they were doing, we will look at the evolution of the royal courts' administrative records, called the plea rolls. In the 1220s and 1230s a coterie of justices and clerks in the royal courts took these terse and dull administrative documents that recorded the outcomes of cases and started reading them as if they contained profound statements of legal principle. They made collections of plea roll entries, at least half a dozen of which existed by the middle of the century. By the end of the century, justices were even writing their plea roll entries differently than they had at the beginning in the hope of appealing to an audience who would read these inauspicious little case records as legal literature. But why take an administrative record and transform it into legal literature? In this dissertation I will show that a small, but very influential, group of royal justices and clerks had been trained in the universities and had imbibed the languages of authority peculiar to scholastic legal thought. Since the plea rolls represented the bulk of the written material the courts produced, they used the rolls as a space to incorporate these scholastic languages of authority. By tapping into these scholastic languages of authority they sought to turn themselves into jurists like the ones they found in Roman and canon law texts.

Justices sought to craft themselves as authors in these documents. They created judicial voices and personalities for themselves in these texts. They silenced other voices, the voices of local knowledge like the jury, in favor of their own. The plea rolls were the spaces they used to imagine themselves as the law's priests and to turn that imagination into a reality. In the process they made the argument that the type of administrative work they performed was different from, and superior to, the types of administrative work performed by other royal servants: it was law.

This project began with a look at the plea rolls of the royal justice Henry de Bratton. Bratton is perhaps today the most famous thirteenth-century English justice—which, admittedly, is not a high distinction—because *Bracton*, most of which he did not write, was attributed to him

for the 700-year span between 1277 and 1977. Bratton's rolls show signs that he was trying to craft his own image as the learned Roman jurist in these administrative documents. They also show what looks very much like the influence of *Bracton* on Bratton's thought. Bratton used Roman law terminology on his rolls, something that we rarely find in the rolls of other justices.

At around the same time I was looking at Bratton's rolls, I was reading about the epitomes of *Bracton* written at the end of the thirteenth century: *Thornton*, *Britton*, and *Fleta*. *Bracton* contains 527 references to cases decided in the royal courts and recorded on the plea rolls. Surprisingly, though, all three of the epitomes cut the cases out of the text entirely. None of the case references survived the process of editing *Bracton* into a shorter text that could be useful to lawyers and justices of the late thirteenth century. This is true even though we are reasonably sure that two of the epitomes—*Thornton* and *Fleta*—were written by justices themselves, who might have included cases from their own rolls if they wished to update the treatise. Why the cases were cut is an interesting question that I will explore more in the conclusion to this dissertation, but this question led me to another set of questions: if the cases decided in the king's courts were so unimportant to the epitomizers of the late thirteenth century, why were they important to the writers of the early thirteenth century? In other words, before we ask why the cases were cut out of the treatise, we need to ask why they were there in the first place. What sort of cultural and textual practices led the authors of *Bracton* to include references to decided cases—a choice that seems obvious to modern common lawyers, educated using the case system—in the treatise at all?

In this dissertation I will examine the culture of the royal justices and their clerks in the period between 1220 and 1260. I will show that this was a period when, through their writing, they not only transformed the plea rolls from an administrative genre to a type of didactic legal literature, but also used the literary space they found in the plea rolls to carve out a space for

themselves in the royal administration. In this age before there were any professional lawyers, who would only start to appear on the scene towards the end of the period discussed in this dissertation, to compete with the justices of the royal courts for the label, the justices appropriated the imagery of the Roman jurists. They began as the king's servants who were responsible for administering the system of writs that had been created in the late twelfth century; they ended as jurists. The modern word *jurist* describes this group very well. It has different connotations than the word *lawyer*. *Jurist* implies a learned person whose interest is in the law as an academic pursuit and whose relation to it is one of detached observation. This is precisely the way this group of justices and clerks wanted to present themselves. They were not servants of the king, but scholars and priests of an impersonal law.

While this coterie of justices was, as I will argue, important for setting the tone of the legal literature that would be produced in the fourteenth century and beyond, I must qualify my claims for this dissertation. The literary and professional aspirations of a circle of half a dozen to a dozen people cannot be the whole story of the genesis of the English common law particularly since, as we will see, this circle was unable to produce itself after the 1260s. The rise of lawyers—the attorneys and serjeants—in the second half of the thirteenth century must have been important to the sense that law existed as a specialist discourse in an independent space. Jurors, coroners, sheriffs, and litigants all must have played roles in the development of the early common law, as well. The circle of justices who turned the plea rolls into legal literature is an important piece of the puzzle, though. Placed at the center of the king's system of justice, these justices were in the perfect position to influence the discourse.

## Case Collecting in the Thirteenth Century

We will look at several types of texts produced by this coterie of justices and clerks. The history of the plea roll collecting in thirteenth-century England has been buried for a long time under the weight of the history of the treatise *De Legibus et Consuetudinibus Angliae*, commonly called *Bracton* due to an early misattribution to the royal justice Henry de Bratton. *Bracton* is the largest compendium on English law we have from the Middle Ages, the last attempt for several centuries to put the whole of English law, whatever that may have meant to the author, into a *summa*. As a text that has the reputation of being one of the foundational texts of the common law, it has received quite a bit of scholarly attention. *Bracton* also contains 527 references to cases drawn from the plea rolls.

Several texts, apart from *Bracton*, survive from the thirteenth century that show that people were collecting cases from the plea rolls: a collection called *Bracton's Note Book* and several rolls marked with instructions for a copyist. Until the 1970s, however, the story of case collecting in thirteenth-century England was a relatively simple one: all of the existing case collections had been made in preparation for *Bracton*. In the late nineteenth century, the legal historian Paul Vinogradoff discovered a collection of 2,000 cases from the plea rolls in the British Museum.<sup>4</sup> Shortly thereafter, Frederick William Maitland made his first foray into legal history by producing an edition of this case collection. After finding some overlap between the cases in *Bracton* and those in this case collection, Maitland decided that the collection was probably made at the instruction of Henry de Bratton to use in selecting the cases that would ultimately end up in the treatise and dubbed it "*Bracton's Note Book*." *Note Book* in hand, Maitland decided to take his research one step further, and to go back to the plea rolls and find the original case records that were copied into the *Note Book*. When he examined the rolls, he

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<sup>4</sup> British Library MS Add. 12269; BNB, 1: xviii-xx.

found that someone had sidelined some cases, written “*volo*” (“I want this”) next to others, and placed chapter headings over others.<sup>5</sup> Maitland thought he had found the instructions Henry de Bratton had left for his scribes, telling them which cases to copy into the *Note Book*, and that he could therefore draw a straight line from marked plea rolls, to the *Note Book*, to *Bracton*. Case collecting in thirteenth-century England was, according to Maitland, all part of a single project and all the work of Henry de Bratton and his small army of clerks. Maitland was humble about his assertions, though, asking at the end of his book that someone prove him wrong.<sup>6</sup>

In 1977, Samuel Thorne did precisely that. In that year he published the third volume of his edition and translation of *Bracton* and argued compellingly that Henry de Bratton could not have been its primary author since most of the work for the treatise was completed in the 1220s and 1230s, when Henry de Bratton was most likely a teenager.<sup>7</sup> He also showed that the *Note Book* was not the source for most of the cases in the treatise, and that the marked rolls were probably not used to make the *Note Book*.<sup>8</sup> *Note Book*, marked rolls, and *Bracton* were all separate projects.

Thorne’s work shows us that there were at least half a dozen independent collections of cases circulating in the early to mid thirteenth century. The *Note Book* was one collection, but, as I will show in chapter two, I think it likely that it was copied from at least two other, earlier collections. These two collections are now lost. The sideliner may be the same person who made one of the collections upon which the *Note Book* was based.<sup>9</sup> That still leaves “*volo*,” the headliner, and the author of *Bracton*, not to mention the author of the late thirteenth-century

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<sup>5</sup> BNB, 1: 66-68.

<sup>6</sup> BNB, 1: 116.

<sup>7</sup> TI3, xii-xvi, xxiv-xxviii.

<sup>8</sup> TI3, xxxiv-xxxvi.

<sup>9</sup> TI3, xxxvi.; BNB, 1: 67.

collection *Casus et Judicia*.<sup>10</sup> These collections appear to have drawn from the rolls of two justices: Martin of Patishall and, to a lesser extent, William of Raleigh, Patishall's former clerk. We get a very different picture of what was going on than we did when we thought this was all the work of one person. There seem to have been several people, centered on the circle of Martin of Patishall and William of Raleigh, who thought that cases were important. I will suggest that the judicial *familia* of Martin of Patishall and William of Raleigh used case-based texts to teach the law to the clerks of the royal courts—who often became judges themselves—through decided cases.<sup>11</sup>

### **The Plea Rolls: Unlikely Case Law**

It is rather remarkable that, in the thirteenth century, English judges began to read, write, and copy cases as if they were a didactic literature, particularly in light of England's case tradition at the time: the plea rolls. Plea roll entries at the beginning of the thirteenth century were little more than simple administrative records. They did not look much different from Pipe Roll entries, which recorded payments to and from the Exchequer, or from the somewhat later patent or close rolls, which recorded the king's correspondence by letters patent and letters close, respectively. There were a few fairly standard forms that plea roll entries could take. Entries recording court appearances to begin litigation or to appoint an attorney might take up only a few lines. The following, fairly typical entry from 1199 shows some of the elements of that terse, administrative form:

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<sup>10</sup> British Library MS. Add. 35179, fos. 36-9; William Huse Dunham, ed., *Casus Placitorum and Reports of Cases in the King's Courts 1272-1278* (London: Bernard Quaritch, 1952), lxxv-lxxxiv.

<sup>11</sup> There is no completely standard spelling convention for Raleigh's and Patishall's toponyms. Raleigh can also be spelled Raleigh. Patishall can also be spelled Pateshull. I have chosen Raleigh and Patishall more or less at random.

Buckinghamshire—Robert son of David seeks against Lefwine the merchant 2 acres of meadow with appurtenances in Aylesbury, which David the father of the aforesaid Robert, as he says, gaged to the aforesaid Lefwine for a term which has ended. Alan the son of Lefwine, having been put in his [Lefwine's] place, seeks the view. Let the view be had. A day is given to him from Easter day in one month: Meanwhile let the view be made.<sup>12</sup>

This entry combines several elements, which could appear in one entry or several. First, it tells us, by way of an abbreviation in the margin, that the case arose in Buckinghamshire. It tells us who the parties are: Robert, who seeks the land, and Lefwine, who holds it. It tells us how much land, 2 acres, and what kind of land, pasture, the demandant is claiming. Most entries tell us what kind of writ the demandant brought to begin the case. This one does not do so explicitly, although we can guess from the relatively standard form that it takes that Robert brought a writ of right; writs of right usually take the form “A seeks X acres from B as his right.” Although we are missing the words “as his right,” the rest of the phrase is enough to point the reader to that writ. After the phrase indicating the type of writ, we get a little bit of information pertinent to the case. Robert's father, David, had held the land and had gaged it to Lefwine's father at some point in the past.

All of that was contained in the first sentence of the entry. The second sentence does something slightly different, and could have been included in a second entry if done at a later sitting of the court. It tells us that Lefwine's son, Alan, will be acting in his place, as his attorney, and will have the power to bind him. It also tells us about the first action Alan took as his

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<sup>12</sup> “*Buk'*—*Robertus filius Davidi petit versus Lefwinum Mercatorem ii. acras prati cum pertinenciis in Ailesberi, quas David pater predicti Roberti, ut dicit, invadiavit predicto Lefwino ad terminum qui preterit: Alanus filius Lefwini positus loco ejus petit visum inde. Habeat visum. Dies datus est eis a die Pasche in j. mensem: interim fiat visus.*” CRR, 1:102.

father's representative: he requested that the jurors view the land in question. The last few clauses tell us about the process the judges ordered. They scheduled a day for the case to be heard and ordered that the jurors view the land before that date.

Because this is an administrative entry, economy is the aesthetic, and much is left implicit. The clerk did not feel the need to use the technical language specific to the writ of right because one could read into the general wording of the entry. This entry tells us about the parties and the law only incidentally to telling us about the mechanics of the case. It tells us nothing about the gage, for instance, except that it was expired. Why did David gage the land to Lefwine? How long ago? What was the term of the gage? How long ago did it expire? What steps did Robert take before he came to court to try to recover the land? None of these questions are answered in the fifty-three words of the entry. The court is concerned with the bare bones of the case and with what it told the parties at the end of it; it is concerned with what is going to matter when the court hears the case again.

The plea roll entry expanded over the course of the thirteenth century, but it did not expand to include more information about the parties or the nature of their dispute; it expanded to include legal abstractions that took the record further and further away from the particulars of the dispute at hand and into a realm of universals. Legal historians, for the most part, have not found this particularly troubling. They have treated plea rolls as resources for discovering legal doctrine rather than as a phenomenon in themselves. They have placed most of their emphasis on the treatises of the twelfth and thirteenth centuries, primarily the two that claim to be descriptions of the law of all England, the two treatises titled *De Legibus et Consuetudinibus Angliae, Regni Angliae*, or *Anglicanis*, commonly called *Glanvill* and *Bracton* after the royal justices who were once thought to have written them. The labels “The Age of Glanvill” and “The Age of Bracton” have become commonplaces used to describe the last quarter of the twelfth century and the first

half of the thirteenth century, respectively, and have come to mark periods in the development of English law.<sup>13</sup> These learned treatises, neatly packaged summations of the medieval common law, are still the sources historians are most likely to go to for their knowledge of the black letter law of the thirteenth century, in spite of more recent skepticism about the general applicability of the doctrines they contain. *Bracton* especially, as it is a much longer and more comprehensive treatise, is your one-stop shop for all of your thirteenth-century legal needs.

It feels natural to go to a treatise to find law in the thirteenth century. But why does it feel natural? Lawyers and historians consult the *Bracton* we call *Bracton* because it lines up very easily with our modern conceptions about what law should be. *Bracton* tells us about the difference between law and fact. It tells us about abstract rights in property. On an even more general level, it tells us about disputes and how they are settled. All of this is what we, in the twenty-first century, expect to find in a treatise on law. What the author of *Bracton* was doing, though, was actually very radical. We look to *Bracton* because it divides up spheres of life along roughly the same lines we do. It separates the legal from the financial or the merely entertaining. People in the thirteenth century ordered their lives in different ways than we do today. As we will see in chapter one, in the thirteenth century, law was not yet the specialist activity that we think of today. The same people who sat in judgment in the courts also did many things in their roles as justices that we would not necessarily consider “legal” work. A “court” was not necessarily a place for law. Even “law” could mean something closer to “community” than to a system of rules that govern society. The *Bracton* authors’ notion of law was different, though. They thought about law as a specialist discourse, just as we do today, and we engage with the text more easily because of that.

In the nineteenth- and twentieth-century debates about *Bracton* it was popular to refer to

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<sup>13</sup> Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed. (London: C.J. Clay & Sons, 1887), 1:136-225. Ralph V. Turner, *The English Judiciary in the Age of Glanvill*

the *Bracton* author as a lawyer; the treatise is often described as lawyerly.<sup>14</sup> Scholars use the term “lawyer” as if it is an innocuous term for someone who is learned in the law. They certainly do not mean that he was a professional pleader. Professional pleaders were just starting to appear on the scene in the second half of the thirteenth century, and professional attorneys—the people who handled the procedural parts of a case—appeared around the same time.<sup>15</sup> But the word “lawyer” implies much more than someone who knows the law. Lawyers have a distinct culture; they are part of a profession with its own educational practices and a strong sense of identity. In the thirteenth century we see something like that sense of identity arising among the judges and clerks in the royal courts. A community formed around the plea rolls and the educational practices associated with the plea rolls. In this dissertation we will look more closely at *Bracton* for evidence of the ways these judges and clerks perceived themselves and their place in the royal administration. We will see that *Bracton* is, like the plea rolls, not just a source for the black letter law of the thirteenth century, but a phenomenon in itself.

### **Emic and Etic**

Our relative comfort with the treatise culture of thirteenth-century England can actually hinder us when trying to understand law in thirteenth-century England. One of the issues with writing “legal” history is that the very conceptualization of law was in flux in the thirteenth century. Anthropologists distinguish between two different ways we can use conceptual terms when writing about a culture. A term is emic when we are describing the way the culture itself

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*and Bracton, c. 1176-1239* (Cambridge: Cambridge University Press, 1985).

<sup>14</sup> “Let us indeed remember, that Englishmen have never admitted in theory or in fact that none but a lawyer is fit to judge his fellows.” BNB, 1:5. See also BNB 1:45, calling Martin of Patishall a lawyer, and Paul Brand, “The Age of Bracton,” in *The History of English Law: Centenary Essays on ‘Pollock and Maitland’* ed. John Hudson (Oxford: Oxford University Press, 1996), 86, where Brand mentions that Pollock and Maitland, 1:205, call him one of the great lawyers. Richardson says that it was not unusual “for a lawyer of his day” to discard citations to authority in treatises. H.G. Richardson, “Studies in Bracton,” *Traditio: Studies in Medieval History, Thought, and Religion* 6 (1948): 84. John Barton thought that the editor of the treatise “was lawyer enough to recognize” outdated material.” J.L. Barton, “The Mystery of Bracton,” *Journal of Legal History* 14 (1993): 86.

uses that term. It is etic when we are using it in a way that the culture would not use it, viewing it from the outside and creating a theoretical language to talk about that culture. When we write legal history, we often confuse the emic with the etic. When we use law in the etic sense, we assume a certain amount of continuity in the thirteenth century, that we can usefully describe the procedures of the royal courts as law for the entire period from 1200 to 1300. When we look at emic uses of the term law, though, we find significant discontinuities between the beginning of the thirteenth century and the end.

Using terms in the etic sense can be extremely helpful for comparing ideas across cultures or time periods and for relating to periods that speak in very different languages than we do. Talking about the Anglo-Saxon “state” can be useful when discussing the historical development of the English state, even though people in Anglo-Saxon England had no equivalent word and never thought about their political organization in that way. We are using the term as shorthand for a set of characteristics that we want to study. Thus, we might define the state as the entity which has a monopoly on the legitimate use of violence within a discrete territory, as Max Weber did.<sup>16</sup> Weber did not intend to say that there was some Platonic form of a state, and that this is objectively what the word “state” must mean across temporal, cultural, and physical space. His intention was to compare the entity which monopolized the legitimate use of force within a discrete territory, and so he filled the term “state” with this meaning. If we were to apply Weber’s definition to Anglo-Saxon England, it would be to see if Anglo-Saxon England met these criteria. If it did not, it would tell us something about the difference between Anglo-Saxon forms of political organization and, say, modern American forms of political organization.

There is a real danger in using terminology in the etic sense, though. Imposing a modern, Western term on a context in which it does not apply can give us a very skewed view of what

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<sup>15</sup> Paul Brand, *The Origins of the English Legal Profession* (Oxford: Blackwell, 1992), 55-67.

was happening in that context. If one argues, as I do, that the state and the law exist primarily in the realm of discourse, that they are not composed of individuals, procedures, and institutions so much as the way people talk about, write about, and imagine those individuals, procedures, and institutions, then the discourses of the state and of law are very culturally specific. The Anglo-Saxon “state” is an imposition of later centuries. No one living in the 10th century would have thought of power as existing in that way. Gerhard Baaken has similarly argued that the political history of twelfth- and thirteenth-century Germany has suffered because it has been called “political,” a term that would have had no meaning to people living at the time.<sup>17</sup> In the colonial context, this kind of imposition has had disastrous consequences. To take one example, the imposition of the category of the “philosophical” in nineteenth-century Africa had the result of privileging certain types of knowledge that European colonizers recognized as legitimately philosophical and of subalternizing other types of knowledge, which did not fit within that European category.<sup>18</sup> Likewise, the ossification of various practices—social, religious, agricultural, etc.—into codified “customary law” in Africa actually changed the way societies operated, often to the detriment of certain social groups, like women and younger men.<sup>19</sup> The colonizers, by “legalizing” practices, molded society in a way that made sense to Europeans. The Western notion of law as a separate sphere of activity thus acted as a prism through which colonizing Europeans and colonized Africans viewed old practices in a new, and distorted, way. Law served as one of the “interpretive constructions the members of a society apply to their experiences,” to borrow a phrase from Stephen Greenblatt.<sup>20</sup>

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<sup>16</sup> Max Weber, *The Theory of Social and Economic Organization*, trans. A.M. Henderson and Talcott Parsons (New York: Free Press, 1997), 154.

<sup>17</sup> Gerhard Baaken, “Recht und Macht in der Politik der Staufer,” *Historische Zeitschrift* 221, no. 3 (1975): 553-570.

<sup>18</sup> Walter D. Mignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton, NJ: Princeton University Press, 2000), 10;

<sup>19</sup> Terence Ranger, “The Invention of Tradition in Colonial Africa,” in *The Invention of Tradition*, ed. Eric Hobsbawm and Terence Ranger (Cambridge: Cambridge University Press, 1983), 211-262.

<sup>20</sup> Stephen Greenblatt, *Renaissance Self-Fashioning from More to Shakespeare* (Chicago: University of Chicago Press, 1980), 4.

One way to avoid falling into this trap is to avoid using terms like “law” and “state,” which did not exist in the Middle Ages, and instead to use the language that the people who lived at the time used to refer to their own practices. This is using language in the emic sense. Using terminology in the emic sense can be hazardous, as well, though. In modern discourse, terms like “law” and “state” are not value-neutral. To 21st-century people, state-less and law-less societies are societies that have failed in some respect. To deny that a society had something called law can be seen as culturally insensitive, even when the goal is not to deny that the society is sophisticated, but rather to understand it in the terms the people who lived in that society understood it.<sup>21</sup> There is a way to turn this type of thinking on its head, though. Instead of thinking about how different the people who lived in medieval England look to us, we should try to think like medieval people, and to look at our own world through their eyes. Our discourses would seem as bizarre to them as theirs seem to us. Law is, after all, a construct that we impose upon the world. By looking at the shift in discourses in the thirteenth century towards the clearly defined sphere of the legal that we still imagine to exist today, we can capture a moment where discourses were colliding, where people were struggling with different modes of thought. We need not look at them as primitive. We can use them as a mirror for our own time.<sup>22</sup>

## **The Legal Sphere**

The shift in meanings, which I will describe in more detail in chapter one, was from an undifferentiated notion of law to a notion of law as existing in an independent sphere. This shift occurred not only in England, but in large parts of Europe, in the twelfth and thirteenth centuries.

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<sup>21</sup> Of course, it is only a very select audience of people that become incensed at cultural insensitivity directed at twelfth-century English people.

<sup>22</sup> This is something I hope to return to in a new project, titled “Property Before Property,” which looks at the ways people related to things before the Romanized language of property, which is still with us today, began to dominate the discourse in the thirteenth century. The people who began to use the new property-based discourses were legitimately confused by them because they seemed so unnatural to people who were used to dealing in seisin and

Harold Berman has described it as “the legal revolution.”<sup>23</sup> Berman developed a multi-part definition of post-revolutionary Western law. I disagree with Berman’s notion of an international revolution, and instead see the spread of this new legal thinking as highly contingent. In England’s case the shift was the result of a small group of mid-level administrators who used these legal discourses to strengthen their own position in the government and to increase their own prestige; it was not the result of the high-level struggles over the Gregorian reforms that Berman posits as the cause. I agree with Berman, however, that law as we use the term today, in the sense of what I will call the legal sphere, is very specific to Western discourse. I believe we can even take Berman’s argument a step further and say that the way we use the term ‘law’ today is very specific to Roman discourse and it was that Roman discourse of law as an independent sphere that created the legal systems that have come to dominate the world today: canon and civil law (the Continental European *ius commune*), common law, and even Islamic law, which, although it distanced itself early on from the Roman past, arose in former Roman provinces under Roman influence.<sup>24</sup>

What does this legal sphere look like? I will use some of Berman’s criteria, which I find useful for describing the shift in discourse that occurred in the texts I am examining. Berman posited that the new law of the high Middle Ages was characterized by 1) “a relatively sharp distinction... between *legal* institutions... and *other* types of institutions,” 2) a “special corps of people” who were entrusted with the administration of legal institutions, 3) a “specially trained in a discrete body of higher learning” in which this corps of professionals was trained, 4) that the body of legal learning in which the legal professionals were trained “stands in a complex,

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right. It is a case where the language we use today would have seemed bizarre to people living in the twelfth and thirteenth centuries.

<sup>23</sup> Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1982), 18-19.

<sup>24</sup> See Patricia Crone, *Roman, Provincial, and Islamic Law: The Origins of the Islamic Patronate* (Cambridge: Cambridge University Press, 2002).

dialectical relationship to the legal institutions, since on the one hand the learning describes those institutions, but on the other hand the legal institutions, which would otherwise be disparate and unorganized, become conceptualized and systematized, and thus transformed, by what is said about them in learned treatises and articles and in the classroom,” and that 5) “law is conceived to be a coherent whole, an integrated system, a “body,” and this body is conceived to be developing in time...”<sup>25</sup> Although I find these criteria useful for determining what it means for something to be called law in the modern, Western sense, I shall re-order Berman’s list chronologically for present purposes. In the English royal courts, the dialectical process that Berman describes in step number 4 had to come first. Justices and clerks learned Roman and canon law in the classrooms and began to define their practices, their personnel, and their body of learning as discrete and separate from the rest of the royal administration. They adopted from Roman and canon law the idea that the body of practices and doctrines formed a coherent whole that could develop over time. It was Roman and canon law that gave them the language necessary to make a sharp distinction between their own “legal” institutions and other institutions like Chancery.

### **Legal History and Lawyers’ History**

When we do “legal” history we assume that the sorts of things people did in twelfth-century England have something in common with the things we think of as “legal” in modern society. We are often confused because people in the twelfth century used terms that are translated by the word “law” today (Latin *lex*), and in some cases are even cognate with it (Old French *lei*, Old Norse and Old English *laga*). But this assumes a certain continuity in “legal” thought, an area of thought that experienced a major break in the thirteenth century. Simply by

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<sup>25</sup> Ibid., 7-9. Berman does have other criteria that fairly describe Western law today, but that do not apply as well to the discourses of thirteenth-century jurists.

doing “legal” history we are confusing the etic with the emic, assuming that the “law” we see in the twelfth century can be merely compared to the law we know today without a great deal of intellectual unpacking.

It is in the area of continuity and change that the methods of law and the methods of history often collide with each other. Historians who are situated within history departments generally see a present purpose to their work as a necessary evil. One must, of course, translate the past into the language of the present to make a work of history understandable to a modern audience. The past must be explained using the language and the concepts of today. Historians also choose their topics based on the needs of their own time and place. But the historian working in a history department is ultimately concerned with understanding the past on its own terms, to the extent that it is possible to do so.

Lawyers, on the other hand, do not usually see presentism as something to be avoided or minimized. Informing present debates is an important role for both the historical academy and the legal academy, but legal academics see it as far more central to their identity as professionals. They tend to prefer topics of present interest and research their roots over long periods of time. James Q. Whitman’s *The Origins of Reasonable Doubt: The Theological Origins of the Criminal Trial*, for instance, follows the modern Anglo-American burden of proof standard for criminal trials from its origins in medieval theology to the present.<sup>26</sup> Alternately, some legal historians look at historical legal institutions for their potential to inform current debates. Marianne Constable’s *The Law of the Other*, is a hybrid of history and modern legal criticism. Constable looks at the medieval mixed jury, which included people who represented the nationalities of the plaintiff and the defendant, as a model for reforming the modern American jury.<sup>27</sup>

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<sup>26</sup> James Q. Whitman, *The Origins of Reasonable Doubt: The Theological Origins of the Criminal Trial* (New Haven: Yale University Press, 2008).

<sup>27</sup> Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge* (Chicago: University of Chicago Press, 1994).

Lawyers are also trained to be advocates. Their impulse is to take a position and to find all of the evidence that supports that position. This combination of writing for a present purpose and writing in the style of advocacy, rather than the style of neutral observation, can lead legal historians who are institutionally and professionally placed within law to write what one lawyer legal historian has called “lawyer’s history”:

A genre of writing in which the author rummages through the attic of the law for a story that will support the argument that he wants to make. It is a species of brief writing, history in the service of present politics rather than as an attempt to render the past in its pastness, to explain why the past is different from the present, why “they” are different from “we” in their understanding of the world that naively we believe both “we” and “they” inhabit.<sup>28</sup>

Lawyer’s history can be problematically uncritical. By picking and choosing those aspects of the past the author finds most relevant to the present it can seriously misrepresent the past. For instance, a historian who seeks to find the origins of contract law will probably emphasize actions like covenant and debt when he discusses the thirteenth century, actions which cover similar types of obligations arising out of an agreement between two parties. To emphasize covenant and debt is to seriously misrepresent law in the thirteenth century, however, which focused much more on pleas concerning land than on those concerning obligations.<sup>29</sup>

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<sup>28</sup> John Henry Schlegel, “Damn! Langdell!,” *Law and Social Inquiry* 20 (1995): 766.

<sup>29</sup> For an example, see J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths, 2002), 317-378, where Baker uses the modern categories of contract law to explain the development of medieval and early modern English law.

## English Practice and Roman Law

The problems of lawyers' history—the focus on doctrine, the confusion of the emic and the etic, and the assumption that law is an a-historical constant—are all particularly prevalent in the literature on the influence of Roman law on the early common law, a literature which is important to the story of case collecting in the thirteenth century.<sup>30</sup> This literature makes it seem natural for the people who worked in the king's courts in the twelfth and thirteenth centuries to turn to Roman law for analogues for their own law and ideas for its reform. Underlying this narrative is the unstated assumption that the people who worked in the royal courts would have thought of what they did as law, on some level analogous to Roman law, and that, when they wanted a model, or a source of prestige, they would have looked to Roman law to model their own practice. Lawyer's history thus assumes continuity between the outlook of royal justices in the twelfth century and the outlook of justices in the thirteenth century. The analogy that the justices made between their own work and Roman law was itself an important step in "legalizing" the practices of the royal courts. It was through the connection that the justices of the thirteenth century, in particular, made with Roman law that they transformed the work of the courts from administration into law. It is thus impossible to write a "legal" history that embraces the twelfth and thirteenth centuries. To do so is to read the developments of the thirteenth century into the twelfth.

The debate over the influence that Roman law did or did not have on the development of the early English writs is long-standing.<sup>31</sup> Frederick William Maitland's writings were influential in setting the tone for the later literature. Maitland saw the genesis of Henry II's law reforms,

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<sup>30</sup> The following discussion is largely taken from my paper "Between England and France: A Cross-Channel Legal Culture under the Angevin and Capetian Constitutions," which will appear in the volume *Law, Justice, and Governance: New Views on Medieval English Constitutionalism*, ed. Richard Kaeuper. The manuscript of the volume is currently under review at Brill.

which we will examine in more detail in the next chapter, in Roman law thinking.<sup>32</sup> As an example of how Maitland thought the Roman law borrowing worked, let us look at one of the most famous of Henry's reforms, the assize of novel disseisin, which allowed someone who had been recently ejected from his land to sue to get it back. Maitland believed that, in the late twelfth century, the writ of right, another writ that could be used to recover lost land, was not working, since its procedure was cumbersome and slow.<sup>33</sup> Henry II and his councilors saw that the same was true of the Roman *vindicatio*, the action for *proprietas*, which settled the matter of who owned the thing against the entire world once and for all. It made perfect sense that the *vindicatio* was designed as a slow procedure; if the court is to determine something as absolute as the *proprietas* of the thing, it should go about it in a deliberate manner and make sure that everyone who might be able to claim the *proprietas* is heard. In most cases, though, one does not need to settle one's rights against the world once and for all. By way of example, let us imagine two neighbors, Titus and Lucius. When Titus has been holding a piece of land peacefully for as long as anyone can remember, and Lucius then comes to that land with some thugs, kicks Titus off of it, and sets up residence in Titus' house, Titus does not need to prove that he has a better right than anyone else in the rest of the world, only that he has a better right to the land than Lucius. Thus, the Romans created the possessory interdicts, which protected the last person in possession of the land, which did not determine anything with respect to who owned the land, and which were much simpler, faster, and easier to use than the *vindicatio*. Titus can thus bring an interdict—in this case an interdict *unde vi*—against Lucius to be put back in possession of the

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<sup>31</sup> For two recent surveys of the literature see Anne Duggan, "Roman, Canon, and Common law in Twelfth-Century England: The Council of Northampton Re-Examined," *Historical Research* 83 (2010): 379; Joshua C. Tate, "Ownership and Possession in the Early Common law," *American Journal of Legal History* 48 (2006): 281-313.

<sup>32</sup> Frederic William Maitland, *Equity: also, The Forms of Action at Common law: Two Courses of Lectures* (Cambridge: Cambridge University Press, 1913), 318-23.

<sup>33</sup> *Ibid.*, 318.

land.<sup>34</sup>

Of course, Titus may have been in possession of the land unlawfully, and Lucius may have ejected him from the land because Lucius actually owned it. If that was the case, Lucius, after losing in the *unde vi* action that Titus brought, could always bring his own *vindicatio* to prove his ownership. Maitland thought that Henry II's advisors had looked to the Roman example and used it to fix the problems with royal justice in post-anarchy England.<sup>35</sup> Thus, in the same way that a Roman litigant could bring an action on the possession and then on the property, a late twelfth-century Englishman, let's call him Alan, ejected from a piece of land could bring an assize of novel disseisin against his disseisor, Ranulph. If Alan lost at the novel disseisin, he could always bring a writ of right, a more cumbersome procedure, but one that could trump the novel disseisin and put him back on the land. Frederic Joüon des Longrais called this type of procedure the "double action," where there is a simple action that gives Alan less secure control of the land and a more complicated action that gives him more secure control.<sup>36</sup>

Maitland thus thought that Henry II's councilors looked to Roman law, adopted specific aspects of its procedure, and analogized its actions to their writs. This was a very direct type of influence that operated on a very practical level. But while Maitland's narrative does explain Henry II's law reforms very neatly, it has several weaknesses, the most serious being that it relies on a very few references from the end of the twelfth century. A charter of Archbishop Theobald uses the word *possessio* interchangeably with *saisina*.<sup>37</sup> Richard FitzNeal, in his *Dialogue of the Exchequer*, written in the 1170s or 1180s, uses the term "*proprietarios*" to mean "owners," suggesting that he knew something about Roman law, but then turns immediately to refer to the things they own as "*possessionis*," indicating that he knew these terms but was not overly

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<sup>34</sup> Barry Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962), 108-9.

<sup>35</sup> Maitland, *Forms of Action*, 318-23.

<sup>36</sup> Frederic Joüon des Longrais, "La portée politiques des réformes d'Henry II en matière de saisine," *Revue historique de droit français et étranger*, 4th series, 15 (1936): 540-71.

troubled by their technical meanings.<sup>38</sup> For their evidence, historians mostly rely, though, upon a few words in *Glanvill*, a treatise written ten to twenty years after the possessory assizes were created. The evidence that the *Glanvill* author was thinking very deeply about Roman law is sparse: he uses the word *proprietas* three times and the word *possessio* only once.<sup>39</sup> Moreover, for the *Glanvill* author, the words seem little more than tags for types of writs. He does not import any of the Roman law substance of possession or property into his treatise, and discusses none of the implications that might follow from a writ being designated either possessory or proprietary. While he drew “much inspiration from learned law,” the author of *Glanvill* “remained faithful... to the *esprit coutumier*,” as one scholar from the civil law tradition put it.<sup>40</sup> By itself *Glanvill*’s use of possession and property is hardly enough to prove that the king’s servants had lifted the idea for the new writs that we call the petty assizes from Roman law.

Why, then, do historians look to Roman law to find the origins of Henry II’s program. The answer is that the authors of *Bracton*, writing in the thirteenth century, wanted us to see English law through a Roman lens, and made a great investment of time, parchment, and ink in convincing us that English law could be reconciled with Roman law. Where the *Glanvill* author does little more than use Roman terms as rough synonyms for their English counterparts, the *Bracton* authors import the substance of the Roman law of possession and property into their discussions of seisin and right. Reading back from *Bracton*, it is easy to see *Glanvill* as the mere tip of an iceberg; the one small piece of evidence for a lost late twelfth-century Roman law program, rather than as the work of someone who had a bit of Roman law training borrowing terminology.

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<sup>37</sup> Avrom Saltman, *Theobald, Archbishop of Canterbury* (London: Athlone Press, 1956), 390, no. 167.

<sup>38</sup> Ralph FitzNeal, *Dialogus de Scaccario*, ed. Emilie Amt and S.D. Church (Oxford: Clarendon Press, 2007), 160-1, book II, c. xiii; Van Caenegem, *Royal Writs*, 311.

<sup>39</sup> GDL, 4, 6, 132 (book I:3; book I: 7; book XI: 1). When the author turns to the assizes, though, he does not call them writs of possession, but writs of seisin. *Ibid.*, 148, book XIII: 1.

<sup>40</sup> Jean Yver, “Le Bref Anglo-Normand,” *Tijdschrift voor Rechtsgeschiedenis* 29 (1961): 324.

It is thus with hindsight that we read Roman law influence into Henry II's procedural reforms. *Bracton* convinces us that there must have been more to *Glanvill's* Roman law borrowing than was really there and *Glanvill* convinces us that there must have been some Roman law influence on Henry himself.<sup>41</sup> We also come to this problem with an unhealthy dose of presentism, though. We, as modern people who are used to thinking about law as an independent discourse, are comfortable when we find law in the Middle Ages. It is easier for us to relate to Roman law discourses neatly packaged in treatises, even if most people living in England, and even most people in the royal administration, in the thirteenth century would have thought about the things the royal courts did.

The law only exists to the extent that we imagine it existing, and if Henry II and his councilors were not imagining their reforms as existing within a discourse called law, then it becomes impossible to write a "legal" history that embraces the twelfth and thirteenth centuries. To say that Henry II's reforms were legal reforms is to confuse the emic with the etic. It is to assume that the people who brought about these reforms thought about them as legal when what we mean to say is that, according to our own, modern way of categorizing the world, these reforms would fit into a rubric we call "the legal." The fact that the people who reinterpreted

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<sup>41</sup> John Makdisi posits that Henry II's councilors borrowed their new procedures from a different, previously established body of law, Islamic law, which he argues could have come to England through the Norman kingdom of Sicily. I will not treat the Islamic law thesis in depth here because it is not a connection that the jurists of the 13th century made. William of Raleigh and Henry de Bratton tried to make the case that their law was equivalent to and borrowed from Roman law; they did not make the case that it was borrowed from Islamic law. Makdisi raises some intriguing possibilities that have received little attention from historians of English law. His specific arguments are not very convincing, however. In order to make his argument for finding the origins of the jury in the Maliki school's institution of *lafif*, by which a group of twelve witnesses could be called upon to establish a fact, Makdisi is forced to discount the royal and local inquests that had been used throughout Western Christendom for several centuries. John A. Makdisi, "The Islamic Origins of the Common Law," *North Carolina Law Review* 77 (1999): 1685-7. While, as Makdisi points out, these inquests were not uniformly of twelve men, twelve was one of the more common numbers to use and had special significance in Christianity because of the twelve apostles and in Christianity, Judaism, and Islam because of the twelve tribes of Israel. *Ibid.*, 1686. Still, connections between Angevin procedures and Islamic law through the Norman kingdom of Sicily are possible. The English and Norman exchequers may very well have taken their lead from Roger II's *diwan*, particularly since Master Thomas Brown had worked in the Sicilian *diwan* before taking up a high post in Henry II's exchequer. *Ibid.*, 1723-30. Brown's activities in England and their connections to the Islamic legal and financial practices that had been adopted by Roger's court require further study.

these reforms in the thirteenth century reinterpreted them as legal adds to the confusion. It is thus the *Bracton* authors' Romanizing program, not Henry II's, combined with our own biases that makes us want to find Roman origins for Henry II's law reforms.

The group of royal clerks and justices who were responsible for *Bracton* were deeply invested in the idea first voiced by the *Glanvill* author, that "it will not be absurd to call English laws *leges*, though they are unwritten."<sup>42</sup> They set out to prove that English law deserved to stand beside the written laws and consequently took a great deal of their organizational principles and substantive law from Roman and Canon law. Their deep investment in showing that English law could be reconciled with the *ius commune* was something altogether new.

### **Moving Away from Lawyers' History**

There are ways to avoid "legalizing" discourses that contemporaries would not have recognized as legal. Academic legal historians have come to recognize the dangers of overly thesis-driven, teleological history, and are now seeking a better balance between present concerns and accurately representing the past. There are in fact a few different paths that lead away from lawyers' history. One is the "law as process" approach pioneered by anthropologists like John Comaroff and Simon Roberts.<sup>43</sup> This type of history, mostly written by people situated in history departments, focuses on the lived experience of the law from the standpoint of the people who used it as part of their lives. Stephen D. White's work on the *laudatio parentum* is an example of this type of scholarship. White explicitly takes the *laudatio*—an eleventh- and twelfth-century French practice whereby nobles wishing to donate land to religious houses received the consent of their relatives to the gift—out of the context of legal history. He argues

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<sup>42</sup> "*Sed non erit absurdum leges Anglicanas licet non scriptas leges appellare.*" BDL, 2: 19; "*Leges autem Anglicanas licet non scriptas leges appellari non videatur absurdum.*" GDL, 2, prologue.

<sup>43</sup> See John L. Comaroff and Simon Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (Chicago, University of Chicago Press, 1981).

that the previous treatments of the *laudatio* have failed to describe it properly because they have been written by scholars who wish to deduce a system of rules concerning land tenures from this practice; in other words, they want to derive the black letter from what people do.<sup>44</sup> White argues that people in eleventh- and twelfth-century France would not have thought in terms of a system of rules, or a legal system, but would instead have placed the *laudatio* in the context of several different types of relationships: familial, religious, and lordly. His goal is not to “reconstruct a consistent theory of real property law, but to find or reconstruct several different and potentially conflicting norms or adages about landholding,” norms and adages “that could have been explicitly or implicitly invoked, before or after the fact, to justify practices that legal theories supposedly explain by positing the existence of certain systems of land tenure.”<sup>45</sup> The law, to White, is largely a mechanism that people use to justify their social reality, usually after the fact, rather than an autonomous system that governs social relations from the outset. White’s analysis is designed not to recreate a legal system, which in any event he does not think people in France in his period could have imagined, but to see what the *laudatio* might be able to tell us about how people experienced landholding, about how they perceived their relationship to land in the eleventh and twelfth centuries, before a system of tenures was invented.

The history of the disputing process is one of the most fruitful expressions of this “law as process” approach to history. It tends not to identify itself as legal history, though, because one of the questions it asks is whether the actors in these processes were thinking about these institutions, formulae, and norms they used as legal, and what that would have meant to the participants in the process themselves. Paul Hyams has shown that, to people living in twelfth- and thirteenth-century England, the king’s court was just one of many places one might turn when one entered into a dispute; vengeance could operate alongside law. Hyams places going to

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<sup>44</sup> Stephen D. White, *Custom, Kinship, and Gifts to Saints: The Laudatio Parentum in Western France, 1050-1150* (Chapel Hill: University of North Carolina Press, 1988), 132-145.

court on a spectrum of things that a twelfth-century person might do when he felt wronged, which also included private self-help, going to a big man who might be able to obtain redress on one's behalf, or "lumping it" and accepting the wrong.<sup>46</sup> Daniel Lord Smail has shown that the same was true of the courts in late medieval Marseilles. Smail looks at notarial acts and court cases through the lens of hatred, which he sees as a constructive social force. Hatred was not a "departure from the norm" for people in Marseilles; it was itself a powerful norm that structured social relationships, constituted social groupings, and conferred status upon people.<sup>47</sup> For Smail, "the courts became venues for the pursuit of hatred."<sup>48</sup> Smail places law in the context of hatred, instead of placing hatred in the context of law. By making this move, Smail is positing that hatred is the more important social category, the one that people in Marseilles would have identified with and experienced. The law courts, with their specialized discourse, were one of the places where that hatred could be played out, but the lived experience of thirteenth-century Marseilles was more about hatred than it was about law.

An analytical framework that sees law as process has many advantages, for the historian. In the 10th century very few people, if anyone at all, thought about law as a complex and internally consistent system of rules. One only starts to see this kind of thinking in the universities, beginning in the 1080s with the advent of Roman law teaching in Bologna.<sup>49</sup> By stepping outside of the law and looking at the ways people thought about land without reference to this modern idea of "the legal," the historian of law as process can get a more accurate picture of how people ordered their lives. For the later Middle Ages, when there was an independent sphere of legal thought and when law was a discrete discourse, this type of approach can help us

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<sup>45</sup> Ibid., 145.

<sup>46</sup> Paul R. Hyams, *Rancor and Reconciliation in Medieval England* (Ithaca, NY: Cornell University Press, 2003), 146-7.

<sup>47</sup> Daniel Lord Smail, "Hatred as a Social Institution in Late-Medieval Society," *Speculum* 76 (2001): 110.

<sup>48</sup> Ibid., 121.

<sup>49</sup> Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), 45-6.

to look at society in a more holistic way, because even if the approach recognizes the existence and power of legal norms in society, it does not assume that they are the most important norms. Smail and Hyams, for instance, argue that emotions—hatred and anger, respectively—were more important to social relations than law, to the point that, in Marseille, for instance, law became a servant of socially constructed hatreds.<sup>50</sup>

There are also disadvantages to this type of analysis, particularly for the period after 1200, however. It has a tendency to discount the power of law to create norms and to shape social relationships. When law is taken away from the center of the analysis and some other analytical category, like hatred, put in its place, law largely ceases to explain people's actions and becomes a weapon in the arsenal of hatred; people use the law instrumentally. But law is one of the most powerful ideas in world history. There is a debate in law schools currently over the increasing tendency to hire interdisciplinary scholars, who do “law and \_\_\_\_\_” (insert literature, history, anthropology, economics, sociology, psychology). Some scholars believe that law has its own disciplinary identity that it is losing due to the changes taking place in the legal academy. This is an identity that has to do with legal doctrine and the power of that doctrine to take on a life of its own. Thus, when we observe law from the outside, as the result of other social forces such as politics or economics, we lose sight of law's own power. The idea that someone must obey a system of abstract rules because it is “the law” has had an incredible hold on the world. There is power in language, and the language of an impersonal law has a powerful hold over people.

Most people follow the law most of the time not because they are threatened with the force of the state if they do not, but simply because it is the law and the law should be followed. Of course, laws do not just influence people's actions because the law is written on their hearts.

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<sup>50</sup> Smail, “Hatred as a Social Institution,” 91-93; Hyams, *Rancor and Reconciliation*, 34.

The coercive force of the state, the king, the lord, or the bishop certainly makes the law more efficacious. But coercive force on the one hand and linguistic and ideological force on the other work together. As Natalie Zemon Davis has demonstrated in her work on petitions for pardons in early modern France, murderers and man-slaughterers had to learn to speak the language of the law and of the state.<sup>51</sup> The power was in the language, as people began to imagine themselves as subjects who had to abide by the king's law. The penalty for not learning to speak the language was death. The court thus played a didactic function; it was a schoolroom with a particularly lethal ruler, which did not merely rap one on the hand, but actually took off one's head. People became aware of the law and adopted its modes of speaking and thinking about oneself, or else. The histories of the disputing process tend to play down the coercive side of law, because law appears as a tool that the ordinary person used to his own advantage, in the context of his own disputes, rather than as a coercive tool of a power—the king, the town, the diocese—which is trying to stamp its own authority upon the world and to legitimize that authority.

If one path is to try to take the things that we today would consider “legal” and to try to understand them in the (nonlegal) terms that people at the time would have understood them, another path, which works best in the thirteenth century and beyond, is to look at things that contemporaries clearly delineated as “legal” and to see how ordinary people understood them. Anthony Musson, for example, writing on the growth of legal consciousness among people in thirteenth- and 14th-century England, places law at the center of his analysis. He presupposes that there were norms and institutions that were considered legal, that these were largely elite norms and institutions, and that people became aware of them through the institutions of the law.<sup>52</sup> This move, towards a history that self-defines as “legal,” but which is not lawyer's history

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<sup>51</sup> Natalie Zemon Davis, *Fiction in the Archives: Pardon Tales and their Tellers in Sixteenth-Century France* (Stanford: Stanford University Press, 1987), 20.

<sup>52</sup> Anthony Musson, *Medieval Law in Context: The Growth of Legal Consciousness from Magna Carta to the Peasants' Revolt* (Manchester: Manchester University Press, 2001), 2.

in the narrower sense, has been popular in the last decade or so. Musson identifies his brand of scholarship as a “new legal history,” which moves beyond the doctrinal to look at the social and cultural effects of legal thought. Rather than trying to step outside of the realm of the law and see how people perceived their world in a broader way, it looks at legal institutions and norms and how people interacted with them as law, at how people began to think legally.

My approach is to look at law as it existed in the imagination. What we call *law* is simply a set of inchoate practices that involve things like punishing wrongdoers, protecting people’s land, forcing individuals to abide by the promises they make to each other, and making people pay up for the damage they have caused. These disparate things required a spectacular act of imagination so that they all might be united into a single category, or discourse, called *law*, and it is only by a further leap of the imagination that created specific fields within the law called *crime, property, contract, and tort*.

### **Law as Literature, History as Literature**

Where do we find evidence of law in the imagination? Since I am positing that the power is in the discourse, I will look at the ways discourses changed in the 13th century. I will examine texts not so much as evidence of change, but as sites where change took place. People began to write about what they were doing in new ways in the texts of the 13th century, and it was in these texts that they began to establish the discourse of law. In the latter half of the twentieth century, historians discovered a new layer of information that was hidden underneath the surface of texts. By taking the “linguistic turn,” historians began to appreciate the textiness of their texts and the ways those texts constitute, rather than describe, reality. The first step was taken by historians who turned to literary texts for the kinds of information they could get from the imagination of their authors. If a work of fiction makes a bad source for the narrative history of a

period, it makes a good source for the ways people in that period understood their world. The second step was then taken by historians who discovered the imaginary and the fictive in some texts that purported to be non-fiction: chronicles, annals, charters, and administrative records, to name a few. Natalie Zemon Davis' *Fiction in the Archives* is a magnificent example of what can be done when we read legal texts as if they are works of fiction. Davis looks at petitions for pardons for homicide in sixteenth-century France. Where previous scholars had mined them for biographical information or for evidence of legal doctrines, Davis looks at them for the ways people told their stories. She uses these texts—which were written in the context of the French legal system—to see how the accused, the pardon petitioner, represented the basic reality that he or she had caused someone else's death. The petitioner was not completely free to tell her tale any way she wanted. She was telling a story for her life and was required not only to tell the story in the format that the legal system required, a task that usually required technical assistance from a notary, but also had to tell a story that would be compelling to the king's judges, who would grant or decline to grant the pardon. The people who told the pardon tales that produced these documents were thus speaking in a coercive setting. Davis opens a window into how people imagined their world, how they told their stories in terms of sacred time, how they told their stories to line up with contemporary gendered ideals of guilt and innocence.<sup>53</sup> Davis' history explores how people began to change their personal narratives to incorporate the language of the early modern state, a language that appealed to the judges. Through these pardon tales, early modern people throughout the Kingdom of France learned to represent and imagine their lives as subjects of a royal state, and the body of institutions, individuals, and procedures began to exist as "the state" in the minds of early modern French subjects.<sup>54</sup> Davis thus ties these representations of reality directly to the course of history. The way people represented their lives

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<sup>53</sup> Davis, *Fiction in the Archives*, 29, 36-110.

<sup>54</sup> *Ibid.*, 20.

actually affected the way they lived their lives.

Literary theory began to influence legal scholarship in a wholehearted fashion with the rise of the law and literature movement starting in the 1970s. This movement has several different branches. Some scholars look at literary texts in which legal issues are implicated. More important for my own analysis, though, is the brand of law and literature scholarship that uses the techniques of literary analysis to understand legal texts. The book generally held up as the foundational text of law and literature, James Boyd White's *The Legal Imagination*, is a work of this "law as literature" style of scholarship. In this book and subsequent books, particularly *Justice as Translation*, White looks at the ways legal texts constitute subjects. White's primary goal is ethical: he wants to teach law students how to write about people as people, how to use legal language without denying people their humanity and turning them into abstract cogs in the legal system.<sup>55</sup> White focuses on several ways that writers in general, and legal writers more specifically, can craft texts. He focuses on the ways authors seek to create a community with their readers, whom the text includes in that community, and whom it excludes from it. Some authors try to dominate or patronize their reader, while others respect the reader as someone with whom to converse.<sup>56</sup>

The sense of community a text seeks to create—or deny—with particular types of readers will be a major issue in this dissertation. Whom does the text bring in and whom does it push away? How does the author imagine himself, and how does he imagine himself in relation to the reader? As we will see, the plea roll collections and treatises that were written in the thirteenth century were part of a process that created a legal sphere, a realm of specialist activity where the royal justices reigned. But the very process of creating this sphere pushed some people out. The "legal" audience was constituted in opposition to the non-legal types whose opinions no longer

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<sup>55</sup> James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990), 79, 195-197.

mattered. For example, as we will see most closely in chapter 4, the justices who wrote the plea rolls stopped treating litigants and juries as major players in the disputing process, and started treating them as abstractions, as the non-human entities who White decries in modern judicial writing. The plea rolls of the thirteenth century went a long way towards transforming Roger de Reyni and Robert of Schete into the nameless “plaintiff” and “defendant” of later legal speech or of the even more abstract  $\pi$  and  $\Delta$  of the modern law school classroom. The law simplifies what is a very human and probably very messy dispute by turning it into a set of propositions. The result is to make the litigants and jurors the objects of the system and the justices the real players in it, to turn the people into “caricatures” as White puts it.<sup>57</sup>

We will examine how the royal justices of the mid thirteenth century created a sense of self through their use of language in the plea rolls, in plea roll collections, and in the treatise *De Legibus et Consuetudinibus Angliae*. Although, as we have seen, the plea roll entry was a genre with strict conventions which did not allow much room for the presence of the entry’s judicial author in the text, royal justices found ways to make themselves felt in these texts, to construct themselves in the way they wanted to be viewed, as sages of the law in the model of the ancient Roman jurists and to push out other types of actors in the process.

## **Texts and Communities**

The idea of an interpretive community originated in literary theory as a way to explain the deficiencies of previous theories that either posited that the meaning of a text is fixed in the text or that the meaning existed only in the subjective interpretation of the reader. The one theory makes it difficult to explain why two people would ever disagree about the meaning of a text and the other makes it difficult to explain how one reading of a text could ever be superior to another.

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<sup>56</sup> Ibid., 100.

<sup>57</sup> White, *Justice as Translation*, 79.

Stanley Fish argues that the notion of an interpretive community solves this problem. The construction of meaning is not located in the text or in the individual, but in a community of people with shared understandings about how a text should be interpreted. It eliminates the problem of objective reading versus subjective intention because

the authorizing agency, the center of interpretive authority, is at once both and neither. An interpretive community is not objective because, as a bundle of interests, of particular purposes and goals, its perspective is interested rather than neutral; but by the very same reasoning, the meanings and texts produced by an interpretive community are not subjective because they do not proceed from an isolated individual but from a public and conventional point of view.<sup>58</sup>

Fish is primarily concerned with the question of what authorizes us to interpret a text and why any interpretation can be seen as valid. His goal is to give an underpinning to the project of literary criticism and to validate its practices. But we can invert the idea of an interpretive community to make it useful to the historian: we can use the tools that Fish developed to understand how people interpret texts to help us understand the people who were doing the interpreting. By reading the texts that seem to be in dialogue with each other—a treatise that cites to plea rolls, plea rolls that rely on material from the treatise, and plea roll collections that are drawn from the same rolls as the treatise—we can read those texts to uncover the shared values, preferences, and assumptions of the community that made them.

This group-based analysis is particularly useful when dealing with the justices and clerks who wrote *Bracton* and the plea roll collections, a circle of clerks and justices who shared a

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<sup>58</sup> Stanley Fish, *Is there a Text in this Class? The Authority of Interpretive Communities* (Cambridge, MA: Harvard University Press, 1980), 14.

certain set of assumptions, because we know so little about these people individually. We do not even know for certain the number of clerks in this circle, or which justices would have associated themselves with the two justices whom we know for sure to have been involved in collecting cases and writing *Bracton*, namely William of Raleigh and Henry of Bratton. Moreover, when we read the plea roll collections and *Bracton*, we cannot be sure whose work we are reading. Some of it came from the pen of William of Raleigh. Some came from Henry de Bratton. Apart from that, we do not know who worked on these projects. We do not know if they had their clerks writing in response to their dictation, people who might themselves have been learning Raleigh's and Bratton's interpretive practices in the process of writing the treatise. We do not know for certain if someone else edited it. Thus, tools which help us to recover the interpretive practices of a community rather than an individual are useful to us here.

Medievalists have found Fish's framework useful for explaining textual practices in the Middle Ages. Brian Stock used Fish's "interpretive community" as the foundation for his "textual community." Stock emphasized that, in medieval Europe, where literacy was the exception rather than the rule, the very acts of reading, writing, and engaging with texts set off the people who did these things from the rest of society. Thus, writing itself was an act of self-fashioning.<sup>59</sup> Stock's emphasis on the act of writing as self-fashioning is perhaps not so useful for my analysis here. The justices and clerks who I will be discussing were part of a court culture that had taken the turn towards literate practices half a century before any of them began to serve in the royal courts. The exchequer began to use written records in the early twelfth century and the courts followed suit sometime in Henry II's reign.<sup>60</sup> If justices were trying to set their work apart from the work done by royal administrators, then writing would not be the way to do it.

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<sup>59</sup> Brian Stock, *The Implications of Literacy: Written Language and Models of Interpretation in the Eleventh and Twelfth Centuries* (Princeton, NJ: Princeton University Press, 1983), 12, 88.

<sup>60</sup> M.T. Clanchy, *From Memory to Written Record: England 1066-1377*, 2nd ed. (Oxford: Blackwell, 1993), 92, 96-7.

While this community was not defined by its literacy, the emphasis that Stock places on the text as the space where the community is constituted is useful to my analysis. The plea roll text is not merely evidence that justices were creating a new identity for themselves in the thirteenth century; it is the space where that act of creation took place. It was through their rewriting of a record as legal literature that the justices tried to transform themselves into Roman jurists. It was in their writing of plea roll entries that judicial clerks learned to think of their masters as jurists and to reproduce the knowledge of the community. I will thus use Stock's "textual community" to refer to this group of people who thought of the plea roll as a text that was more than an administrative record.

Richard Firth Green set out three minimal requirements for a textual community, which can clarify the way the justices and clerks who wrote *Bracton* interacted with the plea rolls. According to Green an interpretive community is defined by

(1) a set of texts which share many of the same features, (2) an identifiable group of early readers of these texts who can be shown to have known one another, and (3) evidence, either internal or external, that their self-consciously literate habits of thought led such readers to evolve a distinctive way of using and interpreting these texts.<sup>61</sup>

This definition provides a way for thinking about how a group of people in the royal courts forged an identity through their relationship with their texts. In this project, I take the plea rolls and plea roll collections as the texts and the justices and clerks of the courts who wrote, compiled, and commented on these texts as the community that formed around them. My method is to look for the evidence of this group's "distinctive way of using and interpreting these

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<sup>61</sup> Richard Firth Green, "Textual Production and Textual Communities," in *The Cambridge Companion to Medieval English Literature 1100-1500*, ed. Larry Scanlon (Cambridge: Cambridge University Press, 2009), 29.

texts.”<sup>62</sup> As we will see in chapters 2 and 3, *Bracton* is a major source for the ways people within this group interpreted the plea rolls, because it comments on the entries and engages with them as scholastic authorities. As a text written by people who were reading the plea rolls, *Bracton* gives us evidence for the peculiar way they were reading them. In chapter five, we will look to internal evidence from the later plea rolls and see how one justice, Henry de Bratton himself, composed his plea rolls in a peculiar way because he thought of them as something more than administrative records. My analysis is dialectical, though. It is not just that this group of justices and clerks shared a common understanding of the plea rolls that we can recover by reading texts like *Bracton*. Their textual practices *vis-à-vis* the plea rolls also helped to constitute the community. The rolls and *Bracton* are thus evidence of the community’s identity, but they are also the places where that identity was constituted.

### **The Literature on *Bracton***

Although I have often mentioned its title, this dissertation is not primarily about the treatise *De Legibus et Consuetudinibus Angliae*, which has received ample treatment by historians of English law. It is about the justices and clerks of the royal courts who discovered this new discourse called law and who created a legal sphere through the construction of texts like the plea roll collections and *Bracton*. But *Bracton* is an important window into this group of people. It is useful as evidence of what an important sub-section of the thirteenth-century judiciary was thinking. It was the work of several hands of men who were in a position to influence a large group of justices and clerks.

Scholars working on *Bracton* before Samuel Thorne were hampered in their investigation by the fact that no one yet knew that the treatise was begun in the 1220s and that Henry de

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<sup>62</sup> Ibid.

Bratton could not have begun the project. The more strictly doctrinal legal history that was done in the late nineteenth and early twentieth centuries nevertheless remains extraordinarily useful to understanding the treatise, and I owe a great debt to the historians who combed *Bracton* and the *Corpus Iuris Civilis*, without the benefit of searchable online texts, to find the connections between *Bracton* and Roman law.

In the 1860s, Carl Güterbock made one of the earliest contributions to the study of the treatise—at least one of the first to use the new methods of professional history—and one that took the study of *Bracton* in a direction that few others have followed. One of the fundamental splits within the German legal academy at the time, and indeed still today, was between the Romanists and the Germanists, between those who thought that German law had a largely Roman character and those who thought that scholars should look for its origins in the *volksgeist* of the German people.<sup>63</sup> Güterbock, who was of the Romanist camp, published a book in 1862 titled *Henricus de Bracton und sein Verhältniss zum römischen Rechte: Ein Beitrag zur Geschichte des römischen Rechts im Mittelalter*, which appeared in English four years later as *Bracton and His Relation to the Roman Law: A Contribution to the History of the Roman Law in the Middle Ages*.<sup>64</sup> The title of this work itself places it in a different context than the historical works on *Bracton* that would follow it. This is a contribution to the history of *Roman law*. Most of the historians who would come after Güterbock would come out of the common law tradition. Even those who were interested in the treatise's relation to the Roman law would be interested primarily in Roman law's influence on the common law.<sup>65</sup> Their interest would be primarily

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<sup>63</sup> See Friedrich Karl von Savigny, *Of The Vocation of our Age for Legislation and Jurisprudence*, trans. Abraham Hayward (New York: Arno Press, 1975). Originally published in 1814, this text laid out the distinction between those who wanted a Romanist code and those who thought that an exploration of the German *volksgeist* was required before any codification could be made.

<sup>64</sup> Carl Güterbock, *Henricus de Bracton und sein Verhältniss zum römischen Rechte: Ein Beitrag zur Geschichte des römischen Rechts im Mittelalter* (Berlin: Julius Springer, 1862); Carl Güterbock, *Bracton and His Relation to the Roman Law: A Contribution to the History of the Roman Law in the Middle Ages*, trans. Brinton Coxe (Philadelphia: J.B. Lippincott, 1866).

<sup>65</sup> The one partial exception to this was Hermann Kantorowicz who, in his *Bractonian Problems*, argued that

insular: how much thinking drawn from Roman law managed to break its way into the common law fold. The “influence” school tends to assume a still developing, but nevertheless reified common law and a fairly developed Roman law that influenced it. Even Brinton Coxe, Güterbock’s American translator, put *Bracton* in this context:

It is perhaps proper to call attention to the difference in the motives which have impelled the author and the translator to their respective tasks. The former entitles his work a “Contribution to the History of the Roman Law in the Middle Ages,” and the purpose of his investigation is to throw light upon the medieval history of the *Roman* law. The object, however, with which the translation has been made, is to add to the sources of information concerning the history of the *English* law.<sup>66</sup>

Coxe tells us that to understand the history of English law, “it is first necessary to determine the position which Bracton, the father of our legal learning, bears to the Roman law.”<sup>67</sup> *Bracton* is clearly placed within a common law context. Bracton is “the father of *our* legal learning,” and by “us,” Coxe clearly means those lawyers in the Anglo-American common law tradition. *Bracton*’ contribution was to common law, not to civil law.

The types of questions asked by the historians who defined *Bracton*’ historical context in this way were largely whether the author was a good Romanist or a bad Romanist. Güterbock instead looked at the thirteenth century as a period when Roman law was involved in a dynamic development, when there was dialogue across Europe about what the ancient Roman texts meant

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William of Drogheda, professor of law at Oxford, probably knew of the treatise and borrowed from it in his work on canon law, the *Summa Aurea*. He suggested that Henry de Bratton, who was still believed to be the author at the time Kantorowicz was writing, may have met Drogheda when he was studying law and let him see an early draft of the treatise. Hermann Kantorowicz, *Bractonian Problems* (Glasgow: Jackson, Son and Company, 1941), 29-33.

and how they should be applied in practice. He placed *Bracton* in the context of this international development. The question of whether the author was a good Romanist or a bad Romanist took a back seat to the question of how he engaged with ancient texts to make something that was relevant in his own time. Indeed, Güterbock thought that the *Bracton* author was “superior to his contemporary Civilian brethren,” because, where they simply followed the arrangement and organization of the *Institutes* and the *Digest*, the *Bracton* author attempted to develop his own organization, one that would be useful for his own time period.<sup>68</sup> By systematizing Roman law in an original way, he made it relevant in a way that the scholars at Bologna had not yet done, according to Güterbock.

Historians writing in English after Güterbock used his work on Roman law in *Bracton*, but, like Coxe, they placed the treatise in the context of the history of the common law. Frederic William Maitland, who may accurately be called the father of modern legal history in the English language, built on Güterbock’s work in his *Select Passages from Bracton and Azo*, a Selden Society volume that placed passages from *Bracton* beside passages from the thirteenth-century jurist Azo of Bologna’s *Summa on the Code* and *Summa on the Institutes*.<sup>69</sup> Güterbock had pointed out that the *Bracton* author had drawn on Azo. Maitland used Güterbock’s work on this subject to make an argument about English law. Sir Henry Maine had argued in his *Ancient Law* that the *Bracton* author had “put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the

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<sup>66</sup> Brinton Coxe, translator’s preface to *Bracton and His Relation to the Roman Law: A Contribution to the History of the Roman Law in the Middle Ages*, by Carl Güterbock, trans. Brinton Coxe (Philadelphia: J.B. Lippincott, 1866), iii-iv (Emphasis mine).

<sup>67</sup> *Ibid.*, iii.

<sup>68</sup> Güterbock, *Bracton and His Relation to the Roman Law*, 49. Of course, Güterbock’s thinking on *Bracton* was bound up with nineteenth-century biases about what makes a “good” work. Güterbock saw the *Bracton* author’s changes to fit with current practice as originality, a positive attribute for an author as authors were constituted in the nineteenth century, but perhaps not one that a thirteenth-century civilian would have seen as a virtue. We will look more closely at the scholastic view of authority and originality in chapter 3.

<sup>69</sup> F.W. Maitland, *Select Passages from the Works of Bracton and Azo* (London: Bernard Quaritch, 1895).

Corpus Iuris.”<sup>70</sup> Maitland took umbrage at the idea that the author had done something dishonest, passing off Roman law as English law, and said that Maine had made a “stupendous exaggeration” and that the amount that the author directly borrowed from Roman law was less than a thirtieth of the total content of the treatise.<sup>71</sup> Maitland himself conceded that the author of the treatise passed off some materials that were really Roman as English in origin, but much less than Maine had claimed. And he maintained the opposition between “Roman” and “English” and assumed that Bratton was writing an “English” treatise. He separated the “Roman” and the “English” parts of the text in his introduction and claims that the former were “less expert” than the latter because they “are not, as most of his pages are, a record of experience.”<sup>72</sup> The author was, in Maitland’s opinion, a “poor Romanist,” but he did not use much Roman law in his text, which was primarily intended to be a treatment of the law of the English king’s courts.<sup>73</sup>

While Maitland turned the discussion away from Güterbock’s useful emphasis on the author’s contribution to Roman law and placed it in a very English context, the context that virtually all of the subsequent scholarship would treat it in, he did make many suggestions about the treatise and how we should think about it that will be useful to our own discussion in later chapters. Maitland thought that, even if most of the treatise’s doctrine is English, not Roman, Roman law did make a contribution to the thinking of English justices and clerks. From Roman law

they learnt how to write about, how to think about, law, and besides this they acquired some fertile ideas, distinctions and maxims, which they made their own and our own... In a very true sense Bracton is most Roman, not when he is copying from the Institutes or

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<sup>70</sup> Maitland, *Bracton and Azo*, xiv; Henry Sumner Maine, *Ancient Law*, 16th ed. (London: John Murray, 1897), 82.

<sup>71</sup> Maitland, *Bracton and Azo*, xiv.

<sup>72</sup> *Ibid.*, xix, xx.

<sup>73</sup> *Ibid.*, xvii.

from Azo's *Summa*, but when he is studying his *Note Book*, when he is weaving a doctrine out of the plea rolls, when he is dealing with the judgments of Patishall and Raleigh as Azo had dealt with the opinions of Ulpian and Paulus, or the glosses of Martin and Placentin.<sup>74</sup>

According to Maitland, even if the author of *Bracton* did not borrow much of his doctrine—and certainly not the full third that Maine thought he had—from Roman law, he had at least learned certain ways of *thinking about law* from it. Most important for our purposes, though, is Maitland's statement that he treated “the judgments of Patishall and Raleigh” as Azo did “the opinions of Ulpian and Paulus, or the glosses of Martin and Placentin.”<sup>75</sup> When he refers to the judgments of Patishall and Raleigh, Maitland is referring, primarily, to the 527 references to cases, which mostly come from the rolls of Patishall and Raleigh, in the treatise.<sup>76</sup> He suggests that part of this process of adopting civilian patterns of thought, learned in the universities or cathedral schools, involved thinking about authority in the same sorts of ways the Roman and canon lawyers did. Thus, when the authors included cases from Patishall and Raleigh, they did so because they were analogizing Patishall and Raleigh to ancient Roman jurists (Ulpian and Paulus) or to modern civilians working in the universities (Martin and Placentin).

Perhaps fortunately for my own project, Maitland took this issue no further. He left it as a suggestion and as an open question for further research. A few people have tried to solve the mystery of the cases in the treatise since Maitland. Some have done so by treating the cases as the beginning of the modern case law tradition. This is because, to the extent that modern common lawyers think about the treatise at all, they think of it as a foundational text of the

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<sup>74</sup> Maitland, *Bracton and Azo*, xxiv.

<sup>75</sup> *Ibid.*

<sup>76</sup> There are some references to things done or said by Martin of Patishall and William of Raleigh in the treatise that are not case references, but they pale in comparison to the 527 case references.

common law, with its feet firmly planted in the common law tradition. The best example of this is a 1987 address by Justice T.L. Yang to the Hong Kong bar titled “Henry de Bracton: The Father of Case Law.”<sup>77</sup> Yang treats *Bracton* as the beginning of an unbroken, 700 year-old case law tradition. Although he points out differences from modern case law—for instance the author “did not intend to rely on a doctrine of *stare decisis* as we understand the term today”—Yang posits that *Bracton* represents “the case law system in its embryo” and contributed to the later development of case law by “accustom[ing] lawyers of the thirteenth and early fourteenth centuries to read and discuss the cases which he put in his book.”<sup>78</sup> Yang’s approach is teleological: although *Bracton*’ case law is not the same as modern case law, it contains the germ, the potentiality, of modern case law. Yang distances us from *Bracton* and draws us close at the same time.<sup>79</sup>

The “father of case law” approach to *Bracton* is not one that is usually adopted by professional historians. In fact, historians have spent little time on the cases at all, an odd state of affairs considering the common law interest in the history of case law. Theodore Plucknett tried to explain the role of the cases in light of what he termed a “crisis of authority” in the early Common law: judges and clerks in the royal courts were looking for their own equivalent to the papal decretals, imperial constitutions, patristic writings, and jurists’ opinions that Roman and canon law used as their authorities.<sup>80</sup> According to Plucknett, though, they found their equivalent in writs, not in plea roll entries.<sup>81</sup> Plucknett held that the author of *Bracton* did think of the cases

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<sup>77</sup> T.L. Yang, “Henry de Bracton: The Father of Case Law,” *Law Lectures for Practitioners* (1987): 211-215. Yang was apparently unaware of Thorne’s evidence that Bratton was not the author of the treatise.

<sup>78</sup> Yang, “Father of Case Law,” 213, 215.

<sup>79</sup> Justice Yang actually presents us with an interesting parallel to the justices and clerks of the royal courts who I will discuss in this dissertation. As a member of a British colonial court system who, within a year of this article’s publication, would become chief justice of Hong Kong and a knight, Yang was perhaps more attuned to issues of the common lawyer’s identity than the average English or American lawyer. Yang, as justice, was looking for his own place in the world of the common law just as I will argue William of Raleigh and Henry de Bratton were when they collected cases from the plea rolls and wrote the treatise.

<sup>80</sup> T.F.T. Plucknett, *Early English Legal Literature* (Cambridge: Cambridge University Press, 1958) 26-33.

<sup>81</sup> *Ibid.*, 33, 41.

in the treatise as authorities, but in his opinion, the cases in *Bracton* were “scientific or intellectual authorities” rather than “formal authorities binding on the courts,” meaning by this that, unlike modern judicial opinions, they were “useful illustrations but not in themselves sources of law.”<sup>82</sup> The author placed them in the treatise to show how his doctrines worked in practice, not to bolster the authority of those doctrines.

Plucknett’s thesis that the cases were mere illustrations has become the major theory in opposition to the thesis that uncritically takes *Bracton* to be the origin of Anglo-American case law. David Ibbetson elaborated on Plucknett’s argument in his brief sketch of the history of case law in the common law tradition.<sup>83</sup> Turning to the introduction to the treatise, he analyzed the author’s assertion that he “turned [his] mind to the ancient judgments of just men,” a phrase that will become important in my analysis in chapter 3.<sup>84</sup> Ibbetson argued that “there is nothing in this remark to suggest that judicial decisions *per se* had any precedential force. If anything, the inference is to the contrary: the focus is on the ‘ancient’ decisions of ‘just’ men, not on the accretion of layers of law through series of legal decisions.”<sup>85</sup> He thought that there was “nothing obviously normative” about the cases and that they were most probably “nothing more than illustrations of the way in which the rules had been applied in practice within the experience of the writer.”<sup>86</sup>

Frederic Cheyette also thought that the authors of *Bracton* were taking a Roman and canon law approach to the problem of authority, but he took a different position on how the author solved that problem. For Cheyette, custom was the key. Cheyette compared discussions of custom in Roman and canon law treatises and in *Bracton* and made an entirely plausible

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<sup>82</sup> *Ibid.*, 59, 80.

<sup>83</sup> David J. Ibbetson, “Case Law and Doctrine: A Historical Perspective on the English Common law,” in *Richterrecht und Rechtsfortbildung in der Europäischen Rechtsgemeinschaft*, ed. Reiner Schulze and Ulrike Seif (Tübingen: Mohr Siebeck, 2003), 27-41.

<sup>84</sup> BDL, 2:19.

<sup>85</sup> Ibbetson, “Case Law and Doctrine,” 30.

argument that the authors of *Bracton* structured their theory of authority around Roman and canon law doctrines of custom and the role of the judge.<sup>87</sup> Custom had a force of its own in the two laws; there is authority supporting the view that even a papal decretal could not override a local custom unless it did so explicitly.<sup>88</sup> By custom, though, the canonists and civilians did not mean an inchoate set of practices. Custom only obtained legal force when some higher authority gave its stamp of approval to that custom. When a court had spoken on a custom, the court's judgment proved that the custom existed and at the same time transformed it into a legal rule.<sup>89</sup> Customary law, then, is custom that has been approved by the king or pope through his judges. Custom was not the primary source of law to the canonists or civilians, however. The primary sources were legislative or juristic: the decrees of popes and emperors found in the *Codex* and decretal collections, and the opinions of important jurists found in the *Digest*. Since English law had no such collections of authority, says Cheyette, the justices and clerks who wrote *Bracton* turned to custom to fill in their law, but the custom they turned to was the positive law custom of the schools. Thus, the cases in *Bracton* serve to prove the existence of custom, which in this case means the customs that have the king's approval.<sup>90</sup>

The main thrust of Cheyette's article was not to solve the mystery of case law in the treatise. In fact, he never engages with Plucknett in his analysis of the cases. Cheyette was engaged in a different historiographical debate about the treatise: the debate about the author's political theory. Much ink has been sacrificed at the altar of the political theory debate. At its core lie two contradictory statements in the treatise, one that the king is bound by the laws and customs of the realm and the other that he is free of the laws (*legibus solutus*). The debate has

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<sup>86</sup> Ibid.

<sup>87</sup> Frederic L. Cheyette, "Custom, Case Law, and Medieval "Constitutionalism": A Re-Examination," *Political Science Quarterly* 78 (1963): 378-381.

<sup>88</sup> Ibid., 379-80.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

been lively and extensive, with no clear consensus on whether both sections were written by the same author or whether one was an addition by another author with a different political theory.<sup>91</sup> Cheyette was intervening in this debate to argue that the authors of the treatise did not think that custom was a popular source of law that bound the ruler to the people's will. Because custom was only valid as law when approved by the ruler's court, it did not represent a constitutional bind on the king so much as a source of law when others failed.<sup>92</sup> Cheyette was thus responding to a strand of argument that turned custom into a method of popular resistance to the monarchy, a position that he thought *Bracton* would not support.

At stake in this debate over the role of the cases in *Bracton* is whether those cases are really case law or not. Plucknett thought not. The case illustrates a legal point that is fully independent of the case itself. For Cheyette, cases are case law. They are a moment when a body empowered to do so by the king breathes life into a custom and makes it a binding rule. I will argue for a third possibility. The cases in *Bracton* are indeed case law. The authors of the treatise collected cases because they were thinking like civilians and canonists. But they were not using cases because they were statements of custom. They were using them because, in the eyes of the clerks of the courts, cases were the words of great jurists. The authors of the treatise imagined the royal justice as the equivalent of the Roman jurist, a figure they encountered in the *Digest*, the most popular of the three parts of Justinian's *Corpus* in the Middle Ages.<sup>93</sup> The *Digest*, compiled in the sixth century, recorded the opinions of jurists of the classical period of Roman

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<sup>91</sup> See Fritz Schulz, "Bracton on Kingship," EHR 60 (1945), 136-176; Ernst H. Kantorowicz, *The King's Two Bodies* (Princeton, N.J.: Princeton University Press, 1957), 143-192; Gaillard Lapsley, "Bracton and the Authorship of the Addicio de Cartis," EHR 62 (1947): 1-19; S.J.T. Miller, "The Position of the King in Bracton and Beaumanoir," *Speculum* 32 (1956): 263-296; W. Fesefeldt, *Englische Staatstheorie des 13 Jahrhunderts: Henry de Bracton und sein Werk* (Göttingen, 1962); Brian Tierney, "Bracton on Government," *Speculum* 38 (1963) 295-317; E. Lewis, "King Above Law? Quod Principi Placuit in Bracton," *Speculum* 39 (1964): 240-269; Gaines Post, "Bracton on Kingship," *Tulane Law Review* 43 (1968): 519-54; Gaines Post, "Bracton as Jurist and Theologian on Kingship," in *Proceedings of the Third International Congress of Medieval Canon Law* (Vatican City, 1971), 116-30; W.C. Jordan "On Bracton and Deus Ultor," *Law Quarterly Review* 88 (1972): 25-29.

<sup>92</sup> Cheyette, "Medieval Constitutionalism," 378-82.

<sup>93</sup> Stein, *Roman Law in European History*, 44.

law. By placing them in a collection, the *Digest* textualized authority. The authority of the jurist existed both as personal authority and as the authority of a text in a particular juristic genre, the *consilia* (advice letters) or *responsa* (responses), synonyms for the text that contained a jurist's answer to a legal question posed to him by a litigant or judge. The authors of *Bracton*, who, we can be certain, had had legal training in the schools, imported this image to the justices they worked with and served. They began to imagine the royal justice not as an administrator, but as a jurist. The plea roll entry thus became important as a place where the jurist-justice's words could be found, the royal courts' equivalent to a *consilium*. I shall argue here that it was as juristic opinions, not as proof of custom or as mere illustrations, that the authors of *Bracton* engaged with plea roll entries.

In this dissertation, I will follow the paths first traversed by Güterbock, Maitland, Plucknett, and Cheyette. I will show, on the one hand, that Roman law's influence on the common law was through the direct application of particular Roman law doctrines. It was, rather, a particular mode of thought. In chapter one, I will bring historical contingency back into what has largely been a history of relentless, continuous development. I will show that there was no reason why anyone in England needed to think about the types of things the royal courts did as a specialist field called "law." It was only by analogy to Roman and canon law, the two scholastic laws, taught in the universities, that the people who worked in the royal courts began to imagine that law was a field separate from the general flow of lay culture. I hope to show that Güterbock's and Maitland's impressions were indeed correct—that Roman law made itself felt in common law through patterns of thought. I also hope to confirm Maitland's suggestion, that the people who wrote *Bracton* thought plea roll entries were analogous to juristic texts—*consilia* and *responsa*—in the two laws.

## **Why England?**

One final question must be addressed before moving on. Why focus on the intellectual processes in *England* specifically? There has been a strong tendency in the scholarship to place England at the center of historical development more generally and legal development more specifically. Plenty has been written about “the rise of the common law” as one of the foundational institutions of the modern world. Of course, the royal courts and justices of the thirteenth century are part of the narrative that eventually leads to our modern common law; eight centuries of contingent developments led to the common law as we know it today. Since the common law is still a part of life in England and the lands that were colonized by England, it is natural for those of us in common law systems to be interested in the source of our tradition, and to write historical narratives that take the common law back to the thirteenth century. There is no way to completely escape this teleology: we are interested in thirteenth-century English law less because of what England was than because of what it would become. This is why we study Magna Carta and not the near-contemporary Golden Bull of Hungary. As a lawyer educated in a common law system, I am certainly not immune from this desire to know something about what came before and to connect our modern common law traditions to what was happening in the thirteenth century.

Thinking as a historian, though, there is another reason why England makes a particularly good case study for the development of legal discourse in the thirteenth century. England was on the periphery of a primarily Mediterranean civilization in the thirteenth century. Compared to the great Mediterranean polities of Al-Andalus, Egypt, and Byzantium, and the trade centers of Italy and Sicily, England was a backwater. It was not on the main routes of the exchange of ideas: Sicily and Spain were much more central to the programs that brought Greek and Arabic learning to Latin Christendom. The schools that rediscovered and refashioned the ancient Roman

discourse of law were in the north of Italy and the south of what would become France. This does not mean that the developments that took place in England in the thirteenth century are unworthy of study. In fact, it makes England that much more interesting. The justices of the royal courts were a liminal group of people—between the king and his subjects, wielding borrowed authority in a world they did not fit into perfectly—in a liminal place, on the edge of Latin Christendom. That they recognized their liminality in English society and sought to carve out a space for themselves using the discourse of law is the subject of this dissertation. But they also recognized the liminality of English society itself. In the *introductio* to *Bracton*, one of the authors tells us that “England alone uses unwritten law and custom,” presenting England as a lone holdout in a world that the author imagines to be populated by textualized law.<sup>94</sup> Why exactly the author thought that England was alone in using unwritten law is something of a mystery. By no means was all of Western Christendom ruled by *ius scriptum*. *Bracton* was written before most of the Northern French *coutumiers*. But the author thinks of England as a unique place. At the same time he tries to draw England back into the legal fold. Quoting *Glanvill*, he tells us, “Nevertheless, it will not be absurd to call English laws *leges*, though they are unwritten, since whatever has been rightly decided and approved with the counsel and consent of the magnates and the general agreement of the *res publica*, the authority of the king or prince having first been added thereto, has the force of law.”<sup>95</sup> The author places himself on the edge of a Roman and canon law culture of written law and tries to convince the reader that England is a part of it, albeit in an unconventional way.

Despite our tendency to place England at the center because of what it would eventually become, England can be interesting for what it was in the thirteenth century: a place on the edge.

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<sup>94</sup> “*Cum autem fere in omnibus regionibus utatur legibus et iure scripto, sola Anglia usa est in suis finibus iure non scripto et consuetudine.*” BDL, 2:19.

England can therefore be useful for seeing how people took the universal and universalizing language of Roman law and deployed it in local contexts, in places far from the center of intellectual life, political power, and commerce.

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<sup>95</sup> “*Sed non erit absurdum leges Anglicanas licet non scriptas leges appellare, cum legis vigorem habeat quidquid de consilio et consensu magnatum et rei publicæ communi sponsione, auctoritate regis sive principis præcedente, iuste fuerit definitum et approbatum.*” BDL, 2:19.

## Chapter One

### A World Without Law

Twelfth-century England was a “lawless” society. By this I do not mean that it was anarchic and violent. It was lawless in the sense that the people who lived in this society did not organize their society around a systematic set of rules called law as we do today. People did not view their world through the prism of law. There was no specialized discourse, no professional lawyers and judges to speak in that discourse. And when people in the twelfth-century did use the word “law,” they filled this word with very different meanings than we do today.

In the century between 1150 and 1250, ideas of what law was and what it was expected to do changed dramatically in England. As we shall see in the next few chapters, the intellectual thought of the justices of the central courts was one very important part of the process by which a series of royal administrative<sup>96</sup> practices that originated in the twelfth century would coalesce into something that could be identified as the common law. Justices were certainly not the only participants in this process. Jurors, litigants, suitors, and sheriffs were also major players. As they participated in these administrative practices, they changed what they meant. In the twelfth and early thirteenth centuries, it would have been difficult for a juror, a sheriff, or a royal administrator to imagine the work done by the royal courts as an enterprise that was distinct from any other type of royal administration. Surely the royal courts, just like the exchequer, the chancery, and the king’s household, had different procedures, but *law* was not a separate sphere of life in the Middle Ages, at least not in the vernacular world outside of the universities. What

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<sup>96</sup> Throughout this dissertation, I will make a distinction between “law” and “administration.” This is not meant to imply that these were two, opposing spheres of action. Since my argument is about a developing consciousness among some people who did the mundane work of managing the realm that their work was not mundane, but was something called law, I do posit that law was a distinct sphere of activity within the ranks of the king’s *curiales*, at least by the 1220s. The work that justices and clerks began to identify as legal in the thirteenth century conferred on them a strong sense of identity. By administration I merely mean any work done on behalf of the king, most of which did not lead to any strong sense of identity in those who did it.

makes the work of the judges important is that it was the justices of the royal courts who took all of the disparate practices of the royal justices and the royal courts and identified them as “law.” They created an independent legal space in many ways. Ritual and dress were important to the ways the justices presented themselves as operating in a specifically legal space. In this dissertation, however, we will focus on the ways they used their writing to bring that legal space into being in the realm of discourse. It was this intellectual development that allowed them to imagine the work they did, the series of practices undertaken by the royal justices, as the common law of the realm.

This chapter looks at the situation in England in the generations before people began to collect cases, the world without law, and then turn to the administrative transformation that created the corps of justices and clerks who produced the case collections. We will see the changes in the procedures of government that were not sufficient, but were certainly necessary for the change in mentality towards a world where law could become a specialist discourse.

### ***Lei, Lex, and Laga: The Vocabulary of the Law in the Early Middle Ages***

The language of the twelfth century bears out this undifferentiated view of law. Many modern languages make a distinction between two senses of the word *law*, a distinction we do not make quite so explicitly in modern English. There is law as a discrete text, such as a piece of legislation. In English the indefinite article is a sure sign that we are talking about law in this sense. This is “*a law*,” a statute, regulation, or ordinance on a specific subject—the French *loi*, the German *Gesetz* (literally, something which is set down), and the Latin *lex*. There is also a broader sense of law, which in English we would denominate by the definite article: “*the law*.” This is law as a complex system of rules and rights, and is denominated by the word *droit* in French, *Recht* in German, and *ius* in Latin. When an American law student receives her first

degree in law, it is as a *juris doctor*, a doctor of *the* law in a general sense, someone who understands the system of rights, duties, commands, and procedures that makes up the American legal system. If she earns a second degree in law, it will be called a *legum magister*, a master of *laws*, meaning a master of specific laws, someone who has mastered a particular set of rules within the broader system. The first degree, the doctor of *ius*, is meant to teach one the system and the second, the master of *leges*, is meant to teach one a specific field of law.

The vernaculars of early medieval Europe did not make the same distinction. The specific sense denominated by *loi* and *gesetz* existed, but the general sense denominated by *droit* and *Recht* stood for something more general than a system of rules and rights. Old English, for instance, had no word that corresponded to the modern French *droit* or Latin *ius*. There was a tradition of royal law codes written in Old English from the 6th century onwards, but the word used for these codes was usually *domas* (judgments), from which we get the modern English “doom.”<sup>97</sup> These were specific provisions—in many cases very specific<sup>98</sup>—and there is no sense that their authors imagined them to form a coherent system; these were merely the individual laws that a particular king had laid down for his people.

It is not until the Danish invasions of the 9th century and the subsequent establishment of the Danelaw that the English language adopted a word, from Old Norse, that meant something broader than law as a specific provision. The Old Norse *laga* is the etymological root of our word “law,” and the Norse world seems to have shared a common linguistic culture with Northern France, because the ways Norse-speaking peoples used the word *laga* in the 9th

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<sup>97</sup> “Þis syndon þa *domas*, þe Æðelbirht cyning asette on Augustinus dæge.” (These are the decrees which King Aethelbert established in the time of Augustine). F.L. Attenborough, trans. and ed., *The Laws of the Earliest English Kings* (Cambridge: Cambridge University Press, 1922) 4-5. In this older sense, a doom did not necessarily have to be negative. “Doomsday” was merely the day of judgment. Some of those judgments would send people to heaven, not hell.

<sup>98</sup> See, e.g., III Atr. c. 4, which gives amounts to be paid and procedures to be followed in every possible outcome of a trial for theft. The sections before and after this one, one interfering with purchases of land and acquiring cattle without surety do not seem to be related to it in any kind of systematic way. A.J. Robertson, *The Laws of the Kings of England from Edmund to Henry I* (Cambridge: Cambridge University Press, 1925), 66-7.

century onwards line up very well with the ways French-speaking peoples used the word *lei*, the ancestor of the modern *loi*.<sup>99</sup> First of all, these words could have the same meaning as the Latin *lex*, i.e., a specific provision. The words *laga*, *loi*, and *lex* all figured into the tradition of the Anglo-Saxon law codes, when they were continued in Old English under post-Danish invasion kings and in French and Latin after the Norman Conquest. Æthelred's (r. 978-1016) third law code begins much like earlier Old English law codes, but where the word *domas* appears in earlier law codes, Æthelred inserts the word *laga*.<sup>100</sup> The French *Leis Willelme* presents the reader with a set of commands that were allegedly issued by William the Conqueror, denominated as *leis*.<sup>101</sup> In Latin, we see texts like the *Leges Edwardi Confessoris* or the *Leges Henrici Primi*, which continue the Old English tradition in a post-Conquest format. The *Leges Edwardi*, although composed after the Conquest, claims to be the official enactments of Edward the Confessor.<sup>102</sup> The *Leges Henrici* continues the tradition for a Norman king.<sup>103</sup> The words *domas* and *laga*, meaning specific enactments of a king, are here replaced with the Latin *leges* (the plural of *lex*). *Lex*, *lei*, and *laga* could also refer to an oath, and the defining feature of a *legalis homo*, often translated as a law-worthy man, was that he was capable of making an oath, and consequently could sit on a jury.<sup>104</sup>

But *lei*, *laga*, and *lex* could have a broader meaning. Æthelred's (r. 978-1016) first law code, set down a royal ordinance (*gerædnys*, lit. "thing that has been counseled"), which was to apply "according to English law" (*æfter Engla laga*).<sup>105</sup> *Laga* here seems to have a meaning approaching the meaning of the Latin *ius*; *gerædnysse* are specific laws which the king has been

<sup>99</sup> *Oxford English Dictionary*, s.v. "law."

<sup>100</sup> III Atr. prol., in Robertson, *Laws of the Kings of England*, 64-5.

<sup>101</sup> "Cez sunt les leis et les custumes que li reis Will. grantad al pople de Engleterre après le conquest de la terre..." Robertson, *Laws of the Kings of England*, 252-3.

<sup>102</sup> Bruce R. O'Brien, *God's Peace and King's Peace: The Laws of Edward the Confessor* (Philadelphia: University of Pennsylvania Press, 1999).

<sup>103</sup> L.J. Downer, ed., *Leges Henrici Primi* (Oxford, Clarendon Press, 1972).

<sup>104</sup> BDL, 2: 433.

<sup>105</sup> I Atr. prol., in Robertson, *Laws of the Kings of England*, 52-3.

counseled to make by his *witan*, which must be observed where English *laga*, “the law” in a general sense, is observed. Does *laga* here refer to a system of laws as we imagine it today, to the legal sphere as Berman describes it? In fact, the word *laga* seems to be broader than the modern *droit* or *Recht* in many cases. It did not have the meaning with which the canonists and civilians in the universities or the thirteenth-century authors of *Bracton* would fill the word *ius*. In the Old French epic poems and romances consumed by the English aristocracy, *laga*’s cognate *lei* usually means something close to “community.” The author of the *Chanson de Roland* uses “*la Chrestien lei*” to refer to what we would call the Christian *religion*, and *chansons de geste* and romances continued this usage into the thirteenth century.<sup>106</sup> The author of the *Chanson* used the word *law* in the sense that the Icelanders referred to their community as *var lög* (our law), and that the people in the North of England called their patch of land the Danelaw.<sup>107</sup> This is probably also the sense in which Æthelred uses the phrase “*Engla laga*” in his code.<sup>108</sup> It is the English counterpart to the Danelaw, the place where English, not Danish, ways and customs prevail. To become an *utlaga*, one who was outside of the *laga*, was to be cast out of the human community altogether and be condemned to bear the wolf’s head.<sup>109</sup> Similarly, one who was cast out of God’s community, the *Song of Roland*’s *Chrestien lei*, could be called “an outlaw of God” (*Godes utlaga*) in Old English.<sup>110</sup>

The l-words—*laga*, *lex*, and *lei*—could thus be used to mean something broader and less tangible than specific provisions, but they do not refer to the kind of system of rules implied by words like *ius*, *droit*, or *Recht*. They do not imply a specialist discourse about rights, duties, and

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<sup>106</sup> Ian Short, trans. and ed. *La Chanson de Roland*, 2nd ed. (Paris: Librairie Générale Française, 1990), 32. In several places, “recevrez li lei de Chrestiens” is used to refer to baptism. Ibid. 30, 32, 58. A book of “*la lei I fut Mahum e Tervagan*” also makes an appearance. Ibid. 66.

<sup>107</sup> Kirsten Hastrup, *Culture and History in Medieval Iceland: An Anthropological Analysis of Structure and Change* (Oxford: Oxford University Press, 1985), 121.

<sup>108</sup> III Atr. prol., in Robertson, *Laws of the Kings of England*, 64-5.

<sup>109</sup> Frederick Pollock and Frederic William Maitland, *History of English Law Before the Time of Edward I*, 2nd ed. (Cambridge: Cambridge University Press, 1898), 1:476.

<sup>110</sup> See II Canute 4a.1, Robertson, *Laws of the Kings of England*, 176-7.

procedures, but rather the way of life of a community: Christians, pagans, English, or Danes. The people who wrote words like *lei*, *lex*, and *laga* did not imagine law to be separate from other parts of life. The word actually referred to one's entire way of life, not a specialized part of it.

### **The Spaces of the Law**

The terminology associated with the places where law took place and the activities that went on there were ambiguous, too. Much of the terminology that would eventually be legalized had many overlapping meanings in the thirteenth century. For instance, there is a great deal of ambivalence in the word "court," which even today has two senses. We lawyers tend to think of it as a place where judges make decisions. But the word "court" can also conjure up images of Louis XIV entertaining the French aristocracy at Versailles. "Courtly love" does not refer to an affair between two lawyers. The court in this sense is a social, artistic, literary, and political space composed of a lord, his servants, and his aristocratic hangers on. In the thirteenth-century, these two meanings of the word "court" were not distinct. The court was the place where a lord (including the lord-king) met with his vassals, those people who held their land directly of him, who were bound to give him their counsel, and to whom he was bound to give justice. The king's court, the *curia regis*, made decisions that resolved disputes not because it was a specifically legal space, like today's courts, but because it was a place where many types of decisions were made; its political, financial, legislative, and adjudicative functions were not distinct. The *curiales* of Henry II's *curia regis* were a diverse group of people including people like Ranulph de Glanvill, magnate and justiciar; Richard FitzNeal, treasurer; Marie de France, poet; William Marshal, tournament champion; and Walter Map, cleric, writer, and inveterate gossip. As we can see from this group, the line between judicial-financial center and literary circle was thin. Walter Map wrote his *De Nugis Curialium* (*On the Trifles of Courtiers*), a collection of histories,

mythical tales, and satires—including a comparison of Henry’s court to hell—for courtiers (*curiales*) while he himself was one of them.<sup>111</sup> Although we know little of Marie de France, she was probably associated with Henry’s court. Marie composed a series of *lais* on love and translated Aesop’s fables into Norman French. Some of those on the more administrative side of the court were also clearly engaged with both the Latin and French literary culture of their circle. Richard FitzNeal wrote the *Dialogue of the Exchequer*, which contains many Biblical and classical allusions, while he was in the king’s service.<sup>112</sup> William Marshal’s wife commissioned a massive poem in French to commemorate her husband after his death.<sup>113</sup> Ranulph de Glanvill, the justiciar, was apparently familiar with the epic Raoul de Cambrai.<sup>114</sup> The fact that the justices who administered what would come to be called the “common law” worked in an institution called a court would not necessarily make it a “legal” institution in the way we think about it today.<sup>115</sup>

Some of the words that we can recognize later in the thirteenth century as legal terms of art could be used in much broader ways in the late twelfth and early thirteenth centuries. In Marie de France’s *lais*, a *plaint* could just as easily be a plea to one’s lover as to the king’s justice.<sup>116</sup> When the plaintiff of the 1260s told his story in court it was called his *narratio* in Latin and his *conte* in French. We get the modern legal term “count” from this, but in the twelfth century, it was not part of a specialized language. In English, it seems to have been called a

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<sup>111</sup> Walter Map, *De Nugis Curialium*, ed. and trans. M. R. James et al. (Oxford: Clarendon Press, 1983).

<sup>112</sup> Richard FitzNeal, *Dialogus de Scaccario and Constitutio Domus Regis*, Emilie Amt and S.D. Church, eds. (Oxford: Oxford University Press, 2008).

<sup>113</sup> A.J. Holden, ed., *History of William Marshal*, 3 vols. (London: Anglo-Norman Text Society, 2002).

<sup>114</sup> Paul R. Hyams, “Henry II and Ganelon,” *Syracuse Scholar* 4 (1983) 25.

<sup>115</sup> Although the courts of other lords might not have been as grand or as literary, this basic pattern, where the court was an unspecialized space of financial administration, legal judgments, literary production, and entertainment, could apply to any court. The manorial bailiffs who heard pleas in the courts of lesser lords were financial managers first and judges second.

<sup>116</sup> Marie de France, *The Lais of Marie de France*, Robert Hanning and Joan Ferrante, trans. and ed. (Grand Rapids, MI: Baker Books, 1979), 128 (*Les Deus Amanz*, ln. 75).

“tale,” a word which did not make it into the modern legal lexicon.<sup>117</sup> The word *conte* could as easily be used to mean an epic poem or a chivalric romance as a story about real events. A *conteur* or *narrator* could easily be a “storyteller,” but it was also the regular word for that type of lawyer who argued on behalf of his client in the mid thirteenth century.<sup>118</sup> The *conteur* of the 1190s or 1210s was not a legal professional. He was an aristocratic storyteller. Pleading was an aristocratic sport, just as telling a good story was.<sup>119</sup> The *Roman d’Eneas*, a twelfth-century reworking of Vergil’s *Aeneid* as a chivalric romance, includes a character named Drances, a knight of “*haut peraje*,” (“high peerage”) who is not a good fighter, but makes up for it by fighting well with his tongue in court.<sup>120</sup> Being a good storyteller was part of *courtoisie*—the art of being a good courtier—not the specialized activity of a profession.

We even see this blurring of the line between legal speech and entertainment in the recording of cases decided in the courts. Richard FitzNeal, in the *Dialogue of the Exchequer*, tells us that, as a young man, he wrote a chronicle in three columns. The first recounted “various matters concerning the English Church and some decrees of the Apostolic See.” The second told of the “glorious deeds of the aforesaid king [Henry II], which exceed human belief.” The third recorded, “various public and private matters, including judgments of the court (*curie judiciis*).”<sup>121</sup> In the *Dialogue*, FitzNeal, the teacher, tells his student that this text “could be useful to posterity, and enjoyable for those who are interested in the state of the realm under the said prince,”<sup>122</sup> indicating that the book’s purpose was primarily for entertainment. The story told at trial and the story told after trial bore the same name as the fictional stories told to entertain people at court, and those courtroom stories themselves could be used to entertain.

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<sup>117</sup> William Craddock Bolland, *The General Eyre* (Cambridge: Cambridge University Press, 1922), 11.

<sup>118</sup> Paul Brand, *The Origins of the English Legal Profession* (Blackwell: Oxford, 1992), 47.

Hyams, “Henry II and Ganelon,” 26.

<sup>119</sup> Hyams, “Henry II and Ganelon,” 35.

<sup>120</sup> Aimé Petit, ed., *Le Roman d’Eneas* (Paris : Livre de Poche, 1997), 418-424.

<sup>121</sup> FitzNeal, *Dialogus*, 40-1.

<sup>122</sup> *Ibid.*

The trial was actually a popular topic for the types of literature that were produced in these courts. The *Lais* of Marie de France include trial scenes that raise difficult points. These could have served as points of debate for courtiers who would need to serve on courts themselves.<sup>123</sup> But it was not just the trial literature of the twelfth century court that created a space for the debate of norms. The trial itself served that function. The typical trial in a lord's court of the twelfth century looked quite different from what the trial in the royal courts would turn into in the thirteenth century. Fictional accounts of fictional kings' courts give us some idea of what a trial—one that would have been plausible to the readers of the fictional tale—looked like in the twelfth century. The complaining party would bring his case before his lord, who was bound to give his vassals justice. The lord would preside, but would not judge in any way we would recognize today. Instead, the lord's other vassals, those people who, through their personal bond of homage and fidelity, were bound to give the lord their counsel and to attend his court, would make the judgment. Their judgment would not decide the case, but would decide three preliminary questions: 1) what method of proof—oath, ordeal, battle, or jury—will be used? 2) Who will make the proof, the plaintiff or the defendant? 3) What is the final issue that the proof will decide?<sup>124</sup> The vassals had to work to refine the issue, because the issue would eventually be put to God to give his judgment. Thus, the question had to be posed in a way that God could answer through one of the forms of proof. The old adage that in medieval courts “judgment preceded proof” still held for the twelfth-century trial.<sup>125</sup>

God was the judge of the twelfth-century trial, whether the issue was the betrayal of one's lord (*felonie*) or about who should hold a piece of land (*seisin*). Of course, God only gave yes or no answers by giving one person the strength to defeat another in the duel or by causing someone's wound to fester. In defining the question for God to answer, the members of the

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<sup>123</sup> Hyams, “Henry II and Ganelon,” 35.

<sup>124</sup> *Ibid.*, 27.

<sup>125</sup> Maitland, *Equity*, 309.

lord's court had a great deal of leeway to determine the norms that should surround the case. Likewise, by assigning a very light and easy-to-produce form of proof, like a simple oath, to one of the parties, the lord's vassals could make value judgments about who was probably in the right and who was probably in the wrong. If the literature is any indication, the members of the court often appealed to custom when they made their judgments. They looked to what they had done before, knowledge that came from the older and more senior members of the court. Knowledge about the norms to be applied was not imposed from the top. It was knowledge that came out of the culture of the aristocratic class, the peers of the complainant and the defendant. Although the lord or king might try to manipulate the proceedings through threats and displays of royal anger, he could not impose his own norms on the court outright.

The twelfth-century trial took place in a space where the norms of the aristocratic community were debated, created, and enforced. The thirteenth-century trial would occupy a very different space, where justices delegated by the king would lead juries through the wording of standard writs, which supplied the issue, the burden, and the form of proof. We will see in chapter five that the royal justices, in their versions of the trial proceedings recorded on the plea rolls, tried to write the jury, the people with knowledge of the local aristocratic norms, out of the trial. They presented the application of norms as a top-down process, with the norms coming directly from the justice learned in "the law," an arcane body of knowledge unknown to the aristocrats who sat on the jury.

### **Towards a "Public" Authority**

Today we think of private, individual, and affective relationships as harmful to the effective administration of law. When a public official, acting in his official capacity, does a favor for a friend, it is seen as an illegitimate exercise of public authority, which should ideally

be applied equally. Friendship is not a legitimate basis for governance. A gift to a public official can easily be seen as a bribe, and we protect against this in many ways. Even postal carriers in the United States, whose power is, needless to say, limited, are not allowed to accept gifts over a certain value. Exercises of government power are supposed to be impersonal. “Public authority,” “the state,” and “the law,” the most impersonal of terms, are all terms that legitimate those who have power over others.

This was not the case in twelfth-century Europe. The language of public authority existed, but, as Thomas Bisson has argued, people did not normally experience power as public authority. Thus, while they might follow a person who bore one of the titles of a public official of the defunct Carolingian Empire, a count or a viscount, the reasons why people followed such a person were very different than they would have been in the Carolingian Empire.<sup>126</sup> The primary experience of power in the twelfth century, according to Bisson, was lordship. People followed other people because they created affective bonds of lordship and vassalage with those people. This was an intensely personal relationship, and the personal nature of that relationship did not de-legitimize it as it would in the context of a modern state. The people of the twelfth century knew the idea of public authority, but they did not primarily imagine authority to flow from impersonal entities. Rather, power flowed through personal relationships. People bound themselves to each other through oaths. So when people, particularly churchmen, in the Western parts of the former Carolingian realm thought that violence against peasants, travelers, and religious houses had become endemic and needed to be stopped, they did not appeal to crime control, crime being a Roman term for an offense against the political community. They instead strong-armed the offenders or potential offenders into taking oaths on the bones of saints to

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<sup>126</sup> I think Walter Miller got it right when he created his new Middle Ages (post nuclear holocaust) in *A Canticle for Leibowitz*. The ruler of the city state that rises to power in the wake of the nuclear war is titled “Hannegan II, by the Grace of God Mayor of Texarkana.” I mean no disrespect to the current mayor of Texarkana, but Miller was obviously imagining that the meaning of the mayoralty of Texarkana had changed quite a bit from what it is today. Walter M. Miller, *A Canticle for Leibowitz* (New York: J.B. Lippincott, 1960).

uphold the peace. They bound people to saints and to each other through these public oath ceremonies, in very personal and affective relationships.<sup>127</sup> It was a world in which watching a ceremony would have understood it as a ritual that constituted a relationship between people, not as a particular manifestation of a general rule that was applicable to all society.<sup>128</sup>

The language of public authority nevertheless must have meant something to someone, because if the old public titles were merely hollow reminders of a defunct past, why would anyone have continued to use them? There are several possible ways to explain the survival of the language of public authority. One is instrumental. In the twelfth century kings and their servants, in particular, began to see the usefulness of the language of public authority. Anyone could be a lord; in parts of Western Christendom, it was even possible for one man's serf to be another man's lord.<sup>129</sup> Not everyone could represent the authority of the state, however. The language of the state was one of several that kings could deploy in order to get what they wanted. That kings and other princes used many different languages to legitimate their rule is apparent from the fact that, in Normandy, the dukes asserted their power by assuming the position of special protectors of the Peace of God.<sup>130</sup> If lordship or an oath to the peace was insufficient, then *publica potestas* might work.

Surely kings had something to do with this shift in the royal administration, and the investiture controversy and the Becket conflict must have played a role in monarchs' hiring practices. When the papacy used canon law to support its positions, monarchs often fired back

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<sup>127</sup> Daniel F. Callahan, "The Peace of God and the Cult of the Saints in Aquitaine in the Tenth and Eleventh Centuries," in *The Peace of God: Social Violence and Religious Response in France Around the Year 1000*, ed. Thomas Head and Richard Landes (Ithaca, NY: Cornell University Press, 1992), 176-8.

<sup>128</sup> I follow Frederic Cheyette here. Frederic L. Cheyette, "The Invention of the State," in *Essays on Medieval Civilization: The Walter Prescott Webb Memorial Lectures*, ed. Karl Lachner and Kenneth Roy Philp (Austin: University of Texas Press, 1978) 143-178.

<sup>129</sup> Frederic L. Cheyette, *Ermengard of Narbonne and the World of the Troubadours* (Ithaca, NY: Cornell University Press, 2001), 154.

<sup>130</sup> Julius Goebel, Jr., *Felony and Misdemeanor: A Study in the History of English Criminal Procedure* (Philadelphia: University of Pennsylvania Press, 1937), xv-xvi.

with Roman law, and they needed Roman lawyers to make their arguments for them.<sup>131</sup> I will focus less on the kings, though, than on their servants, the people they relied on to administer their realms. This is a story about those officials whom the king found to manage his realm and how they came to imagine themselves and their position in the realm. All of us want to think that our jobs are important and to justify what we do. I will argue that this was the primary drive for royal justices to think of the work they did as law. It was self-interested. It was also historically contingent; there is no reason why the king's servants necessarily had to create a new identity for themselves. No similar drive occurred in the exchequer. Officials there never compared themselves to Roman quaestors and used the comparison as the basis of a new identity.

## Henry II's Reforms

Although there is no necessary reason why administrators needed to create a new juristic identity for themselves, there were some conditions that needed to be met before they could create such an identity. There needed to be dispute resolution procedures that the justices could analogize to the law they found in the universities. There had to be a group of justices who had the sense of cohesion necessary to imagine themselves as a community.

The series of reforms carried out by Henry II after his accession in 1154 mark an important moment in the history of English law and in our story of the creation of a legal sphere. But would anyone have thought that these were *legal* reforms in the second half of the twelfth century, or is it only with the benefit of hindsight of people living with a developed set of institutions, practices, and discourses that we call the common law, that we are able to call the administrative procedures that Henry introduced *legal* procedures for the recovery of lost land?

Henry took the throne in 1154 as a result of a peace treaty. England had been at war for

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<sup>131</sup> See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), 255-270.

almost two decades because Henry I had died with two potential successors. The supporters of the Empress Matilda, who was Henry I's daughter and Henry II's mother, and the supporters of Stephen of Blois, Henry I's nephew waged civil war. The war had played itself out on the continent as well as in England. When the head of the ruling house of Normandy and England had died without an heir, the heads of the other Northern French comital houses scrambled to make good on claims that had lain dormant when the Anglo-Norman realm had a strong king. Stephen, whose brother was the count of Blois-Champagne, was the first to stake his claim to the English throne. Matilda was married to Geoffrey Plantagenet, Count of Anjou, and brought the Angevin house into the scramble to pick up the pieces of the Anglo-Norman *regnum* and tip the balance of power in Northern France, which had favored the Normans for several decades, in favor of one of the other houses. Blois-Champagne, Anjou, and the royal domain of Île de France all vied for power. Normandy, along with England, was a battle front and suffered from frequent turnovers as supporters of one side would dispossess supporters of the other.

In November, 1153, Stephen and Henry agreed to end the war under the terms that Stephen remain on the throne and adopt Henry as his heir. Stephen died unexpectedly less than a year later, in October, 1154, and Henry ascended to the throne, combining his father's counties of Anjou, Touraine, and Maine with his mother's inheritance of the duchy of Normandy and the English crown. Having married Eleanor of Aquitaine in 1152, he also brought her duchy of Aquitaine and her claims to the county of Toulouse into the mix. The houses of Normandy and Anjou had combined, had held onto the English crown, and had even added much of Occitania to their control, making the combined royal-ducal-comital house the most powerful in the world of Northern French politics.<sup>132</sup>

Even with the Angevin victory, though, Henry had quite a bit of work to do to repair the

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<sup>132</sup> Jean Dunbabin, *France in the Making, 843-1180*, 2nd ed. (Oxford, Oxford University Press, 1985), 325-7.

domains that had been ravaged by the war. In a world where lordship was the normal experience of power and where dispossession was the usual penalty for disloyalty, many of the landholders in England and Normandy had had their estates confiscated by one side or the other and regranted to their rivals on the other side of the conflict. Feuding families might take sides in the politics of the royal succession to secure a grant of their neighbors' lands, using the competing sides in the war as a proxy for their relatively small-scale disputes. Moreover, many religious establishments had used the opportunity afforded by the king's weak bargaining position to obtain concessions or seize prerogatives for their churches.<sup>133</sup> By the end of the war, England and Normandy were patchworks of competing claims that could not be easily sorted out.

Henry's reforms in England and Normandy must be seen in this light. The Constitutions of Clarendon of 1164, which purported to state the custom of the realm regarding the relationship between the Church and the crown, were, from Henry's perspective, an attempt to take some of the power that had been lost to the Church. The constitutions are important to our story because they probably produced the first of Henry II's important procedural reforms, and one that would be copied, the assize *utrum*. This was a procedure for deciding whether (*utrum*) a piece of land belonged to a church in free alms or was held in lay fee. If the land had been donated to a church in free alms it was in the complete and total control of the church and several consequences ensued. It owed no service to any lord, either in the form of knights or rent. The king could not tax it, and disputes concerning it could not be heard in the king's court, but would instead be sent to the ecclesiastical courts. The king, by establishing the assize *utrum*, assumed the privilege of deciding the preliminary question—whether the land was held in free alms or not—for his own court. The king's court seized the right to decide whether it had jurisdiction.

The procedure for invoking this new assize was to obtain a writ from the king's chancery

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<sup>133</sup> W.L. Warren, *Henry II* (Berkeley: University of California Press, 1973), 420-1.

which ordered the sheriff to summon a jury to come before the justices. The writ called upon the Sheriff to bring “twelve free and lawful men of the neighborhood to be before me or my justices on a certain day” to “declare on oath” whether the land is owned in free alms or lay fee.<sup>134</sup> Two aspects of this procedure are important for the later history of the reforms, because they were copied in later procedures. First is the returnable writ. The returnable writ, a document written by the king’s chancery, was written in the form of a command from the king to the sheriff and sealed close, so that the seal had to be broken for the writ to be read. The complaining party would purchase the writ from the chancery and then take it to the sheriff, who was to carry out the orders in the writ by summoning a jury and returning the writ to the king or his justices. That jury, or assize, was the second aspect of the assize *utrum* to be copied in later procedural reforms. *Utrum* required the sheriff to call together twelve men of the neighborhood who would be sworn to tell the truth about the matter. They were essentially witnesses who were expected to know something about the circumstances of the case. Similar panels were used in the Carolingian Empire and had been adapted by William the Conqueror for his Domesday survey.<sup>135</sup>

In 1166, Henry turned his attention towards what he perceived as a problem of violence and adapted some of the institutions he created in the assize *utrum* to be useful in this context. In the Assize of Clarendon, Henry created a procedural system for the new eyres to be sent out around the realm for finding and punishing breakers of the king’s peace. The assize required “twelve of the more lawful men of the hundred and four more lawful men of each vill” to appear before the justices, take an oath to tell the truth, and to present to the justices any man “cited or charged” (*rettatus vel publicatus*) as being a robber, murderer, or thief, or who had been a

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<sup>134</sup> GDL, 163, book XIII, c. 24; Elsa de Haas and G. D. G. Hall, eds., *Early Registers of Writs* (London: Bernard Quaritch, 1970), 8, 50.

<sup>135</sup> Robin Fleming, *Domesday Book and the Law: Society and Legal Custom in Early Medieval England* (Cambridge: Cambridge University Press, 1998), 11-17. The number twelve had religious significance, as it evoked images of Pentecost and the Holy Spirit speaking through the twelve apostles.

receiver of robbers, murderers or thieves, since Henry ascended the throne.<sup>136</sup> Again, we see Henry using the inquest of twelve men sworn to tell the truth. At the time, though, the Assize of Clarendon did nothing to indicate that this was anything but a one-off attempt by Henry to clear the kingdom of wrongdoers.

That same eyre saw a second innovation based on the jury of twelve men. It is in 1166 that we first find payments on the pipe rolls “for disseisin upon the assize of the king” (*pro disseisina super assisam Regis*).<sup>137</sup> We do not know for certain if this phrase refers to something like the assize that would come to be known as “novel disseisin,” and which would later be so important in the history of English law, but it seems a logical extrapolation. The assize of novel disseisin was, like *utrum*, a returnable writ that began “A. de N. has complained to us that B., unjustly and without judgment, has disseised him of his free tenement in N.”<sup>138</sup> The original purpose of the writ has been debated. S.F.C. Milsom thought that its original purpose was to prevent lords from taking their vassals’ lands without a proper judgment of the lord’s court.<sup>139</sup> Whether this is the case or not, it is clear that within a very short period of time people would begin to use it in much broader ways. It could apply to any case where one person had recently (novel) ejected (disseised) another person from a piece of land. By the end of the thirteenth century, it was the ordinary way to litigate non-inheritance disputes over land.<sup>140</sup> The case was once again decided by a jury of twelve men of the neighborhood.

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<sup>136</sup> “*Per xii. legialiores hominess de hundredo, et per iv. legialiores hominess de qualibet villata, per sacramentum quod illi verum dicent: si in hundredo suo vel villata sua sit aliquis homo qui sit rettatus vel publicatus quod ipse sit robator vel murdrator vel latro vel aliquis qui fuerit receptor robatorum vel murdratorum vel latronum...*” Assize of Clarendon (1166), c. 1, in in William Stubbs, *Select Charters of English Constitutional History From the Earliest Times to the Reign of Edward the First*, 9th ed., ed. H.W.C. Davis (Oxford: Clarendon Press, 1913), 170.

<sup>137</sup> R.C. Van Caenegem, *Royal Writs in England from the Conquest to Glanvill* (London: Bernard Quaritch, 1959), 294.

<sup>138</sup> “*Questus est nobis N. de N. quod N. iniuste et sine iudicio disseisivit eum de libero tenemento suo in N.*” De Haas, *Early Registers of Writs*, 2. De Haas and Hall modified the translation, since the original uses “N.” as the abbreviation for all proper names.

<sup>139</sup> S.F.C. Milsom, *The Legal Framework of English Feudalism* (Cambridge: Cambridge University Press, 1976), 11-12.

<sup>140</sup> Donald W. Sutherland, *The Assize of Novel Disseisin* (Oxford, Clarendon Press, 1973), 42.

In the late 1170s, Henry and his councilors continued to copy these procedures in the assize of mort d'ancestor, which was established by the Assize of Northampton in 1176 and the assize of darrein presentment, which first appears in 1180.<sup>141</sup> Mort d'ancestor allowed the "nearest heir" (*propinquior heres*) of a person who died in seisin of a piece of land to sue for that land. Darrein presentment allowed the last person who presented a priest to an ecclesiastical benefice to sue for the right to present the next priest to the benefice. Both were returnable writs and both were decided by assizes of twelve men. A slightly different, but related, procedure, the grand assize, came about in 1179. Previously people sued by writ of right, a writ which decided the ancestral right to a piece of land. But a plaintiff using the writ of right could be required to settle the dispute with a trial by battle. The grand assize, on the other hand, allowed them to opt for an assize of twelve men to settle it. Procedures based on the originating writ and the assize of twelve men continued to proliferate in the late twelfth and early thirteenth centuries. The treatise known as *Glanvill* contains several assizes that were apparently current in the 1180s, but which did not make it into later registers.<sup>142</sup> Writs of the thirteenth century, like the assizes of aiel and cosinage and the family of writs of entry, would copy this format, as well.

These reforms had two major results. First, they brought many people into the king's courts who previously had no access to them. When the king's court was a lordly court of the kind we saw earlier in the chapter, an undifferentiated space inhabited by the king and his vassals, direct access to the king was generally limited to those who had a direct relationship with him, his tenants-in-chief, those who held their land directly from the king. The new writs cost very little, though, and from the time of the earliest plea rolls, we see people very low on the social scale coming into the courts. The prevalence of widows suing for very small parcels of land—and who were often unable to pay their amercements, or fines, when they lost—is one

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<sup>141</sup> Van Caenegem, *Royal Writs*, 82; Joshua C. Tate, "Ownership and Possession in the Early Common law," *American Journal of Legal History* 48 (2006): 307.

<sup>142</sup> GDL, xxxiv.

indication of the growing use of the king's courts by people of humble origins.<sup>143</sup> The reforms also led to a textualization of disputing. Where the king's court or lord's court of the early twelfth century would have relied on the norms and mores of the court holders, the lord's vassals, to make judgments as to how a case should be decided, the new writs laid out the processes to be followed, the norms to be applied in deciding cases. In some ways this simplified the issue; the lord's court did not have to collectively decide which norms to apply in each case. Certain ones were selected over others. Where the question of who should succeed to a fee when the holder of that fee died might be a complicated one in the lord's court, where one would have to consider not only the custom that the previous holder's eldest son should succeed to the fee, but also circumstances peculiar to the situation. Is there another son more fit to hold the fee? Did the lord or the deceased prefer someone else? The custom would not necessarily control the court's decision. The writ of mort d'ancestor, however, told the jury and justices what norms they were to use in deciding a succession case. The writ says that the deceased must be the father, the mother, the brother, or the sister of the person claiming the land.<sup>144</sup> It also says that the claimant must be the next heir (*propinquior heres*).<sup>145</sup> Of course, this second requirement leaves some of the complexity in the system. What makes someone the next heir? If we have both children and siblings of the deceased alive, then which of them takes precedence? This is a question about the norm that will apply, but the writ does not answer this question. That could either be left to the local knowledge of the jury or to the central knowledge of the king's justices. As we shall see, the king's justices created a literature that reserved this type of decision-making, decision-making about the norms to be applied, to themselves. They discovered the Roman distinction between law and fact and turned questions about the norm to be applied into questions of law.

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<sup>143</sup> See, e.g., CRR 15, nos. 68, 279, 314.

<sup>144</sup> De Haas, *Early Registers*, 3.

<sup>145</sup> *Ibid.*

## **Towards Specialization: The Justices and the Clerks of the Royal Courts**

It was in this world without law that the justices and the clerks of the king's courts began to construct a separate legal sphere, a space for a specialist type of activity and discourse called law, which was independent of literature, theology, and arbitration. Henry II's administrative reforms created a need for people who could administer it, to staff the eyres, to write the writs, to keep the records, and to sit in the central courts. Who were the justices<sup>146</sup> and clerks who performed these duties for the king? The English royal courts and their staff underwent some major changes over the course of the late twelfth and early thirteenth centuries and these changes must have had an impact on the outlook of the royal justices. English kings had, even from before the Conquest, personally dispensed justice. The king's time was precious, though, and from at least the reign of Henry I (r. 1100-1135), kings were appointing delegates to hear cases on their behalf, just as other lords often had bailiffs or seneschals hear the disputes of their dependents. Henry I had periodically appointed itinerant justices to represent him in the counties. Henry II (r. 1154-1189), no doubt in response to the increase in court business spurred on by his creation of new writs, made this a more regular practice, appointing justices to regular circuits in 1176 and 1179.<sup>147</sup> Henry turned to several different groups of people to staff these courts, called eyres (Latin *iter*, or "journey"). Bishops, earls, and other local notables sat as justices, as did royal clerks and officials of the king's financial office, the exchequer. By Richard I's reign, the eyre had been established as an important royal court, usually composed of about six panels of

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<sup>146</sup> I prefer not to call these people by the term judges (*iudices*) because the word has such strong associations with legal work. Furthermore, it was not commonly used to refer to these people in the late twelfth and early thirteenth centuries. They were far more often referred to as "justices" or, at times "barons." In fact, these same titles were used by the exchequer, the royal financial office, in the late twelfth century, which is not surprising, because the exchequer and the courts shared personnel. See Turner 24, 71. The Latin word "*iudex*" is most often used by the Romanizing texts, like *Bracton*, which compare the English justices to Roman *iudices*. This is part of the same process we will see in other parts of this dissertation, by which the justices and clerks of the thirteenth century made connections between the work of the royal courts and Roman and canon law, between the plea rolls and jurists' opinions, and between justices and judges.

<sup>147</sup> Ralph V. Turner, *The English Judiciary in the Age of Glanvill and Bracton, c. 1176-1239* (Cambridge: Cambridge University Press, 1985), 20-21.

three justices each who travelled around different parts of the country once every few years.

While the eyres were going on, a small group of justices usually stayed in Westminster, the king's administrative center just outside of London. It is difficult to imagine Westminster as being outside of London, since it is nearly in the center of it today, but in the twelfth century a field separated England's largest city from the growing royal administrative center on the Thames. Westminster Hall was a royal residence and also home to the exchequer, which was the first part of the royal court to become stationary. While the king and his court itinerated, often on the other side of the Channel in the king's vast continental domains, the exchequer stayed put. The justices who began to sit more regularly at Westminster as Henry II's reign came to a close were often called the "king's court at the exchequer" (*curia regis ad scaccarium*) leading to considerable debate about whether they were part of the exchequer itself or simply royal justices who used the same space. It seems, though, that the financial and judicial functions were not separate at this time, and these justices may very well have been considered part of the exchequer. In fact, some of the people who filled this role also worked on the financial side of the exchequer.<sup>148</sup>

Whatever its status under Henry II, it is clear that under Richard I (r. 1189-1199) the court at Westminster began to separate itself from the exchequer and to form a separate royal office. This separation of this royal court, called the bench, from the exchequer, is associated with Hubert Walter, whom Richard appointed his chief justiciar in 1194. Where that court had previously sat for only two sessions of a few weeks each every year, Hubert established the pattern of four judicial terms—Hilary, Easter, Trinity, and Michaelmas—still used by the English courts today.<sup>149</sup> Around the same time there seems to have been a shift in the court's personnel away from using exchequer officials as part-time justices and towards a more regular

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<sup>148</sup> Turner, *English Judiciary*, 20-21, 70-74

<sup>149</sup> *Ibid.*, 69.

and stable group of men whose primary duty was sitting as justices in the courts.<sup>150</sup>

By the end of Richard I's reign, the royal courts thus consisted of a regular bench at Westminster and a series of eyres that visited the counties on a semi-regular basis. As a general rule one could also petition the king directly, although this was difficult because of Richard's long absences from England, a kingdom which he saw as peripheral to his continental domains. John, however, kept a permanent group of four justices at his side to hear complaints. This group travelled around the country with the king and became known as the court *coram rege* (before the king) or *coram ipso rege* (before the king himself). A litigant wishing to sue in this court could obtain a writ addressed to the king's justices "wherever they may be," and then would have to seek out the itinerant court in order to obtain redress.<sup>151</sup> In 1209, John, wishing to keep judicial work tightly under his own, personal control, eliminated the bench at Westminster to reserve cases for his justices *coram rege*.<sup>152</sup> This was unpopular with litigants, since it could be costly to follow the constantly moving court; the barons laid down in Magna Carta that common pleas must be held in "a fixed place," meaning that writs should be returnable to a named place, either in the county court or at Westminster, rather than to the king, "wherever he may be."<sup>153</sup> As a result, the court at Westminster, which had made a brief return when John had sent his justices to sit there while he was waging war against France, was put on a firmer footing after the civil war between John and the barons had ended.

During Henry III's long reign (1216-1272) the court *coram rege* and the bench at Westminster were established as the two highest courts in England, with eyres and special assize commissions supplementing them and helping to handle the increased legal work of the

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<sup>150</sup> One of Hubert Walter's first acts as justiciar was to recruit five new justices to sit at Westminster to relieve the exchequer of some of the burden of hearing cases. Turner, *English Judiciary*, 73.

<sup>151</sup> Musson, *Medieval Law in Context*, 137.

<sup>152</sup> Turner, *English Judiciary*, 134-5.

<sup>153</sup> *Magna Carta* (1215), c. 17; (1225), c. 11.

thirteenth century.<sup>154</sup> They also became differentiated from the royal court and solidified into independent institutions, more like the exchequer than the king's council. While most of the members of the bench at Westminster during the first part of Henry III's reign were John's men from the old court *coram rege*, they were not so under the thumb of the monarch as they had been under John. Henry III was a minor for the first ten years of his reign and therefore did not dispense justice personally. Most judicial business was done through the bench and the eyres, which were revived in 1218 with personnel largely taken from the bench. The king's minority caused much more than an institutional shake-up, though. It probably also produced a shift in thinking about the relationship between the monarch and the government that operated in his name. In Maitland's words, the minority "made it possible to distinguish between the impersonal 'Crown' and the little crowned head."<sup>155</sup> During the minority the bench and the eyres were left to function fairly independently of the king's regents and they developed a strong institutional base during these years. By the time Henry had reestablished the court *coram rege* in 1234, there was already a professional set of justices who were relatively independent of the king in place.

The new court *coram rege* was small—usually one full-time justice supplemented by the stewards of the royal household, sitting as his associates—and became more specialized than it had been under John.<sup>156</sup> Since Magna Carta required that common pleas, which covered most lawsuits between private parties, be held at "a place certain," the court *coram rege* could not hear these claims.<sup>157</sup> Instead it specialized in pleas of the crown, those areas that touched the king's own rights.<sup>158</sup> The chief justice of the court *coram rege* was also the king's chief legal advisor and was thus at the apex of the judicial administration. He oversaw the eyres and instructed the

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<sup>154</sup> These two courts would survive into the nineteenth century. The court *coram rege* was, confusingly, renamed the King's Bench and the bench was renamed the Common Pleas.

<sup>155</sup> BNB, 1:3.

<sup>156</sup> Paul Brand, "Edward I and the Transformation of the English Judiciary," in *The Making of the Common Law*, ed. Paul Brand (London: Hambledon Press, 1992), 136-7.

<sup>157</sup> *Ibid.*, 136; Magna Carta (1215) c. 17; (1225), c. 11.

<sup>158</sup> Brand, "Transformation of the English Judiciary," 136-7.

eyre justices to reserve difficult questions of law for his own hearing.<sup>159</sup>

## Judicial Careers

But even with the greater specialization brought about by separate staffs for financial administration and dispute-resolution the work of the royal justices was not yet highly differentiated from that of other royal administrators. The title *justice—iusticiarius* in Latin—did not imply legal work in the thirteenth century. We have talked about judging as one of many activities a royal servant might perform in the twelfth century. But even those royal justices who did little work outside of the royal courts dealt with many issues apart from dispute resolution, as the work of the royal courts was broad and varied. Into the thirteenth century the highest *iusticiarius*, who headed up the king's courts, was also something like a prime minister, aiding the king with many types of administration and even acting as viceroy during his frequent absences from the kingdom.<sup>160</sup> The lesser justices acted in many capacities that did not involve punishing the wicked and giving each man his due.

Royal justices (*barones errantes*) were sent out in 1170 on the inquest of sheriffs to make inquiry into the honesty of royal officials and were sent out again in 1181 to take oaths from people in the counties that they would maintain the armor and weapons required by the assize of arms.<sup>161</sup> The assize of Northampton of 1176 assigned to the king's justices the tasks of taking oaths of fidelity from the entire kingdom on the king's behalf, seeing that unlicensed castles were pulled down, enforcing all of the king's monetary rights to the amount of half of a knight's fee or less, inquiring into lands escheated into the king's hand, and discovering which heiresses and

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<sup>159</sup> C.A.F. Meekings, *The 1235 Surrey Eyre* (Guildford, Surrey, UK: Castle Arch, 1979), 1: 9; Turner, *English Judiciary*, 198.

<sup>160</sup> Although historians often make a distinction between the “justiciar” and the “justices,” this distinction is a nineteenth-century invention. There is no evidence that twelfth- and thirteenth-century people thought of the justiciar as anything other than the most important of the justices.

<sup>161</sup> Stubbs, *Select Charters*, 174, 184.

widows were in the king's gift, to be married off to whomever the king wished.<sup>162</sup> Even though they did not regularly work in the exchequer any more, the justices were involved in financial administration throughout this period. In 1172, the same justices who had been sitting in Henry's eyres were sent out to collect a scutage for Henry's Irish campaign.<sup>163</sup> Collecting tallages became a regular duty of eyre justices. Henry II included this among the justices' duties in 1177 and Hubert Walter instructed the eyre justices to collect a tallage for King Richard's ransom in 1194.<sup>164</sup> In 1207, itinerant justices were sent out to assess the moveable goods of the barons and earls in preparation for taking a thirteenth.<sup>165</sup> Even one of the authors of *Bracton*, William of Raleigh, worked as a tax assessor in the counties during judicial vacations.<sup>166</sup> In a version of the chapters of the eyre, a series of questions that the eyre justices posed to a jury from each hundred within the county they were visiting, from the 1250s, the first five questions the justices ask have little to do with legal disputes:

Of young men and maidens who are and ought to be in the king's wardship: who they are, who have them and through whom, and how much their lands are worth. Of ladies who are and ought to be in the king's gift: whether they are married or not, and if they are married, to whom and by whom, and how much their lands are worth. Of churches in the king's gift: which churches they are, who hold them and by whom they were presented. Of the king's escheats: which they are and who hold them, [by whose grant] and by what service, having regard to the lands of the Normans as well as other lands, and whether

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<sup>162</sup> Assize of Northampton, c. 7-9, in William Stubbs, *Select Charters of English Constitutional History From the Earliest Times to the Reign of Edward the First*, 9th ed., ed. H.W.C. Davis (Oxford: Clarendon Press, 1913), 180-1.

<sup>163</sup> Turner, *English Judiciary*, 20.

<sup>164</sup> *Ibid.*, 67.

<sup>165</sup> Stubbs, *Select Charters*, 278-9. The thirteenth was a tax of one-thirteenth of all moveable goods. The justices did not have to do any serious accounting work for this thirteenth. The onus was on the lords' bailiffs to assess the value of their moveables and then to swear to the value before the justices.

<sup>166</sup> C.A.F. Meekings, "Martin Patishall and William Raleigh," *Bulletin of the Institute of Historical Research* 26 (1953), 165.

they are held without warrant. Of the king's serjeanties: which they are and who hold them, by whose grant and what kind of serjeanties they are, and how much they are worth.<sup>167</sup>

The justices here are instructed to look after the king's interests in the county. They are assessing the value of the king's rights in wards, widows, advowsons,<sup>168</sup> land that has escheated for lack of heirs, and lands held in exchange for personal, non-military service to the king (serjeanties).

These were all important sources of income and patronage for the king. We will see the importance of advowsons, wardships, heiresses, and escheats in rewarding royal servants. The justices also asked the jurors about "the chattels of slain Jews and their pledges, debts and charters, and who has them."<sup>169</sup> This was probably not out of royal concern for the Jews, but because, being under close royal control, could be tallaged at will. The king was once again ensuring that his property was secure. In this particular eyre he also wanted to know what had happened to the chattels of French subjects, which had been seized during a period of hostility with the French king, and where they had gotten to.<sup>170</sup>

In addition to looking after the king's property, the justices in eyre looked into the behavior of the king's representatives in the shire: the sheriffs, coroners, and royal bailiffs. The justices wanted to know, for instance

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<sup>167</sup> "De valletis et puellis qui sunt et esse debent in custodia domini regis, qui sunt et qui illos habent et per quem, et quantum terræ illorum valent. De dominabus quæ sunt et esse debent de donatione domini regis sive sint maritatae sive non, et si sint maritatae, quibus et per quem et quantum terræ illarum valent. De ecclesiis quæ sunt de donatione domini regis, quæ ecclesiæ illæ sunt et qui illas habent et per quem. De eschætis domini regis, quæ sunt et qui illas tenent et per quod servitium, tam de terris Normannorum quam de aliis, et si teneantur sine waranto. De seriantii domini regis, quæ sunt et qui illas tenent et per quem, et cuiusmodi seriantie illæ sunt et quantum valent." BDL, 2: 330.

<sup>168</sup> The right to present a candidate to the bishop for an ecclesiastical benefice, such as a parish church. As long as the holder of the advowson presented met certain minimum requirements, the bishop was bound to accept him. An advowson was thus a valuable right, since the income from that benefice was essentially in its holder's gift.

<sup>169</sup> "De catallis Iudeorum occisorum, et vadiis et debitis et cartis eorum et quis ea habeat." BDL, 2: 331.

<sup>170</sup> BDL, 2:333.

Of bailiffs who hold their ale-drinkings, which they sometimes call scot-ales, sometimes filast-ales, in order to extort money from those who owe suit to their hundreds and their bailiwicks; and also of those who, though they do not hold ale-drinkings, extort gifts in harvest time, corn, lambs and other things, by virtue of their office, by which they aggrieve and harass the poor.<sup>171</sup>

Additionally, there was no necessary reason why their dispute resolution activities, those duties of the royal justices that look the most legal to modern observers, should be thought of as “legal” work. The writs that began litigation were formulated as royal commands, usually to the sheriff. The writ of right *praecipe quod reddat*, for instance, begins by telling the sheriff to “Command N. to render to R., justly and without delay, one hide [or another amount] of land in such-and-such a vill, which the said R. complains that the aforesaid N. is withholding from him.”<sup>172</sup> If N. refused to hand over the land, litigation ensued, but the writ is formulated as a bare command. One might just as easily call the writ an expression of the king’s will as call it law.

The royal justices were thus concerned with much more than what we would consider “legal” work. Even if the courts and the exchequer were institutionally separate by the end of the twelfth century, law and finance were not clearly separate in this period. Nor were law and the administration of royal estates, such as those that royal bailiffs would have overseen. As late as the 1250s, royal justices were jacks of all trades. The difference between the justices of the 1180s and those of the 1250s was that the latter were not speaking or writing about themselves as if they were jacks of all trades. *Bracton* may include financial and administrative concerns in its copy of the articles of the eyre, but it does not discuss these issues.

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<sup>171</sup> “*De ballivis qui faciunt cervisias suas quas quandoque vocant Scotale, quandoque Filastale, ut pecuniam extorqueant ab eis qui sequuntur hundreda sua et ballivas suas, et de illis similiter qui licet cervisiam non faciunt, blada tamen colligunt in autumnno, agnos et alia, praetextu ballivæ suæ, per quod pauperes gravant et molestant.*” BDL, 2:332.

<sup>172</sup> GDL, 5, book I, c. 6.

It is the dispute resolution practices of the courts, and only the dispute resolution practices, which a royal justice or judicial clerk decided to compile into a treatise called *De Legibus et Consuetudinibus Angliae*.<sup>173</sup> The authors, by their strategies of inclusion and exclusion, defined the legal sphere in a very specific way. Although, as we have seen, the words *lei* and *lex* might have been used to describe many of the practices associated with the work of the royal justices, the author of *Bracton* is talking about a law with a more specific definition. The *Bracton* authors used these words neither in the specific sense of legislation nor in the general sense of a community and its practices, the meanings that were prevalent in the twelfth and early thirteenth centuries. They use these words as something in between: a specialist set of ideas and practices. Where *lei* and *lex* in the thirteenth century could refer to all those practices that make the English one people, that combine them as a community, the law of *Bracton* refers to a very limited subset of practices that have to do with resolving disputes. These practices fit very neatly into our 21st-century categories of what should fall within the boundaries of the law and what should lie outside of them, so it is easy for us, as modern readers, to relate to *Bracton* as a “legal” text. It makes the text seem less than extraordinary to us today and makes it a popular source for lawyers and historians who want to know the black letter law of the thirteenth century. But the author of *Bracton* was in the very process of creating a realm where black letter law could exist, not stating the content of a black letter law that already existed. To define English law in the way the author of *Bracton* did was extraordinary in the thirteenth century.

The authors of *Bracton* did not invent the sphere of the legal and I do not mean to imply that it was impossible for people in the twelfth- and early thirteenth-century England to imagine law as a system and a specialist discourse. Such a specialist discourse existed, but not in the vernacular world of the king’s court and manor court. It existed in the cathedral schools and

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<sup>173</sup> The one exception to this is the articles of the eyre, which the authors of the treatise include, but do not discuss in detail, and which lay duties of the justices that do not fit into the general pattern of the treatise. We will discuss this in more detail later in this chapter.

universities. Scholars at Bologna were teaching Roman law as a system as early as the 1080s, after the rediscovery of Justinian's *Digest*.<sup>174</sup> As I will discuss in the more detail in chapter two, the scholars in the universities did think about law as forming a coherent system of categorized and systematized rules. The late antique sources of Roman law encouraged this type of systematic thinking about law. The *Institutes*, Justinian's introductory legal textbook, posits that law is a field that can be categorized into the public and the private, the civil and the criminal, and the law concerning persons, things, and actions.<sup>175</sup> The *Digest* emphasizes its own systematic nature by saying in its introduction that all of the contradictions between different laws have been harmonized.<sup>176</sup> By the middle of the twelfth century, scholars were trying to harmonize legal texts into coherent systems on their own. Gratian's *Concordance of Discordant Canons* used the dialectical method to work the writings of church fathers, the letters of popes, and the decisions of church councils into a self-contained system.

The scholars in the universities were able to imagine law as an independent sphere of specialist discourse. They could attach a meaning to the word that was separate from the sense of a specific enactment and from the sense of a broader community. But the justices of the royal courts had to connect the work they did with the specialist discourse coming out of the universities. It was an easy connection to make—both used the same terminology, the terminology of *lei* and *lex*, of *dreit* and *ius*—but someone had to make it. The justices and clerks of the royal courts who collected cases from the plea rolls and who wrote texts like *Bracton* chose to present their work as being primarily concerned with the resolution of disputes and with the punishment of crime, the types of things that people in the universities of the thirteenth century would have considered law. They were turning themselves into jurists who operated in a separate legal sphere through their writing.

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<sup>174</sup> Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), 45-6.

<sup>175</sup> Peter Birks and Grant McLeod, eds., *Justinian's Institutes*, (Ithaca, NY: Cornell University Press, 1987), 36-39.

<sup>176</sup> D.Constitutio Tanta.15.

## Chapter Two

### The Culture of the Clerks

In the last chapter we looked at the changes that took place in the courts. In this chapter, we will turn to the people who staffed them, who wrote the plea rolls, who wrote *Bracton*, and who adopted the discourse of the legal sphere from Roman law. Why did the scholastic way of thinking about what the justices were doing make its way into the culture of the people who worked in the royal courts? Why did they start to think about themselves as working in a legal sphere? Part of the answer must be that some of the justices had been trained in the schools. A few of the justices are described as “*magister*” in the rolls, which usually indicates that they had taken degrees. Even if they had not taken degrees, one or more of the people who were responsible for writing *Bracton* had certainly had some formal training in Roman law. The first author’s knowledge of the *Digest*, *Code*, and *Institutes*, as well as the *summae* of Azo, Tancred, William of Drogheda, and Raymond of Peñafort is too extensive and systematic to believe, as some have claimed, that he was a clumsy Romanist who came to his knowledge late in life and only from books.<sup>177</sup> If his, or their, Roman legal theories are sometimes idiosyncratic, Güterbock may have been correct that the author was not a passive consumer of Roman law, but was engaged in the debates going on throughout Europe about the meaning of ancient Roman law texts. In the *Bracton* authors’ time, there was no static and established Roman doctrine; Roman law was in the process of formation just as common law was.

Even the prestige enjoyed by Roman law in the universities would not explain why the author of *Bracton* adopted Roman law’s definition of “law” as his own. After all, there is no necessary reason why the practices of the royal courts needed to be defined as “legal” practices.

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<sup>177</sup> H.G. Richardson, “Studies in Bracton,” *Traditio: Studies in Medieval History, Thought, and Religion* 6 (1948), 72.

It appears, though, that someone had already made the connection, early on, between the royal courts' dispute-resolution procedures and law in the Roman sense. The *Glanvill* author made the first tentative steps in this direction by smattering his book with bits of Roman terminology. It was probably fairly easy for a small group of justices and clerks—who were becoming specialists in an increasingly complex area of royal administration, and who appear to have already been defining themselves as a special type of royal servant—to pick up on this language, which made law a special type of administration, separate from politics, separate from *courtoisie*, and separate from the general administration of the king's household, and to speak in a discourse that supported a self-image that already existed.

By the early decades of the thirteenth century some people in England were beginning to think of law as a specialist discourse. In 1210, King John went to Ireland and brought with him several “*virī discretī et legis peritī*,” a group that included Simon of Patishall.<sup>178</sup> There are signs that the king and his councilors were beginning to imagine law as a system of rules as early as this journey to Ireland. While he was in Ireland, John decreed that the laws and customs of England should henceforth be observed in Ireland.<sup>179</sup> Although the charter does not survive, secondary evidence implies that it included a brief summary of those laws and customs that were to be transplanted.<sup>180</sup> Even if the charter contained only the barest summary of the laws and customs of England, the very fact that King John thought that the laws and customs of England could be transplanted suggests that they were seen as a complete system that was something different from the more general sense of *lei*, *lex*, or *laga* as *human society* that we saw earlier.<sup>181</sup>

Even as the justices and clerks acted as the king's personal servants, they wrote about

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<sup>178</sup> Paul Brand, “Ireland and the Literature of the Early Common law,” in *The Making of the Common law*, ed. Paul Brand (London: Hambledon Press, 1992), 447.

<sup>179</sup> *Ibid.*, 446.

<sup>180</sup> Brand, “Ireland,” 446

<sup>181</sup> Of course, 5 years later Magna Carta could be seen as another attempt to write down the laws and customs of England. Magna Carta, however, took the form of a charter of liberties, a format that kings and lords had been using for over a century and which did not need to be considered “legal” in any significant sense.

themselves as if they were serving something more ephemeral. Henry II's courts were staffed by many different types of people: bishops, earls, exchequer clerks, and local notables. There were many paths to the judicial bench, including service in the Church, service in the royal household, and office-holding in the counties as a coroner, sheriff, or bailiff. By the first decades of the thirteenth century, a new path was opening up. Every justice had his own clerk who kept his roll for him. A justice who was a jack-of-all-trades royal servant would probably have a clerk who was a jack of all trades, as well. The clerk of a justice like Simon of Patishall, who spent almost all of his time being a justice, however, would have to spend much more of his time doing court work, and would, in the process, develop some expertise. This expertise could pay off; in 1216, for the first time, one of these clerks became a justice himself with the elevation of Martin of Patishall to the bench upon the retirement of his master, Simon of Patishall. If the path from clerk to justice was not the primary route to the bench in the thirteenth century, it was at least one of the more common ones. It was also the route taken by many of the most important justices of the thirteenth-century; the chief justices Martin of Patishall, William of Raleigh, William of York, Roger of Thurkilby, Robert of Lexington, and Ralph of Hengham all followed this path. More importantly, the justices who are most often cited in *Bracton* and who are responsible for creating this idea of the independent legal sphere followed it too, a fact which must have affected their outlook and their sense of professional cohesion. Although some have doubted the connection, I find persuasive the evidence that there was a judicial dynasty running from Simon of Patishall to Martin of Patishall to William of Raleigh to Roger of Thurkilby and Henry of Bratton.<sup>182</sup>

Simon of Patishall has been called the first professional justice in the royal courts.<sup>183</sup>

Turner's criterion for professionalism in Patishall's case is that he served continuously for about

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<sup>182</sup> H.G. Richardson, *Bracton: The Problem of His Text* (London: Bernard Quaritch, 1965), 4.

<sup>183</sup> Brand, *English Legal Profession*, 27.

twenty-five years. Beginning his service as a justice under Richard I in 1190, probably thanks to the patronage of Geoffrey Fitz Peter, Patishall served in every eyre of Richard's and John's reigns, as a justice of the bench at Westminster, and as the chief justice of John's court *coram rege*.<sup>184</sup> According to Matthew Paris, he "at one time guided the reins of the justices of the whole kingdom."<sup>185</sup> In the confusion of the Civil War Simon was dismissed, arrested, and reconciled to the king within a very short period of time. Despite John's inconstancy, it seems that Simon was loyal to his lord to the last and, after his reconciliation, even sat as a justice again in 1216. Later that year he finally retired and probably died shortly thereafter. Thus, when Henry III's regents restored the courts after the war, it was not Simon, but his former clerk, Martin of Patishall, who was guiding the reins.

Martin, who was no relation to Simon, although the two men came from the same village in Northamptonshire, was already Simon's clerk in 1201.<sup>186</sup> Martin probably sat in Westminster from the beginning of Henry III's reign. When the first eyres were sent out after the war in 1218 and after, Martin was active in several of them. The plea rolls list the justices sitting at any given term in order of precedence. For Martin's entire career as a justice, from 1216 to 1229, he is listed first in precedence for every eyre, except for a few where an earl or a bishop was sitting with him, and even in those eyres we have evidence that he was regarded as the real leader of the eyre. He was listed first among the justice at the bench at Westminster for every term except for a few where Hubert de Burgh, the king's chief justiciar, was present.<sup>187</sup>

Martin was the first justice's clerk to make it to the bench. Like most of the clerks who worked in the royal courts, but unlike his master Simon, Martin was a cleric.<sup>188</sup> Many men took minor orders in order to receive some training in the literate skills that a clerical education

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<sup>184</sup> Turner, *English Judiciary*, 105; ODNB, s.v. "Simon of Patishall."

<sup>185</sup> Matthew Paris, 3:296- give your own translation

<sup>186</sup> ODNB, s.v. "Martin of Patishall."

<sup>187</sup> BNB, 1:60.

<sup>188</sup> ODNB, s.v. "Martin of Patishall."

provided. The clerical path also made it possible for a royal servant to hold ecclesiastical benefices, which were an economical way for the king to maintain his servants. Although the balance between laymen and clerics on the bench was about even throughout the twelfth and thirteenth centuries, the clerical path was common and many of the chief justices of the thirteenth century were clerics. Martin must have moved into major orders at some point in his career, since he held several ecclesiastical benefices, including five rectories, an archdeaconry and two deaneries. He was elevated to dean of St. Paul's cathedral in London about a year before his death.<sup>189</sup> We get a sense of his personality from a letter written in October 1226, probably by the clerk, and future chief justice, William of York. Apart from revealing that William was both a whiner and a sycophant, the letter tells us that working with Martin was "a great nuisance...for Martin works from sunrise to nightfall and has worn out all his fellows, above all William of Ralege and myself."<sup>190</sup>

That same clerk whom William of York describes as being worn out by Martin of Patishall, William of Ralegh, had served Martin for many years. The first evidence we have of Ralegh as a clerk comes from 1214, before Martin was even a justice, although the fact that King John had presented him to the rectory of Bratton Fleming in Ralegh's native Devonshire in 1212 suggests that he had done something to merit royal favor by then. C.A.F. Meekings thought he was Martin of Patishall's personal clerk from at least 1219;<sup>191</sup> C.T. Flower argued that he personally wrote Patishall's first five rolls from the bench at Westminster, rolls that were written in the same hand as Patishall's correspondence from early in his period on the bench.<sup>192</sup> If these letters are indeed in the hand of William of Ralegh, then Ralegh must have received his own clerks towards the end of Patishall's career, since Patishall's letters from this period are in

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<sup>189</sup> ODNB, s.v. "Martin of Patishall."

<sup>190</sup> C.A.F. Meekings, "Six Letters Concerning the Eyres of 1226-8," *EHR* 65 (1950): 495.

<sup>191</sup> C.A.F. Meekings, "Martin Patishall and William Ralegh," 160.

<sup>192</sup> C.T. Flower, *Introduction to the Curia Regis Rolls*, (London: Bernard Quaritch, 1944), 8-10, 32, 271. Meekings, "Martin of Patishall and William of Ralegh," 178.

different hands.<sup>193</sup> Raleigh was closely associated with Patishall in the minds of other justices. The rolls of the two junior justices of the bench for Michaelmas term, 1228 refer to the roll of the senior justice, Martin of Patishall, as “the roll of W. de Raleigh.”<sup>194</sup> In Hilary term, 1229, just before Martin retired, a woman is recorded as coming “before Martin of Patishall and William of Raleigh,” who were justice and clerk at the time.<sup>195</sup> Raleigh was made a justice of the bench in May of 1229, just a few months after Patishall retired. Some of his time as a clerk must have counted as time towards his seniority, because Robert of Lexington, who had been serving on the bench for two years already, fell below Raleigh on the list of precedence when Raleigh was promoted. In 1233, Raleigh apparently caught up to Thomas of Muleton, who had been listed before him in precedence before that date.<sup>196</sup> From that point on, he was the senior justice in the bench.

Raleigh was a crafty political operator. There was some political turmoil around the court in the early 1230s, and Raleigh seems to have come out of it on top. In 1232 Hubert de Burgh, the justiciar, was ousted from power by the king’s Poitevin relatives and counselors, led by Peter des Rivaux. In 1233, Richard Marshal, Earl of Pembroke rose up and freed de Burgh from prison.<sup>197</sup> The king was forced to dismiss the Poitevins and the chief justiciar, Stephen of Segrave, who had allied himself with their party.<sup>198</sup> When the dust settled and the king reversed the pronouncement of outlawry against de Burgh, it was William of Raleigh who read out the pronouncement.<sup>199</sup> Raleigh had managed to ingratiate himself with the king and was a close advisor for the next half decade. Henry allowed the office of chief justiciar, which had been a focal point for the troubles between de Burgh’s supporters and the Poitevins, to lapse, but he created a new court *coram rege*

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<sup>193</sup> Meekings, *Martin Patishall and William Raleigh*, 177.

<sup>194</sup> *Ibid.*, 169.

<sup>195</sup> *Ibid.*, 170.

<sup>196</sup> *Ibid.*, 171.

<sup>197</sup> J.R. Maddicott, *Simon de Montfort* (Cambridge: Cambridge University Press, 1994), 11-14.

<sup>198</sup> BNB, 1:46.

<sup>199</sup> BNB, 1:46.

with Raleigh as the sole full-time justice. We see many instances where Raleigh acted as the king's right arm. Raleigh was intimately concerned with the debates of 1234-6 around the issue of special bastardy: whether a child born to a man and a woman who later married became legitimate after the marriage. Robert Grosseteste, the saintly bishop of Lincoln, wrote to him protesting the king's decision of 1234 that such a child would not be legitimate under English law.<sup>200</sup> In 1236 he wrote parts of the Statute of Merton.<sup>201</sup> In January of 1237, at a great council of the realm, "William of Raleigh, cleric and familiar of the lord king, a man indeed discrete and learned in the law of the land, rose up in the middle, just as if a mediator between the king and the magnates of the realm, and staked out the proposition and the will of the king in public."<sup>202</sup> At this council Raleigh and William of Savoy managed to secure a tax of one-thirtieth of the value of all moveable goods in the realm in exchange for a reissue of Magna Carta and other concessions.<sup>203</sup> Later that year, he attended a Church council being held by the papal legate as one of three royal representatives who were sent to remind the council not to do anything detrimental to the king's rights.<sup>204</sup> After delivering this message, the two laymen withdrew, but William of Raleigh "remained there, so as to observe it, dressed in the cope and surplice of a canon..."<sup>205</sup> Matthew Paris gives us the impression that William of Raleigh was sitting there as the king's creature, impassively, and perhaps threateningly, taking in the council's proceedings to report back to his master.

Raleigh ruled the royal courts with an iron fist. The business of the court *coram rege* was slim in its first few years. The rolls for that court are nowhere near the size of the rolls of the bench at Westminster for a comparable period of time. In 1236, Raleigh made what looks very

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<sup>200</sup> BNB, 1:107.

<sup>201</sup> ODNB, s.v. "William of Raleigh."

<sup>202</sup> CM, 3: 380.

<sup>203</sup> ODNB, s.v. "William of Raleigh."

<sup>204</sup> CM, 3: 416-7.

<sup>205</sup> CM, 3: 417.

much like a play for power. He corrected a mistake by one of the justices in the bench, after which the king sent a writ to the justices in the bench saying that they should not make judgments in doubtful cases without the king's—read William of Raleigh's—permission.<sup>206</sup> Raleigh also recalled Adam Fitz William, a justice who seems to have been closely connected to him, to serve on the bench at this time.<sup>207</sup> After 1236, Raleigh seems to have reserved all difficult cases from the bench or from the eyres for his own hearing.<sup>208</sup> This fits well with the *Bracton*' author's insistence that the justices who are “major, general, permanent and of greater importance, who remain at the side of the king [i.e., the justices *coram rege*]” have a duty to “correct the wrongs and errors of all others.”<sup>209</sup> Raleigh had asserted his authority over the other courts and, from 1236 until his retirement from the court in 1239, was England's senior justice.

Raleigh, like his mentor, acquired many ecclesiastical benefices as rewards for his services. As mentioned, he was the rector of Bratton Fleming, Henry de Bratton's home village, from 1212. From 1220, he was rector of Blatherwycke in Northamptonshire, where, in 1225, while he was spending his vacation from the bench on his lands there, he offered to accept payment for a composition to end litigation so the parties would not have to go all the way to Westminster to pay it.<sup>210</sup> This prebend may have come to him through the influence of Martin of Patishall, who was from Northamptonshire himself.<sup>211</sup> The rectory of King's Somborne in Hampshire almost certainly came to him through Patishall's influence, since Patishall had been rector of the parish before Raleigh. Perhaps Patishall had resigned from it in Raleigh's favor upon

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<sup>206</sup> Turner, *English Judiciary*, 203; BNB, 3:179-180, no. 1166; H.C. Maxwell-Lyte, *Close Rolls of the Reign of Henry III Preserved in the Public Record Office, A.D. 1234-7* (London: Hist Majesty's Stationary Office, 1908), 348.

<sup>207</sup> C.A.F. Meekings, “Adam Fitz William (d. 1238),” *Bulletin of the Institute of Historical Research* xxxiv, no. 89 (1961): 7, 11. Raleigh had served on more eyres with Adam than with any other justice.

<sup>208</sup> Turner, *English Judiciary*, 198; Meekings, *1235 Surrey Eyre*, 1:9.

<sup>209</sup> “*Item iustitiariorum quidam sunt capitales, generales, perpetui et maiores a latere regis residentes, qui omnium aliorum corrigere tenentur iniurias et errores.*” BDL, 2:307.

<sup>210</sup> Turner, *English Judiciary*, 199.

<sup>211</sup> ODNB, s.v. “William of Raleigh.”

his retirement.<sup>212</sup> He acquired the living of Whaplode in Lincolnshire in 1231 and was treasurer of Exeter cathedral in his native Devonshire by 1234.<sup>213</sup> He was also a canon of St. Paul's cathedral in London, where his master had briefly been dean, from at least 1237.

Raleigh may have overplayed his hand. In 1238, Richard of Cornwall, the king's brother, led an uprising against the king, which seems to have destabilized Raleigh's position.<sup>214</sup> In the summer of 1238 his situation deteriorated even further. Henry III asked the monks of Winchester, the richest see in England, to elect his wife's uncle, William of Savoy, as their bishop; they elected Raleigh instead. The king displayed his anger by asking them why "you refuse to elect [William of Savoy], saying that he is a man of blood, [while] you elect William of Raleigh, who has slaughtered many more with his tongue than the other has with his sword."<sup>215</sup> Raleigh was not consecrated bishop at that time, but was instead elected bishop of Coventry and Lichfield, which he declined, and later bishop of Norwich, which he accepted, and he resigned from the court *coram rege*.<sup>216</sup>

The fight over Winchester was just heating up, though. In 1241, with William of Savoy having passed away in 1239, Henry tried to secure Winchester for another of his wife's uncles, Boniface of Savoy. The monks of Winchester again elected Raleigh. Henry hired canon lawyers to take his case to the pope, among whom was Henry de Segusio, a canonist in the queen's household who would later become cardinal bishop of Ostia and so known to later generations as Hostiensis.<sup>217</sup> Raleigh won his case before the pope, who confirmed him to the see in 1243. But Henry did not give up. In response, he ordered the gates of Winchester guarded against Raleigh, sent letters against him to Oxford, shut the diocese of Norwich to him, and ordered that no one

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<sup>212</sup> C.A.F. Meekings, "Martin de Patishall of Good Memory my Sometime Lord," *Bulletin of the Institute of Historical Research* 47 (November 1974): 227-9.

<sup>213</sup> ODNB, s.v. "William of Raleigh."

<sup>214</sup> ODNB, s.v. "William of Raleigh."

<sup>215</sup> CM, 3:494.

<sup>216</sup> ODNB, s.v. "William of Raleigh."

<sup>217</sup> James Brundage, *Medieval Canon Law*, 214

give him food or shelter.<sup>218</sup> Raleigh skulked in London for a bit, hiding in the canons' house in Southwark, before fleeing to the continent, where Louis IX of France offered him aid.<sup>219</sup>

According to Matthew Paris, the French held up Raleigh's case as an example of English perfidy towards their bishops, comparing him to Anselm, Thomas Becket, and the more recent Edmund of Canterbury.<sup>220</sup> After intervention from the pope, for which Raleigh was rumored to have paid 8,000 marks, Henry finally relented and allowed Raleigh to return in April of 1244.<sup>221</sup> He eventually reconciled with Henry, and the king spent his Christmas courts of 1246-47 and 1249-50 at Winchester, dining in the bishop's hall on both occasions.<sup>222</sup> Raleigh was broke, though, due to years of litigation, and his see was not as wealthy as it once had been after years in the king's hands.<sup>223</sup> He died on the continent, in Tours, in 1250, while on a mission to raise money.<sup>224</sup>

Raleigh had two clerks that we know of. Roger of Thurkilby, a clerk in the bench from 1230, was Raleigh's clerk from at least 1231, when Raleigh was a junior justice on that court. He was already serving as an eyre justice in 1240 and was promoted to justice of the bench at Westminster in 1242. Apart from a few breaks of a term or two, he was chief justice of the bench from 1249 to 1260 and served as chief justice on thirty-eight eyres.<sup>225</sup> Thurkilby, like Raleigh, was a cleric, but he seems never to have taken major orders, but rather to have married a wealthy widow while he was still a clerk in the courts in 1235 or 1236. His advancement came not from acquiring benefices, but from acquiring land in the manner of a layman. He seems to have been highly respected by his contemporaries. Matthew Paris calls him a "discreet man" and a

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<sup>218</sup> CM, 4:264.

<sup>219</sup> CM, 4:285-6, 295.

<sup>220</sup> CM, 4:296.

<sup>221</sup> CM, 4:346-7, 360.

<sup>222</sup> CM, 4:590, 5:94.

<sup>223</sup> ODNB, s.v. "William of Raleigh."

<sup>224</sup> CM, 4:179.

<sup>225</sup> ODNB, s.v. "Roger of Thurkilby."

“*litteratus*.”<sup>226</sup> Another chronicler said that he was incorruptible.<sup>227</sup> Thurkilby, it seems, made good his apprenticeship under Raleigh and was able to turn it into a lofty career as an important royal justice.

Thurkilby’s career path stood in contrast to that of another person who was, at the very least, closely connected with Raleigh, although we cannot be absolutely certain that he was Raleigh’s clerk. Henry de Bratton is most famous now as the man who did not write *Bracton*. Bratton did some work on the treatise, adding references to a few of his own cases, but the majority of it was already written by the time he entered the royal courts. We do not know exactly how it came to be attributed to him, but by the 1270s, people already thought that Henry de Bratton wrote the treatise. We call it *Bracton* today because the copyists of several of the manuscripts mistook the first “t” for a “c,” an easy thing to do when reading thirteenth-century scripts, and the 16th-century editor of the first printed edition of the treatise drew from a version that had it wrong. The man from Bratton Fleming became Henry de Bracton. At any rate, being known as the person who did not write the treatise and whose name is even misspelled on the first page is not the kind of legacy any of us would like to have. The academy, perhaps feeling a bit betrayed, has largely lost interest in Henry de Bratton since Thorne showed that much of *De Legibus* must have been written before his time. The emphasis has turned from what Henry de Bratton could have done to what he could not have done. Scholars have discovered, for instance, that he was not a very important justice.<sup>228</sup>

Bratton was from the Devonshire village of Bratton Fleming, where William of Raleigh, another Devonshireman, was the absentee rector. His family was probably of knightly rank. In 1242 or 1243 we have evidence that Bratton held a knight’s fee of the Fleming family, after

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<sup>226</sup> CM, 5:211, 317.

<sup>227</sup> Musson, *Medieval Law in Context*, 73.

<sup>228</sup> See Paul Brand, “The Age of Bracton,” in *The History of English Law: Centenary Essays on “Pollock and Maitland,”* ed. by John Hudson (Oxford: Oxford University Press, 1996), 65-90.

whom his home village was named, and that fee may very well have been his inheritance.<sup>229</sup> Bratton first appears in the records in 1238 as a clerk on the court *coram rege*, of which Raleigh was the only full-time justice.<sup>230</sup> He continued on the court for at least a few months after Raleigh retired to become bishop of Norwich. In February 1240, we have evidence that Bratton was being paid by the king, who authorized a retainer of 40 marks a year for him. This was a large sum, equal to what junior justices would be paid later in the century.<sup>231</sup> But there is no mention of him receiving a salary in any previous year. How did he reach the lofty heights of those paid 40 marks a year without any previous experience in the courts? My guess is that he had served Raleigh in some capacity in the previous years and was simply paid out of Raleigh's pocket, as a member of his household. In Easter term, 1240, he was referred to as "Lord Henry de Bratton" (*Dominus Henricus de Brattone*), although he still seems to have been a clerk at the time.<sup>232</sup> Shortly thereafter, he disappears from the records for five years.

His disappearance from the records of the court, which corresponds almost exactly with Raleigh's fight with the king over the see of Winchester, probably signals that he stood by William of Raleigh through his troubles. When he does resurface in the historical record, in 1245, it is because William of Raleigh is giving him one of two papal dispensations he had received for his clerics to hold benefices in plurality. These were hot commodities, and Raleigh would not have given one away lightly.<sup>233</sup> At some point, Bratton also acquired the plea rolls of Martin of Patishall and William of Raleigh, which certainly would have been in the possession of Raleigh or one of his clerks. In 1247 he wrote to Roger of Thurkilby that he had Patishall's rolls and he was

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<sup>229</sup> Kantorowicz, *Bractonian Problems*, 14.

<sup>230</sup> The 1238 record is of Bratton recording an agreement he made with Martin Fleming to hold a piece of land and the advowson attached to it from the Fleming family. The bench would have been a more usual place to record such an agreement, although the court *coram rege* gave its own personnel the privilege of using that court for their own legal business. CRR, 16:51-2, no. 149.

<sup>231</sup> Richardson, *Bracton: The Problem of His Text*, 2.

<sup>232</sup> CRR, 16:492-3, no. 2483.

<sup>233</sup> ODNB, s.v. "Henry de Bracton" Of Course, it is also possible that Bratton had remained close to the king and Raleigh was using the dispensation to try to ingratiate himself with someone in the judicial administration, but this does not explain Bratton's absence from the records.

thought to have them still in 1258, when he was ordered to return them to the treasury.<sup>234</sup> Even if we cannot be sure exactly what his relationship to Raleigh was—scribe, senior clerk, ne'er-do-well nephew—Bratton was close enough to Raleigh to be showered with special favor and to be entrusted with his rolls, which, as we shall see, were important documents to the people in Raleigh's circle, who treated them as a type of legal literature.

Bratton was a fairly successful royal justice, although never as successful as Thurkilby. As mentioned, he had been listed as "*dominus*" on the rolls while still a clerk and was put on a high royal retainer when Raleigh left the court. He served on only three regular eyres, however, all in his first year back to the judicial establishment, in 1245. In all three he was junior to Roger of Thurkilby and Gilbert of Preston.<sup>235</sup> He spent two terms on the court *coram rege*, his most prestigious appointment, from 1247 to 1251 and from 1253 to 1257.<sup>236</sup> Most of his career as a justice was spent on special assize commissions, which, like eyres, involved royal justices visiting the counties, but were limited to hearing the petty assizes, although they sometimes had commissions of gaol delivery attached. Between 1248 and 1267, the year before his death, Bratton regularly went to the south of England—Somerset, Essex, Cornwall, and his native Devonshire—on assize commissions, in which he was usually the sole justice from the central courts, with the authority to appoint two associates to sit with him.

Just as Raleigh served the king through the troubles of the 1230s, Bratton sat as a justice through the great political upheavals of the 1250s and 1260s. Where Raleigh was entwined in the political battles of the 1230s and clearly took sides in the struggle between Hubert de Burgh and Peter des Roches' factions, Bratton seems to have remained fairly apolitical, serving both sides equally as they rose and fell, perhaps showing us a shift in the way the judiciary was perceived.

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<sup>234</sup> H.G. Richardson and G.O. Sayles, *Select Cases of Procedure Without Writ Under Henry III* (London: Bernard Quaritch, 1944), clxxxv; BNB, 1: 25.

<sup>235</sup> Paul Brand, "The Age of Bracton," in *The History of English Law: Centenary Essays on 'Pollock and Maitland'* ed. John Hudson (Oxford: Oxford University Press, 1996), 88.

<sup>236</sup> *Ibid.*

Henry III's government made many enemies in the kingdom over the course of the 1240s and 1250s. One issue that particularly grated on the magnates was the favor the king showed towards his continental relatives. After his marriage to Eleanor of Provence, Henry showed a great deal of favor to his queen's Savoyard uncles, and promoted several to important positions in England. This led to his five-year fight with William of Raleigh. Later in the reign it was the king's promotion of his Poitevin half-siblings, the de Lusignans, that caused consternation.<sup>237</sup> One of them, Aymer, actually did become bishop of Winchester after William of Raleigh died. The favor shown to Henry's foreign relatives alienated some within the English barony, however. Nor did the de Lusignans' behavior in England ingratiate them to the populace. Henry exempted them from lawsuits in the royal courts and allowed them to run rampant.<sup>238</sup>

Nor did Henry's grandiose plan to buy the crown of Sicily from the pope as a gift for his second son, Edmund, endear him to his council or to the realm. The pope had been at war with the Hohenstaufen kings of Sicily for several years when he offered the crown to Henry in 1255, but the offer required Henry to pay all the expenses incurred by the papacy in the prosecution of the war and to actually launch an invasion of Sicily to take the crown for himself.<sup>239</sup> When the pope offered the same deal to Henry's brother, Richard of Cornwall, he is reputed to have paraphrased the Pope's offer as "I sell or I give you the moon, go up there and get it!"<sup>240</sup> Henry jumped at the offer, though, and did so without asking for the counsel of the realm first. By 1256 he owed the papacy 135,000 marks, and failure to pay would result in excommunication.<sup>241</sup> Henry presented this deal to the community of the realm as a *fait accompli* and then asked for the money to pay for it.

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<sup>237</sup> Henry's mother, Isabella of Angoulême, herself a Poitevin, had married Hugh de Lusignan, one of the major power players in Poitou, after King John died. Henry thus had several half-siblings from the Poitou, which was of strategic importance in the English royal family's continuing struggle to hold onto Gascony, its last continental possession. Henry thus showered favors upon his half brothers and sisters.

<sup>238</sup> Maddicott, *Simon de Montfort*, 143-6.

<sup>239</sup> *Ibid.*, 128.

<sup>240</sup> "Vendo vel do tibi lunam, ascende et apprehende eam." CM 5:457.

<sup>241</sup> ODNB, s.v. "Henry III."

By 1258, one faction among the magnates thought that Henry had been taking entirely too much advice from his small circle of foreign-born advisors, and that their advice was likely to ruin them financially. On April 28th, a group of magnates threatened the king with arms and demanded that he dismiss his cousins and rule through a council of 24 barons, half of whom would be selected by the barons themselves, half selected by Henry.<sup>242</sup> The barons' main concern seems to have been to make sure that Henry was taking counsel from the realm or, more cynically, from them. Their view of good kingship was a very traditional one; counsel was important to the lord-vassal relationship. The barons were trying to force the necessity of taking counsel on Henry, who had tried, at times, to rule without it, and who, at other times, had taken counsel from a very limited group of advisors, his French relations.<sup>243</sup>

By June, this conciliar government had broken down. The barons seized power and appointed four electors to elect a royal council of fifteen. With this new royal council, the barons dropped the pretense of negotiating with Henry over the government of the realm and imposed baronial rule upon him outright. The barons issued the Provisions of Oxford, which transferred the king's powers to the council, and then forced Henry and his son Edward to take oaths to support these provisions. A few months later, in October 1259, the council called a parliament to Westminster which enacted the Provisions of Westminster, a document that addressed many of the grievances of Henry's reign. In particular, it called for a special eyre to visit the counties and hear complaints against Henry's officials.<sup>244</sup> Henry resigned himself to baronial rule for several years, but in 1264, the king and the baronial party agreed to submit their grievances to Louis IX of France who, in the Mise of Amiens, decided entirely for Henry.<sup>245</sup> With this Simon de Montfort seized control of the kingdom, leading to Civil War between the king's party and the

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<sup>242</sup> Maddicott, *Simon de Montfort*, 152-3.

<sup>243</sup> ODNB, s.v. "Henry III."

<sup>244</sup> Andrew H. Hershey, *The 1258-9 Special Eyre of Surrey and Kent* (Woking, Surrey, UK: Surrey Record Society, 2004), xxxviii.

<sup>245</sup> Maddicott, *Simon de Montfort*, 258.

barons. On May 13, 1264, de Montfort and his allies renounced their allegiance to Henry.<sup>246</sup> On the following day de Montfort captured Henry at the Battle of Lewes and made him a puppet king.<sup>247</sup> In August, 1265, however, Henry's son Edward, the future Edward I, led an army against de Montfort at Evesham, which ended with de Montfort's death and the effective disintegration of the baronial party, although the war would continue on and off until 1267, a few months before Henry de Bratton's death.<sup>248</sup>

The last ten years of Bratton's career were thus a period of crisis in English government, when the king and his subjects were involved in a struggle over their respective powers. Bratton was involved in some of the events of the period. In August 1259 the baronial council issued an edict restricting the justices who could sit on special assize commissions—in line with their policy of restricting the king's power to appoint his councilors and officials—to Roger of Thurkilby, Henry of Bath, Henry of Bratton, Giles of Erdington, Gilbert of Preston, William of Wilton, and John of Wyville.<sup>249</sup> The council not only trusted Bratton to continue his work, but also placed him third in line after two of the most important justices in the realm. Shortly thereafter, the council dominated by Simon de Montfort appointed Bratton to sit on one of the special eyre circuits to hear grievances against Henry's government.<sup>250</sup> Bratton received several advancements during the period of baronial control. He received a life interest in an estate in Cornwall from the Raleigh family, possibly relatives of his former master, in 1261.<sup>251</sup> He received rectories in the Southwest in 1259 and 1261. Early in 1264, as things were coming to a head between de Montfort and the king, he became archdeacon of Barnstaple, which was near

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<sup>246</sup> *Ibid.*, 270.

<sup>247</sup> Maddicott, *Simon de Montfort*, 272.

<sup>248</sup> *Ibid.*, 342.

<sup>249</sup> BNB, 1:20.

<sup>250</sup> BNB, 1:19.

<sup>251</sup> J.H. Round, "Bractoniana," *EHR* 31 (1916): 588-9.

his home in Devonshire.<sup>252</sup> Shortly thereafter, he became chancellor of Exeter cathedral.

Bratton thus seems to have been respected by the baronial council, but we cannot easily take this as evidence of his politics. He was also shown favor by the king in the years leading up to the baronial coup and even during the period of baronial reform, suggesting that he might have been seen as an apolitical figure who could serve both sides. In 1253 and 1256, he was granted deer from the king's forests.<sup>253</sup> In 1254, the king gave him a house in London.<sup>254</sup> In 1256, he was present at the king's council when it made the decision as to how to count leap years.<sup>255</sup> And in 1260, when the king was ruling subject to the baronial council, the king himself made Henry de Bratton the protector of the Carthusian charterhouse at Witham, a religious establishment important to the Angevin royal house—it was built as part of Henry II's penance for Thomas Becket's death—and personally important to his grandson.<sup>256</sup> More importantly, though, Bratton seems to have retained the king's favor after the baronial administration fell, despite his work for that administration. In 1267, he was placed on a special commission that was appointed to hear claims by supporters of Simon de Montfort who had lost their lands.<sup>257</sup> An amnesty had been declared, and the lands that the king had taken into his hand and regranted to his own faithful were being returned to the former rebels. Bratton was also appointed to hear special assizes in the Southwest continuously from the 1250s to the late 1260s, by both the king's administration and the barons'.

As political fortunes rose and fell between 1258 and 1267, Bratton's career was remarkably stable. What are we to make of the fact that Bratton was able to survive and even flourish during some of the most tumultuous times for the kingdom, and that boons came to him

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<sup>252</sup> Round, "Bractoniana," 589.

<sup>253</sup> BNB, 1:21.

<sup>254</sup> BNB, 1:21.

<sup>255</sup> BNB, 1:43.

<sup>256</sup> Richardson, *Bracton: The Problem of His Text*, 9.

<sup>257</sup> BNB, 1:22.

from both sides in the struggle between the barons and the king? It might be evidence that he was highly thought of, but it might also be evidence that the king and the barons did very little thinking about Henry de Bratton at all. In fact, although an earlier generation of historians believed that Bratton was a great justice of the reign, the evidence points to the notion that he was not one of the most important justices. The only time he ever appeared as the chief justice in any judicial commission were the times when he sat as an assize justice in the Southwest, his homeland, and then he was the only justice of the central courts sitting at these assizes. The other members of his commission were locals whom Bratton had chosen to sit with him. When he sat in the court *coram rege*, he always appeared on lists of justices after Henry of Bath and Jeremy of Caxton.<sup>258</sup> In the leap-year ordinance of 1256, he is listed after the royal justices Henry of Bath and Henry de la Mare, as well as two magnates, although before Walter of Merton, who was at the time the chancellor's right-hand man and the protonotary of the chancery.<sup>259</sup> In the 1259 order on special assizes, he appears high on the list, but not at the top, behind Roger of Thurkilby and Henry of Bath, both justices who would be cited in legal texts of the last decades of the thirteenth century, something that we never see for Henry of Bratton. In 1277, nine years after Bratton's death, Robert of Scarborough said that he had borrowed the "book which *Magister* Henry de Bratton composed" from the bishop of Bath and Wells.<sup>260</sup> This is the first evidence we have for the treatise being attributed to Henry de Bratton. It also shows, though, that Robert of Scarborough did not know enough about Henry de Bratton to know that he was never called a *magister* during his life.<sup>261</sup> Likewise, the author of a manuscript of the treatise copied around 1300, in which he is called, "Henry de Bratton, doctor of civil and canon law and afterwards chief justice of King Henry for twenty years and more," clearly thought that Henry de

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<sup>258</sup> BNB, 1:21.

<sup>259</sup> BNB, 1:43.

<sup>260</sup> J.L. Barton, "The Authorship of *Bracton*: Again," *Journal of Legal History* 30 (2009): 173.

<sup>261</sup> Paul Brand, "The Date and Authorship of *Bracton*: A Response," *Journal of Legal History* 31 (2010): 242.

Bratton was someone to be celebrated, but just as clearly had no idea who he was.<sup>262</sup> The memory of the real Henry de Bratton was quickly forgotten, to be replaced by the legend of the hero who allegedly wrote *Bracton*.

Bratton may not have been a very important justice, but the stability of his career suggests that the judiciary was beginning to be seen as apolitical in this period. After all, the justices at the very top, like Thurkilby and Bath, never saw any dramatic rises and falls like the ones we saw in the 1230s. Service as a justice was possibly no longer seen by the king or the magnates as personal service or the service of a vassal to a lord. If this is the case, it represents a major shift in thinking about the justices. Their loyalty was to the system, not to the people at the top of it—who, in any event, were constantly changing during this period. The test presented by the baronial coup shows that law was becoming an independent sphere. *Bracton* certainly presented this view of the royal justice. In this text, written by people in William of Raleigh's circle, the justices are "priests of the law," who are presented as serving an impersonal law more than a personal king.<sup>263</sup> This text represents the aspirations of a group of justices to separate themselves from the rest of the royal administration, to differentiate "legal" work from the drudgery of administration and from the caprice of politics. Of course, the reality was never so clear. William of Raleigh, as we have seen, was intimately involved in the political struggles of his age and was a close confidant of the king. But the fact that Henry de Bratton was appointed by both the baronial government and the king's government, before and after the baronial government's ascendancy, implies that at least some of the judiciary had been successful in promoting this image as a second priesthood. Like the first priesthood, they were not entirely divorced from politics, but they could draw on language and imagery that separated them from

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<sup>262</sup> "Explicit liber qui vocatur Bretun, et componebatur a quodam magistro Henrico de Bractone, doctore in iure civili et canonico, et postea iusticiario capitali Henrici regis per XX annos et amplius." Worcester Cathedral Library MS F. 87; BDL, 1:18.

<sup>263</sup> BDL, 2:24.

the crowd and that made them useful to any political party.<sup>264</sup>

The men who were responsible for *Bracton* and the plea roll collections—Patishall, Ralegh, Bratton, and their associates—were thus a small and relatively homogenous lot. While they had humble origins compared to many of the king’s advisors, they were by no means proletarians who had risen to greatness in a meritocratic system. These men were still part of the aristocracy. They came from lesser knightly families. They probably would have grown up bilingual, speaking French and English. This was the direction the gentry and nobility was taking in the thirteenth century. They were clerks who had probably taken minor orders while still in their teens in order to obtain access to a clerical education. We have no direct evidence as to where they received this education, but the cathedral at Exeter in Devonshire had several canons and officials who were known to have training in law, both Romano-canonical and English. Ralegh and Bratton were both from Devonshire, so the cathedral school is a decent guess for the site of their legal learning.

We have seen that there were various reasons why the judiciary changed in this period and why the English courts, coming out of a world without law, became the center of a legal culture. First, the amount of work increased as Henry II’s assizes became more popular and brought people on lower and lower rungs of the social ladder into court, requiring more man-hours, which meant that either more people had to be brought into the administration or the people who were there had to devote more of their time to administering the assizes. But the size of the judiciary, as Ralph Turner has shown, actually contracted during the reigns of John and Henry III, meaning that fewer people were doing more of this type of work.<sup>265</sup> This contraction was the result of the second major reason for change: after the introduction of Henry II’s assizes,

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<sup>264</sup> It is true that two of the justices, William of Wilton and Fulk Fitz Warin, were killed fighting for the king at the battle of Lewes, but Fitz Warin, at least, was also a Welsh marcher lord and could not be counted among the regular judicial establishment. His identity came from a very different place than the identity of someone like Henry de Bratton, who spent most of his career in the king’s courts.

<sup>265</sup> Turner, *English Judiciary*, 19, 77, 126-7, 192.

the work of the courts became more complex than it had ever been before, requiring people who were trained specifically for these types of work. Magnates who dabbled in law were no longer qualified for the type of work a justice needed to do by the early 1200s, and although some continued to appear on eyres and are even listed first in precedence, they were not actually the ones leading the sessions. Third, Henry III's minority put the courts on a firm institutional footing. A court had sat more or less permanently at Westminster during Richard's reign and part of John's, but John's move to bring the law court back into the royal court disrupted the continuity of that court. The court at Westminster that he was forced to restore at the end of his reign was the continuation of his court *coram rege*, composed of the same justices who had followed him around on his perambulations. If the justices at Westminster had been developing any sense of institutional identity at the beginning of John's reign, the justices who composed that court at the end of his reign essentially had to start over. There was a new court at Westminster at the start of Henry III's reign and for the first ten years of the reign Henry was a minor. There was no court *coram rege* during this period. The court at Westminster had some space, therefore, to develop its own sense of identity between 1216 and 1227, before Henry personally took the reigns of the realm.

The first three reasons for the change in the judiciary are perhaps necessary, but certainly not sufficient, to explain the transformation that took place. Although we can see there were good structural and institutional reasons why the judiciary changed between the two Henrys, there is nothing inevitable about this change. Financial administration became more complex during this period, and actually became independent of the royal household several decades before the courts did. Yet one does not see anything like *Bracton* for the exchequer in the thirteenth century. Exchequer officials made no attempt to transform themselves into priests of finance, nor did they try to engage themselves with the Roman past. They might have tried to

take up the mantle of the ancient quaestors just as the justices and clerks who wrote *Bracton* and made the plea roll collections took up the mantle of the ancient jurists.

The final reason for the change in the judiciary is different from the first three: it is a change in the way the justices thought about the work they did. The small textual community, composed of those university-educated clerks and justices who wrote *Bracton* and who collected cases from the plea rolls, could find a model to emulate in the Roman jurists. The types of things dealt with by the Roman and ecclesiastical discourse called *law* were very similar to the types of things dealt with by the royal courts: the relationship between people and inanimate objects, the proper compensation for causing harm, and the proper punishment for transgressing society's norms. While it was fairly easy to connect the dots between the types of activities undertaken by the royal courts and Roman law, the connection still had to be made. Some people had already made this connection for the justices and clerks of the courts, in a limited way, by the 1220s. The author of *Glanvill* had talked about felonies as *crimines* and about seisin and right as *possessio* and *proprietas*.<sup>266</sup> The authors of *Bracton* took this to a new level.

### **Dating *Bracton***

*Bracton*, as a site of identity-creation, is therefore central to my analysis. This dissertation, however, is not primarily a dissertation about *Bracton*. It is not another attempt to date the text, to evaluate the author's knowledge of Roman law, or to work out the author's political theory. Instead, *Bracton* is a piece of evidence that helps us to understand how the justices of the thirteenth century interpreted the plea rolls and the process by which they transformed the plea rolls from administrative records to legal texts. My focus is on the plea rolls and the people who reinterpreted them and, in the process, re-fashioned themselves as jurists.

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<sup>266</sup> GDL, 4, book I, c. 3; 6, book I, c. 7; 132, book XI, c. 1. When the author turns to the assizes, though, he does not call them writs of possession, but writs of seisin. *Ibid.*, 148, book XIII: 1.

Nevertheless, the history of *Bracton* is important for understanding when interpretive shifts took place and who was responsible for them. *Bracton* is a complex text, the work of many hands over a long period of time. This project owes a great debt to the scholars who immersed themselves in *Bracton* and discovered many of its sources, although there are undoubtedly more to be found. A number of scholars have weighed in on the dating of the treatise. The most significant contribution to this debate was Samuel Thorne's 1977 introduction to his translation of volume 3 of the treatise, in which he showed persuasively that parts of the treatise must have been written before 1236, and that other parts may very well have been written before 1227.<sup>267</sup> But before Thorne, there were several contributions to this scholarship. The starting point is Maitland, who thought that the treatise was written by Henry de Bratton in the 1250s.<sup>268</sup> Scholarship in the late nineteenth and early twentieth centuries largely followed Maitland's lead. Woodbine accepted Maitland's timeline, but added some thoughts about Bratton's writing process. Portions of the treatise are either marked "*addicio*" or appear in the margins of many of the early manuscripts. When they are placed in the text, they often appear in odd places, a few sentences away from the material to which they appear to relate to. Woodbine, in his edition of the treatise, argued that most of these *addiciones* were afterthoughts, written by Bratton after he had completed a first draft of the treatise, and which he may have placed in the manuscript on slips of parchment, which were later incorporated into the main text by a scribe.<sup>269</sup> Woodbine did not make any move towards re-dating the treatise, however. The first to try this was Hermann Kantorowicz, who noticed that the introductions to *Bracton* and to the thirteenth-century Oxford canonist William of Drogheda's *Summa Aurea* shared much in common. Both relied on the civilian jurist Azo of Bologna's two *summae* on the *Codex* and the *Institutes*. Kantorowicz

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<sup>267</sup> TI1, xiii-xxviii

<sup>268</sup> BNB, 1:41-44.

<sup>269</sup> George Woodbine, introduction to *Bracton De Legibus et Consuetudinibus Angliae*, attributed to Henry de Bratton, ed. George Woodbine (New Haven, CT: Yale University Press, 1915), 312-372.

thought that Drogheda had actually gotten his Azo from the introduction to *Bracton*.

Kantorowicz placed texts from the *Summa Aurea* and *Bracton* side-by-side in the attempt to show that the versions of Azo that Drogheda used were probably borrowed from Bratton's text, meaning that Bratton must have had a draft available to show the canonist by the end of the 1230s, when the *Summa Aurea* began to circulate.<sup>270</sup> Kantorowicz also introduced another player in the saga of *Bracton*: the redactor. He thought that many of the mistakes in the treatise were not of a kind that the great jurist he assumed Henry de Bratton to be would make, and posited a redactor, a man with just enough legal learning to be dangerous. The redactor, in his attempt to improve the treatise, had made Bratton's original text unreadable in places.<sup>271</sup>

Kantorowicz pushed the writing of the treatise back two decades, to the 1230s, with an additional round of redaction at a later date. But he did not have the last words on *Bracton*. Shortly after Kantorowicz's *Bractonian Problems* was published posthumously, two other scholars took up the questions raised by Kantorowicz about the dating of the treatise and both took issue with his suggestion that Drogheda borrowed from *Bracton*. Fritz Schulz and H.G. Richardson discovered additional sources relied upon by the authors of *Bracton* that would not have been available until the late 1230s or early 1240s, such as Raymond de Peñafort's *Summa de Matrimonio* and Johannes de Sacrabosco's *Computus Ecclesiasticus*.<sup>272</sup> While it was plausible to think, as Kantorowicz did, that an Oxford canonist borrowed from *Bracton*, it is less plausible that someone like Raymond de Peñafort, the Spanish master-general of the Dominican order, borrowed from a text which was specific to the English royal courts. Richardson additionally showed that Kantorowicz was probably mistaken in thinking that the borrowing had been from *Bracton* to the *Summa Aurea*. Indeed, it had probably been the other way around, meaning that

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<sup>270</sup> Kantorowicz, *Bractonian Problems*, 28-33.

<sup>271</sup> *Ibid.*, 36-38.

<sup>272</sup> Richardson, "Azo, Drogheda, and Bracton," 23-26; Schulz, "Bracton as a Computist," 279.

these parts of *Bracton* had been written in the 1230s or early 1240s at the earliest.<sup>273</sup> While Schulz accepted the existence of a redactor, Richardson did not, pointing out that the only reason why a redactor is necessary in the narrative of the treatise is to prove that Henry de Bratton, the great jurist, was infallible.<sup>274</sup>

Kantorowicz pushed for an earlier date for at least some of the treatise; Richardson and Schulz pushed it later again. But then Samuel Thorne, while working on a translation of Woodbine's edition of the treatise, discovered that much of it must have been written quite a bit earlier than originally thought, in the late 1220s and early 1230s.<sup>275</sup> This redating revolutionized the way scholars thought about the treatise. For one thing, the new date meant that Bratton's *De Legibus et Consuetudinibus Angliae* was written only 30-40 years after Glanvill's *De Legibus*, the other celebrated treatise of the early common law. But it also meant that *Bracton* was probably not Bratton's work. Bratton does not appear in the records of the royal courts at all until 1238, let alone in any position to be writing such an ambitious *summa* on the laws and customs of England, in the late 1220s.<sup>276</sup> We do not know when he was born, but he died in 1268, and it would be reasonable to guess that in the late 1220s Henry de Bratton's voice had just cracked for the first time. Thorne thought that Raleigh was a more likely candidate for the "prime mover" behind the treatise, although Bratton doubtless had some role in its composition, since there are materials in it that could only have come from Bratton's pen.<sup>277</sup> Thorne also rethought the role of the *addiciones*—materials that are marked in some of the manuscripts of the treatise with the word *addicio*—in the treatise. While some could have been afterthoughts, as Woodbine suggested, there are many that seem to be composed of a) material that repeats material found very near to the *addicio* or b) legal doctrines that would have been archaic compared to the law

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<sup>273</sup> Richardson, "Azo, Drogheda, and Bracton," 23-26.

<sup>274</sup> Richardson, "Studies in Bracton," 102.

<sup>275</sup> TI1, xiii-xxviii.

<sup>276</sup> CRR, 16:51-2, no. 149.

<sup>277</sup> TI3, xxxvi.

in the surrounding text.<sup>278</sup> The author would have been unlikely to add archaic or repetitive material to a text that was up to date and said what it needed to say already.<sup>279</sup> Thorne thus thought that the *addiciones* were, on the whole, *subtracciones*. He believed that there was probably an original draft of the treatise and a fair copy made sometime afterwards, probably under Bratton's instruction, which cut out some of the repetitious and archaic material. Sometime after Bratton's death, a scribe copied the fair copy. Subsequently, the owner of this copy of the fair copy came across the draft and, seeing that it contained material lacking in his text, had it copied into the margins or on slips of parchment and marked "*addicio*."<sup>280</sup> We know that this sort of copying happened in later decades, when people who possessed copies of *Bracton* from one manuscript family had material added to their texts from copies from another manuscript family, cross pollinating the manuscript traditions and creating hybrid texts.<sup>281</sup> Of course, both Thorne and Woodbine might be right. Some of the texts marked *addicio* could have been *subtracciones* and some could have been genuine afterthoughts added at some late point in the writing process. There need be no one answer to the question of the *addiciones*. This makes them extremely difficult to date.

Although Thorne's evidence of the early date for the treatise has convinced most of the scholarly community, he has not had the last word on it. John Barton has recently argued that Thorne's evidence of a later date is flawed.<sup>282</sup> Some of his arguments that the law in the treatise would have been "outdated" by the 1250s, Barton thought, rested on an anachronistic view of how law changes. According to Barton, many of the archaic doctrines in the treatise may have simply reflected a different point of view on a particular point of law than we see in the plea

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<sup>278</sup> TI3, xliv.

<sup>279</sup> TI1, xxviii.

<sup>280</sup> TI3, xliv.

<sup>281</sup> TI3, xlix.

<sup>282</sup> J.L. Barton, "The Mystery of Bracton," *Journal of Legal History* 14, no. 3 (1993): 1-142; J.L. Barton, "The Authorship of *Bracton*: Again," *Journal of Legal History*, vol. 30, no. 2 (2009): 117-174.

rolls.<sup>283</sup> Barton maintained that Henry de Bratton remained the primary author of the treatise. In a 1996 response, Dr. Brand summarized the arguments against Bratton as the primary author, from Thorne and from others, and added some of his own evidence and impressions of the treatise, e.g., that the two introductions to the treatise look very much like the work of two different authors.<sup>284</sup> Barton's posthumous response reiterated his objections to Thorne and Brand's view of legal change in the thirteenth century and argued that one cannot claim that the treatise was written in the 1220s and 1230s simply because the law laid out in it is not the law we see on the plea rolls in the 1240s and 1250s. The author may very well have been idiosyncratic in the legal doctrines he employed.<sup>285</sup> Moreover, Barton argued, the author would not necessarily have seen newer as better. Barton thought that Thorne and Brand were too influenced by the modern notions of case law and *stare decisis*.<sup>286</sup> To an author influenced by Roman and canon law, Barton thought, older would have been better.<sup>287</sup> To the scholastic mind authorities only get better with age, so the author of the treatise was looking for the old and the venerable, not the recent and up-to-date. He was also concerned less with the fact that the cases in his treatise had received the stamp of approval of the king's courts than that they represented the opinions of respected justices, whose authority was grounded in their personal importance, not in their position as justices.<sup>288</sup>

Barton's opinions deserve to be taken seriously. His most serious objection is that, if by the 1250s the treatise was outdated, it is hard to explain why so many copies of it were made, why Justice Bereford admonished a serjeant pleading before him in the early 14th century to look in his *Bracton*, and why the author of the late thirteenth-century epitome called *Fleta* copied

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<sup>283</sup> Barton, "Mystery of Bracton," 3-5.

<sup>284</sup> Brand, "Age of Bracton," 77.

<sup>285</sup> Barton, "Authorship of Bracton," 121.

<sup>286</sup> Barton, "Mystery of Bracton," 3; Barton, "Authorship of Bracton," 121.

<sup>287</sup> Barton gives examples of other places in the royal courts where the old was preferred to the new. Writs, for instance, were supposed to follow standard forms, and novelty could be used as an objection to a writ. Barton, "Authorship of Bracton," 138.

<sup>288</sup> Barton, "Authorship of Bracton," 121.

so many of the original treatise's archaisms.<sup>289</sup> If it was out of date in the late 13th century, the lawyers of the late 13th century didn't seem to know it. Indeed, the question of usefulness is actually much larger than Barton presents it. The treatise takes account of none of the legal innovations introduced from 1259 on. The Provisions of Westminster of 1259 appear nowhere. Nor does the Statute of Marlborough of 1267, nor do any of Edward I's great statutes. The statutes changed procedures in the English courts so fundamentally that it would be hard to see what a budding lawyer could get out of a treatise like *Bracton* apart from general principles of law. Even if Barton is correct that justices and serjeants could differ on matters of legal doctrine, we have no evidence that justices ignored statutes in favor of 70 year-old cases. The fact that the treatise was still being copied in 1300, and even in 1320, is mysterious, whether the treatise was written in 1220 or 1250. Perhaps justices and lawyers were more freewheeling about what they considered good, current law than Thorne and Brand would have us believe. It seems more likely, however, that the treatise's perceived value lay in something other than in the nitty-gritty of its doctrines. In fact, the cases seem to have been the least relevant part of the treatise to the lawyers of the late thirteenth and early 14th centuries. As I will discuss in more detail in the conclusion, the editors of *Bracton*'s epitomes did not venerate the references to Martin of Patishall and William of Raleigh's cases as "good, old law." They cut them out entirely.<sup>290</sup> Perhaps they were more interested in the treatise for its systematic exposition of English law, which would have been as valid in 1300 as it was in 1230, than for anything specific it had to say about court procedure. The cases of the 1230s, so carefully placed in the treatise, were often abandoned by the copyists and epitomizers of the 1290s. It is much easier to explain an archaism retained than one deliberately cut out, and the fact that so many were deliberately cut out weighs against Barton's argument in favor of the "good old law."

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<sup>289</sup> *Ibid.*, 164-5.

<sup>290</sup> See S.E. Thorne, "Gilbert de Thornton's *Summa de Legibus*," *University of Toronto Law Journal* 7, (1947): 6.

On the whole, Brand's arguments about the text, its strange, mid-sentence additions, its doctrines that are no longer followed by the courts, its sudden changes of heart, and its ancient limitation dates for writs are more persuasive than Barton's arguments.<sup>291</sup> Although Barton does occasionally claim that Thorne and Brand were factually wrong when they dated a particular shift in doctrine on the plea rolls, he primarily relies on the assertion that in the thirteenth century a person *could have* thought that a legal doctrine was still good long after the courts had stopped following it.<sup>292</sup> But the burden of proof for this assertion rests with Barton, particularly given the sheer number of areas where, if we agree with Barton's dating, Henry de Bratton must have believed strongly enough in ancient doctrines to present them as good law, despite the fact that the courts were no longer following them. For Barton's theory to work, Bratton had to believe that the old fashioned doctrines of Patishall and Raleigh were the best, a proposition that, it seems, would have brought him into significant conflict with his colleagues in the courts, who were applying newer doctrines. But he also had to be working from an outdated register of writs, with limitation dates that were twenty years out of date, which, as Brand points out, would be odd for a sitting justice. Barton's theory relies on Bratton being a lazy curmudgeon, too stubborn to permit the rules his colleagues were actually applying in the courts a place in his treatise and too comfortable in his chair to bother to find an up-to-date register of writs, which could not have been very hard to do in the royal courts. Too many unlikely circumstances need to have coincided for Barton's theory to be correct.

### **A Chronology for the Treatise**

With all of this in mind, I will attempt to create my own timeline for the writing of the treatise in order to place it in temporal relation to the collections of plea rolls that were being

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<sup>291</sup> Brand, "Date and Authorship of Bracton," 217-244.

<sup>292</sup> See Barton, "Authorship of Bracton," 140.

made in the thirteenth century. Of course the difficulty of making any large claims for a text so complex and so large is that someone will be able to point out counter-examples, and any claims that I make here can only be tentative. I think, however, that they are consistent with the available evidence. I will show that the treatise was written in at least three separate stages. The first probably occurred between about 1225 and 1230 and the primary author during this period was almost certainly William of Raleigh, possibly under the direction of Martin of Patishall. The second, which began after about 1240 and lasted until about 1245, was, again, probably driven by Raleigh, although Henry de Bratton may have become involved at this stage. The final phase of writing took place from about 1254 to 1259, and was the work of Henry de Bratton.

Thorne showed that some of the writing in the treatise was probably earlier than 1236, the date of the council of Merton. The portions of the treatise that discuss the provisions of Merton all appear to be later additions to an established text. The first chapter of the provisions was inserted into the text mid-sentence. The second was inserted in the middle of a long excerpt from the *Glanvill* treatise. The fourth was inserted in a place in the treatise where it contradicts the text that comes directly before it.<sup>293</sup> In addition to the evidence relating to the council of Merton, there are other bits of evidence that point to an earlier date of composition. The treatise contains many writs, all but one of which have limitation dates that were not in force after 1237.<sup>294</sup>

Indeed, there is evidence that the treatise might date to even earlier than 1236. For example, the treatise states that a demandant could bring a writ of novel disseisin not only against the original disseisor, but also against his heirs. Under later thirteenth-century law, according to Thorne, such a demandant would have to bring a writ of entry, because novel disseisin could lie only against the original disseisor. Thorne thought that this was the rule by 1230 at the latest, meaning that, unless the author of the treatise took a minority view on this

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<sup>293</sup> TI3, xii-xvi.

<sup>294</sup> *Ibid.*, xxviii.

matter, as Barton thought, this part of the treatise was written in the 1220s or earlier.<sup>295</sup> The treatise also gives two opinions on the issue of whether a free woman married to a villein is barred from suing for her land held in free tenure during her husband's life. Before 1227, most justices had barred the villein's widow from bringing a suit, but in that year Martin of Patishall took the opposite view in a case. In some parts of the treatise, the pre-1227 rule is given and in others Patishall's 1227 ruling is lauded as a necessary correction to the practice of the courts.<sup>296</sup> This hints that people were working on the treatise before and after 1227, again, assuming that that author adopted Patishall's view of the matter.<sup>297</sup> A case of 1232, that of Thomas le Butiller, archdeacon of Totton, which appears in the treatise, would have been considered to have been decided incorrectly by the late 1230s, and indeed is marked as "error" in the case collection known as *Bracton's Note Book*.<sup>298</sup> This shows that work on the treatise continued through the early 1230s, even if some of it must have been written before 1227.

This evidence points to a period of writing that began before 1227, when Patishall changed the rule about the villein's wife, but that continued at least through 1232, when the Totton case was decided. This phase of writing, which can be dated to the late 1220s and the first half of the 1230s, is when the treatise took its shape and most of the sections of it were begun. By 1235 there were probably several long, but possibly poorly edited, tractates in existence. The huge tractate on novel disseisin—it fills 187 pages in the modern edition—was certainly begun in this period, as was the shorter tractate on the assize *utrum*; both of these tractates contain materials that were either outdated by the late 1230s or that were revised to bring the doctrines in line with the new rules of the Council of Merton of 1236.<sup>299</sup> The tractate on the assize of mort

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<sup>295</sup> *Ibid.*, xxiv.

<sup>296</sup> BDL, 3: 113, 172.

<sup>297</sup> TI3, xxvii.

<sup>298</sup> TI3, xxii; BDL, 4: 269; BNB 2: 522-3.

<sup>299</sup> Thorne points out that the tractate on novel disseisin says that the assize of novel disseisin lies against the heirs of the original disseisor, but by 1230 this was no longer true. The writ of entry sur disseisin had replaced the assize for

d'ancestor, like the tractate on novel disseisin, contains writs with limitation dates that were not in force after 1236.<sup>300</sup> The treatise's discussions of dower were probably written in the first phase, too. One discussion of dower appears at the very end of the long, heavily Romanized tractate near the beginning of the treatise on acquiring dominion of things.<sup>301</sup> Another appears in the larger tractate on the writ of dower.<sup>302</sup> Both contain references to the provisions of Merton, but in both cases they appear to be later revisions, inserted clumsily either mid-sentence or between two sentences that look like they must have originally been contiguous.<sup>303</sup> Brand has argued that the writ of summons for the eyre that appears in the tractate on actions is in a form that dates to before 1234, suggesting that either the author had an outdated writ in his possession or that at least parts of that tractate date to the earlier period.<sup>304</sup> The tractate on actions also contains a reference to a type of essoin—an excuse for not appearing in court—that had been

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these types of cases. Some passages in the treatise are corrected to reflect the new rule, at least one of the authors was aware of the change in the law, but others are not, and were probably written before 1230. TI3, xxiv. The section on redisseisin at the end of the tractate, which includes material from the provisions of Merton, appears to be an addition. BDL, 3:201-2, Brand, "Date and Authorship of Bracton," 219. Another provision of Merton that appears in this tractate contradicts the text that comes right before it, suggesting that a rather lazy reviser inserted it without modifying the rest of the text. TI3, xiii, 179-182. The limitation dates used for the writs in this tractate also suggest an early date for it. One writ uses the limitation date in use before 1238. Another uses the limitation date in force before 1229, and three more use limitation dates that were never used in the courts, but which seem to be incorrect attempts to update the pre-1229 limitation dates. BDL, 3:194, 57, 72, 192; Brand, "Date and Authorship of Bracton," 225.

The argument that the tractate on the assize *utrum* was written in the 1220s and 1230s is based on the author's opinion that the assize could be brought by either a layman or a cleric. The assize was used to decide whether (*utrum*) a parcel of land was held in free alms, as church property with no secular obligations, or as a lay fee. In a 1227 case which is in the treatise, Martin of Patishall held that it could only be brought by a cleric. The treatise, however, says immediately after that that "it obtains today" (*obtinet hodie*) that the assize can be brought by either a cleric or a layman. BDL, 3:329. A 1235 case that appears in *Bracton's Note Book* allows a layman to use the assize. A register of writs that was made after the council of Merton also includes writs for both clerics and laymen. By 1240, however, it seems that the opinion had reversed, and laymen were no longer allowed to bring them. This would place the tractate somewhere between about 1230 and 1240. Brand, "Date and Authorship of Bracton," 225-226. The tractate on *utrum* also contains a writ with an early limitation date. BDL, 3:343; Brand, "Date and Authorship of Bracton," 225.

<sup>300</sup> BDL, 3:249.

<sup>301</sup> This section runs from BDL, 2:42-281 in the modern edition. The discussion of dower runs from BDL, 2:265-281.

<sup>302</sup> BDL, 3:357-411.

<sup>303</sup> TI3, xiii, inserted in the middle of a sentence in 3:357; between two formerly consecutive sentences at 3: 398-9 and 2: 276-7

<sup>304</sup> BDL, 2:309-310; Brand, "Date and Authorship of Bracton," 228-230.

disallowed by 1236.<sup>305</sup> A reference to the same essoin appears in the unfinished tractate on the writ of right.<sup>306</sup> The tractate on exceptions was probably also begun in this earlier period, since it contains a reference to the writ of *habeas corpus*, which is concerned with mesne process and is not related to our modern writ of the same name; this was no longer a regular part of court procedure by 1233.<sup>307</sup>

The places where the treatise has clearly been updated—mid-sentence in many cases—to reflect the most current rule constitute the strongest evidence for a date in the 1220s or early 1230s. These updates show us that someone thought the law in the treatise was archaic. The places where the law is “outdated,” but not updated, are somewhat weaker as evidence of early authorship, since it is possible that the author took an archaic view of the matter or had old materials at hand—perhaps an outdated register of writs, as Barton suggested—and saw no need to include the most current doctrine. The places where the text is revised show us that, at the very least, someone writing at a later date thought that the law was archaic. The treatise is still unfinished, however, and I think it likely, in the places where we see unrevised archaic law, that we are actually looking at evidence of early writing that the revisers never got to. After all, some archaic doctrines are corrected in parts of the treatise and left uncorrected in others. If we take all of these instances of corrected or archaic law as representing a stage of writing that took place in the 1220s and early 1230s, then the tractates that were already underway by 1236 at the latest included the tractates on acquiring dominion of things, actions, novel disseisin, mort d’ancestor, utrum, entry, the writ of right, and exceptions. This leaves out only the short tractates on persons and things, which owe most of their material to Roman law, and the tractates on pleas of the crown, essoins, default, warranty, and cosinage, the last of which we will return to in a moment. This does not mean that these last seven tractates, apart from cosinage, were not written in the

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<sup>305</sup> BDL, 2:312; Brand, “Date and Authorship of Bracton,” 232.

<sup>306</sup> BDL, 4:61; Brand, “Date and Authorship of Bracton,” 232.

<sup>307</sup> BDL, 4:364-9, Brand, “Date and Authorship of Bracton,” 234-6.

first phase, only that we have no evidence for an early composition.

Work on the treatise may have continued unabated through the 1230s, but I suspect that there was a lull followed by a second stage of increased work on the treatise starting around 1240 and continuing until about 1245. We can see several additions and revisions in the treatise that must have taken place after the mid 1230s. The references to the council of Merton and to the writ of cosinage must have been added after 1236, the year in which the council met and Raleigh devised the writ. I suspect, though, that these revisions did not take place immediately after 1236. If they had, it is much more likely that they would have been added correctly and, as Maitland pointed out, the chronology of the fight between the bishops and the lay magnates that culminated in the provisions of Merton is badly garbled in the treatise.<sup>308</sup> But there is other evidence for work on the treatise in the 1240s. Certainly some of the work on the treatise must have been done after 1240. If we accept Richardson's dating of William of Drogheda's *Summa Aurea* as 1239 at the earliest and his estimate of the dates when Raymond de Penafort's *Summa de Matrimonio* could have arrived in England at around 1235 to 1240, then the treatise authors must have copied the material from these texts into the treatise, at the very earliest, at the end of the 1230s.<sup>309</sup>

Circumstantial evidence also points to a period of writing in the 1240s. The early 1240s was a period when William of Raleigh would have had plenty of time to work on a treatise. Raleigh resigned from the court *coram rege* to become bishop of Norwich in 1239 and from 1241 to 1244 was involved in a protracted fight with the king over the see of Winchester. During part of that period, he was living in exile in France and would have had little to do but write. Henry de Bratton may have been with him for at least part of this time. Bratton disappeared from the records of the royal courts between 1240 and 1245. Bratton was possibly in England in 1242-43,

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<sup>308</sup> BNB, 1: 105-112

<sup>309</sup> Richardson, "Azo, Drogheda, and Bracton," 23-26. Schulz also thought that the *Bracton* author used William of Sacrabosco's *Computus Ecclesiasticus*, which he dates to 1236. Bracton as a Computist, 279

when he received a manor, possibly as his inheritance, from Richard of Cornwall, but he must have supported Raleigh through his troubles because Raleigh bestowed a high honor upon him when he was finally installed in the see of Winchester, the dispensation to hold three benefices with cure of souls.<sup>310</sup> The two dates that bookend this period coincide with Raleigh's departure from the court for his episcopal see and with his final reconciliation with Henry, suggesting that Bratton had also left the courts to follow Raleigh. If Bratton was with Raleigh when he fled to France in 1243-44, he may have been introduced to Raleigh's treatise at this time, if he had not already been introduced to it as a clerk to Raleigh in the late 1230s.

We have seen evidence that parts of the treatise must have been written after 1236 or after 1240. We have no material, however, that has to date from after 1236/1240, but before 1245. In other words, there is nothing in the text that we can definitively date to the period 1240-1245.<sup>311</sup> Some materials can be definitively dated to the third stage of writing, but none to the second. Then why do I propose this second period of work on the treatise? Some words that must postdate 1240 appear to have flowed from Raleigh's pen.<sup>312</sup> There is only one part of the treatise that I would date with any probability to this second phase of writing. That is the second of the two introductions to the treatise, titled the *prohemium auctoris*, which copies material from William of Drogheda's *Summa Aurea*, which, as mentioned above, dates from the late 1230s or early 1240s.<sup>313</sup> The concerns in this part of the treatise line up much better with the concerns of a chief justice *coram rege*, Raleigh's position, and even with concerns that we know that Raleigh personally exhibited in other contexts. For instance, the underlying concern about unlearned men ascending the judgment seat and making incorrect decisions is consistent with Raleigh's self-

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<sup>310</sup> ODNB, s.v. "Henry de Bracton."

<sup>311</sup> Of course, part of the reason for this is that scholars have not looked for evidence of materials written between 1240 and 1245. The drive has been to show what could not have been written by Henry de Bratton, so the scholars who have written about the dating of material in the treatise have been concerned with separating out the pre-1236 material from the post-1236 material.

<sup>312</sup> See Brand, *Age of Bracton*, 77

<sup>313</sup> BDL, 2:20-21.

assumed role in policing the other justices of the royal courts. In 1236, Raleigh chided the Common Bench, the other major royal court, for making a decision that he thought was incorrect and instructed the court not to make decisions in doubtful cases without the king's permission in the future.<sup>314</sup> The *prohemium* thus most probably dates to this middle period, when Raleigh still had the treatise in his possession and could have had Tancred and Raymond available to him. My guess is that Raleigh wrote this material during his exile, when he had nothing better to do, and perhaps passed the treatise on to Henry de Bratton, who seems to have stuck with him through his travails.

The discussion of what to do with the “year-and-a-day” time limit for some procedures when the year is a leap year was probably also written in this second phase. This section states a different rule than the one adopted by the courts in 1256, which Henry de Bratton was present to witness, so it is unlikely to have been written after that date. It also had to have been written after 1236, if Schulz correctly identified and dated the author's computational source for this passage as William de Sacrobosco's treatise, which would not have been available before then. As Schulz pointed out, it also has been heavily revised from the original version, but not to bring it in line with the 1256 rule.<sup>315</sup> So this passage must have been written after 1236 and then revised sometime after 1236, but before 1256, when the new rule came into effect, a rule that Bratton undoubtedly knew about. I suspect that this section was written by Raleigh in the 1240-45 phase of work on the treatise and rewritten by Bratton in the third phase of work in the 1250s.

The revisions that refer to Merton are more problematic. Merton is called a *nova gratia et provisio* or a *nova constitutio* in two places in the treatise.<sup>316</sup> Brand has argued that provisions of this type were called “*nova*” for a period of just a few years after their issuance in the thirteenth century—Magna Carta, for instance, is never called a “*nova constitutio*” in the treatise—making

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<sup>314</sup> Meekings, “Adam Fitz William,” 11

<sup>315</sup> Schulz, “Bracton as a Computist,” 299.

<sup>316</sup> BDL, 2:276, 3:398-399.

it more probable that the person writing the references to Merton was writing within a decade of the council itself.<sup>317</sup> And yet at least one of the references to Merton has the dates of the council badly mangled, something Raleigh, who was a key player in the events surrounding Merton, is unlikely to have done.<sup>318</sup>

It is worth taking a moment to examine the account of Merton, because the same account appears in the *Note Book* and will in due course help us to establish the relationship of the *Note Book* to the treatise. We know from other sources that the king instructed his justices in 1234 that, from then on, in cases in which a party was alleged to be a bastard because he was born before his parents were married, the justices were to send a letter to the bishop asking “born before marriage or after.” They were to ask this narrow question because, according to canon law, a child born before marriage becomes legitimate at the moment his parents marry, while under English law, he remained a bastard.<sup>319</sup> Thus, if the justices simply asked the bishop if the child was legitimate, he would answer yes even in circumstances where, under English law, the child would be considered illegitimate. A distraught letter from Robert Grosseteste, bishop of Winchester, to William of Raleigh, attests to the cold response some of the bishops gave to this method.<sup>320</sup> Therefore, at the council of Merton in 1236, a group of bishops protested being made to answer this question and to condemn some people who would not be bastards under ecclesiastical law to lose their land in the royal courts. Various accounts tell us that the barons answered with one voice that they did not wish the laws of England to be changed, an incident often referred to as the baronial *nolumus* (“we do not wish”).<sup>321</sup>

The accounts in both the treatise and the *Note Book* reverse the two parts of the process. According to the treatise, the bishops asked for the king’s courts to adopt the rule of subsequent

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<sup>317</sup> Brand, “Date and Authorship of Bracton,” 222-223.

<sup>318</sup> BNB, 1:104-113.

<sup>319</sup> Ibid.; BDL, 4:297

<sup>320</sup> BNB, 1:108.

<sup>321</sup> BNB, 1:110-111; BDL, 4:297.

legitimation and to stop asking them whether the litigant was born before the marriage or after;<sup>322</sup> the barons said they did not wish for the laws of England to be changed, and, to resolve the issue, the king issued a decree instructing his justices to ask the ecclesiastical courts “born before marriage or after?”<sup>323</sup> The author of this *addicio* to the treatise, which must have been added after 1236, confused events that happened in 1234 with those that happened in 1236. Raleigh was intimately connected with Merton; it was Raleigh to whom Robert Grosseteste wrote to protest the royal courts’ policy and it seems unlikely that he would have forgotten the order of events.<sup>324</sup> I think perhaps Raleigh brought Henry de Bratton into the writing of the treatise during this phase and that it was Bratton who wrote the incorrect dates for Merton, which he is not known to have attended.

In addition to the material that I suspect was written in the second phase, there is some material that must have been added after 1236, but which we cannot date with precision to the second or the third phase. For instance, the tractate on the writ of cosinage had to have been written after 1236, when Raleigh invented the writ, but there is nothing to suggest exactly when.<sup>325</sup>

The third phase of writing on the treatise took place in the late 1250s, and we can date this one fairly accurately to the period between 1254 and 1259. William of Raleigh was dead by this point. We can set the end date for writing on the treatise as 1259 at the latest. That is the year of the Provisions of Westminster, which had a huge impact on thirteenth-century English law; they are never mentioned in the treatise.<sup>326</sup> We can also pinpoint some moments when Bratton was working on the treatise; for instance, he mentions Richard of Cornwall, the king’s brother, as

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<sup>322</sup> BDL, 4:295; BNB, 3: 135, no. 1117.

<sup>323</sup> BNB, 4:296-297; BNB, 3: 136, no. 1117.

<sup>324</sup> BNB, 1:108.

<sup>325</sup> TI3, xxxi.

<sup>326</sup> Richardson, “Studies in Bracton,” 100. Although there is one case in the treatise that is dated to the 1260s. BDL, 2:447.

a candidate for Holy Roman Emperor, which dates that passage to an 11-month period between 1256 and 1257, after Richard's predecessor had died but before Richard was elected.<sup>327</sup> The primary author of these additions and revisions can only be Henry de Bratton. The only cases from the 1240s and 1250s added to the treatise were cases for which Henry de Bratton was either a sitting justice or one of the litigants. Brand makes the tantalizing suggestion that Bratton may have substituted his own name for Martin of Patishall's in an already complete passage on the use of the incorrect title for a party named in a writ; the example of the "correct" title is "dean," but Henry de Bratton was never a dean. Martin of Patishall, on the other hand, was dean of St. Paul's cathedral in London.<sup>328</sup> Added to the section on formed prohibitions—writs of prohibition drafted for exceptional circumstances and based on very specific facts—was one writ that appears to be a draft of one issued by Henry de Bratton himself in 1255.<sup>329</sup> Some other additions can probably be dated to this period, although they have no particular connection to Henry de Bratton. Brand argues that the passage on mesne process, which includes material about *habeas corpus*, was probably added to after the late 1240s, when grand distress, which appears after *habeas corpus* in that passage, became a common part of court proceedings.<sup>330</sup> Likewise, H.G. Richardson and Helen Cam thought that one of the versions of the articles of the eyre that appears in the treatise was issued sometime late in 1254 or early in 1255.<sup>331</sup> Finally, a point I will treat in much more depth in chapter four, I follow Brand in thinking that the *introductio*, the first of the two introductions to the treatise, was written by Henry de Bratton during this last phase of writing.<sup>332</sup>

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<sup>327</sup> Ibid., 95.

<sup>328</sup> Brand, "Age of Bracton," 78.

<sup>329</sup> BDL, 4:258-9; Brand, "Date and Authorship of Bracton," 228.

<sup>330</sup> Brand, "Date and Authorship of Bracton," 234-6.

<sup>331</sup> Richardson, "Studies in Bracton," 79-82; Helen Cam, *Studies in the Hundred Rolls: Some Aspects of Thirteenth-Century Administration* (Oxford: Oxford University Press, 1921), 23. This version of the articles date to 1253 at the very earliest, because they mention the king's trip to Gascony of 1253-4. Richardson, "Azo, Drogheda, and Bracton," 37.

<sup>332</sup> Brand, "Age of Bracton," 77.

Thus we have three major periods of writing for which there is evidence in the treatise. There may, of course, have been more. And more people than just William of Raleigh and Henry de Bratton may have worked on it. Books were often dictated in this period and Raleigh and Bratton probably engaged their clerks in the writing in this way at the very least. Moreover, if Raleigh allowed Henry de Bratton to work on the book in the 1240s without direct supervision, to the point that he could make mistakes about the council of Merton that would go uncorrected, then why not let other members of his household work on it? Is it possible that clerks were doing some of Raleigh's research and copying? Perhaps Raleigh gave them his old documents and asked them to incorporate them with the intention of going back and checking their work, something that he never quite got around to doing.<sup>333</sup> Was Raleigh even the original author? If portions were written before 1227, then Raleigh was still a clerk, albeit a very senior and respected clerk, to Martin of Patishall when the treatise was begun. Perhaps the treatise was a project that dreamed up by Patishall in his later years and begun with the help of his senior clerk. Although I see no reason to believe in the "redactor" posited by Woodbine, Kantorowicz and Schulz as the explanation for the numerous mistakes in the treatise—which they did not think a genius like Henry de Bratton could have made—there is no reason to suppose that many other hands, probably within the circle of Patishall, Raleigh, and Bratton, touched the treatise. The process of determining who wrote what and when, however, is likely to be something we discover piecemeal, as scholars with specialties in particular areas of law look at the treatise with specialists' eyes and discover things that do not seem to be quite right. This discussion can, therefore, never pretend to be anything close to the last word on the dating of the treatise; it is merely an explanation of my own view of its chronology, which I shall in rely on in the rest of

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<sup>333</sup> Brand thinks that many of the documents copied into the treatise come from Raleigh's original drafts, not from final copies. This seems to be true of some writs and of the provisions of Merton, which all appear in slightly different forms than they do in the "official" versions. It would seem that Raleigh had a lot of papers in his collection that got incorporated into the treatise at various times. Brand, "Date and Authorship of Bracton," 221, 222, 231.

this dissertation as I use the treatise to try and understand the culture of the justices and clerks who produced this massive work.

### ***Bracton* and Plea Roll Collections: A Suggested Synthesis**

Even if the *Note Book* and the other plea roll collections were not made in preparation for *Bracton* and were not the major source for *Bracton*'s cases, there are still many unanswered questions about the relationship between these texts. Both collections take cases largely from the same court terms and also draw their cases from the rolls of the same two justices, rolls which, as we have seen, were passed from Raleigh to Bratton in the 1240s, if not earlier...<sup>334</sup> That the *Note Book*'s excerpts from Bench rolls end in 1234 and the excerpts from the *coram rege* rolls begin in 1235, the year in which William of Raleigh moved from the Bench to the court *coram rege*, suggests that the *Note Book*, like the treatise, was made by Raleigh or someone close to him. The authors of the treatise and the *Note Book* seem to have been following the same two justices and to have had the same rolls in their possession. They may have been the same person or group of people. If so, why did they write these two works, which seem to bear little relation to each other apart from the emphasis on cases?

The *Note Book* has many of the same dating issues as the treatise. Maitland thought it was made no later than 1256, because an addition to the *Note Book* disagrees with the provision on leap years that was enacted in that year.<sup>335</sup> Again, Maitland's narrative was a simple one that fit most of the facts, and we cannot blame him, as the first person to analyze this huge mass of

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<sup>334</sup> There are a few terms that are represented in one, but not the other, but both *Bracton* and the *Note Book* cite from the Bench rolls from 1217 to 1234 and from the court *coram rege* from 1234 to 1240, with some late outliers in the treatise. They both contain cases and references from Patishall's eyres in 1220 and 1226-7. The treatise contains references to many more of Patishall's eyres, running back as early as 1218. It also contains Raleigh's eyres, which do not appear in the *Note Book* at all. This does not mean that they never did, though. The end of the *Note Book* is lost and it is impossible to say what it contained. BNB, 1:146 ff.

<sup>335</sup> BNB, 1:42. There are some striking similarities to the treatise here. The *Note Book* ascribes this case to "Martin," presumably Martin of Patishall, just as the treatise often speaks of Martin without his toponym. They also both contain the same metaphor for a leap year: a snake holding a tail in its mouth. BNB, 3: 209-301, no. 1291. BDL, 4:134.

material together—*Note Book*, treatise, and marked rolls—for getting it wrong. He thought that the treatise drew directly from the *Note Book*, a proposition which Thorne showed to be incorrect. He also thought that the markings on the rolls were made in preparation for the *Note Book*. When searching the plea rolls for cases that were in the *Note Book*, Maitland “discovered that the work was done for me. Every case that I wanted had against it a mark of an obvious, unmistakable kind.”<sup>336</sup> The unmistakable mark was a sideline made in a “dark rusty brown” color.<sup>337</sup> Maitland thought that these sidelines were “the work of the man who had the *Note Book* made for him,” made to instruct the scribes in which cases to take from the rolls, and were thus, according to his narrative, the work of Henry de Bratton himself.<sup>338</sup>

But Maitland’s enthusiasm at finding the sideliner who lined up so well with the “author” of this case collection that we call the *Note Book* may have blinded him to some of the problems with his theory. First, as he himself points out, there are many sidelined cases that were not copied, and some marked rolls in which too many of the sidelined cases are omitted from the *Note Book* to imagine that it was merely scribal error.<sup>339</sup> We see this regularly in *Bracton*: a case that was sidelined ended up in the treatise but not in the *Note Book*.<sup>340</sup> Moreover, many of the cases in the *Note Book* bear marks of not having been taken directly from the roll, as they contain mistakes that would have been very hard to make if they were.<sup>341</sup> It is improbable then, that the *Note Book* is taken directly from the sidelines.

Maitland did have evidence that strongly suggests that the sidelines bear some relationship to the *Note Book*. He found that “the copyists who wrote the *Note Book* had very

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<sup>336</sup> BNB, 1:66.

<sup>337</sup> BNB, 1:67.

<sup>338</sup> BNB, 1:67.

<sup>339</sup> Ibid.

<sup>340</sup> TI3, xxxiv-xxxix.

<sup>341</sup> TI3, xxxvii.

faithfully obeyed the direction to copy implied in the scoring.”<sup>342</sup> Indeed, at times they would follow the sidelines too literally, copying the first few lines of the next case when the sideliner accidentally ran his line too long, or leaving out the last few lines when it was too short.<sup>343</sup> Thus, when the case was copied from the roll, the sideline must have been there, even if the sidelines were not intended specifically for the construction of the *Note Book*. This suggests that the sidelines were made in preparation for some other collection of cases, one that no longer exists, and that the *Note Book* was then copied from that collection.

The idea that there was an intermediate collection, between the marked rolls and the *Note Book*, was first floated by H.G. Richardson.<sup>344</sup> Thorne presented further evidence for this view. The *Note Book* arranges its cases by the judicial term in which they were heard. Sometimes, however, the scribe unwittingly continues copying cases from the next judicial term without inserting the new term heading, as when he follows the cases from the Bench in Trinity term, 1227, with those of Hilary and Easter 1228, without marking the change in term.<sup>345</sup> This would be difficult to do if he was copying from the rolls themselves, because each term had its own roll and it would have been obvious to the scribe when he was switching to a new roll.<sup>346</sup> If he was copying from an intermediate text that was not so concerned with the judicial term in which a case occurred, however, he might elide them by accident. Some cases are also abridged, suggesting that at least parts of the *Note Book* were not copied verbatim from rolls with sidelines.<sup>347</sup>

Although both pieces of evidence are suggestive, Thorne probably makes too much of them. By showing that the scribes did not copy the rolls verbatim he merely demonstrates that

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<sup>342</sup> BNB, 1: 67.

<sup>343</sup> BNB, 1: 67; nos. 75, 320, 710, 711, 935.

<sup>344</sup> Richardson, “Bracton: The Problem of His Text,” 73-4.

<sup>345</sup> TI3, xxxvii.

<sup>346</sup> Ibid.

<sup>347</sup> Ibid.

the copying of the *Note Book* did not happen as Maitland described it: a collector marking the rolls and telling his clerks to take those cases precisely as they were found in the rolls. Somewhere in the process of getting these plea roll entries into the *Note Book*, the plea roll entries were modified, either by leaving out the heading from the roll, or by abridging individual cases. We are therefore dealing with someone who was an author as well as a collector and copyist. That author need not be the author of an intermediate collection. It may very well have been the creators of the *Note Book*, not the creators of some intermediate text, who were unconcerned with listing cases under the correct term. It may have been the collector of the *Note Book* who instructed his scribes to abridge certain cases, or a scribe with a tired hand who decided that his employer could not possibly need the entire case. Thorne assumes that the people who made the *Note Book* would have correctly noted the roll from which they were taking, had they known; he assumes that they would not have abridged cases they were taking from the rolls. Someone, however, had to do both of these things for them to end up in the *Note Book* that way, and that someone could as easily be the person who created the *Note Book* as the creator of an intermediate collection.

There is one final piece of evidence that makes Thorne's point definitively. The account of the discussion of bastardy at the council of Merton that appears in the *Note Book*—an event with which we are now familiar from the treatise—could not have been copied from the roll. It places events that took place in 1236 after those that took place in 1234, and places them all on the 1234 roll. If it was copied from the roll, the scribe would not have placed it among the cases decided *coram rege* in 18-19 Henry III (1234-5), since it was actually decided in 1236. It is temporally impossible for the *coram rege* roll of 1234 to contain an account of Merton that switched the events of 1236 and 1234. While possible, it is highly improbable that the 1236 roll did, either, and even less probable that the scribe included this one entry from 1236 among

entries taken from the roll of 1234 and then misdated it. This account of Merton, then, is not an account from the rolls, but someone else's account of what happened at Merton in 1234 and 1236. Apparently the copyists of the *Note Book* mistook this account for a plea roll entry.

There has to have been an intermediate collection of cases between the rolls and the *Note Book*, a collection used by the author to write the *Note Book*. Additional evidence shows that it was probably not one collection, but two. The *Note Book* contains some inconsistencies in dating that lead to the conclusion that it must be a copy of several different collections. Thorne pointed out that there are three cases close to the end of the *Note Book* that have notes in the margin referring to the council of Merton of 1236—the accounts of which, as we have seen, show us that the *Note Book* was not copied directly from a roll and which, as we will see, help us to date *Bracton* itself. One of these cases says that the rule has been changed by a “new grace” and the other two say that the point raised in the case is “against the constitution of Merton.”<sup>348</sup> Thorne argued that it would not have made much sense for someone to select these cases for copying only to mark them as error, and he thus used them to date those parts of the *Note Book* to before the Council of Merton in 1236.<sup>349</sup> Of course, there might be reasons to copy an entry even if it is old law. For instance, one of the cases contains additional marginal annotations that highlight a point of law raised in the case.<sup>350</sup> If the creator of the *Note Book* thought a case was a particularly good example of a rule, he might copy the case, but note that another element of the case violated the constitutions of Merton so that the reader would know not to trust that part as good law. A case that comes only a few folios after that, however, puts that theory to rest. A short case with very little of legal interest in it at all has one and only one note: that the case is “against the

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<sup>348</sup> “*Nova gracia*.” Maitland, BNB, 3: 304; British Library MS Add. 12269 fo. 210r. “*Contra constitutionem de Mertona*” BNB, 3: 662, 713; British Library MS Add. 12269 fos. 275v, and 287r.

<sup>349</sup> TI3, xvii.

<sup>350</sup> BNB, 3: 662, British Library MS Add. 12269, f. 275v.

constitution of Merton.”<sup>351</sup> There could be no other purpose in copying this case than for the very rule that the marginal notation tells us is bad law. It seems that these outdated cases must have been copied into the *Note Book* not because they were specially selected for inclusion, but because they were in a pre-1236 collection that was being copied.

These cases all appear in the last two sections of the *Note Book*: one of pleas in the Bench from 1217 to 1226, running in chronological order, and one of miscellaneous eyres, from 1221 to 1227, which do not run in any particular order. The obsolete cases appear in the bench in Trinity Term, 1220, in the Yorkshire eyre of 1222, and in the Staffordshire eyre of 1221, all very close to each other chronologically. It would seem, then, that these last two sections, at least, were selected for inclusion in a set of cases that was made before 1236 and later copied into the *Note Book* and modified.

If this is so, then these last two sections must have been copied into the *Note Book* from a different case collection than the cases in the section immediately before them, for the simple reason that this earlier section—cases decided *coram rege* between 1234 and 1240—contains cases that postdate Merton by four years! This is also the section of the treatise in which we find the faulty account of Merton. Thorne’s evidence for the intermediate collection—the faulty account of Merton and the corrected pre-Merton cases—points not to one, but to two different collections, an implication of the evidence that Thorne did not consider.

This was not merely a matter of material being added later to update the *Note Book*,

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<sup>351</sup> The text of this entry, in its entirety, says “The assize comes to recognize whether John Dagod and such others unjustly etc. disseised John of Brimston of his common of pasture in Brimton which pertains to his free tenement in the same vill infra etc. And they come and concede the assize. The jurors say that in fact John assarted a certain part of the woods where he was accustomed to have his common around two and a half acres *de mora* and he made to include them, but elsewhere/otherwise he could have common anywhere in the wood how much pertains to his tenement etc. After he came and withdrew etc.” It is difficult to see what principle one could take from this. (“*Assisa venit recognitura si Johannes Dagod et tales iniuste etc. disseisiverunt Johannem de Brimstona que pertinet ad liberum tenementum suum in eadem villa infra etc. Et ipsi veniunt et concedunt assisam. Juratores dicunt quod revera idem Johannes assartavit quamdam partem bosci ubi ipse solet habere communam suam circiter duas acras et dim. de mora et illas fecit includere, set alibi potest habere communam ubique in bosco quantum pertinet ad tenementum suum etc. Post venit et retraxit se etc.*” And in the margin is “*Contra Constitutionem de Merton.*”) BNB, 3: 713; British Library MS Add. 12269, f. 287r.

because the pre-1236 material comes *after* the post-1236 material. The possibility that this is the work of the binder is offset by the fact that the three sections are continuous across quires—after quire thirteen, all of the quires begin with material that spills over from the previous quire, indicating that they were copied continuously, as part of a single project. The succession from later cases to earlier was not, then, imposed upon the *Note Book* by a later binder; it was part of the original plan. Therefore, the cases in the bench cannot be a mere update to material that was already part of the *Note Book*. They must have been part of the last twelve, continuous quires from the time they were copied. It follows that the collection of cases *coram rege* from 1234 to 1240 and the cases in the bench and on eyre that come after them must have come from two, intermediate collections that were both copied into the last twelve quires of the *Note Book*, whenever they were made, at the same time.

We see further evidence that the *Note Book* was copied from two earlier collections in the way the copyists constructed the breaks between these sections. The collection of cases from the court *coram rege* ends at folio 195v. Then comes a large gap in the page on 195v, before a new scribe picks up, in a very different hand, with instructions, in Latin, as to how to treat a leap-year.<sup>352</sup> This is followed on 196r—in yet another hand and, even more surprisingly, in French—by the assize of bread, which was established in either 1256 or 1266-7.<sup>353</sup> Then there is a large blank space at the bottom of the page, followed on 196v by the beginning of the cases from the bench. Thus, it appears that after the scribe who copied the cases *coram rege* finished mid-quire, having filled only four folios, a different scribe—his handwriting is not nearly as neat—picked up with the earlier cases from the bench, but left a blank page and a half between the *coram rege* cases and his own bench cases. That page and a half was filled in by a third and a fourth scribe, probably writing much later, who copied in the discussion of the leap year and the assize of

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<sup>352</sup> British Library MS Add. 12269, fo. 195v.

<sup>353</sup> Maitland thought this hand was probably the latest in the manuscript. BNB, 3:301, n. 8.

bread. One can see from the substance, the physical placement in the manuscript, and the hands in which they are written, that these discussions of the leap year and the assize of bread did not form part of the original project of copying cases into the *Note Book*.

It is hard to understand why the scribes would leave such a space. There is no quire break at folios 195-6. The fact that the second scribe left empty space between the series of cases from the *coram rege* rolls and his own cases from the bench rolls does suggest, however, that he was separating the two series in his mind, and that this separation manifested itself on the page. From the evidence above, it seems that the most likely reason why the scribe thought his cases needed to be separated from the previous set of cases, and left blank a page and a half of valuable parchment to do it, is because the cases from the *coram rege* rolls and the cases from the bench rolls did indeed come from two separate collections that were copied into the *Note Book*. Although the last twelve quires of the *Note Book* must have been created as a single work, they were drawn from at least two others.

We thus have an intermediate text from which at least part of the *Note Book* was copied. This intermediate text was made sometime after 1236 and, at the very least, contained a modified version of cases from the *coram rege* roll of 1234, and was probably made after 1240. This is useful in reconstructing case collecting in the thirteenth century. The *Note Book* contained cases from Patishall's eyres (1218-1227), Patishall's terms on the bench (1217-1229), Raleigh's terms on the bench from Patishall's death to his appointment to the court *coram rege* (1229-1234), and Raleigh's term as chief justice *coram rege* (1234-1240). The fact that the cases in the *Note Book* line up perfectly with the careers of Patishall and Raleigh makes one think that this was probably the work of their clerks. Patishall's eyre rolls are sidelined, as are many of the bench rolls. The *coram rege* rolls from Raleigh's terms are not, however.

From this we can attempt to reconstruct two pre-*Note Book* collections, one which

contained cases from Patishall's eyres of 1217-1227 and a second, made after 1240, which contained Raleigh's terms from the court *coram rege*. There may have been others, but we can be fairly certain that at least two existed. The first, written sometime before 1236 by the same person who sidelined the rolls, was updated sometime after 1236. The second collection was compiled after 1240. The creation of the first collection lines up rather well with the first phase of writing on the treatise. The updating of the first collection and the compilation of the second line up well with the second phase of writing on the treatise. The cases from both collections were then copied into the *Note Book*, in reverse chronological order, at some point after 1240, during either the second or third phase of writing on the treatise, when the annotator wrote that those pre-Merton rules were erroneous.

### **From Plea Roll Collections to *Bracton***

The plea roll collections that would ultimately be incorporated into the *Note Book* and the treatise *De Legibus et Consuetudinibus Angliae* thus seem to have been concurrent projects in every phase. They also seem to have been the work of the same people, who had access to the rolls used in both. But, as Thorne has shown, the *Note Book* and its predecessors are unlikely to have been the source for the cases in the treatise. The plea roll collections were not preparatory materials. Why, then, was this group of justices and clerks embarking on two separate projects related to the plea rolls? Thorne thought that copying selected entries marked on the roll by a senior clerk was one of the ways in which younger men were schooled in the art of enrolling pleas.<sup>354</sup> It is possible that the *Note Book* was made with the intention of training clerks to make enrollments, but the two earlier case collections could not have been made as exercises in making enrollments. The creators left every mark that they wanted these cases for the law

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<sup>354</sup> TI3, xxxviii.

contained in them. They did not copy haphazardly from the rolls, but chose long, complex, and interesting cases. As we have seen, they sometimes abridged cases, which would hardly make for good practice in making enrollments, but which might be useful if the creator of the text had a sense that some facts were relevant and others were not—a budding sense of legal relevance—which guided his pen.<sup>355</sup> Finally, and most tellingly, we have cases where the names of the parties and the place where the case was heard are omitted.<sup>356</sup> The identifying information is removed. This is only one symptom of a process that had been taking place in the plea rolls. As they became longer, they added information about the procedure, about the law of the case, rather than information about the parties. These administrative records had started out in the second half of the twelfth century as very simple documents. Even as they grew more complex, they did not add anything about the personal relationships between the parties, about the emotions at the core of the dispute, about the stages that happened before the case came to court. In short, they tell us almost nothing of the things that mattered most to the two people standing in front of the judge. They focused instead on the things that mattered to the judges and clerks of the courts: the types of arguments and procedural moves the parties made, and whether they worked or not. The cases in the *Note Book*—which come from these earlier case collections—take this to the extreme by turning the parties into complete abstractions. The case is thus about the legal abstraction contained within it, not about the parties or even about the proper way to make an enrollment. The people who were collecting these cases had begun to separate law from fact, could think about some things as legally relevant and others as wholly irrelevant to their work, and could imagine their work as a special type of royal administration, one that dealt with something called “law.”

It seems like these two earlier case collections from which the *Note Book* was drawn

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<sup>355</sup> BNB, 1:68.

<sup>356</sup> *Ibid.*

were created and crafted for the finished product rather than for the process of making them. Learning how to make a case more abstract than it would be on the roll, or how to abridge a case, would help very little in training a clerk to make enrollments. There is no reason to suspect, as Thorne did, that short entries are included merely to give the copyist or the reader the form of an enrollment. Thorne identified thirty-three cases that he thought were solely there as forms of enrollments.<sup>357</sup> But why would someone intersperse cases of “legal” interest with simple forms of enrollments. The *Note Book* and presumably the earlier collections were organized by term. If a clerk needed a form of enrollment, there would be no way to find it among all of the cases “of more than usual interest.”<sup>358</sup>

## Conclusion

In this chapter we have established a chronology for the growth of a core of full-time justices and clerks in thirteenth-century England. We have also established a likely chronology for their literary production: *Bracton* was begun sometime in the mid 1220s. The first case collection we know of was probably made from Martin of Patishall’s rolls sometime in the late 1220s or early 1230s. Another of the pre-*Note Book* collections was made after 1240, perhaps during the second phase of writing on the treatise, and with the treatise’s same incorrect account of Merton, perhaps, again, Henry de Bratton’s doing. Then the *Note Book* was compiled from these two collections at some later date, and corrections were made for rules that had been superseded by Merton. It is difficult to account for “*volo*” and the headliner, because their works do not survive and their annotations may have been added to the plea rolls any time after they were made in the 1210s and 1220s. Other comparable works from this period remain to be

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<sup>357</sup> TI3, xxxviii.

<sup>358</sup> *Ibid.*

examined.<sup>359</sup>

We can see from evidence internal to the plea roll collections themselves and from the way *Bracton* discusses cases from the plea rolls that these collections were not made simply to give clerks practice in making enrollments. While that may have been one of the goals of copying, it was certainly not the only one. The features of the plea roll collections show that they were used to teach general rules and principles from decided cases. How they did that will be the subject of the next three chapters.

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<sup>359</sup> In 1244, someone kept a roll of the London eyre that included very long and detailed entries. I plan to return to this narrative in later work and discuss the 1244 London roll and later collections of cases like *Casus et Judicia* and *Casus Placitorum*.

## Chapter Three

### Understanding Cases in the Mid Thirteenth Century<sup>360</sup>

In the last two chapters, we have seen that case collecting was a more important phenomenon in the thirteenth century than the traditional narrative would have us believe. People were excerpting cases from the royal courts' administrative records and placing them in separate collections. We know that, at the very least, five such collections were made in the thirteenth century, and probably more. At least one of those was made as early as the late 1220s or early 1230s. We have also seen that the case collections were not made as preparatory materials for the treatise *De Legibus et Consuetudinibus Angliae*, commonly called *Bracton*, as Maitland believed, but that they were separate collections made for different purposes. Where the traditional narrative, which originated with Maitland, hid case collecting behind *Bracton*, we can see now that case collecting was a phenomenon that lasted from the early decades of the thirteenth century until at least the 1270s.

While *Bracton* has obfuscated the existence of the case collection as an independent genre of legal writing, it is a valuable source for understanding how the people who were collecting cases read them and engaged with them as texts. The case collections themselves give us little purchase for understanding their purpose. None of the existing collections contains any extensive commentary or even an introduction. *Bracton*, on the other hand, is mostly commentary, sprinkled with cases. Although the authors of *Bracton* comment explicitly on the role of the case references only briefly, we can learn quite a bit about the role the case references played in the treatise from their placement relative to other parts of the text and by the ways the authors of the treatise introduce them. *Bracton* can thus serve as a sort of key for understanding how the people who were collecting cases in the thirteenth century understood those cases.

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<sup>360</sup> A version of this chapter will appear in Volume 84, Issue 4 (Summer 2012) of the Temple Law Review, and is printed here by permission.

*Bracton* is particularly useful for decoding the plea roll collections because the collections and the treatise were almost certainly made by the same small, but important, group of people. Even if the case collections and plea roll annotations discussed by Maitland were not made for the treatise, they share many important features with it. As previously noted, they all include cases from the justices Martin of Patishall and William of Raleigh, two of the most important justices of their age. Patishall's and Raleigh's rolls would not have been easy to access. They would probably only have been available to their clerks and other people close to them. We know that one clerk in particular had at least some of their rolls in his possession in 1258. In that year, Henry de Bratton, Raleigh's former clerk and by this time a justice himself, was instructed to return Patishall's and Raleigh's rolls to the treasury.<sup>361</sup> Bratton, although not the primary author of *Bracton* as once thought, probably had the exemplar of *Bracton* in his possession at his death and was almost certainly one of the authors who worked on the treatise in its later stages. Bratton himself could not have been the influence behind the case collecting culture, since some of the collections and parts of *Bracton* were written before he began working in the courts, but he does provide us with evidence that the case collecting tradition was located in the circle of Martin of Patishall and William of Raleigh. If the earliest case collections and the earliest portions of the treatise are dated correctly, the project began during Martin of Patishall's tenure as chief justice, while Raleigh was his senior clerk, continued during Raleigh's tenure, and was further continued by Raleigh's clerks, who included the future justices Henry de Bratton and Roger of Thurkilby. It was this group of maybe a dozen justices and clerks who first thought to collect cases for something other than the bureaucratic facts contained in them *and* who wrote the treatise.

Since the case collections and the *Bracton* treatise come out of the same textual

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<sup>361</sup> Leicester Abbey was instructed to return Stephen of Segrave's rolls at the same time. Doris Mary Stenton, *Rolls of the Justices in Eyre for Lincolnshire 1218-19 and Worcestershire 1221* (London: Bernard Quaritch, 1934), xx.

community, this coterie of justices and clerks, the treatise can be used to understand the case collections. We shall see that they engaged with them in much the same way that the Civilians of their time engaged with the writings of Roman jurists. They appear to subscribe to the same peculiar notion of authority as the jurists of the schools, and they used dialectical reasoning to create new legal knowledge. *Bracton* thus raises the possibility that that most English of legal institutions—case law—was not a purely autochthonous development, but a combination of English administrative practice with civil law thought.

The 527 references to cases that appear in *Bracton* are still something of a mystery. As we have seen, Theodore Plucknett argued that they were “useful illustrations but not in themselves sources of law.”<sup>362</sup> Frederic Cheyette thought that the authors of the treatise borrowed canon law theories about custom—that custom had to be approved by a court to have force—and argued that the cases were placed in the treatise to prove that certain customs were good law.<sup>363</sup> At stake in this debate is whether the cases in *Bracton* are really case law or not. Plucknett thought not. The case illustrated a legal point that is fully independent of the case itself. For Cheyette, cases were case law. They were moments when a body empowered to do so by the king breathed life into a custom and made it a binding rule. I will argue for a third possibility. The cases in *Bracton* were indeed case law of a sort. The authors of the treatise collected cases because they were thinking like civilians and canonists. But they were not using cases because they were statements of custom. They were using them because cases were, in the eyes of the clerks of the courts, the words of great jurists. The authors of the treatise imagined the royal justice as the equivalent of the Roman jurist, a figure they encountered in the *Digest*, the most popular of the three parts of Justinian’s *Corpus* in the Middle Ages.<sup>364</sup> The *Digest*,

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<sup>362</sup> *Ibid.*, 59, 80.

<sup>363</sup> Frederic L. Cheyette, “Custom, Case Law, and Medieval “Constitutionalism”: A Re-Examination,” *Political Science Quarterly* 78, no. 3 (1963): 379-80.

<sup>364</sup> Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), 44.

compiled in the sixth century, recorded the opinions of jurists of the classical period of Roman law. The authors of *Bracton*, who, we can be certain, had legal training in the schools, exported this image to the justices they worked with and served. They began to imagine the royal justice not as an administrator, but as a jurist. The plea roll entry thus became important as a place where the jurist-justice's words could be found. It was as juristic opinions, not as proof of custom or as mere illustrations, that the authors of *Bracton* engaged with plea roll entries.

### **Authority Words**

It is hard to tell from most of the case references why the author chose to place those specific citations in his text. A minority of references, though, show us that the authors understood the cases in a very different way than either Plucknett or Cheyette thought. The problem with Plucknett's argument in particular is that it is an argument from absence. As he sees it, the case references in the treatise *need not* mean more than what he thinks they mean. If we find an example to the contrary, though, where the case or the judge can only have been treated as an authority, Plucknett's argument from absence is less secure. There are more than a few places in the treatise where the authors indicate to us that the case is more authoritative than Plucknett would have us believe, that they are indeed the author's English equivalent to decretals or, more to the point, to the opinions of Roman jurists that we find in the *Digest*. A minority of cases show us the plea roll entry as something more than a mere illustration. The entries at times even mobilized a particular form of scholastic textual authority, much like an entry from the *Digest*, the *Decretum*, or the Bible. Furthermore, they treat the judges who were responsible for these plea roll entries like their equivalents in the *Digest*, the Roman jurists whose writings are excerpted there. *Bracton* can thus help us to understand the plea roll collections discussed in the last chapter. While the sidelines, chapter headings, and "volos" we find on the rolls tell us very

little of why the collections were made, and the *Note Book* offers only a little more; *Bracton* is highly suggestive if we look at the way the cases are presented and discussed. We have an advantage with the treatise that we do not have with the case collections. The authors of the treatise do not simply copy the cases; they reference them, allude to them, and sometimes excerpt them. All of these activities require some type of reworking of the plea roll entry into a new text, which new work contains some of the author within it. We can thus use the ways the authors of the treatise present the cases to determine why they put the cases in the treatise in the first place. We will now turn to that minority of cases that neither Plucknett's nor Cheyette's hypotheses can explain.

The words that introduce case references are important for understanding the ways that the authors and thirteenth-century readers of the treatise would have understood those cases. While most of them leave the relationship between case and rule ambiguous, a few show us that the authors of the treatise undoubtedly thought that cases were authoritative texts from which general rules could be abstracted. Unfortunately, the vast majority of case references are introduced by the words "*ut*" or "*sicut*," which give us very little to go on when trying to understand the function served by the cases where they are cited. For example, one author tells us that "dower may be constituted not only in lands and tenements acquired but in those to be acquired, if they are acquired or fall in during the life of the husband, as (*ut*) of Easter term in the seventh year of King Henry in the county of Somerset, concerning Emma, wife of William Dacy."<sup>365</sup> We can break this sentence into two halves, separated by the word *as* (*ut*). The first half states a general rule and the second names a case decided in court. But what is the relationship between the two? The text tells us that the rule appears in this treatise *as* it does in Emma's case. But what does that mean? Does the case illustrate the point? Or does it do

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<sup>365</sup> "*Item constitui potest dos non tantum in terris et tenementis perquisitis, sed etiam perquirendis, si perquisita fuerint vel acciderint in vita viri, ut de termino Paschæ anno regis Henrici septimo, comitatu Somersetiæ, de Emma quæ fuit uxor Willelmi Dacy.*" BDL, 2:268.

something more? We cannot tell from this entry.

Phrases like “matter may be found in,” “there is matter in,” “as happened” and “as is shown,” carry little more meaning than the ubiquitous “*ut*,” implying only that the rule stated above can also be found in a plea roll entry, but without specifying the relationship between the two texts.<sup>366</sup> In some instances, though, the text pulls us away from the theory that cases are mere illustrations, as when the authors of the treatise introduce case references with normative prescriptions. “Ought” words (from the verb “*debere*”) are often used in combination with the introduction to the case reference: “And that she is not entitled to dower (lit. “and that she ought not to have dower”) can be found in Hilary term in the seventeenth year of King Henry.”<sup>367</sup> The impression the author gives us here is that the case is not merely an illustration of what to do in a particular procedural situation. Rather, the case states a rule that ought to be followed. We have a similar situation with, “*that this is so* you have...” or “*that this is so* may be seen,” both of which indicate that there is some normative value behind the statement the author has just made, and which also make the plea roll the locus of that normative rule.<sup>368</sup> The reader is engaged to seek out the text in which the rule or principle resides, which will show him that “this is so.”

We start to see that the cases must be more than mere illustrations when we move on to the very explicit authority words that introduce some of the case references. In one case, which we will examine in more detail later, a rule is said to be “*proved* in the last eyre of Martin of

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<sup>366</sup> There are some cases, introduced by phrases like “as was done,” “it was said” (*dictum fuit*) and “you have” (*habetis*), that tell us something slightly more than the introductory phrases above. BDL 2:94, 238, 3:123. All three imply actors in a way that the previous examples do not. “As was done” and “it was said” imply that the aforementioned rule comes from the deed or speech of someone in the case that follows. “You have” implies a different sort of actor: the reader. It implies that there is something in the plea roll to be had that is not to be had in the treatise itself, but which the reader may want to check. Apart from giving us some indication that the intended audience of the treatise was composed of people who had access to the rolls—judges and clerks in the royal courts—this phrase hints that, in the case references, there is something that the treatise does not provide and that might be found outside of it. None of these tell us exactly why it is important to know what was done or said, or why we would want to have the material from the plea rolls. These types of introductory words need not imply any more than that cases are illustrations. But they do point, first of all, to the need to know what happened in past cases and, secondly, to the importance of reading the plea roll record itself.

<sup>367</sup> “*Et quod dotem habere non debeat, inveniri poterit de termino Sancti Hilarii anno regis Henrici septimo decimo.*” BDL 3:361. See also BDL, 3:403, 4:29, 321.

<sup>368</sup> “*Quod ita sit habetis.*” BDL, 3: 371. “*Quod ita sit videri.*” Ibid.

Patishall in the county of Suffolk, an assise of mortdancestor beginning ‘If Ralph of Wadleysham.’<sup>369</sup> The author of this passage makes the relationship between the rule and the case explicit in a way he does not in the entries that begin with “*ut*.” He tells us directly that the case proves the rule. This is not an isolated case. The author uses the verb *probare* to connect the rule to the subsequent plea roll entry forty-six times in the received text of the treatise, i.e., in just under 9% of the entries.<sup>370</sup> *Probare* could mean *to test* in medieval Latin, particularly in the context of trials by battle and ordeal, but the context in which it is placed makes it far more likely that the author is using it to mean *to prove* or *to approve*. Many of the case references that use the verb *probare* show us unequivocally that they represent the view of the author. Several cases use *debere* (the *ought* verb) together with *probare* to show us that the case that proves the rule represents the author’s own view. For instance, in one part of the treatise, the author tells us, “And that the warrantor *ought* to be demanded that it may be known what right he has in the two parts, is *proved* [in the roll] of Michaelmas term in the fourteenth and the beginning of the fifteenth years of king Henry in the county of Warwick, [the case] of John the son of Elfric.”<sup>371</sup> The author follows this with a brief description of the facts of the case, which he ends by saying, “Whereupon it was clear that the woman demandant could not have dower, because the heir of her husband had no right in the two parts.”<sup>372</sup> The author states the rule in *ought* terms and then says that it is *proved* by the case. He then gives tells us that the result in the case was clear (*manifesta*). The text gives us every indication that the rule as stated in the case is the correct rule. If *probatur* means “is tested,” then the author of this passage seems to believe that the test had positive results. It is more likely that the word, as the *Bracton* authors use it, means

<sup>369</sup> “*Item quod... probatur in ultimo itinere Martini de Pateshilla in comitatu Suffolciæ, assisa mortis antecessoris, si Radulfus de Wadlegesham.*” BDL, 3:209.

<sup>370</sup> See, e.g. BDL, 3:360, “*secundum quod probatur in ultimo itinere Martini de Pateshilla in comitatu Lincolnia.*”

<sup>371</sup> “*Et quod warantus exigi debet ut sciri possit quid iuris habuerit in duabus partibus, probatur de termino Sancti Michaelis anno regis Henrici quarto decimo incipiente quinto decimo comitatu Warrewickia, de Iohanne filio Elfridi.*” BDL, 3:360.

<sup>372</sup> “*Et unde ibi manifestum fuit quod mulier petens dotem habere non potuit, quia heres viri sui nihil iuris habuit in duabus partibus.*” Ibid.

something closer to *prove*.

The power of the case to prove law comes through even more strongly when we are told that it “is proved from the eyre of William of Raleigh” that a person holding land for a term of years may vouch the lord to warrant it, “although there may be an argument (*ratio*) to the contrary.”<sup>373</sup> The author here seems to doubt the principle the case states, because it is contrary to some *ratio*, which can mean both “argument” and “reason,” and yet believes that the case proves the point. This would be truly odd if he was using the case as a mere illustration of his point.<sup>374</sup> The case must, therefore, have some authority on its own, apart from the fact that it is reasonable or that it is in line with the author’s own opinion; it can help the author overcome his doubts about the rule’s rationality. If a case can overcome reason, it must have a strong authoritative power.

### Scholasticism and the Dialectic

*Pace* Plucknett, we have seen the evidence that the authors of the treatise thought that the cases in it were more than mere illustrations. None of the evidence above, however, would cut against Cheyette’s thesis that the cases are authorities in the sense that they give the royal imprimatur to custom, i.e., that they confirm and prove custom and, in the process, turn it into binding law. The cases in the treatise do not read like proof of existing custom, however. The discourses the authors use for talking about cases are instead of the kind that scholars in the

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<sup>373</sup> “*Et quod ille potest qui tenet ad terminum, quamvis ratio se habeat in contrarium, probatur de itinere Willelmi de Ralegha in comitatu Warrewickiæ, de quadam Sibilla quæ dotem petiit, circa finem rotuli.*” BDL, 4:193.

<sup>374</sup> We see something similar in an *addicio* that must have been added by a later author, because it seeks to distance itself from the *addicio* that comes immediately before it. The author of this later *addicio* claims that the principle that is found in the previous *addicio* is “true according to R. and others. But to the contrary [the roll] of Michaelmas term in the second and the beginning of the third years of king Henry son of king John, in the county of Kent, [the case] of Matilda daughter of Simon.” (*Et hæc vera sunt secundum R. et alios. Sed contra de termino Sancti Michaelis anno regis Henrici filii regis Iohannis secundo incipiente tertio comitatu Cantia, de Matillide filia Simonis.*) BDL, 4:274. The author’s distancing technique—“according to R. and others”—combined with the use of a case to bolster the other opinion suggests that the author held the contrary opinion and that the case has some sort of normative value in determining what the proper rule should be.

universities used to talk about their authorities: scripture, the words of the Church fathers, the pronouncements of popes and emperors, and, most importantly for present purposes, the works of jurists.

The *Bracton* authors used cases because they had adopted civilian attitudes about harmony and authority. The twelfth and thirteenth centuries were a time of rapid change in education in Europe. New methods were being taught in the cathedral schools and, later, in Europe's first universities. Starting in the twelfth century, scholars began to organize knowledge into systems, and systems which were internally coherent.<sup>375</sup> As the foundation of their systems of knowledge, scholars looked to ancient texts, to which they ascribed a peculiar type of authority. Different texts acquired this authoritative status in different fields. In Theology, the Bible, obviously, but also the writings of the Church fathers and the *Sentences* of Peter Lombard had acquired this status by the early thirteenth century. In medicine, it was Galen's works. In Canon law, Gratian's twelfth-century *Decretum* would become an authority. In Roman law, it was Justinian's monumental collections: the *Institutes*, the *Codex*, and especially the *Digest*. Medieval scholars read these works because their authors were thought to have had some special light. As A.J. Minnis has pointed out, the scholastic idea of authority was circular: "an authority was a book worth reading."<sup>376</sup> Through a probably less-than-conscious process the collective community of scholars had ascribed worth to particular authors, much in the same way we create and perpetuate literary canons today. No one questioned that Justinian was an authority.

But what did it mean to be an authority? Authorities should, ideally, not conflict with each other. The body of work of all of the church fathers presented a coherent whole; thus Jerome was not only incapable of contradicting Jerome, but Jerome was also incapable of

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<sup>375</sup> Charles M. Radding & William W. Clark, *Medieval Architecture, Medieval Learning: Builders and Masters in the Age of Romanesque and Gothic* (New Haven, CT: Yale University Press, 1992).

<sup>376</sup> Alastair Minnis, *The Medieval Theory of Authorship: Scholastic Literary Attitudes in the Later Middle Ages*, 2nd ed. (Philadelphia: University of Pennsylvania Press, 2010), 12.

contradicting Augustine.<sup>377</sup> Jurists in the Civil and Canon law faculties likewise emphasized the harmony of authorities. The book that established canon law as an academic discipline in the universities, Gratian's *Decretum*, was titled, in full, *The Concordance of Discordant Canons*. Gratian took seemingly contradictory decrees of councils and popes, along with some statements of the Church fathers, and not only placed them beside each other, but also offered solutions to the contradictions. Indeed in the Civil law, this kind of thinking about the foundational texts that were at the center of legal training—Justinian's *Institutes*, *Digest*, and *Codex*—was aided by the fact that the *Digest*, the most studied of the three in the medieval universities, explicitly said in its prologue that it did not contradict itself:

Nothing contradictory will claim a place for itself or be found in this book, if anyone will examine the reasons for the difference with a subtle mind. But something new or secretly placed will be found, which dissolves the complaint of dissonance and introduces another nature, fleeing the bounds of discord.<sup>378</sup>

To see how this system worked, let us look at one case where Gratian, in his *Decretum*, takes several authorities that seem to conflict and creates a harmonious set of doctrines out of them. In his 36th *causa*, Gratian highlights a major issue in the law of marriage: the question of whether the man who commits *raptus*—an act which, at the time, primarily referred to carrying a woman off without her father's permission—can later marry the woman he has carried off. To discuss this issue, Gratian lines up a series of authorities, interspersed with bits of commentary explaining how they relate to each other. In his first string of authorities, Gratian quotes three

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<sup>377</sup> Ibid., 11-15.

<sup>378</sup> “*Contrarium autem aliquid in hoc codice positum nullum sibi locum vindicabit nec invenitur, si quis subtili animo diversitatis rationes excutiet: sed est aliquid novum inventum vel occulte positum, quod dissonantiae querellam dissolvit et aliam naturam inducit discordiae fines effugientem.*” D.Constitutio Tanta.15.

church councils, letters written by the popes Symmachus and Gregory the Great, and the writings of Jovinian, all of which say explicitly that the ravisher cannot marry his victim.<sup>379</sup> One would think that Gratian wants his reader to come to the conclusion that such a marriage is forbidden, but Gratian's commentary at the end of this string of six cases tells a different story. Gratian distinguishes these cases and tells us that they apply to a specific circumstance. He contends that, in all of these cases, the marriage was forbidden because "the ravisher did not wish to marry the woman he carried off," although there is no textual basis in any of them for this interpretation.<sup>380</sup> Gratian thus does not openly disagree with these authorities. He simply tells us that they do not say what the reader might, at first glance, think that they say: that a ravisher cannot marry the woman he carried off. In these cases, he did not want to marry her, and thus he could not be forced to. Therefore, the cases are not directly pertinent to the question of whether the ravisher *can* marry the woman he has taken away from her father.

After these six authorities, Gratian presents another authority without comment, an authority who seems to represent his opinion. Gratian gives us a quote from Jerome, who said that "there are three legitimate marriages written about in scripture," two of which are marriages between a ravisher and the woman he has carried off.<sup>381</sup> Following this, he presents three more texts. The first describes the case where the father consents to the marriage, and, in agreement with Jerome, posits that such a marriage is legitimate. Gratian does not comment on this text. The second, a text from the Council of Meaux, is more troubling for Gratian, and he writes a commentary on it that is longer than the primary text. The council initially said that if there are any ravisher-ravishée couples who have not, at the time of the council, already been wed, they should be separated immediately. The council then made a small concession, holding that such a couple, if they had both done public penance and if "age has driven out incontinence," could

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<sup>379</sup> C. 36 q. 2 c. 1-6.

<sup>380</sup> "*His auctoritatibus evidenter datur intellegi, quod raptor in uxorem rapta ducere non valet.*" C. 3 q. 2 post c. 6.

<sup>381</sup> C. 36 q. 2 c. 7.

marry, but “in this we have not constituted a rule, but...we observe what is rather more tolerable,” hardly a ringing endorsement for such a marriage.<sup>382</sup> The council tells us that the general rule here is that the couple cannot marry, with the proviso that, under certain special circumstances, they can. Gratian turns the reasoning of the council on its head, though, when he titles this text, “Licit marriages are conceded to the ravisher and the woman carried off after penance,” focusing his attention on the limited permission granted in the second half of the text rather than on the blanket prohibition in the first half.<sup>383</sup> Where the council laid down a general rule that such a couple could not marry and a limited set of conditions under which they could, Gratian understands the permission to marry as a general rule, and the penance requirement as a minor condition placed on it.

Gratian does not continue his streak of selective reading, though, when he arrives at a text from the Council of Aachen, which says explicitly that men who have carried off women cannot marry them “although they have afterwards come to agreement, or given dower to them, or have accepted marriage with the consent of their parents.”<sup>384</sup> He does not find a way to reconcile this opinion to Jerome’s. According to Gratian, this authority does not prejudice the authority of Jerome,” though, since Jerome’s opinion “depends on the testimony of divine law.”<sup>385</sup>

Brian Tierney uses this passage as an example of a place where Gratian chooses one of his authorities over others.<sup>386</sup> The medieval law faculties did not follow their authorities blindly and did at times feel free to reject certain texts in favor of others, as Gratian does here. But while Gratian clearly prefers Jerome’s rule and selects it over all of the other authorities in this passage, this is not what he tells us he is doing, except in the case of the Council of Aachen.

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<sup>382</sup> C. 36 q. 2 c. 10.

<sup>383</sup> Ibid.

<sup>384</sup> C. 36 q. 2 c. 11.

<sup>385</sup> C. 36 q. 2 post c. 11.

<sup>386</sup> Brian Tierney, “‘Only the Truth has Authority’: The Problem of ‘Reception’ in the Decretists and in Johannes de Turrecremata,” in *Law, Church, and Society: Essays in Honor of Stephan Kuttner*, ed. Kenneth Pennington & Robert Somerville (Philadelphia: University of Pennsylvania Press, 1977), 69, 79.

Gratian instead tries to convince us that all of these authorities but one come to the same conclusion on the general point that, ordinarily, a ravisher may marry the woman he has stolen from her family. If Gratian did feel free to choose his rules based on the substance, not the source, he did it in a way that showed his respect for the source as an authority. He could not simply say that Jerome was right and the other *auctoritates* were wrong. He instead did his best to reconcile them, even when it is fairly obvious to the modern reader that the passages do not say what he wanted them to say.

By reconciling authorities that seem to conflict, Gratian is not just trying to show the reader that all authorities are in accord. He also uses this process of reconciling texts to create new knowledge. Gratian never tells us explicitly what he thinks the answer is. Gratian clearly thinks that Jerome's opinion is correct, that such a couple can wed, but he does not reject the other texts. Rather, he reads them against the grain to create a harmonious system. Fidelity to the system trumps fidelity to any individual text within it. These ancient *auctoritates* can be made to accord with Jerome and can help us to flesh out what Jerome means. The first series of authorities show us that while the ravisher *can* marry the ravishee, he cannot be forced to do so. The Council of Meaux shows us that the couple must do penance before they wed. By bringing the texts into harmony with each other, Gratian creates new knowledge.<sup>387</sup>

Gratian thus wrote in the mode of reconciliation, the mode in which scholastic lawyers were most comfortable, and used it to create new knowledge. While legal authorities could be wrong, the law faculties strove to find a way in which all of the authorities that spoke on a particular point could be right and to thus create a workable system of law out of a cacophony of texts. This creation of new knowledge out of old authorities was not unique to Gratian. Hand-in-hand with the scholars' emphasis on harmony was their use of the dialectical method, which was

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<sup>387</sup> See Stephan Kuttner, *Harmony from Dissonance An Interpretation of Medieval Canon Law* (Latrobe, PA: Archabbey Press, 1960), 10-13.

designed to create new knowledge through the process of reconciliation. John of Salisbury was complaining as early as the 1150s that dialectic was taking over in the schools, to the detriment of rhetoric and grammar, the other two parts of the *trivium*, the first round of studies in medieval schools.<sup>388</sup> Where rhetoric seeks to convince the speaker's audience to adopt the speaker's own opinions, dialectic seeks to find truth by putting two people with differing viewpoints in conversation, with the ultimate goal being to reach a synthesis between two initially divergent viewpoints. One of the major teaching methods in the universities, the *quaestio*, pitted apparently contradictory authorities against each other and challenged students to reconcile them.<sup>389</sup> Medieval scholars thus used dialectical reasoning to reconcile the opinions of authorities that seemed to conflict with each other and to bring harmony to the system.

The medieval dialectic used authorities as a starting point. Contrary to popular belief, it was not Sir Isaac Newton who first said, "We are dwarfs standing on the shoulders of giants." It was rather a phrase John of Salisbury attributed to his teacher Bernard of Chartres in the twelfth century, and described the twelfth- and thirteenth-century attitude to scholarship.<sup>390</sup> The authorities studied by the medieval schoolmen constituted the foundation of knowledge, but they were a foundation that could be built on because medieval scholars "can see more and farther than our predecessors, not because we have keener vision or greater height, but because we are lifted up and borne aloft on their gigantic stature."<sup>391</sup> By working out the apparent contradictions of the fathers, the jurists, or the Bible, medieval scholars were able to see farther and lead people to a greater understanding of old knowledge. By positing that the system ought to be (or had to be) a harmonious whole and resolving the cruxes of apparent conflict, scholars could actually

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<sup>388</sup> John of Salisbury, *The Metalogicon of John of Salisbury: A Twelfth-Century Defense of the Verbal and Logical Arts of the Trivium*, trans. and ed. Daniel D. McGarry, (Gloucester, MA: Peter Smith, 1971), 24-5, 80-100, Book I, c. 6, Book II, cs. 4-10.

<sup>389</sup> John Marenbon, *Medieval Philosophy: An Historical and Philosophical Introduction* (New York: Routledge, 2007), 215-7.

<sup>390</sup> John of Salisbury, *Metalogicon*, 167, Book III, c. 4.

<sup>391</sup> *Ibid.*

innovated, creating an interesting dynamic between authority and creativity, just as Gratian had done in expounding on the ravisher's marriage.

But the dialectic was not just an epistemological strategy. It was, at the same time, a didactic strategy. It was an efficient way to teach, because it pointed out the problems in a particular field. Peter Abelard, in his *Sic et Non* ("Yes and No"), for instance, juxtaposed snippets of writings from the Church fathers that seemed to conflict with each other.<sup>392</sup> He also provided students with a guide for using dialectical reasoning to reconcile texts with each other, however, so they could use *Sic et Non* as a sort of workbook.<sup>393</sup> Peter Lombard likewise wrote his *Sentences* in order to create a shortcut to the major problems in theology. His goal was to show where the authoritative texts conflicted so that students could find them quickly without spending a lifetime poring over volumes of the writings of the fathers, looking for apparent contradictions to reconcile. Peter Lombard focuses on the problem areas and uses the *Sentences* to teach his students how to reconcile.<sup>394</sup> When Peter Lombard and Peter Abelard showed their students the conflicting opinions of the fathers, they showed them the problems that scholars in the field of theology had to deal with. It was a way of getting to the heart of the matter.

The quintessential product of this type of thirteenth-century thought was the *summa*, a text which sought both to point out the major areas of debate within a field and to reconcile the various opinions in order to present the whole of knowledge in that field as a coherent system.<sup>395</sup> The authors of *Bracton* relied heavily on the *summae* of the Bolognese civilian Azo and called their own work a *summa* in imitation of Azo.<sup>396</sup> The *summa* format aspires to present the subject it is treating as a complete, harmonious system. Its logic assumes that the system of authorities is

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<sup>392</sup> Peter Abelard, *Sic et Non: A Critical Edition*, ed. Blanche B. Boyer and Richard McKeon (Chicago: University of Chicago Press, 1977).

<sup>393</sup> Marenbon, *Medieval Philosophy*, 160-1.

<sup>394</sup> R.W. Southern, *The Making of the Middle Ages* (New Haven, CT: Yale University Press, 1953), 207; Peter Lombard, *Sentences*, trans. Giulio Silano (Toronto: Pontifical Institute of Mediaeval Studies, 2007).

<sup>395</sup> Southern, *Making of the Middle Ages*, 204-5.

<sup>396</sup> BDL, 2:19, 46; F.W. Maitland, *Select Passages from the Works of Bracton and Azo* (London: Bernard Quaritch, 1895).

complete and contains everything necessary for any situation that might arise, much as the modern civil law code does.

### Cases and the Dialectic

There are several case references in *Bracton* that show that the authors of that treatise were thinking like university-trained civilians and canonists. They were treating cases from the plea rolls—particularly those of Martin of Patishall and William of Raleigh—as authorities and using those authorities as a base on which to build new legal knowledge. They used dialectic to reconcile cases to each other and to create a harmonious system. Although the dialectical reasoning in the treatise is not always as sophisticated as that in the most learned civil and canon law *summae*, the authors of *Bracton*, justices and clerks of the royal courts, were using the same tools as the people in the universities.

In *Bracton*'s tractate on the assize of darrein presentment,<sup>397</sup> there is an *addicio* that references two cases of Martin of Patishall:

That in the eyre, in all assises... an essoin lies, and after the essoin a resummons, and after the resummons another essoin of absence on the king's service, provided the essoined person has his warrant by writ of the lord king, is proved in the last eyre of Martin of Patishall in the county of Suffolk, an assise of mortdancestor beginning 'If Ralph of Wadleysham.' /But this could well be for this reason, because the tenant was resident outside the county and in the service of the lord king./ But the contrary may be found in the county of Kent [in the roll] of the eyre of Martin of Patishall in the eleventh and the beginning of the twelfth years of king Henry, in Michaelmas term, that no

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<sup>397</sup> If two people claimed the right to present a priest to the same church, one of the claimants could acquire a writ of darrein presentment from the royal chancery ordering the royal courts to look into which of them had made the last presentment to the church. The tractate can be found at BDL, 3:205-244.

resummons lies in the eyre.<sup>398</sup>

The *addicio* starts by telling us how many delaying tactics a litigant being sued by an assize can use if he is being sued before the king's justices in eyre. The author tells us that one can use an essoin, a resummons, and then a second essoin, and that we know this because it "is proved in the last eyre of Martin of Patishall in the county of Suffolk, as assize of mortdancestor beginning 'If Ralph of Wadleysham.'" <sup>399</sup> By referencing the case as proof, the author signals to us that we know that this is the proper procedure to follow because it has been done this way before: the case proves the rule. But this was not the only way this type of case had been handled before, and it was not even the only way it had been handled by Martin of Patishall. As the author of the *addicio* tells us, "the contrary may be found in the county of Kent, of the eyre of Martin of Patishall in the eleventh and the beginning of the twelfth years of King Henry, in Michaelmas term, that no resummons lies in the eyre." <sup>400</sup> The author thus presents us with two contradictory cases. If we are to follow previous practice, which case should we choose?

One of the authors of the treatise tried to solve this problem. He added a second *addicio* between these two cases, which is set in brackets above. Immediately following the first of these two cases, this author seeks to explain the reasoning behind the first case, telling us that "this could well be the reason [why there was a resummons in the case], because the tenant was resident outside the county and in the service of the lord king," implying that perhaps the first case cites not a general rule of procedure at the eyre, but an exception to that rule, that a

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<sup>398</sup> "*Item quod in itinere aliquando iacet essonium et post essonium resummonitio et iterum post resummonitionem essonium de servitio domini regis, dum tamen essoniatus warantum habeat per breve domini regis, præter assisam ultimæ præsentationis, quæ excipitur ex certa causa et necessitate in omnibus assisis, probatur in ultimo itinere Martini de Pateshilla in comitatu Suffolciæ, assisa mortis antecessoris, si Ralphus de Wadlegghesham. Sed hoc bene potuit esse hoc ratione, quia tenens forte manens fuit extra comitatum et in servitio domini regis. Contrarium tamen inveniri poterit in comitatu Cantia de itinere Martini de Pateshilla anno regis Henrici undecimo incipiente duodecimo de termino Sancti Michaelis quod in itinere nulla iacet resummonitio.*" BDL, 3:209.

<sup>399</sup> BDL, 3:209.

<sup>400</sup> Ibid.

resummons will lie if the tenant is resident outside the county or in the king's service, which were both generally sufficient reasons for an essoin.<sup>401</sup> In other words, the two cases can be reconciled if we accept that there were some peculiar circumstances in the first case.

This *addicio* within an *addicio* was probably written by a different author than the one who wrote the initial *addicio*, which seems to be complete without it. It is clumsily worked into the text, giving us the solution to the problem before it tells us what the problem is; it explains how the two cases can be reconciled before we even know there is a second, contradictory case. We are probably, then, dealing with two cases originally added by an author of the 1230s and an explanation of these cases added at a later date. This later author seems to have been troubled by the inconsistency between the cases. After all, this second *addicio* must have been added specifically to address the problem of the resummons, since it begins with the words “this could well be the reason,” but does not specify what it is the reason for. It is only when we read the second, contradictory case that we can see that the resummons is the issue. But why was the author troubled by the apparent contradiction between the two cases? Was it because similar cases should be decided similarly, as the author says at another point in the treatise, and these two cases seemed not to be?<sup>402</sup> Or is it because the authors are looking to cases as authorities and are attempting to reconcile them?

In other cases we see clearer uses of scholastic reasoning. For example, the authors of the treatise occasionally use a case as the foundation for a new rule, as in the following case:

Thus if one plows the balks [or] removes and carries away a boundary stone or tree, he commits a disseisin, as [in the roll] of the eyre of Martin of Patishall for the taking of

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<sup>401</sup> Ibid.

<sup>402</sup> “*Si autem aliqua nova et inconsueta emerint et quæ prius usitata non fuerint in regno, si tamen similia evenerint per simile iudicentur, cum bona sit occasio a similibus procedere ad similia.*” BDL, 2: 21. This is a maxim that the author takes from Roman law. D.1.3.12.

assises of novel disseisin and gaol deliveries in the county of Southampton, an assise of novel disseisin [beginning] “If Ralph de la Haye.” for there it is said that if one plows my land he commits a disseisin. And especially if someone plows the balks between himself and me he commits a disseisin, because there a greater wrong is done than if he had plowed other land, for then the crops could be kept [by the owner of the soil], which is not true with respect to balks, because such metes and bounds belong to both the neighbors in common, to the extent that neither may appropriate anything for himself without committing a disseisin, since they hold in common.<sup>403</sup>

The author uses *a fortiori* reasoning, albeit rather simple *a fortiori* reasoning, to prove a point that is not directly implicated in the case.<sup>404</sup> He first takes this specific case and extracts a general principle from it, that if A plows B’s land, that is considered a disseisin, the equivalent of depriving B of his land. He then tells us that if that counts as a disseisin, then the case where A plows the boundaries between his land and B’s should be considered a disseisin, because all of the arguments that apply in the first case apply in the second, plus a few more. He finally creates a new general rule out of this case: “if one plows the balks [or] removes and carries away a boundary stone or tree, he commits a disseisin.”<sup>405</sup> This statement is not inherently bound up with what a person must do in court. It is not addressed to a potential litigant to instruct him in how he must proceed with his case. The authors of *Bracton* assume that there are principles, rules, and definitions behind the assize of novel disseisin. There is a term of art called

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<sup>403</sup> “*Si quis igitur divisas araverit, lapidem vel arborem finalem amoverit et asportaverit, facit disseisinam ut de itinere Martini de Pateshilla ad assisas novæ disseisinæ capiendas et gaolas deliberandas in comitatu Suthamtoniæ, assisa novæ disseisinæ, si Radulphus de la Haye: quia ibi dicitur quod si quis terram meam araverit, et maxime qui divisas araverit inter me et ipsum, facit disseisinam. Quia in hoc magis iniuriatur quam si aliam terram arasset, quia si aliam terram, tunc possent blada retineri, quod non est in divisis videtur, quia huiusmodi metæ et bundæ sunt utriusque vicinorum in communi, quoad hoc quod nullus vicinorum aliquid sibi appropriare possit sine eo quod non facit disseisinam, ex quo tenent in communi.*” BDL, 3:31.

<sup>404</sup> In fact, Thorne translates the words “*et maxime,*” with some license, as “*a fortiori.*” BDL, 3:31.

<sup>405</sup> “*Si quis igitur divisas araverit, lapidem vel arborem finalem amoverit et asportaverit, facit disseisinam,*” BDL, 3:31.

“disseisin,” which they seek to define. The author here tells us that moving a boundary stone or tree would count as a disseisin. We even get a hint here that the author might be borrowing this style from Roman law. We can tell that he was reading Roman law texts, because he lifts the phrase “*lapidem vel arborem finalem*” from the *Institutes*, the book of general rules *par excellence*.<sup>406</sup> The author uses a type of Aristotelian syllogism to create a new rule. He is doing something similar to what modern judges and lawyers do—he is deducing a general rule from a specific case and applying that rule to a new case.

We see this again when the author uses a case about dower to prove a point slightly different from that in the case. He tells us that, if a woman claiming dower from a deceased man proves her marriage to that man in an ecclesiastical court, but “an impediment supervenes, such as war or the like, so that the judgment cannot be put into effect, and before she comes to the court the tenant dies, in the war perhaps,” she can recover against the new tenant.<sup>407</sup> The author goes to some pain to put this case in very unspecific terms—the impediment is a war, “or the like” and the tenant dies in the war “perhaps”—making it sound like a general rule, rather than a case that happened in real life. He gets very specific, though, when he tells us that this was “as in the eyre of the Bishop of Durham and Martin of Patishall in the county of York in the third year of King Henry, of Muriel who was the wife of Hugh of Hammerton,” a case for which, unfortunately, there is no surviving record to tell us how closely it conforms to the facts presented in the treatise.<sup>408</sup> One might suspect that in a case of this kind being heard in the third year of King Henry (1218/1219), a supervening war would have been less than theoretical and that the tenant who was keeping Muriel from her dower had been a victim of the same war that

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<sup>406</sup> I.4.17.6; BDL, 3:31, fn. 4.

<sup>407</sup> “[E]t cum mulier in veniendo sit cum inquisitione versus curiam supervenit impedimentum sicut Guerra vel huiusmodi, quod iudicium non poterit executioni demandari, et antequam ad curiam pervenerit moritur tenens in guerra forte.” BDL, 3:376.

<sup>408</sup> “[U]t de itinere episcopi Dunelmensis et Martini de Pateshilla in comitatu Eboraci anno regis Henrici tertio, de Muriella quæ fuit uxor Hugonis de Havertona.” Ibid.

had followed after the issuance of Magna Carta, which had just ended in September of 1217.<sup>409</sup> And yet the author wants it to sound very general, as if this fact pattern is the basis of a rule that can apply to many different cases.

The author uses this case to produce an analogy, even if it is not a very profound one: “By analogy (*per simile*) it appears that if a woman claims someone as her husband and the decision is in her favour and not appealed, if the man dies before the judgment is put into effect she will obtain dower without further proof.”<sup>410</sup> The author essentially restates the case without the supervening impediment, but it is significant that the author writes as if he is analogizing from one case to another, *per simile*, even if his analogy seems an obvious observation on the case.<sup>411</sup> The case is not merely a specific set of facts, but a rule that can be applied to other cases.<sup>412</sup>

We have seen two cases in which the authors of the treatise use dialectic as an epistemological tool: they use dialectic to create new legal rules that fill in gaps in the system. There are also places, though, where the didactic function of the dialectic, using apparent contradictions as teaching tools, comes to the fore. In a section where he discusses the view—a procedure by which the parties to the case went to the land as a preliminary to determine the boundaries of the land at issue—an author tells us that in a plea *de proparte sororum*—where sisters are suing for their shares of an inheritance—the tenant, the person holding the land, cannot successfully request the view. The reason is that, in such a case, the sisters do not claim to have seisin of any particular part of the land, but to have an undivided interest in the entire

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<sup>409</sup> W.L. Warren, *King John* (Berkeley : University of California Press, 1961), 256.

<sup>410</sup> “*Per simile videtur quod si mulier petat aliquem in virum, et sententia lata fuerit pro muliere et ab ea non sit appellatum, si vir moriatur ante executionem iudicii ipsa sine alia probatione dotem obtinebit.*” BDL, 3:376.

<sup>411</sup> Ibid.

<sup>412</sup> See also BDL, 4:225, where the author references a case for a principle concerning heirs and then cites an additional case for the principle that “what is said of an heir ought to be applied to a successor.”

parcel. Since there are no boundaries between the sisters' claims, the view would be pointless.<sup>413</sup> The author then uses a formula used in other parts of the treatise: "and you have what he did with regard to this (*Et ad hoc facit quod habetis*) among the first pleas after the war in the county of Buckingham, of William of Avranches and Matilda his wife."<sup>414</sup> The case is once again used to prove the rule. But the author saw a problem with this case, because "the contrary, however, that the view lies, appears of Michaelmas term in the second year of king Henry after the war in the county of Essex, of Matilda de Say and William de Mandeville."<sup>415</sup> Two cases, from different rolls, come to opposite conclusions.<sup>416</sup> The author does not choose one or the other. Instead, he does what any good university-trained scholar would do and reconciles the two cases. The author tells us "indeed it is solved thus" and distinguishes between two different types of writs *de proparte sororum*, one called *nuper obiit*, where the sisters are claiming an indivisible interest in the parcel of land as a whole and the other a writ of right where the sister is claiming a certain part within that parcel of land.<sup>417</sup> In the former, the view does not lie and in the latter, it does. This is a fairly simple example of reconciliation. The author does not use the apparent contradiction to make a profound statement about the law or to uncover some principle at a high level of abstraction, so the dialectic's value as an epistemological strategy is fairly weak here. As a didactic strategy, though, the dialectic is very useful in this case. Abelard built *Sic et Non* around contradictions so that he could use those contradictions as teaching tools. The apparent contradictions are used to help the student understand what the *auctores* are actually saying, because when you distinguish two contradictory writings, you have to refine your definition of

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<sup>413</sup> BDL, 4:180.

<sup>414</sup> "*Et ad hoc facit quod habetis inter prima placita post guerram comitatu Bukinghamiae, de Willelmo de Abryncis et Matillide uxore eius.*" BDL, 4:181.

<sup>415</sup> "*Contrarium tamen videtur et quod visus iaceat, de termino Sancti Michaelis anno regis Henrici secundo post guerram comitatu Essexiae, de Matillide de Say et Willelmo de Maundeville.*" Ibid.

<sup>416</sup> Although the author does not mark them this way, both cases were probably decided by Martin of Patishall. This author may have been troubled by the thought that this single justice, who was quite possibly the author's own mentor, contradicted himself. He does not highlight the fact that both were cases of Martin of Patishall, however.

<sup>417</sup> "*Quod quidem sic solvitur...*" BDL, 4:181.

what you think the author means. In this passage, the author of *Bracton* is doing precisely what Abelard did in *Sic et Non*: using an apparent contradiction in his authorities to teach, in this case the difference between two writs.<sup>418</sup>

That the authors of *Bracton* were thinking about the plea rolls in scholastic ways indicates to us that they thought the cases in them were authorities in the same way medieval scholars understood the words of the jurists in the *Digest* to be authorities. They were writings that were worth reading, that should, ideally, be in harmony with one another, and that could serve as the basis for new knowledge. The authors and readers of *Bracton* were to the justices who decided the cases contained in it as the thirteenth-century commentators on the *Sentences* were to Peter Lombard. They were the dwarfs standing on the shoulders of the giants who had written these cases earlier in the century.

### Case Law Medieval and Modern

The cases in *Bracton* did not operate in the same way as modern English or American case law. So much of the American lawyer's identity is bound up in the idea that American law is based on cases partly because American law schools still teach using the case method instituted by Christopher Columbus Langdell at Harvard in the late nineteenth century, a method which has come into popular culture through John Jay Osborn's novel *The Paper Chase* and the

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<sup>418</sup> This is not the only case in which one or another of the authors find it necessary to solve an apparent contradiction. An author also distinguishes two cases, one in which a prohibition is said to lie against the ecclesiastical court in a case involving tithes and one in which it is said not to lie, with the words "*Sed hoc solvitur sic.*" He also uses the word "*casus*" to describe each case. See BDL, 4: 266-7. At BDL, 3:307, one of the authors adds an *addicio* where he says that the contrary rule to what is stated in the main text appears in an eyre of William of Raleigh in Kent. He explains, though, that this is a custom peculiar to Kent, and so the rule in the main text stands as the general rule.

In the section of the treatise on bastardy, the author tells us of two cases in the same eyre of Martin of Patishall that reached opposite conclusions. In the first, it was held that an inquest of bastardy could not proceed because the alleged bastard was underage, and the second in which the inquest was allowed to proceed despite the fact that he was underage. The author tells us, though, that "the two cases are not contrary" (*sed non fuit contrarium*) because in the first case, the alleged bastard was the tenant, the person being sued, and in the second, the alleged bastards were the ones suing. The inquest can thus go ahead when it is being used defensively by the tenant, but not when it is being used offensively by the demandant. BDL, 3: 316-7.

film and television series based on it.<sup>419</sup> Because of this emphasis on the case as part of common law culture, there has been much written about case law and how it operates. Comparing and contrasting the cases in *Bracton* with these models can help us to understand how the dialectical method is working in this text. Many of the models used to describe Common law reasoning focus on the writing judges do in published opinions. Ronald Dworkin, for instance, has likened common law reasoning to a chain novel, in which several authors are asked to each write one chapter of a book in succession, so that the first author writes the first chapter and then hands it off to the second, who must write the second chapter using the first as the basis for his story.<sup>420</sup> The second author thus has room for creativity, but he is also constrained by what the first author wrote. In Dworkin's estimation, his duty is to make the novel the best novel it can be, given what the first author wrote, not to cast aside what the first author wrote and write a better novel. He does this according to the "aesthetic hypothesis:" the author writes the new chapter or opinion based on what will make the best novel or the best system of law, according to the author's own view of what is best.<sup>421</sup> Dworkin's image does a good job of describing how the relationship between change and fidelity to authority can be dynamic in a legal system. Dworkin's chain novelist is an author whose creativity comes into the work in several ways. He must build upon what has been written by his forebears and must use his own idea of what makes the best system when he does so. But the final product does not come entirely from his individual genius. It is also the product of a system.

One might ask, however, if case law is actually the most relevant site where legal knowledge is created in the Common law. I would suggest that the power of Dworkin's model to explain the way the Common law system works—although it does explain judicial decision

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<sup>419</sup> Paul D. Carrington, "Hail Langdell," *Law and Social Inquiry* 20 (1995): 691-760; John Jay Osborn, *The Paper Chase* (New York: Fawcett Popular Library, 1970).

<sup>420</sup> Ronald Dworkin, *A Matter of Principle* 158-162 (Cambridge, MA: Harvard University Press, 1985) 158-162; Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press, 1986), 228-243.

<sup>421</sup> Dworkin, *Principle*, 149.

making in a cogent way—is limited by the fact that it treats only half of the work we expect cases to do in the American common law. It focuses on the judicial opinion as the site where legal change occurs. Dworkin’s model is not wrong, it just gives us an incomplete picture of the work cases do in the common law, because the case plays two important roles in the Anglo-American common law, and those roles, while not completely distinct, are different in some ways. The didactic and epistemological strategies that take place in the law school classroom are just as important to the creation of Common law culture as the case law created in the courtroom. Judges are formed in this environment and it shapes their attitudes towards the work they do. It is also a more democratic space than the judicial opinion. Whereas the judicial opinion privileges one particular actor, the judge, the law school classroom is a space where virtually every member of the legal profession uses cases to learn the law and to create legal knowledge.

The classroom is a space where the opinions produced by judges are refined from long documents into short, abstract rules. The process actually begins before the student is ever assigned a case to read. As Frederick Schauer has pointed out, “appellate opinions are *not* the primary teaching vehicles in American law schools—that role is served by severely edited appellate opinions as they appear in casebooks.”<sup>422</sup> The process of placing the case in a casebook and editing it down to the parts most important to a law student is the beginning of a larger process of refinement by which a case is turned into an abstract rule. When the student reads the case, she further refines it by abstracting a holding, a legal rule, out of it. The case, which may be very long even in its edited form, is transformed into a single sentence. The professor then challenges the student with hypothetical cases that usually alter the facts of the case progressively, by small degrees, until it becomes more difficult to justify the application of the holding from the present case to the new set of facts. The hypothetical presses beyond the

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<sup>422</sup> Frederick Schauer, “Opinions as Rules,” *University of Chicago Law Review* 62 (1995): 1472.

bounds of the opinion, to places where the rule that the student and the professor have refined from the opinion pushes up against other rules in other cases. It encourages the student to try to reconcile competing rules, to decide which is the overriding norm, and to decide whether the rule in this case should be applied in a more marginal set of facts or whether a competing norm should take over.

Midway through the semester, the emphasis shifts from refining rules out of cases to organizing those rules into a system of knowledge, when law students usually begin to work on a different type of legal-literary project: the outline.<sup>423</sup> This document forces the student to take the rules she has abstracted from cases and to organize them into a rational system marked off by sections and subsections. In the process, the student makes something that looks more like a civil law code, or possibly a medieval *summa*, than a judicial opinion. The American Law Institute has even turned the legal outline into a semi-official legal literature. The ALI's restatements of the law are "something less than a code and something more than a treatise," that are intended to "unify our law," according to Benjamin Cardozo.<sup>424</sup> The restatement, like the case, moves law forward. In fact, the reporters often consciously adopt rules that are not currently in the majority, but which instead reflect a trend in the jurisprudence that the reporters favor. The restatement, and possibly also the student outline, is surely designed to fit to some kind of aesthetic principle, but the principle operates in a different way than it does in the chain of cases, where the judge is tasked to fit his analysis into a line of authority.

Both the outline and the restatement organize the law and the restatement, at least, pushes the bounds of legal knowledge. The major difference between Dworkin's judge deciding a case and the legal scholar or law student producing a restatement or outline is that while Dworkin's judge is creating a document that presents itself as dynamic, moving law forward, the authors of

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<sup>423</sup> Schlegel, "Damn! Langdell!," 767. Of course, the student might also buy a ready-made outline.

<sup>424</sup> Benjamin N. Cardozo, *The Growth of the Law* (New Haven, CT: Yale University Press, 1924), 9.

the latter two documents present the law as static. They give us a snapshot of the law at a particular time, transformed from real-life cases into abstract rules, which are neatly organized into conceptual categories. They support their static structure with a discussion of cases. Students include references to cases in their outlines; reporters include discussion of the relevant case law along with the abstract rules they have drawn out of that case law.

The final product of the dialectical project we see in *Bracton* is much more like the student outline or the restatement than it is like Dworkin's chain novel. The authors of *Bracton* refine real-life cases into a coherent system of rules. The student outline and the restatement are thus documents that play the kinds of roles the scholastic *quaestio* and *summa* played in the Middle Ages. They create harmony out of authority and, in the process, present us with a different type of dynamic between continuity and change in the common law than we would perceive if we focused only on the work done by the judge in writing the opinion.<sup>425</sup> But even though the student outline and the restatement transform a text that is the work of a single, judicial author into an authorless system of rules, today's common law judge is not cut out of the system entirely. She retains importance because common lawyers think of the judicial opinion as the primary literature of the common law, and the outline and restatement as secondary products of reading case literature. The royal justice similarly retains his authority even as he is being transformed into a small part of a larger system of rules through the dialectic. As we shall see, the authors of *Bracton*, even as they strove to create an authorless system of rules, still maintained that the justice was an individual with authority.

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<sup>425</sup> Mitchel Lasser has shown how the analysis of a legal system can be enriched by looking to the types of literature a legal system produces beyond those that carry the force of law. For instance, Lasser discovered a "hidden discourse" in the preliminary texts which the French Cour de Cassation uses to create judicial decisions. Mitchel de S.-O.-L'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2004), 28, 47.

## Cases as Judicial Writings

If *Bracton*'s version of the dialectic and Dworkin's chain novel share one thing in common, it is the emphasis on the justice/judge as an authority. We have seen that the authors introduced cases in ways that show they were authorities. Words like "prove," show us that the author thought that the relationship between his text and his case references was that of postulate to proof. Additionally, at least one of the authors used the dialectical method of the schools to show his reader that cases do not conflict. Dialectical reasoning arose out of a very particular idea of *auctoritas* that was popular among medieval scholars, a type of *auctoritas* that was at once collective and individual. "The Fathers," or "the jurists" were, as a bloc, correct and their statements formed a system of thought that was self-contained and internally consistent. At the same time, however, each individual Father or jurist had his own authority, which might make sense only with reference to the body as a whole, but which was nevertheless a type of personal *auctoritas*. Cheyette also thought that cases were authorities, but for Cheyette the case's authority is impersonal and collective. The efficacy of a case as a proof of law has nothing to do with the individual who made the decision in it. The justice is only important insofar as he represents the king and a decision made by a learned and renowned justice will thus have no more authority than a decision made by a man who has only served on a single eye. The case's authority instead comes from the fact that it was decided by a royal institution, which could put the king's stamp on the custom at issue in the case and transform it into positive law. This is a positive law theory: custom must be confirmed by a higher power to have any effect. If Cheyette is right, then we would expect the court to be portrayed as an impersonal body or as an arm of the king. Instead, what we find is a tension between language that emphasizes the justice as an individual and language that emphasizes his place among a collective body of justices, the same sort of tension we find in Roman and Canon law. The case was, on the one hand, an expression

of an impersonal law. But on the other hand it was an expression of the individual authority and learning of the justice who decided it.

The parts of the treatise in which the authors use the dialectic to reconcile seemingly contradictory cases support a collective theory of authority. All cases are authorities and all authorities must be correct; if two appear to conflict, they must be reconciled. But there is a tension throughout the treatise, mirroring the tension in scholastic thought, between the justices as a collective group and individual justices as personal authorities. This tension comes out in cases where there is no resolution that would make both *auctores* right—when the author of the treatise finds the cases to be wholly contradictory and must hold one case to be right and another to be wrong. This appears in the treatise when there is “disagreement among the ancients.”<sup>426</sup> For example, the author tells us at one point that when a tenant loses a case brought by writ of right by his default, he may still correct his default and recover the land, “until he has so put himself on the grand assise that the four knights have been summoned to choose twelve, according to some, and according to others until the twelve have been chosen.”<sup>427</sup> There is an *addicio* in the text at this point, the author of which tries, without success, to resolve the problem. He is troubled by this contradiction among the ancients, “because of the disagreement of the ancients (*veteres*), nothing certain may be held as to what ought to be done if the default is made when the four knights have been summoned to choose, since some say one thing and some another.”<sup>428</sup> The lack of consensus among the ancients makes it impossible to deduce a single legal rule from these cases. To try to resolve the problem, the author adduces two cases from the rolls, one from the 16th year of King Henry and one from the 4th and 5th years, each of which “proves” one side. For the latter case, he says that “several other cases are in accord with this,” perhaps

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<sup>426</sup> “*De hoc autem contentio fuit inter veteres.*” BDL, 4:154.

<sup>427</sup> “*Ita quod quatuor milites summoniti fuerint ad eligendum duodecim secundum quosdam, et secundum alios quousque duodecim electi fuerint.*” BDL, 4:154.

<sup>428</sup> “*Propter dissensum vero antiquorum non poterit teneri aliquod certum quid fieri debeat si defalta facta fuerit cum quatuor milites sint summoniti ad eligendum, cum quidam dicant sic quidam contrarium.*” BDL, 4:154.

indicating that this case represents the stronger of the two opinions, although he falls short of telling the reader that this is the rule to follow.<sup>429</sup>

This passage raises the issue of authority in several ways. It shows us, for instance, that the case's authority does not come from the date of the decision. Later cases do not necessarily trump earlier ones. Otherwise the case from King Henry's 16th year would be the controlling doctrine, and the case from 4-5 Henry, with which many cases were apparently in accord, would be moot. The author seems to have some sense, though, that more cases are better, since he tells us that many cases are in accord with this earlier case. Of course, the lawyer or litigant reading this text would want to know what most justices had decided when faced with this choice. As we saw in the last chapter, though, the treatise is addressed to the justice or the justice-in-training, not to the lawyer or litigant. Its goal is to instruct the justice in making decisions. The justice's concern would be to pick the correct rule, not to pick the one that someone else is most likely to accept. In this case we have no correct rule, just the knowledge that the majority of the cases have gone a certain way. The fact that the case from 4-5 Henry seems to represent a trend does not settle the matter to the justice's satisfaction. The author still thinks that "nothing certain may be held" concerning this point of law.<sup>430</sup> The author of this passage thus attempts to assert the collective authority of cases even as he is forced to admit that that collective authority breaks down.

The authors of the treatise seem to place a heavy emphasis on cases being collective; they are part of a coherent body and should not contradict each other. If they are collective, are they also impersonal? Just as most of the cases are hidden behind the uninformative "*ut*," most of our judges are hidden behind impersonal, passive statements. In most plea roll entries the justice hides behind the clerk's "*consideratum est*" (it is considered), which tells us only that the case

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<sup>429</sup> "*Et ad hoc concordant plures alii casus.*" BDL, 4:154.

<sup>430</sup> BDL, 4:154.

has come to some kind of decision, not who made that decision.<sup>431</sup> Less than half of the cases in *Bracton*—204 out of 527—give the names of the justices in the case. More often the authors cite only the term and year of King Henry’s reign: “as [in the roll] of Easter term in the seventh year of King Henry in the county of Devon.”<sup>432</sup> The only possible authority figure who expressly appears in this reference is the king. Even the king, though, is not expressly cited as authority. He appears in the entry only as a means of dating it. These types of entries were probably useful for readers of the treatise who also had access to the rolls. Several such entries include the words “in the roll,” which Thorne thought significant enough to supply, bracketed, in his translation of this entry and in the translations of other entries that do not expressly contain it. The fact that a few do contain the words “in the roll” suggests that this whole case reference may be merely a way of referencing a document, not of ascribing authority. Just as 21 U.S. 389 will take you to the 389th page of the 21st volume of the Supreme Court reporter, “as of Easter term in the seventh year of king Henry in the county of Devon,” will take you to the appropriate roll, where you can find your case.

We might deduce then that the author was not thinking about why these cases were authorities: they just were. The authority comes from the case itself, not from the actor behind it. We might go in another direction entirely and say, along with Cheyette, that the author did care about where the authority came from, but the important part was that the point in question had been decided in the king’s court. Who made that decision was much less important than the fact that it had been confirmed in the court and given the king’s *imprimatur*. Yet something more active and personal may still be lurking behind these phrases. We should not read too much into

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<sup>431</sup> This passive tradition of case law seems to have been part of the culture of the royal courts in England and Normandy, since we have collections of cases taken from the rolls of the Norman Exchequer which all begin with “*judicatum est*” (it is judged). See, e.g., Huntington Library MS 1343, which includes a collection of cases from the Norman exchequer and a late thirteenth-century copy of the Norman treatise called the *Summa de Legibus in Curia Laicali*, which is glossed with cases from the exchequer. Most of the cases begin with the words “*judicatum est*.”

<sup>432</sup> “*Ut de termino Paschæ anno regis Henrici septimo comitatu Devonix.*” BDL, 4:226.

the passive construction, for instance, because the passive voice was more highly regarded in medieval Latin than it is in modern English. Where today we assume that the active voice is the norm, this was not the case in the thirteenth century. We cannot, therefore, assume from the lack of an actor in the introduction to the case that the author did not have one in mind.

Thus, we may infer from the passive nature of many of the case references neither 1) that there was no agent behind the cases, or 2) that the passive nature of the citations means that their authority is collective or institutional. While the treatise does give us hints that its authors thought of authority as being in some way collective, there are also strong indications that they thought of authority as individual. We might attribute these differences in presentation to the multiple authorship of the treatise—some of its authors holding one view of authority and some holding another—but that will not explain every instance. It will not explain the passage on defaults described above, in which there is a tension between the collective and the individual. Because there is no consensus among the ancients on this point of law, the author tells us that “nothing certain may be held as to what ought to be done.”<sup>433</sup> While he reinforces the collective authority of the “ancients,” the author also recognizes that they are not a bloc; they can disagree with each other.

Discordant opinion was not only possible among the ancients; conflict between the justices is also apparent at several other points in the treatise. The “some say...others say” (*quidam dicunt...alii dicunt*) formula that appears in so many scholastic texts makes its way into *Bracton*.<sup>434</sup> Sometimes the author resolves these disputes, either with his own solution or that of some judge.<sup>435</sup> William of York, whose cases, oddly enough, never occur in the treatise, is a popular arbiter of law for the author or authors. In one part of the treatise, the author tells us that

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<sup>433</sup> BDL, 4:154.

<sup>434</sup> See BDL, 2:388, 403, 424, 432.

<sup>435</sup> See, e.g., BDL, 2:251, for a case where the author resolves competing opinions by arguing that the latter opinion would create an absurd result.

“if the eldest dies in the lifetime of the father, some say that no mention need be made of him, as though he had never been in existence,” before an *addicio* intervenes to say that this is “according to some, which is not true.”<sup>436</sup> A few lines down, another *addicio* informs us that there are others, not just the author, who hold the opposite opinion, as “there are some who say, and it is true, that mention must be made of a son who has died in the lifetime of his father, the view of William of York.”<sup>437</sup> In another *addicio* where the author complicates the primary text by admitting that “so [the rule stated above] seems to some, but to others the contrary seems true,”<sup>438</sup> he resolves the dispute by saying that this new, contrary opinion “was the reasoning (*ratio*) of William of York, and it is good (*bona*).”<sup>439</sup>

William of York is not the only justice whose opinion seems to matter on its own. Martin of Patishall—not surprisingly, since his cases are the most frequently referenced in the treatise—is featured prominently apart from his cases. The author tells us what he was accustomed to do in certain types of cases. For example, when “boundaries [were] destroyed or completely altered the lord Martin took an assise as of a free tenement, not as a trespass. For he used to say that one could not commit a more harmful disseisin than by destroying boundaries completely, or by moving or removing them.”<sup>440</sup> The author uses the things Martin used to say and do as authorities similar to cases in several places. In another part of the treatise, we are told what “is better, according to Martin.”<sup>441</sup>

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<sup>436</sup> “*Si antenatus in vita patris moriatur, dicunt quidam quod nulla de eo fieri debet mentio, ac si numquam esset in rerum natura secundum quosdam, quod non est verum.*” BDL, 4:173.

<sup>437</sup> “*Sed sunt quidam qui dicunt, et verum est, quod de filio mortuo in vita patris oportet facere mentionem secundum Willelmum de Eboraco.*” BDL, 4:173.

<sup>438</sup> “*Ut quibusdam videtur, sed aliis videtur contra.*” BDL, 2:367.

<sup>439</sup> “*Et hæc fuit ratio W. de Eboraco et bona.*” BDL, 2:367. See also 3:66 for an example of a rule that is true “*secundum W. de Eboraco.*”

<sup>440</sup> “*Dominus tamen Martinus assisam cepit de divisis corruptis vel mutatis omnino sicut de libero et non sicut de transgressionem. Dicebat enim quod non potuit quis magis iniuriosam facere disseisinam quam de terminis demoliendis omnino vel corrumpeendis in parte vel amovendis.*” BDL, 3:128.

<sup>441</sup> BDL, 3:122. Martin of Patishall’s sayings occur at several points in the treatise, but he is not the only justice whose “sayings” are recorded. At one point the author of an *addicio* says that a particular doctrine having to do with curtesy “was wrongful according to Stephen of Segrave,” and that “He used to say that this law was misunderstood and misapplied...” BDL, 4:360.

In addition to his cases and sayings, other texts of Martin of Patishall are quoted and referenced in the treatise, apparently as models for what future justices should do. His consultations to the ecclesiastical courts on issues of jurisdiction are preserved in two places. On one occasion the author of the treatise signals that Patishall's words are authoritative and definitive by using the "ought" language he often uses to introduce cases: "When the ordinary has received the letters of the lord king, according to the consultation of Martin, he ought to proceed to hold the inquest in this way."<sup>442</sup> On another occasion, the author presents Martin of Patishall's role as advisory, in a "consultation of the bishop of Worcester, [to whom], on the advice of Martin, this reply was given on behalf of the king," which is followed by the text of a consultation that is written in the form of a royal letter, with no stamp of Patishall's authorship.<sup>443</sup> The author of this passage felt compelled to inform us of Patishall's role in crafting this consultation, suggesting that Patishall's hand in it was important to him. Patishall was an authoritative justice this author.

### **Writs, Statutes, and Justices**

Apart from cases, sayings, and consultations, the authors provide us with several other types of potentially authoritative documents. Writs and statutes both appear in the treatise in several places. Both of these types of documents are generally written in the king's voice. Could it be that the cases are a red herring, then, and that the judicial voice is not as important a source of authority in the treatise as the royal voice? *Bracton* is certainly not structured around the cases in the same way that the earlier *Glanvill* treatise, on which the authors of *Bracton* draw heavily, is structured around writs. But while the authors of *Bracton* use these royal documents in the

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<sup>442</sup> "Ordinarius cum litteras domini regis acceperit secundum consultationem Martini procedere debet ad inquisitione faciendam, hoc modo." BDL, 3:373.

<sup>443</sup> "Consultationem episcopi Wigorniensis de consilio Martini ex parte regis tale datum fuit responsum." BDL, 3:385.

treatise, they transform them, at various times, into forms of judicial writing. The writ and the statute, like the case, are made into spaces where the jurist-justice expounds the law.

Writs, the workhorse documents of the royal courts, are almost as numerous in the treatise as cases, and they were key to the running of the Angevin administration. To begin litigation in the courts, the litigant needed an originating writ, which took the form of an order from the king to some official—usually the sheriff or his justices—that would set the royal bureaucracy in motion and allow the justices to hear the case. The kings had brought a great deal of litigation that was once decided elsewhere, and not necessarily by law, into the royal court with the maxim that no one need answer for his free tenement without a writ.<sup>444</sup> After the case had begun, the king’s justices might issue their own judicial writs to get the procedural wheels of the court turning. Writs were what made the judicial administration move, and very little was done without them. It seems natural, then, that they should play a prominent role in a treatise about the laws and customs of England. But are they authorities?

The treatise’s second prologue mentions writs among the many things the author hopes to shed some light on in his treatise. He aims to

instruct and teach all who desire to be taught what action lies *and what writ*, [and], according as the plea is real or personal, how and by what procedure, [by suing and proving, defending and excepting, replicating and the like,] suits and pleas are decided according to English laws and customs, and [the art] of preparing records and enrollments according to what is alleged and denied, done and proved, defended and excepted and replicated and of this manner.<sup>445</sup>

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<sup>444</sup> See BDL, 2:317.

<sup>445</sup> “*Intentio autem auctoris est tractare de huiusmodi et instruere et docere omnes qui edoceri desiderant, ut sciatur quæ competat actio et quod breve, secundum quod placitum fuerit reale vel personale, qualiter et quo ordine lites et placita decendantur secundum leges et consuetudines Anglicanas, et super huiusmodi conficienda acta sive*

The prologue signals that writs will be a part of the treatise, because the intended audience needs to know how they work, but it does not give us any indication that they will be authorities. For this, we need to look later in the treatise, where the author of an *addicio* cobbles together his own false etymology for the Latin word for writ, *breve*, by combining this Latin word with a quotation from the *Digest*. He tells us that, “it is called a writ (*breve*) because it formulates the matter in dispute and the demandant's claim briefly and in a few words, as does a rule of law (*regula iuris*), which expounds the matter briefly.”<sup>446</sup> This comes from D.50.17.1, under the last title of the *Digest*, where it is said that a “*regula* is something that formulates a matter briefly.”<sup>447</sup> This title was popular in the Middle Ages because it is a list of approximately 200 pithy *regulae iuris*, what we would call maxims. The author thus turns the writ into a general statement of legal principle, a Roman *regula iuris*.

There are good reasons to think that the authors of the treatise did not think of writs as authorities in the same way they thought of consultations and opinions as authorities, though. When we do, very occasionally, see writs introduced with authority words of the type that the authors use for cases, the judge is the driving force behind that authority. For instance, when a widower without children is unlawfully holding his dead wife's land against the interests of his wife's heir—when, in other words, he is trying to claim curtesy when no curtesy is due to him—“the heir is aided by the writ drawn by William of Ralegh for Ralph of Dodescumbe.”<sup>448</sup> A heading introducing a writ at another point in the treatise reads, “Writ on the constitution of

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*irrotulationes, secundum proposita et obiecta, agendo et probando, defendendo et excipiendo et replicando et huiusmodi.*” BDL, 2:20 (emphasis mine). This is Thorne's reconstruction of what he thought was a poorly copied text. In Woodbine's edition, part of this material appeared in the previous heading and paragraph of the prologue. Thorne's reconstruction makes much more sense both grammatically and substantively.

<sup>446</sup> “*Et dicitur ideo breve quia rem de qua agitur et intentionem petentis paucis verbis breviter enarrat, sicut facit regula iuris, quae rem quae est breviter enarrat.*” BDL, 2:318.

<sup>447</sup> “*Regula est quae rem quae est breviter enarrat.*”

<sup>448</sup> “*Consulitur heredi per tale breve per Willelmum de Ralegha formatum pro Ralpho de Dodescumbe.*” BDL, 4:362.

Merton, which was then provided by William Raleigh, then *justiciarius*.”<sup>449</sup> In both of these quotations the justice is the driving force behind the language of the writ. If writs are *regulae iuris*, as the author of the etymological passage would have us believe, it is the royal justices, according to the treatise authors, who make those *regulae iuris*.

Statutes are another source of authority in the treatise, although they do not appear nearly as often as writs or cases. Statutes are often ascribed to judges, as well, and can even appear in the same format as cases. One heading, very similar to the one introducing William of Raleigh’s writ above, reads, “Of the constitution of Merton by William of Raleigh, then *justiciarius*.”<sup>450</sup> It seems that statutes, like writs and cases, may be important because they are places where one can find the justice’s words.

The examples above are not cases, but they do show us that the authors of the treatise thought that some justices were important because of who they were, not simply because they sat as the king’s delegates. The author legitimizes the good opinions of the text by noting they come from specific justices like William of York and William of Raleigh. Martin of Patishall’s consultations, speeches, acts, and advice served as models for future judicial action. Judicial writings, in all their forms, are important to this author as a source of authority. This is true whether it is the justice’s speech to the eyre, his consultation to the ecclesiastical courts, his habits and sayings, his writs, his statutes, or his cases. The authors put all of these types of writings in similar formats within the treatise, usually with a general statement of law followed by a reference to a case or to the wisdom of some justice.

The case, like the consultation, the writ, and the statute, is not a mere illustration, nor is it a direct statement of the royal will; it is one of the places where the narrative of *Bracton* gives voice to the justices. The justice is certainly an agent of the royal will, but he is not simply a

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<sup>449</sup> “*Breve de constitutione de Mertona secundum quod tunc provisum fuit per Willelmum de Ralegha tunc iustitiarium.*” BDL, 3:180.

<sup>450</sup> “*De constitutione de Mertona per Willelmum de Ralegha tunc iustitiarium.*” BDL, 3:179.

body for the king's authority to pass through. He has authority as an individual, and this is why we should care what happens in cases. The justice, then, is at the same time the king's representative, a member of a body of authorities called the "*veteres*," and an individual whose authority might be weightier than that of some other individual.

### **Justices Right and Wrong**

The authors signal to us throughout the treatise that the words of individual justices are important. If justices can speak as individuals, they can also disagree with each other, and the authors of the treatise at times have to rely on the greater individual authority of one justice over that of another. The tension between the justice as an individual and the justice as part of a collective body of authority comes out in several places in the treatise. We have seen the author's unease when there is no consensus among the *veteres*, their desire for a collective opinion that gives a clear answer. But we also see cases where the *veteres* conflict, and one justice's opinion is preferred over another's, as in the case of serjeanties: the treatise author tells us that, since they are not military fees in the same sense as a fee held by knight-service, the chief lord has no right to the marriage or wardship of the heir to a serjeanty,

but the contrary may be seen concerning an abbess of Barking, among the pleas which follow the king in the [seventeenth] year of King Henry before William of Raleigh, who recovered the wardship and marriage of the heir of one of her tenants who held his tenement [in serjeanty] in the manor of Barking by the service of riding with her from manor to manor; *which Stephen of Segrave did not approve.*<sup>451</sup>

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<sup>451</sup> "*Contrarium tamen habetur de quadam abbatissa de Berkinge inter placita quae sequuntur regem anno regis Henrici—coram Willelmo de Ralegha, et quae recuperavit custodiam et maritagium de herede cuiusdam tenentis sui, qui tenebat tenementum suum in manerio de Berkinge per servitium equitandi cum ea de manerio in manerium, quod quidem S. de Segrave non approbavit.*" BDL, 2:113 (emphasis mine).

Here William of Raleigh, who was most probably deeply involved with one stage of the writing of the treatise, is put in opposition to both the author of this passage and to Stephen of Segrave, whose opinion lines up with the author's own.

Robert of Lexington rarely fares well when he appears in the treatise. At least one of the authors must have seen him as something of a dunce among the English judiciary, since he is “corrected” twice: once, when he held that an assize *utrum* could lie in a case involving a cathedral or convent, he was corrected “of Easter term in the fifteenth year of the reign of king Henry,” which, although the author does not tell us this, was a certification to the bench at Westminster, meaning that he was essentially overturned.<sup>452</sup> The second time, the hapless Robert ruled that a question of bastardy should be sent to the bishop's court, even though the alleged bastard's father had recognized him as legitimate, “a ruling which was revoked and corrected by (*per*) Martin of Patishall.”<sup>453</sup> As we have seen, the author often uses the word “prove”—as well as other authority words—to talk about the relationship between the case and the principle of law that usually comes immediately before it in the treatise. If cases are proofs of law to the treatise authors, they are fallible proofs. At least one of the authors attributed this fallibility to a human being, Robert of Lexington.<sup>454</sup> It was apparently Robert's fault that the case was decided contrary to *ius*.

If it is human agency that gets law wrong, can it also be human agency that corrects it? In the first of these two cases, the author gives us the impression that Robert of Lexington was wrong when he uses his favorite connective, “as” (*ut*), and gives us the term of the case. Robert

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<sup>452</sup> BDL, 3:331.

<sup>453</sup> “*Quod quidem revocatum fuit et correctum per Martinum de Pateshilla.*” BDL, 4:300.

<sup>454</sup> I would like to pursue the negative portrayals of Robert of Lexington and another justice, Richard Duket, in a future project. Lexington was not a clerk-turned-justice. He had done various types of royal service in the counties before becoming a justice. I have been able to find little so far on Richard Duket, although he seems to have been the same type of jack-of-all-trades justice. Perhaps the authors chose these two justices because they represented a model of justice that the new quasi-professional justices were trying to distance themselves from. ODNB, s.v. “Robert of Lexington.”

is corrected impersonally, by the looks of it, by the Easter term of the common bench. There is no agency behind this correction, only a date. In the second correction, though, there is agency. It is Martin of Patishall who “revoked” and, more importantly, “corrected,” Robert of Lexington’s decision. The author’s use of the word *per* does make this quotation ambiguous. Is some other authority acting through Martin of Patishall? Could it be the king or the king’s court? Could it be the law (*ius*)? In any event, Martin of Patishall is an actor in the legal system empowered to correct Robert of Lexington’s mistakes.

Cases like the ones where Raleigh and Patishall correct Lexington give us tantalizing glimpses at what might be hiding behind the impersonal *ut* of all those other cases cited in the treatise. We see, just occasionally, a human being proving, correcting, revoking, or denying a principle of law. The authors rated the acumen of Martin of Patishall and William of Raleigh very highly. They took almost all of their exemplary, probative cases from the rolls of these two justices. In the vast majority of the 204 cases that name the justice, that justice is either Martin of Patishall or William of Raleigh. A dozen other judges are mentioned, but not nearly as often.<sup>455</sup> What did our authors find so special about Patishall and Raleigh? How did they select these twelve other justices from all those they had known or whose rolls they could read?

The justices cited in the treatise are of three types. First are those whom Ralph Turner calls the “professional” side of the bench—those royal servants who spent most of their careers and most of their time at any given point in their careers as either clerks or judges in the royal courts. These are not your typical jack-of-all-trades royal servants; they had specialized in one particular type of royal administration. Among this group are Stephen of Segrave, Simon of Patishall, Martin of Patishall, William of Raleigh, and Roger of Thurkilby, all but the first of

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<sup>455</sup> These include the abbot of Reading (21 cases), the bishop of Durham (8 cases), Stephen of Segrave (5 cases), Robert de Vere, Earl of Oxford (2 cases), Martin of Patishall’s mentor, Simon of Patishall (2 cases), the hapless Robert of Lexington (2 cases), his brother, John of Lexington (1 case), Simon de Roppelay (1 case), John de Lacy, Earl of Lincoln (1 case), Ralph Neville, the chancellor (1 case), the prior of Bicester (1 case), and Raleigh’s former clerk, Roger of Thurkilby (1 case).

whom seem to fit into a judicial dynasty, since each successive justice on the list was the previous justice's clerk.<sup>456</sup> There are also a few royal servants of the jack-of-all-trades variety, who made their careers in other parts of the royal administration, but who sat in the courts from time to time. Robert of Lexington, his brother John, and Ralph Neville fit this description. Finally, there are the magnates and local notables who would be called upon to fill out the bench when the king's justices visited the county in eyre: two earls, the abbot of Reading, the bishop of Durham, and the prior of Bicester.

The authors always pair the non-professionals with one of the professionals, while the reverse is not necessarily true: the two earls, the abbot of Reading, and the bishop of Durham all appear paired up in the case reference with either Patishall or Raleigh, while Ralph Neville is paired with Stephen of Segrave. They never appear on their own. But Patishall, Raleigh, and Segrave all appear alone, as well. This indicates that the "professional" label that Turner applies to these judges is not just a historian's reflection on their careers and how they differed from those of their peers, but was recognized at the time. The authors of the treatise, at least, found it necessary to attach one of them to each of their non-professional magnates. Perhaps a magnate, by himself, not expert in the intricacies of English procedure, is not a strong authority. But why mention him at all, then?

Using a magnate together with a professional in the citation might be a method of citing to a specific eyre of Martin of Patishall or William of Raleigh. The author often tells us that a case happened in "the eyre of the abbot of Reading and Martin of Patishall," without any further information that would allow someone to pinpoint which eyre this was, and in what year. It sounds very similar to his allusions to the "last eyre" of Martin of Patishall, which seem to be

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<sup>456</sup> One individual who is strangely missing from this list is, in fact, Raleigh's clerk Henry de Bratton. Several of Bratton's cases appear in the treatise, and his name appears in the section on mistakes in writs, but Henry de Bratton's name is never attached to a case in the treatise. We will turn to Henry de Bratton's own work on the treatise and the ways he crafted his own plea roll entries in chapters four and five.

meant to tell the reader which of Martin of Patishall's many eyres the author is referring to. The author of the treatise is playing with status and authority in some interesting ways, however. The magnates—the earls, the abbot, and the bishop—always appear first in the pair, which suggests that they took precedence over professionals like Patishall and Raleigh. Which judge is the important one in the pair, the magnate or the professional?

The text of the treatise gives a single hint toward an answer to this question. In referring to a case “of the Abbot of Reading and Martin of Patishall,” the author of an *addicio* places the abbot first. Immediately afterwards, though, this author tells us—in text that is not marked as an *addicio*—that another, related principle can be found in an eyre roll of “the same Martin,” omitting the Abbot.<sup>457</sup> There are no other case references nearby that this could refer back to. It seems that the author felt compelled to list the abbot first because of his social pre-eminence. He was, after all, the head of one of England's wealthiest monasteries; Reading received royal patronage and was the burial place of Henry I and Empress Maud. The roll, however, was Martin of Patishall's, and he was the reason why the case was in the treatise. It was Martin of Patishall's authority that carried the case, not the Abbot of Reading's.

The treatise authors thought that justices mattered, and that some justices mattered more than others. They referenced cases decided by justices who had developed expertise as clerks first, and who had spent most of their careers working in three courts: the bench, the court *coram rege*, and the eyres. It was this type of service that made someone an authority to the authors of *Bracton*.

Very few of the cases proper give us any indication that they are there because the justices who decided them were important as individuals. A little less than half tell us which justice decided the case. A few cases, however, show us that the author did think justices could

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<sup>457</sup> BDL, 3:106.

be important as individuals. The authors place emphasis on the individual authority of the justice in other parts of the treatise, as well. The words and deeds of former justices appear as precedents for future justices. Statutes, writs, and consultations are all presented as places where the justice presents his opinion. It would be odd if the authors of the treatise imagined the justice to be an impersonal arm of the king, placing the king's stamp upon custom, when thinking about the cases and as a learned, authoritative individual, a model to be emulated, when thinking about other types of texts. Instead, it seems that the tension between the individual and the collective pervaded the authors' thinking about justices. This tension lies behind the cases as much as it lies behind the statutes and writs. It caused the authors difficulty when they faced disagreement among the justices. They wanted their justice-authorities to agree with each other, but could not always make them agree. When that happened, they were forced to turn to other methods of determining authority. The greater number of authorities could potentially give them an answer, albeit not a very good one. They preferred in these situations to turn away from the collective and towards the individual. They looked to the individual justices in the case and asked which was the most authoritative. This could solve their problems when nothing else could.

## **Conclusion**

*Bracton* provides us with evidence for how the royal justices who were collecting cases from the plea rolls were thinking about those cases. At every step, they show us that their thinking about cases had been conditioned by their learning in the universities or cathedral schools. On the one hand, they treated cases like they were part of a coherent system of authorities that ideally should not contradict each other, and they used the tools of scholastic logic to try to reconcile them when they seemed to conflict. On the other hand, they recognized the cases as the writings of individual jurists, the literary space where a jurist-justice spoke. In

the next chapter we will see how the authors of *Bracton* explicitly connected the cases referenced in the treatise to scholastic genres of writing and turned the plea roll entry into a jurist's opinion.

## Chapter Four

### The Genres of Authority: Cases and Treatises as Legal Texts

In the last chapter, we saw how the authors of *Bracton* engaged with cases and, in the process, showed us that their patterns of thought and hermeneutic theories were influenced by the schools: they applied dialectical reasoning to reconcile cases when they seemed to conflict with each other and in the process created a system of cases, which were supposed to operate together as a consistent body of authoritative texts. In this chapter we will see how the authors of the plea rolls, the plea roll collections, and the treatise *De Legibus et Consuetudinibus Angliae*, placed cases from the rolls in specifically scholastic—and specifically legal—genres. They cast plea roll entries as the *consilia* and *responsa* of jurists, a type of text that had authority in the schools. The authors call the treatise a *tractatus* and a *summa*, and one of them even suggests that it was the English equivalent to Justinian's *Digest*, with the judgments of English justices replacing the opinions of Roman jurists.

#### A Treatise Constructed Around Cases: *Bracton and its Prologues*

The introduction is often the most important part of a work. The introduction sets the parameters of the reading of the text and gives the reader a framework for understanding what the text is about. It is often written in hindsight, sometimes by a different author than the rest of the work, and can provide us with what an early reader or an author late in the process of composition thought the work was about. The introductions to *Bracton* cast it as a treatise about cases.

*Bracton* has two prologues, titled the *introductio* and the *prohemium auctoris* in the printed edition and in some of the manuscripts. Why the text should have two prologues is a bit

of a mystery, although rather less so when one considers that Justinian's *Digest* has three prologues. These two prologues were seemingly written at different times, though, most probably by different authors, and after much of the rest of the treatise had already been written. They do much the same work in the treatise, but in different ways, presenting the treatise in different lights. This first prologue tells us the work is a *summa* composed in titles and paragraphs; the second calls it a *tractatus*. The first borrows heavily from the *Glanvill* treatise, repeating its defense of English law as *lex* even though it is unwritten; the second takes a standard scholastic form, laying out the material, the intention, the utility, the branch of philosophy, and the end of the work.<sup>458</sup>

The first prologue, the *introductio*, is probably later in time than the second, and represents the work of an author who was working on the treatise in the 1250s rather than the 1220s or 1230s. It is almost certainly the work of someone who was reading a treatise that had mostly been written already. The *prohemium*, on the other hand, was probably written at about the time of the second phase of work on the treatise was being done in the late 1230s or early 1240s, and therefore represents the original author's or authors' understanding of the text. As the work of two different authors, the two prologues represent two different ways of understanding the cases that we find in the treatise, and give us some indication of how this understanding might have changed over time, as new generations of judges and clerks worked on the treatise.<sup>459</sup>

The evidence that both the *introductio* and the *prohemium* were written after much of the rest of the treatise is patchy but persuasive. They weave together quotations from many different works: *Glanvill*, Azo's *Summae* on the *Institutes* and *Codex*, Tancred's *Ordo Judiciarius*, and William of Drogheda's *Summa Aurea*, the last two of which are significant for dating the

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<sup>458</sup> BDL, 2:20; Alastair Minnis, *The Medieval Theory of Authorship: Scholastic Literary Attitudes in the Later Middle Ages*, 2nd ed. (Philadelphia: University of Pennsylvania Press, 2010), 4.

<sup>459</sup> Paul Brand, "The Age of Bracton," in *The History of English Law: Centenary Essays on 'Pollock and Maitland'*, Proceedings of the British Academy 89, ed. by John Hudson (Oxford: Oxford University Press, 1996), 77.

introduction. The version we have of William of Drogheda's *Summa Aurea* seems to have circulated no earlier than 1239. This first prologue appears to be a coherent whole: the parts that can be attributed to Drogheda are unlikely to be later additions, since they are integral to the text. Thus, this first prologue must have been written after 1239 at the earliest.<sup>460</sup>

Both prologues were probably written after 1239, but there is good reason to suspect that the *introductio* was much later even than the *prohemium*. It may well, in fact, have been written by Henry de Bratton, so that the *introductio* to the treatise offers us a peek at what Henry de Bratton, an early reader of the text, thought it meant. The evidence for Bratton's authorship of the *introductio* is circumstantial, but strong. There are several portions of the treatise that state pre-1236, and especially pre-1227, rules, which are often corrected elsewhere, later in the treatise. Paul Brand has pointed out that it would make little sense for a person writing in the 1220s or 1230s, who was apparently writing before the council of Merton and who seems to have had firsthand knowledge of what "Martin" (of Patishall) used to say and do to call cases that were, at most, a decade and a half old "ancient judgments."<sup>461</sup>

The *introductio* contains additional material that sounds much more like Bratton's voice than Raleigh's, indicating a later date of composition. The author of the introduction complains that he has to write this treatise because "laws and customs are often misapplied by the unwise and unlearned who ascend the judgment seat before they have learned the laws... and frequently subverted by the *maiores* who decide cases according to their own will rather than by the authority of the laws."<sup>462</sup> He thus writes his treatise "to instruct the *minores*."<sup>463</sup> The words *maiores* and *minores* are ambiguous in the *introductio*; we do not know quite what they mean. The *maiores* appear in other parts of the treatise, though. We hear of debates among the *maiores*

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<sup>460</sup> H.G. Richardson, "Azo, Drogheda, and Bracton," EHR 59 (1944): 39.

<sup>461</sup> Oxford Dictionary of National Biography, s.v. "Henry of Bracton."

<sup>462</sup> BDL, 2:19

<sup>463</sup> BDL, 2:19

just as we hear of debates among the *veteres*.<sup>464</sup> They seem to be justices in the royal courts. *Maior* can mean “elder” or “greater,” so we could be hearing about the senior justices of the bench or the magnates some of whom still occasionally sat on the court. But the magnates were sitting on the court far less frequently in the 1220s and 1230s than they even had been in the 1210s.<sup>465</sup> If these people are the elders and more senior justices of the court, William of Raleigh is a bad candidate for the authorship of this section of the treatise, because he was the most senior justice of the royal courts, and would have been unlikely to have written about evil *maiores* pushing around good, learned *minores*. He was not a victim of any superiors on the bench. If anything, he was a victimizer of junior justices.<sup>466</sup> We do know, though, that Henry de Bratton, who never quite made it to the pinnacle of the judiciary like his mentor, did complain about being pushed around by the *maiores*. He actually inserted a plea roll reference, explored more fully in chapter five, which showed that he had been wrongly overturned by his superiors at Westminster, into the treatise.<sup>467</sup> The argument is circumstantial, but it would surely make more sense for a man who never quite made it to the pinnacle of the judicial establishment, who was pushed around by some of the *maiores*, and who thought himself better qualified to declare good law than them, to write an introduction about the unlearned *maiores* deciding cases by their own will, than it would for William of Raleigh, who, as chief justice of several eyres from 1232, chief justice of the bench from 1233, and chief justice of the court *coram rege* from 1234, could only be described as one of the culprits himself.<sup>468</sup>

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<sup>464</sup> BDL, 3:321.

<sup>465</sup> Ralph V. Turner, *The English Judiciary in the Age of Glanvill and Bracton* (Cambridge: Cambridge University Press, 1985), 74-107.

<sup>466</sup> See C.A.F. Meekings, “Adam Fitz William (d. 1238),” *Bulletin of the Institute of Historical Research* 34 (1961): 11-12, for an example of Raleigh asserting his authority over the justices of the bench.

<sup>467</sup> BDL, 2:149-150.

<sup>468</sup> ODNB s.v. “William of Raleigh.”

## Constructing an Audience in the *Prohemium*

Owing to the brevity of the *introductio*, which comes first in the treatise as it has come down to us, the *prohemium* appears on the first folio of most manuscripts. The *prohemium*, the earlier of the two prologues, mixes genres of scholastic writing, describing the treatise in several different ways. While there is no explicit mention of the cases in the *prohemium*, they can be discerned lying just beneath the surface of its language. To the *prohemium* author, the treatise's primary audience is the judicial clerks who are to be shown "[the art] of preparing records and enrollments."<sup>469</sup> This sounds like a very practical and administrative type of task. It is more in the nature of a notarial textbook or a precedent book, which would contain sample documents, than a *summa* on the laws and customs of England. This is not a very accurate description of what the treatise does, though. In a few places, the authors command "Let the enrollment be made thus..." but little in the treatise would not be much use to those making enrollments.<sup>470</sup>

The author constitutes his audience in an even more specific way, though. He tells us that he is speaking to the legal professionals whom we saw in chapter one, the clerks who began their careers in the royal courts in hope of eventually becoming justices themselves. In addition to learning the forms for enrollments, the readers of the treatise are to learn

what action lies and what writ, according as the plea is real or personal, how and by what procedure, [by suing and proving, defending and excepting, replicating and the like,] suits and pleas are decided according to English laws and customs.<sup>471</sup>

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<sup>469</sup> "Et super huiusmodi conficienda acta sive irrotulationes, secundum proposita et obiecta." BDL, 2:20.

<sup>470</sup> BDL, 3:364.

<sup>471</sup> "Instruere et docere omnes qui edoceri desiderant, ut sciatur quæ competat actio et quod breve, secundum quod placitum fuerit reale vel personalequaliter et quo ordine lites et placita decidentur secundum leges et consuetudines Anglicanas." BDL, 2:20. This is Thorne's reconstruction of the text. The Latin text as it appears in the treatise is Woodbine's, which Thorne found unreliable in this passage.

The treatise is meant not just to instruct the clerk in how to enroll cases, but also in how cases should be decided, a skill more useful to the justice than to the clerk. The author tells us even more explicitly that he is speaking to aspiring justices. In a section of the *prohemium* titled the *intentio*, the author tells us that the purpose of the work is that the “unskilled be made expert, and the expert more expert, the bad good and the good better.”<sup>472</sup> The *utilitas*, or usefulness, of this learning is that it “ennobles apprentices (*addiscentes*) and doubles their honours and profits and enables them to rule in the realm and sit in the royal chamber, on the very seat of the king, on the throne of God, so to speak, judging tribes and nations, plaintiffs and defendants.”<sup>473</sup>

The author of the *prohemium* thus constitutes the audience for his treatise in this prologue in a very specific way. They are the clerks who will, after a period of apprenticeship, become justices. This was a very select group of people, mostly clerics, who spent most of their careers in the royal courts. The author makes this movement from the clerk who prepares records and enrollments to the exalted justice who sits on the very throne of God the normative career path in the royal courts, discounting those who move into the courts by other paths, such as service in the counties as sheriff and coroner. The ideal justice is a royal clerk who works solely in the realm of the royal courts until he is ready to judge in God’s place.

In constituting his audience, the author of the *prohemium* uses a Roman and canon law lexicon. By doing this, he characterizes that audience of clerks who will someday be justices as jurists in the Canonist and Civilian sense. The *prohemium* follows a fairly standard form for a scholastic commentary on scripture, philosophy, or law: it is divided into subheadings describing the intention, the utility, the material, the branch of philosophy, and the end of the treatise.<sup>474</sup> The author probably borrowed this structure from Azo of Bologna’s *Summa on the Institutes*, an early

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<sup>472</sup> “*Item communis intentio est de iure scribere ut rudes efficiantur subtiles, subtiles subtiliores, et homines mali efficiantur boni et boni meliores...*” BDL, 2:20.

<sup>473</sup> “*Utilitas autem est quia nobilitat addiscentes et honores conduplicat et profectus et facit eos principari in regno et sedere in aula regia et in sede ipsius regis quasi in throno dei,*” BDL, 2:20.

<sup>474</sup> Minnis, *Medieval Theory of Authorship*, 4.

thirteenth-century Roman law commentary.

The author of the *prohemium* saw parallels between the work he had before him and the works of the Canonists and Civilians. He could easily have written it in the style of an administrative manual, like the earlier *Dialogue of the Exchequer* and even the *Glanvill* treatise, which he draws from at times. Instead, he associates his treatise with works of Roman and Canon law. The connection between the kinds of things clerks and justices in the royal courts did and the field called law, which was studied in the universities, may have been an easy one to make. The author still had to choose to make it, though, and he did by drawing on not just scholastic, but specifically legal, scholastic texts for his inspiration. He thus constituted his readership, the clerks of the courts, as jurists.

### **Cases in the *Prohemium***

As we have seen, the author shows us that he is writing for an audience of jurists in the *intentio* and *utilitas*. In the next section, the *materia*, he shows us that his work is composed of the works of jurists. The author tells us explicitly that the *materia* of the treatise—those things that constitute the foundation upon which the treatise is built—are the “*facta* and *casus* which daily arise and come up in the realm of England,” a somewhat different formulation from the “ancient judgments of just men” that we will see when we discuss the *introductio*.<sup>475</sup> What could he mean by these terms? *Facta* is a past participle, used as a substantive here, and generally means “deeds” or “things that have been done.” “*Facta*” is an unspecific term that may mean many things, and occurs hundreds of times in the treatise. The word is used as a participle, as part of a verb construction, and as a substantive noun to refer to many different things that have been done: suit, donation, confirmation, seisin, disseisin, and charters. Perhaps this is a sign of a

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<sup>475</sup> “*Et sciendum quod materia est facta et casus qui quotidie emergunt et inveniunt in regno Angliæ.*” BDL, 2:20. See also BDL, 2:19.

lack of creativity in the authors' Latin, that they used this single verb to so many different types of actions, but how do we make sense of it in this passage? Certainly when the author of this prologue discusses the justices' *facta*, he is not referring to their gifts or the disseisins they have committed.

*Facta* might mean something more specific in the context of the *prohemium*. There are several places in the treatise where the *facta* can refer to rulemaking. In a few instances, it refers to custom. One of the authors tells us that "some say that in other regions it [an earldom] occasionally is divided by custom."<sup>476</sup> The author rejects this view, however, and tells us "nor has a contrary rule ever been seen in England; and the custom of the region in which the claimed inheritance lies and where the persons who claim are born must be observed, and hence, if it is maintained that in the realm of England partition once was made (*facta fuit*), such was unlawful."<sup>477</sup> The author is skeptical of the claim that this has been done before, but, even if it was done once, a single, unlawful deed does not a custom make. In saying this, though, he recognizes that *facta* do have the ability to create norms and rules.

Most importantly for our purposes, the author uses *factum*, in its verb form to refer specifically to cases that were decided in court.<sup>478</sup> *Factum fuit* ("It was done") is not a common phrase in the treatise, appearing only eight times, but in three of those appearances it introduces a case reference. In one case we are told that the rule the author states is "according to what was done (*factum fuit*) before the lord king himself in the presence of Stephen of Segrave at Woodstock, [in a case between] between Geoffrey de Mandeville and Adam of Bono

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<sup>476</sup> BDL, 2:222.

<sup>477</sup> BDL, 2:222.

<sup>478</sup> "Contrarium tamen factum fuit, et male de errore curiæ, et quasi de consilio curiæ de Godefrido de Crewecombe." BDL, 2:98. "Secundum quod factum fuit de comitissa Lincolnæ quæ fuit uxor Walteri comitis marescalli." BDL, 2:269. "Secundum quod factum fuit coram ipso domino rege in præsentia Stephani de Segrave apud Wodestoke." BDL, 3:349. The second of these cases was probably added by Henry of Bratton himself.

Fossato...<sup>479</sup> This is a passive construction and does not tell us explicitly who the *factor* was. The author does tell us that this was done in the presence of Stephen of Segrave, the king's chief justiciar, though, which might be significant.<sup>480</sup> This case reference comes in the middle of a discussion of the procedure for certifying a case to the justices of the central courts, a procedure which will become important in the next chapter. A certification was a procedure that a party to a case heard on eyre or assize could request if he thought the jurors in his trial had not been correctly examined by the justices. He could ask that those jurors be brought before either the justices at Westminster or those sitting before the king and questioned more fully. So the author tells us that when the jurors have been "badly examined by the justices and badly instructed, they must be aided, that they may correct and amend their error," by the justices at Westminster.<sup>481</sup> The author provides us with a textual cue that Stephen of Segrave is the actor here, asking the jurors further questions. The *factum* can thus refer to the acts of royal justices—in cases and certifications—and that those acts can set precedents to be followed.

Then Again, because the author of the *prohemium* had probably read the word *facta* can refer to cases, but does not necessarily have to. We are helped in interpreting it by its conjunction with the word *casus*. *Casus*, although cognate with the English word "case," is similarly unspecific, as it can mean something as general as "happening."<sup>482</sup> *Casus* is used more often than *facta* to refer explicitly to references to cases from the rolls, as it does in the works *Casus*

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<sup>479</sup> "Secundum quod factum fuit coram ipso domino rege in praesentia Stephani de Segrave apud Wodestoke...inter Galfridum de Mandeville et Adam de Bono Fossato." BDL, 3:348-9.

<sup>480</sup> The reference to the case being heard "before the lord king himself" simply tells us which court this case came to, the court *coram rege*.

<sup>481</sup> "Per iustitios male examinati et male instructi, erit ei subveniendum ut errorem sum corrigant et emendent..." BDL, 3:348-9.

<sup>482</sup> It could also refer to a general fact pattern rather than a specific case decided in court. *Casus* has this sense in Raymond de Peñafort's *Summa de Casibus*—a book on which one of the authors of *Bracton* relied—which is a confessors' manual so named because it gives them instruction in what to do when faced with particular fact patterns "if this happens, this is what you do."

*Placitorum* and *Casus et Judicia*, probably both written sometime in the 1250s or 1260s.<sup>483</sup> We see the word used to refer specifically to plea roll entries several times in *Bracton*, as where the author tells us that there is “another case (*alius casus*) in the eyre of Martin of Patishall in the county of Kent.”<sup>484</sup>

The *prohemium* certainly places the treatise within a scholastic genre through the format of its prologue and its copying of Azo. It also emphasizes the “professionals” of the judiciary, those people who spent most of their time judging, and casts them as men of learning, or at least as men who ideally should be learned. The author emphasizes the learned justice, who, as we saw in the last chapter, was important as a source of authority. He also seems to understand his work as fitting within a scholastic legal genre. He seems to refer to the cases in the treatise when he tells us it will contain *facta* and *casus*. But cases, if they are hiding behind those words, are not central to this author’s idea of what the treatise is about. For the author of the *introductio*, as we shall see, they are much more central.

### **The *Introductio* and “Ancient Judgments”**

The *introductio*, the first words of the treatise in its fullest and final form, takes up a very small part of the first folio of most manuscripts of the treatise. That it was probably one of the last parts of the treatise to be written is suggested by the internal evidence of the prologues themselves. They are very different in tone, and the second prologue appears to be complete without the first, indicating that it was the original prologue to the treatise and that the first was added later. The language in the *prohemium* makes much better sense if it was written by Henry de Bratton than if it was written by William of Raleigh. This *introductio* is more interesting than the *prohemium* for our purposes because its author tells us something very explicit about the case

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<sup>483</sup> William Huse Dunham, Jr., ed. *Casus Placitorum and Reports of Cases in the King’s Courts, 1272-1278* (London: Bernard Quaritch, 1952), xxii-xxiii, xxvi.

<sup>484</sup> “*Item alius casus in itinere Martini de Pateshilla in comitatu Cantie.*” BDL, 2:223.

references.

The author of the *introductio* adopts a much more negative tone than the author of the *prohemium*. While the *prohemium* recommends his treatise for the ennoblement of rising apprentices, the *introductio* aims to curb the abuses of bad justices. Its author complains that the laws are often misapplied by “unwise and unlearned men who ascend the judgment seat before they have learned the laws.”<sup>485</sup> When not being inadvertently misapplied, the laws are being willfully subverted by “the *maiores* who decide cases according to their own will rather than by the authority of the laws.”<sup>486</sup> In order to fix these abuses and to “instruct the *minores*,” who might counterbalance the unlearned and corrupt, the author of the treatise has “turned [his] mind to the ancient judgments (*veteres iudicia*) of the just.”<sup>487</sup>

The author thus makes *iudicia* the centerpiece of his plan to fix the abuses of the royal courts. What would *iudicia* have meant to someone in the author’s position? God’s final judgment in a case decided by battle or ordeal was often called the *iudicium Dei*.<sup>488</sup> The *iudicium* could also refer to the point when the courtholders decided what form of proof would be used to obtain God’s judgment. On the plea rolls, although the justice’s final resolution of the case is more often introduced by the impersonal *consideratum est* (“it was considered”) than it is by *iudicatum est* (“it was judged”), the term *iudicium* was often used as a more general term for a decision of the court.<sup>489</sup> For instance, on eyre rolls the phrase “*ad iudicium*” (“to judgment”) was

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<sup>485</sup> “*Cum autem huiusmodi leges et consuetudines per insipientes et minus doctos, qui cathedram iudicandi ascendunt antequam leges didicerint.*” BDL, 2:19.

<sup>486</sup> “*Multotiens pervertuntur a maioribus, qui potius proprio arbitrio quam legum auctoritate causas decidunt.*” BDL, 2:19.

<sup>487</sup> “[A]nimum erexi ad vetera iudicia iustorum.” BDL, 2:19.

<sup>488</sup> Paul R. Hyams, “Henry II and Ganelon,” *Syracuse Scholar* 4 (1983), 27.

<sup>489</sup> This is not the case for Normandy, however. There is a Norman case collecting tradition that was developing contemporaneously with the English tradition; odd, since Normandy and England had been separated politically for several decades when the Norman case collections were being made. Norman case references follow a different format than English ones. They usually begin with the words “*iudicatum est*,” follow this with some general statement of law, and end with a citation to the court, term, and year in which the case was adjudged. One copy of the *Summa de Legibus in Curia Laicali*, a Norman contemporary of the English *Bracton*, is glossed with cases dating from the beginning to the end of the thirteenth century in this format, in the same hand as the primary text. The relationship between the Norman case collecting tradition and its English counterpart in particular, and the

used when, in the course of hearing the case, the justices found that an officer—such as a sheriff, bailiff, or sergeant—had not done his job properly, meaning that an adjournment had to be made for the final judgment.<sup>490</sup> Richard FitzNeal, the late twelfth-century royal official who wrote the *Dialogue of the Exchequer*, signaled that it could be a general word for the business of the courts when he mentioned in the *Dialogue* that as a young man he wrote a tripartite history, part of which included “various public and private matters, including judgments of the court (*curie iudiciis*).”<sup>491</sup>

FitzNeal may have been reading Roman law when he applied this meaning in his work. In Roman law texts, *iudicium* could have several meanings, but to twelfth-century Civilians, it most likely would have meant a final judgment. Classical Roman law used a bipartite procedure. In the first half the praetor, a magistrate, would frame the question to be answered in the case, taking the parties’ assertions and refining them into a legally cognizable issue. The resulting question was called a *formula*. The praetor would then hand the *formula* off to a *iudex*, or judge, who was not a specialist in law, but a citizen appointed for a single case, to answer. In classical law, *iudicium* could refer to either the first or the second half of the bipartite procedure, that is, to the portion in which the legal *formula* was decided upon or to the portion in which the *iudex* gave his sentence on the *formula*. Although both of these meanings came through to the Middle Ages by way of Justinian’s *Digest* and *Codex*, for the most part the jurists who compiled those texts edited out the bipartite procedure, which was already defunct in Justinian’s time. *Iudicium* thus came to be a general term for the final decision in the case, and it is this meaning that

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relationship between Norman and English legal literature in the thirteenth century more generally, requires further investigation. Huntington Library MS 1343.

<sup>490</sup> C.A.F. Meekings, *The 1235 Surrey Eyre* (Guildford, Surrey: Surrey Record Society, 1979), 1: 81-2.

<sup>491</sup> Richard FitzNeal, *Dialogus de Scaccario and Constitutio Domus Regis*, ed. Emily Amt and S.D. Church (Oxford: Oxford University Press, 2008), 41.

medieval Civilians inherited.<sup>492</sup> Works of Canon law often followed the arrangement set out by Bernard of Pavia in the twelfth century into six sections on “*Iudex, iudicium, clerus, connubium, crimen,*” and treated the word *iudicium* as referring to the final judgment in the case.<sup>493</sup> The medieval glossator Azo tells us that “a *iudicium* is a legitimate act of three persons, namely, the judge, the plaintiff (*actor*), and the defendant (*reus*),” words which the *Bracton* author would copy from him.<sup>494</sup> Among English legal texts of the 1250s and 1260s, we find the work *Casus et Iudicia*, which copies plea roll entries with both mesne and final judgments.

The treatise itself uses the word in ways that indicate that its authors understood *iudicium* in the sense of the *Digest* and of the medieval Romanists as a final resolution of the case, but it also indicates that the word can signal a complicated and often confusing relationship between the judge, the jury, the king, and God. In the *prohemium*, again a part of the treatise to which the author of the *introductio* probably would have had access when he started writing about his “ancient judgments,” the author indicates that issuing *iudicia* is the primary activity of the intended audience of this treatise. The purpose of the treatise is to ennoble learners so they will be able to sit as judges and issue *iudicia*, which “are not of man, but of God, which is why the heart of a king who rules well is said to be in the hand of God.”<sup>495</sup> It is through the judgment that both the royal and, by extension, the divine will are expressed. The judge sits “on the very seat of the king, on the throne of God,” qualified by “so to speak,” so as not to deify the justice.<sup>496</sup> The *prohemium*’s *iudicium* is God’s speech mediated through the king and his delegate, the justice.

Even though the king is the ultimate source of the justice’s authority to issue *iudicia*, the

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<sup>492</sup> Adolf Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia: American Philosophical Society, 1953), s.v., *iudicium*.

<sup>493</sup> James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago: University of Chicago Press, 2008), 117.

<sup>494</sup> “*Iudicium est legitimus actus trium personarum, scilicet, iudicis, actoris, et rei.*” BDL, 2:304.

<sup>495</sup> “*Utilitas autem est quia nobilitat addiscentes et honores conduplicat et profectus et facit eos principari in regno et sedere in aula regia et in sede ipsius regis quasi in throno dei, tribus et nationes, actores et reos, ordine dominabili iudicantes, vice regis quasi vice Ihesu Christi, cum rex sit vicarius dei. Iudicia enim non sunt hominis sed dei, et ideo cor regis bene regentis dicitur esse in manu dei.*” BDL, 2:20.

<sup>496</sup> BDL, 2:20.

justice has a very special role in the issuing of *iudicia* that the king does not share with him. In an *addicio*, one of the authors of the treatise asks what happens when the king has been deceived by a litigant, “For the king [who is God’s representative] may be deceived since he is a man, but God can never be since he is God.”<sup>497</sup> Because God’s judgment, in the treatise’s version, is mediated by both the king and the justice before it gets to the litigant, the author of this *addicio* is concerned that litigants will hijack God’s judgment at some point along the way, allowing the judgment to be perverted. If the king realizes he has been duped and fixes the *iudicium*, all will be well. If, however, the king is told that he has been deceived and does not change his *iudicium*, the king has committed a sin, but no one may correct him. We are told that, “If [the king] *imposes the necessity of rendering judgment (iudicium)* upon his justices in this case or others like it, let them render it in this way, that it is not by judgment (*iudicium*) but because the lord king so wishes, whence it follows that the judgment (*iudicium*) is a matter of will (*voluntarium*) rather than *ius*, if it can be called a judgment (*iudicium*) at all.”<sup>498</sup>

The language here is confusing, but we can gather two things from it. First, this author associates *iudicium* with truth and adjudication, as opposed to will (*voluntarium*). Second, he associates both *iudicium* and law primarily with the royal justices, rather than the king. Note that, according to this author, the king does not make judgments himself. We saw this type of thinking in the twelfth-century trial we surveyed in chapter one. The king’s vassals made judgments as to what form of proof would be used and then God made the final judgment. The king made neither. When the king imposes his will on the justices, against the dictates of the law, the author

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<sup>497</sup> “*Rex enim decipi poterit cum sit homo, deus autem numquam cum sit deus.*” BDL, 4:159.

<sup>498</sup> “*Et si iustitiariis suis necessitatem imponat rex quod iudicium reddant, in hoc casu vel consimilibus ita reddant iudicium, quod non per iudicium sed quia dominus rex ita vult, et exinde sequitur quod iudicium potius voluntarium sit quam ius, si dici debeat iudicium.*” BDL, 4:159. I follow Thorne’s reading here, which is, admittedly, a reading taken from a small minority of the manuscripts. Woodbine preferred “*reddat*” for “*reddant*” in the clause starting “*in hoc casu.*” Since *reddat* is singular, it would be the king, not the justices, rendering the judgment. This makes nonsense of the rest of the passage, though, because it is clearly the justices who are rendering judgment. *Reddat* and *reddant* are separated by only one letter and it would be easy to ascribe the difference to scribal error. How people read this passage in the late thirteenth century, since most of the manuscripts read *reddat*, is another question.

first tells us that the justices' decision is "not a *iudicium*," and then calls it a *iudicium*, but immediately qualifies this use of the word by asking whether "it ought to be called a *iudicium*" in those circumstances.<sup>499</sup> Thus, when the king asks the justices to rule against the law, his will cannot be called a *iudicium*. But this author goes even further. It is not only when the king is in the wrong that his decision fails to live up to the standards required for a *iudicium*, because it is not the king who issues the *iudicium* in this passage. Rather, the king "imposes the necessity of rendering judgment upon his justices," who then must issue the wrongful judgment.<sup>500</sup>

The author's concern here is that the judges distance themselves as much as possible from the unclean act so that they will not incur God's wrath, as the king will. But why should they have to involve themselves at all? If the judgment is something that descends from God, to the king, to his justices, and finally to the litigant, as the *prohemium* tells us, should it not be possible to bypass the justices and remove a step of mediation, to get the *iudicium* from God's vicegerent on earth himself? In other parts of the treatise, the authors show us a king who is extremely powerful in his own courts.<sup>501</sup> The author of this *addicio* seems to think that the royal justices have a special role in the chain of judgment that runs from God to litigant, and cannot be bypassed if one is to have a proper *iudicium*.<sup>502</sup>

Later in the treatise, however, the author goes further in telling us what he thinks a *iudicium* is in the context of English procedure. His copy of Azo's definition of a *iudicium* mentioned above leads on to text that probably represents the attempt of the author to build from that definition and explain what a *iudicium* is. In this author's estimation, the *iudicium* seems to describe the entire course of the court proceedings. The first two sentences focus on the work of

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<sup>499</sup> BDL, 4:159.

<sup>500</sup> Ibid. This particular circumstance, where the king is trying to force a particular judgment upon his court, is reproduced in the literature of the time. See Hyams, "Henry II and Ganelon," 29.

<sup>501</sup> Even the famous *addicio de cartis*, which says that the king has a bridle and is answerable to God, says that no one may judge the king. BDL, 2:110.

<sup>502</sup> For the king as a judge ordinary and the justice as a judge delegate—albeit one *with imperium*, like the consuls and praetors of Rome—see BDL, 4:63, 279, 281. For a comparison between the royal justice and a procurator, or one who acts in the place of another, see BDL, 4:279.

the *actor* and *reus*, the wronged and the wrongdoer, telling us that the “*actor*, whether he is plaintiff or complainant, must employ a count (*intentio*), [which] he must put forward in court before him who is to decide upon it, support it, and prove it” and that the “the *reus* must employ exception and defence, as will be explained more fully below.”<sup>503</sup> In the third sentence, though, he turns to the role of the third actor in a *iudicium*, the judge, and indicates that while a *iudicium* is established by three people, it is the judge to whom it belongs. “He who judges” must have the power to coerce, because if he was unable to coerce, “he would not be able to demand that *his* judgment (*iudicium suum*) be executed.”<sup>504</sup> Thus, while it takes three to make a *iudicium*, it is clear that the *iudicium* belongs to the judge.

This definition of the *iudicium* is split in two by an *addicio*, which separates the definition of the *iudicium* as a tripartite event from the description of each of those parts. It too connects the *iudicium* very closely to the *iudex*.<sup>505</sup> It is an exhortation to the judge to judge well and impartially, and not to accept bribes, with a liberal smattering of Biblical quotes. The “truth of the judgment (*veritas iudicium*) consists in the just pronouncement and the just and diligent execution of the sentence,” indicating that the author connects the *iudicium* with the final resolution of the case and that this resolution is undertaken by the judge.<sup>506</sup>

We see this association of the *iudicium* with the justice again in a discussion of the jurisdiction of the constable of the Tower of London. The author of this section tells us that the constable “has record as to matters of fact (*facti*), not matters of judgment and law (*iudicii sive iuris*),” making the distinction between law and fact that originated in Roman law and that is so fundamental to legal thought today.<sup>507</sup> *Iudicia* cannot be made at the Tower “since there the third element of a judgment (*iudicii*) is lacking, namely a judge and jurisdiction (*iudex et*

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<sup>503</sup> BDL, 2:304.

<sup>504</sup> BDL, 2:304. The author is following Canonist sources here.

<sup>505</sup> Ibid.

<sup>506</sup> “*Item consistit veritas iudicii in iusta sententiae prolatione et iusta et diligenti executione.*” BDL, 2:303-4.

<sup>507</sup> “*Habet enim constabularius recordum in iis quae sunt facti et non quae sunt iudicii sive iuris.*” BDL, 4:136

*iurisdictio*).”<sup>508</sup> The constable is not a *iudex* and so cannot issue a valid judgment. He may, however, determine facts. The author presents the *iudicium* as the final element of the case, which must be completed and perfected by the combination of all three elements. Otherwise it is a mere determination of fact, with no power behind it. The author associates the *iudicium* with law, with the part of the decision in the case that comes after the determination of the facts, and with the judge, or royal justice, who can make the judgment complete.

In light of the *iudicium*'s association with law as opposed to fact, it is perhaps not surprising that the author discusses it in connection with the jurors and their verdict. What is surprising, though, is that he uses the term in inconsistent ways, telling us that “if the jurors recite the matter as it is in truth, and afterwards judge (*iudiciaverint*) the matter according to their recital and err in judgment (*iudicio*), the judgment (*iudicium*) is foolish rather than false, since they believe such judgment (*iudicium*) follows from such facts.”<sup>509</sup> The jury does not appear in the treatise's tripartite division of the *iudicium*. Perhaps they are folded into the third part of the *iudicium*, the judge and jurisdiction. Of course, it may also be that the author is not using the verb *iudicare* and the noun *iudicium* as terms of art in this passage about the jury, but as general terms for making a decision. In any event, the author, despite his association of the *iudicium* with the jury, immediately turns around and uses the term in reference to the judge: “if the justice pronounces judgment (*iudicium pronuntiaverit*) according to their [foolish] saying, he gives a false pronouncement.”<sup>510</sup> The *iudicium* here seems to be something the jury makes and the judge pronounces—perhaps not quite synonymous with the jury's *verdictum*—because it is not the jury that pronounces the *iudicium*, but the judge. The judge is the voice of the *iudicium*, who

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<sup>508</sup> “[C]um ibi deficiat tertia pars iudicii, scilicet iudex et iurisdictio.” BDL, 4:136.

<sup>509</sup> “Si autem iuratores factum narraverint sicut veritas se habuerit, et postea factum secundum narrationem suam iudiciaverint et in iudicio erraverint, iudicium potius erit fatuum quam falsum cum credant tale iudicium sequi tale factum.” BDL, 3:341.

<sup>510</sup> “Et si iustitarius secundum eorum dictum et iudicium pronuntiaverit, falsam facit pronuntiationem.” BDL, 3:341. Note that instead of *verdictum*, or verdict, the author here uses *dictum* to refer to what the jury says. This is presumably because what the jury says is, in this case, not true (*verum*).

pronounces the *iudicium* and can even shape it, since, if the jury's *dictum*, what they say, seems to be based on falsehoods, the judge should "amend it by diligent examination."<sup>511</sup>

Given the way the word *iudicia* is used in the rest of the treatise, the *iudicia* mentioned in the *introductio* are thus most likely the final judgments made by the justices in court cases. The only material in the treatise to which they could then possibly refer are the references to cases decided on the plea rolls, so we can be almost certain that the author of the *introductio* had the 527 references to the plea rolls that are scattered throughout the treatise in mind when he said he turned his mind to the ancient judgments of the just. If the ancient judgments are plea roll entries, then the "just men" (*iustorum*) must be the 'good' justices with whom the plea roll entries are associated throughout the treatise. The author thus signals to us that the plea rolls and royal justices are not just important to the treatise; they are its central feature. It is to the "ancient judgments of just men" that the author "turned his mind" in order to correct the abuses that this treatise is designed to correct.<sup>512</sup> *Bracton* is not a treatise that includes cases; it is a treatise *about* cases.

This statement changes the entire meaning of the treatise, which could then only be the work of someone looking at the treatise after most of it had been written, because the cases, while important, are not the centerpiece of the treatise. They do not give the treatise a unifying principle, nor is the treatise organized around them. Large stretches of the treatise have no case references at all.<sup>513</sup> Nonetheless, Henry de Bratton, the likely author of the *introductio* after reading the treatise, picked out the cases as its central feature, and, as I shall show, connected those cases strongly with the judicial voice.

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<sup>511</sup> "*Illud emendare teneretur per diligentem examinationem.*" BDL, 3:342.

<sup>512</sup> BDL, 2:19.

<sup>513</sup> The most obvious example is the beginning of the treatise, which is the most heavily influenced by canonist and civilian treatises. There are no case references in the first 32 pages of Thorne's edition. The introductory chapter to the section on actions has only one case in 43 printed pages. BDL, 2:282-325, esp. 320.

## Copying Azo: The Treatise as *Digest* and *Summa*

There is a potential problem with this reading of the first prologue. As Maitland and his successors, particularly David Ibbetson, have pointed out, the author copied the phrase “the ancient judgments of just men” from Azo’s *Summa*, making it highly problematic as evidence of what the author was thinking when he wrote the treatise.<sup>514</sup> It is not clear whether he copied this because he really thought the cases were the central feature of the treatise, and thought that this line from a Roman law *summa* would give his treatise some credibility as a work of law, or whether he copied it without thinking at all.

Ibbetson perhaps makes too much of these problems. The composer of the first prologue to *Bracton*, whoever he was, did not copy Azo word-for-word. Azo explains to us, in the *Summa Institutorum*, how the *Digest*, Justinian’s compilation of the writings of Roman jurists of the classical period, came about. After Justinian had commissioned the *Codex*, “he turned his mind to the *immense volumes of ancient wisdom (immensa volumina veteris prudentiae)*, a hopeless task, as if advancing through the middle of an abyss, he completed it by heavenly favor, and from nearly 2,000 books and 300,000 verses he composed one book which is called the *Digest...*”<sup>515</sup> It is from this phrase of Azo, about the *Digest*, that the author of *Bracton* takes his “ancient judgments of the just” (*vetera iudicia iustorum*), to which he “turned his mind.”<sup>516</sup>

The author of *Bracton* did not copy from Azo blindly, as is often assumed in dismissing his use of this language as evidence of any special attention to cases on the author’s part. He makes some telling changes to Azo’s formula. First, he turns himself into an English Justinian: in Azo’s *Summa* it is not the author of the *Summa* on the *Corpus Iuris Civilis* who is turning his

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<sup>514</sup> David J. Ibbetson, “Case Law and Doctrine: A Historical Perspective on the English Common law,” in *Richterrecht und Rechtsfortbildung in der Europäischen Rechtsgemeinschaft*, ed. Reiner Schulze and Ulrike Seif (Tübingen: Mohr Siebeck, 2003): 30.

<sup>515</sup> “*Erexit postea animum suum ad immensa volumina veteris prudentiae, et opus desperatum, quasi per medium profundum vadens, coelesti favore adimplevit, et ex duobus paene milibus librorum et ex tricis centenis milibus versuum unicum librum composuit quem digestum appellavit.*” F.W. Maitland, *Select Passages from the Works of Bracton and Azo* (London: Bernard Quaritch, 1895), 16.

<sup>516</sup> BDL, 2:19.

mind to ancient wisdom to accomplish his task, it is the author of the *Corpus Iuris Civilis*, the Emperor Justinian himself. Azo has Justinian wading through the unorganized mass of authorities to create a single book of law. This gives us some indication of what the author saw as his role in the process of organizing English law. He copied parts of Azo's work, but here he does not identify himself with Azo, the author of the *Summa* on the *Corpus Iuris*, but with Justinian, the "author" of the *Corpus Iuris*. He is the compiler of the law, not the commentator. In identifying himself with the great Emperor Justinian, the author of the *introductio* was possibly committing a greater blasphemy than the author of the *prohemium* when he claimed that the judge sits on the throne of God.

And yet the author of the *introductio* calls the book a *summa*, which indicates that he is writing in the mode of an organizer and commentator as well as a compiler of authority. The author of *Bracton* thus signals to us that his work is something of a hybrid, sharing characteristics both with the *Digest* and with the *summae* and other commentaries on the *Digest* that men in the schools had been writing for about a century. More important for our present purposes, the author turns Azo's "ancient wisdom" into "the ancient judgments (*iudicia*) of the just." On the one hand this signals to us that the author of the prologue understood the composition of the *Digest*. Azo's "ancient wisdom" is impersonal and unspecific: it does not tell us what format that wisdom appears in. The *Bracton* author understood that the *Digest* was composed of the wisdom of ancient Roman jurists. In the *Digest* authority is ascribed to particular learned men. In the ancient world, there was even a hierarchy of jurists.<sup>517</sup> On the other hand, he transforms Azo's phrase into something that is useful to his own work. Wisdom (*prudentia*) becomes judgments (*iudicia*) which, as we have seen, he treats in several places as the pronouncements of justices and judges. That individual authority and wisdom is expressed

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<sup>517</sup> Stein, *Roman Law in European History*, 16-18.

through the genre of writing that the authors use throughout the treatise to obtain the opinions of justices: the *iudicium*.

The *Bracton* author shows us that he is not simply copying what he sees in Azo, because he could easily have copied Azo's phrase word-for-word or kept its impersonal tenor. He takes Azo's impersonal wisdom and transforms it into the judgments of just men, which we can be fairly secure in identifying with the judgments of the justices referred to in the treatise. These judgments are not authorities just because they are ancient, but because they come from just people. In the case of the *Digest*, those people are the classical Roman jurists; in the case of *Bracton*, they are the royal justices.

### **The Genres of Judicial Literature: *Facta, Consilia, et Responsa***

The author of the *introductio* also turns these *iudicia* into something much more concrete by telling us what kind of genres of writing *iudicia* can be found in. The author tells us that the ancient judgments of just men can be found in those just men's "*facta...consilia, et responsa*."<sup>518</sup> By using these three terms to refer to *iudicia*, the author of the *introductio* analogizes the plea roll literature he is labeling *iudicia* to genres of juristic writing in Roman and canon law. The author of the *introductio* thus gives us a reading of the treatise in which it is not only a treatise about cases, but a treatise which treats those cases as the authoritative responses of English jurists. The plea rolls are juristic *responsa*.

We have already discussed the ways that the word *facta* is used in the treatise, and we have seen that it can refer—and indeed in the *prohemium* appears to refer to—cases decided in court. It does not indicate any particular genre of writing, however. *Consilia* and *responsa*, on the other hand, do refer to specific genres of writing in both classical Roman law and in medieval

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<sup>518</sup> BDL, 2:19.

Roman and canon law.

Again, because the author of the *prohemium* had probably read and worked on the rest of the treatise when he wrote the *prohemium*, we can use the ways the words *consilia* and *responsa* are used in other parts of the treatise as at least presumptive evidence of what they meant to the author of the *prohemium*. These words appear in other parts of *Bracton*. At times, they refer specifically to the work of royal justices. *Consilium* is the Latin term for a specific judicial practice by which an eyre justice could ask for advice from the justices at Westminster. In the *prohemium*, we are told that if a “judgment is difficult and unclear” it should be “adjourned to the great court to be there determined by the counsel of the court (*consilium curiae*).”<sup>519</sup> This does not refer to a particular genre of literature, though.

In other parts of the treatise, though, the authors indicate that they understand the words *consilia* and *responsa* to refer to the opinions of justices. In the section on essoins, the author cites to the “response (*responso*) of William of Raleigh and Stephen of Segrave made to Richard Duket, who sought their counsel (*consilium*) in this case (*casu*).”<sup>520</sup> The author of this part of the treatise, an *addicio*, uses both *consilium* and *responsum* to refer to a justice giving advice in a particular case. Richard Duket, a royal justice who was apparently unsure of the correct answer to the case before him, asked for *consilium*, or advice, from William of Raleigh, who gave that advice in his *responsum*. The fact that the author uses these two words to describe the process of requesting and giving advice is telling. The author is equating the work of William of Raleigh and Stephen of Segrave with the work of Roman jurists and perhaps of contemporary doctors of law at Bologna, Toulouse, or Orleans. *Consilia* and *responsa* are words that had meaning within the cultures of Ancient Roman law and medieval scholasticism. The two words, *consilia* and

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<sup>519</sup> BDL, 2:21.

<sup>520</sup> “*Ex responso Willelmi de Ralegha et S. de Segrave facto Ricardo Duket qui expetiit eorum consilium in hoc casu.*” BDL, 4:126. *Consilium* is used in other contexts, as well. We see it used to mean the counsel of the court, which seems to be a deliberative process by which an entire panel gave an answer, as in “*Quod ita fieri debeat per consilium curiae.*” BDL, 3:52.

*responsa*, are essentially synonyms. A *consilium* is a piece of advice. When it is given in response to a request for advice, it is a *responsum*. In a particularly legal setting, they were the legal opinions of jurists given in response to questions from magistrates or litigants, and this is the meaning that the author attaches to these words throughout most of the treatise.<sup>521</sup> The *Digest* includes a history of the jurist's *responsa*:

And we might say in passing that before the time of Augustus the right of responding (*respondendi ius*) publicly was not given by the *princeps*, but he who had confidence in his studies responded to those consulting them: and they certainly did not give *responsa* sealed, but they generally wrote to judges, or they bore witness to those who consulted them. The first divine Augustus, so that greater authority of law might be had, established this, that they [the jurists] would respond from his authority (*auctoritas*): and from that time this [the right to respond in the Emperor's name] began to be sought as a privilege. And therefore the best Princeps Hadrian, when men of praetorian rank sought this from him, that he permit them to respond, wrote back to them that this ought not be sought, but was customarily offered, and therefore, if anyone had confidence in himself, he should be delighted and should prepare himself to respond to the people.<sup>522</sup>

This section, in the first title of the *Digest*—a title which is quoted several times in *Bracton* and was obviously known to at least one of the authors—describes the evolution of the law in

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<sup>521</sup> Adolf Berger, *Encyclopedic Dictionary of Roman Law*, s.v. “*Responsa Prudentium*.” In Classical Roman law, *consilia* generally referred to legal advice given to a magistrate by his council. *Responsa* referred to answers to questions from litigants and others.

<sup>522</sup> “*Et, ut obiter sciamus, ante tempora Augusti publice respondendi ius non a principibus dabatur, sed qui fiduciam studiorum suorum habebant, consulentibus respondebant: neque responsa utique signata dabant, sed plerumque iudicibus ipsi scribebant, aut testabantur qui illos consulebant. Primus divus Augustus, ut maior iuris auctoritas haberetur, constituit, ut ex auctoritate eius responderent: et ex illo tempore peti hoc pro beneficio coepit. Et ideo optimus princeps Hadrianus, cum ab eo viri praetorii peterent, ut sibi liceret respondere, rescripsit eis hoc non peti, sed praestari solere et ideo, si quis fiduciam sui haberet, delectari se populo ad respondendum se praepararet.*” D.1.2.2.49.

Rome.<sup>523</sup> The title is called “On the Origin of Law (*iuris*) and of All Magistrates and the Succession of Jurists (*prudentium*).”<sup>524</sup> This particular quotation comes from a long segment on the history of law by the jurist Pomponius. After his account of the twelve tables, the development of statutes, and of the beginnings of the magistracies, Pomponius tells a story that focuses on a line of important jurists, ending his account with the story of Augustus’ granting of the right to respond in the Emperor’s name and with the succession of jurists who were given that right. A reader would thus have gotten the impression that it was the jurists and their responses to questions from litigants and judges that mattered. The remainder of the *Digest* bears out Pomponius’ reading of Roman law as the product of jurists with *auctoritas*, since the whole long work is composed of the writings of jurists, both from their treatises and from responses they gave to people who were asking for their advice.

Medieval canonists and civilians would pick up on and reshape the classical attachment to the *responsa* of jurists. *Consilium* literature was current in the *Bracton* authors’ time both in law and in medicine. The classic period for *consilia* literature would not come about until the early 14th century, when collections of the *consilia* of (mostly Italian) jurists and physicians would circulate as texts with authority.<sup>525</sup> But despite the fact that the *consilia* collection would not flourish until the early 14th century, the *consilium* genre must have been known in the cultural world of the *Bracton* authors. Andreas Capellanus’ *De Amore*, a Latin treatise which Andreas probably wrote at the court of Champagne in the 1180s, shifts between several legal

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<sup>523</sup> The *introductio* itself contains a reference to D.1.3.1. The *prohemium* quotes D.1.3.1. BDL, 2:22. BDL, 2:26 contains a reference to D.1.2.2.13, very close to the above quotation in the *Digest*. See also BDL, 2:21, 30, 186, 304, 305; 3: 56, 128.

<sup>524</sup> “*De origine iuris et omnium magistratuum et successione prudentium*.” D.1.2.

<sup>525</sup> Sebasti Giralt, “The ‘Consilia’ Attributed to Arnau de Vilanova,” *Early Science and Medicine* 7 (2002): 311, 345. Jole Agrimi and Chiara Crisciani, *Les Consilia Médicaux*, trans. Caroline Viola (Turnhout: Brepols, 1994), 39. The connections between medical consilia and juridicial consilia have not been adequately explored. Apart from using the same genre of writing to give advice in both law and medicine, these texts shared terminology.

genres of writing in teaching the ways of love to a young man named Walter.<sup>526</sup> Andreas teaches Walter how to win the love of different kinds of women through dialogues, advice that sounds quite a bit like advice for court procedure and pleading.<sup>527</sup> Andreas uses legal genres most explicitly, though, in a portion of Book II which he labels “various judgments on love” (*variis iudiciis amoris*). These judgments, which are written in the form of *consilia*, pose some kind of problem to a noble lady. These problems are written in the form of a real-life dispute, although the parties are turned into abstractions. Thus, it is an unnamed “certain man (*quidam*)” who is “immoderately bound by love to a certain lady (*cuiusdam dominae*).”<sup>528</sup> The noble lady who gives the *consilium* in the case, however, is named. Eleanor of Aquitaine, Isobel of Vermandois, Ermengarde of Narbonne, and Marie, Countess of Champagne, well-known and powerful women of the late twelfth century who were known for their connections with courtly literature, are named as consulting jurists on the laws of love. The jurist of love’s response to the young lover is called a *consilium*, *responsum*, *iudicium*, or *sententia*, all terms associated with legal texts, although different types of legal texts.<sup>529</sup> *Consilia* and *responsa*, as we have seen, are terms for a jurist’s text written in response to a request from a judge or a party. The *iudicium* or *sententia* usually refers to the judge’s final judgment in a legal case. Andreas’ texts conflate the act of giving advice (*consilium*) with the act of giving judgment (*iudicium*, *sententia*). They are not alone in doing this. Some medical *consilia* of the late thirteenth and early 14th centuries use

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<sup>526</sup> Andreas Capellanus, *Andreas Capellanus on Love*, trans. P.G. Walsh (London: Duckworth, 1982). Walsh, oddly, does not list legal writing among Andreas’ many influences in his introduction, despite Andreas’ clear adoption of legal styles. The text, which has been studied extensively by literary scholars, is in need of analysis by legal scholars. For instance, Andreas’ statement that “surely a wild beast wounded by the spears of an earlier hunter must belong to the one who later captured it” may be an allusion to Ovid’s *Metamorphoses*, a text Andreas quotes from in other parts of his work, as Walsh suggests, but it is also a classic case in the Roman law of property. *Ibid.*, 130-131.

<sup>527</sup> See, e.g., Andreas Cappellanus, *On Love*, 64-5, 86-7.

<sup>528</sup> *Ibid.*, 250.

<sup>529</sup> *Ibid.*, 253.

the term *iudicium* to refer to the physician's advice in the case.<sup>530</sup>

All of this, of course, lines up perfectly with the way the plea roll entry is used in *Bracton*. The judgment (*iudicium*) of a just man (in the case of *Bracton*) or woman (in the case of *De Amore*) is treated as juristic advice (*consilium, responsum*) and used as a teaching text, both for the clerks of the court and for young, lovesick Walter. Andreas used the form of the *consilium* in a humorous way, creating what were almost certainly fabricated cases on the laws of love in a text that shows signs that the author had his tongue firmly planted in his cheek when he was writing it. In order to do that and to make the text resonate with his audience, the *consilium* must have been a familiar form to those literate in Latin in the Northern French cultural context in which Andreas operated. The authors of *Bracton*, broadly speaking, shared this same cultural context. They were a group of educated Latin-literates who probably spoke French as their first language and who could well have read literature produced in the courts of Northern France, like Andreas' Champagne. If *consilia* were known to Andreas, they would likely have been known to the *Bracton* authors, who wrote about judicial cases in a manner so close to that used by Andreas to describe his cases on the laws of love.

The author of this *addicio* knew something about the ways in which classical jurists operated, he knew about the types of legal literature that they wrote and that were collected in Justinian's *Corpus*, and he shows us that he is assimilating the plea roll entry to these types of legal literature. In the case above, the *responsum*, which took the form of the *consilium* of Raleigh and Segrave, is presented in the same format as many of the plea roll entries references in the treatise, since the author makes no distinction between this response to Richard Duket and cases taken directly from the rolls. He first states a rule of law—in this case that the knights sent to make a view of an essoin are considered a court of record—and then tells us that this is proved

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<sup>530</sup> A physician's advice, for example, was often called his *iudicium* in medical *consilia*. Agrimi and Crisciani, *Les Consilia Médicaux*, 35.

(*probatur*) by the *responsum*, in the same way he tells us, about one tenth of the time, that a rule is proved by such-in-such roll.<sup>531</sup>

Reading the *addicio* on Raleigh's and Segrave's *responsum* and the *introductio* together, we get a sense of how the group of people who worked on the treatise understood the role of the words *consilia* and *responsa* as they are used in the *introductio* and in other parts of the treatise. The author of the *introductio* may very well have written this *addicio* and even if he did not, he probably knew of it. Thus, when he used the Roman law terms *consilia* and *responsa* at the very beginning of the treatise, to describe its contents, he probably had the later *addicio* in mind. The fact that the author of the *introductio* has taken his lead in using these two terms from Azo must not mislead us into thinking that he copied in a rote fashion. Rather it clarifies what the author was thinking when he copied and modified these words from Azo. In the process of modifying what he found in Azo he shows us 1) that he understood the wisdom in the *Digest* to be the product of individual jurists, not just a mass of collected, impersonal wisdom, 2) that he understood his own treatise to be about judgments made and to be made in the English courts, and 3) that he combined these two notions and treated the plea rolls as something similar to *consilia* and the royal justices as the English equivalent of the Roman jurists whose *consilia* are found in the *Digest*.

If the *introductio* was written in the 1250s or 1260s by Henry de Bratton, and not by one of the earlier authors who had worked on the treatise, then it represents an early reader's understanding of what the treatise was about. Henry de Bratton read the treatise and interpreted the cases in it as the "ancient judgments of just men," a modified version of Azo's "immense volumes of ancient wisdom."<sup>532</sup> Bratton then took the various strands of authority that appear in

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<sup>531</sup> BDL, 4:126. Note that *consilium* was differentiated in professional usage from the practice of consultation by which the ecclesiastical courts could ask the royal courts whether they should proceed or desist in a case that might touch the royal jurisdiction. The author denotes that practice by the word *consultation*. BDL, 4:263.

<sup>532</sup> BDL, 2:19.

the treatise—the individual authority of the judge, the collective authority of the court, the idea of authorities in the scholastic sense—and interpreted the ancient judgments, *consilia*, and *responsa* of the justices he was familiar with as the nearest English equivalents to the *dicta* of the jurists that Justinian collected in the *Digest*. He placed himself, or the anonymous and imagined “author” of the treatise, as the English Justinian, who turned his mind to these ancient judgments, and thus imagined *Bracton* as a hybrid work: a collection of juristic works akin to the *Digest* and a *summa* on the *Digest*.

### **The Desire for an English *Digest*: The *Note Book* Reconsidered**

The *introductio* may also tell us something about the *Note Book*. Scholars have effectively disproved the suggestion that the *Note Book* was made in preparation for the treatise. It still may have been made in connection with the treatise. The authors of the prologues, particularly the author of the *introductio*, show us that there was a desire in the circle of Raleigh for texts of the types they had read when they were studying Roman and Canon law.

In format, *Bracton* had all the marks of a *summa*, so the *introductio* author was not stretching too far in making this claim for the treatise. Comparing it to the *Digest* and intimating that it was a work composed of juristic opinions in the form of cases was quite a stretch, though. The authors of *Bracton* obviously thought about it when they used Azo’s phrase describing the *Digest*, because they modified it to fit their English project. They were not copying blindly, but creatively engaging with the Roman law tradition to make an analogous English tradition. But *Bracton* looks nothing like the *Digest*, which is made up almost entirely of the writings of the classical jurists, the ancients, with little commentary by the authors apart from the titles they use to divide the work by subject matter. A *summa* it was; a *Digest* it was not.

What the author of the *introductio* shows, though, is a *desire* on the part of the circle of

Raleigh for an English *Digest*. Could the so-called *Bracton's Note Book*—the collection of 2,000 cases from the rolls of Patishall and Raleigh—have been the answer to this desire? If so, the *Note Book* could easily have been compiled within a few years of the writing of the *introductio*. One might speculate that, with the *summa* on English law written, the need for an English *Digest* was felt by the textual community centered on Raleigh, who combined some existing case collections and composed a work that people reading *Bracton* could refer to for the “ancient judgments of the just.”

Although this remains mere speculation, the *Note Book* was possibly meant to be the *Digest to Bracton's summa*. It was a collection of the opinions, in the form of *consilia* and *responsa*, of the English jurists, the justices Martin of Patishall and William of Raleigh. It filled a gap in the literature of English law; while there was a *summa* on the primary texts, there was no collection of primary texts, no jurist's Bible. The *Note Book*, composed around the same time Henry de Bratton was working on the treatise, may indeed be *Bracton's Note Book*. If it is, though, it was made by Bratton not in preparation for the treatise, as Maitland thought, but in response to Bratton's thinking about cases in dialogue with the treatise he was revising, updating, and introducing.

## **Conclusion**

The authors of the two prologues to *Bracton* place the treatise and its cases in scholastic legal genres. In the last chapter we saw that the authors of the treatise, from the first ones who were writing in the 1220s and the 1230s to the last ones writing in the 1240s and 1250s, treated cases as authorities in the scholastic sense, texts which could be understood by using dialectical reasoning. We have seen in this chapter that the authors of the two prologues explicitly assimilate cases from the plea rolls to scholastic genres of writing. Cases were the *consilia* and

*responsa* of jurists. The treatise itself was a *summa* and a *Digest*. *Bracton* can thus give us insight into what a group of two or three authors who apparently were traveling in the same circles as the people who marked Patishall's and Raleigh's rolls and who made the *Note Book* from those rolls—a group of authors who had access to Raleigh's and Patishall's rolls—thought about cases. We can thus use *Bracton* to understand the mysterious plea roll collections, which offer so little information about why they were made.

Using *Bracton* as a window into the minds of justices and their clerks in the thirteenth century is complicated by its multiple authorship and the fact that the several authors may not have understood the cases in the treatise in the same way. The authors perhaps held a range of opinions on the role of cases in the treatise, on a continuum from what we might call “maximalist” to “minimalist.” The minimalist view might conceivably be as minimal as Plucknett's hypothesis that the cases were mere illustrations. I do not find this probable, however, because many of the cases that do not bear this interpretation are early ones that show no sign of being later additions to the treatise, as we saw in the last chapter.<sup>533</sup> I think it far more likely that the first of our authors held a view that cases were important because justices are, in some way, authorities. He may not have had a clear idea of why they were authorities, other than that he—and he was very likely William of Raleigh, the royal clerk and then justice—had worked for a justice for many years as a sort of clerical apprentice. Wisdom was handed down from one generation to the next, and the plea rolls were a record of that wisdom that was largely restricted to the apprentices.

The maximalist view of cases is represented by work in the treatise that we know to be of later origin than the bulk of the treatise. This is the work that was likely done by Henry de Bratton himself: the *introductio* and at least the 19 cases that date from the 1240s to the 1260s.<sup>534</sup>

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<sup>533</sup> BDL, 4:193.

<sup>534</sup> TI3, xl.

This position appears most clearly in the *introductio*, where the justices of the court are compared to Roman jurists and their “ancient judgments” are transformed into “*consilia et responsa*,” genres of legal literature associated with the jurists in the schools. In these portions of the treatise, the idea of the justice as an *auctoritas* in the schools sense is most explicitly sketched out; in these portions of the treatise the justice’s words become law. Bratton shows us this not only in his reworking of Azo’s language, but also in the way he revised the text of the whole treatise. When he wrote the *introductio*, he did not cut out the *prohemium*. Rather, he added his *introductio* to the existing text. But these two prologues are prologues for different types of works. The *introductio*—Bratton’s work—is written in the format of the prologue to Justinian’s *Institutes*, and seems to have come to the treatise by way of *Glanvill*. It is the type of prologue appropriate for an *auctoritas*. The prologue that follows is of the type found at the beginning of a *summa*. It is appropriate for a work that comments on an *auctoritas*.<sup>535</sup> Where the original author seems to have understood this text to be a *summa*, with all the implications that has for the role of the cases in the treatise, Henry de Bratton’s contribution to it was to see the text as a hybrid: a collection of the works of jurists, not unlike the *Digest*, and a commentary on those works. The treatise underwent a change in meaning between the time it left the hands of William of Raleigh and the time it left the hands of Henry de Bratton.

*Bracton* is valuable to us because it shows the justices of the royal courts both relying on the authority of cases and also constructing that authority at the same time. The plea rolls were the unlikeliest of candidates for a new legal literature, but they were available. In a world with limited material means, they took already existing materials that contain judicial speech—the plea rolls—and transformed them into authorities. From all this we can see that Henry de Bratton, at the very least, wanted to borrow some of the glory of the Roman jurists for his

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<sup>535</sup> Minnis, *Medieval Theory of Authorship*, 6.

English justices. When he worked on the treatise, he brought the understanding that cases were important because they served as a locus for judicial speech to it. Whether it was there already is an unanswerable question. In the next chapter we will turn to Henry de Bratton's own plea rolls. We will see how Bratton brought this understanding to his own cases, and how he crafted his own rolls to reflect this image of the plea roll as a locus of judicial speech and, ultimately, judicial authority.

## Chapter Five

### A New Plea Roll for a New Audience

We have seen in the last three chapters how the compilers of plea roll collections and the authors of *Bracton* took the administrative records of the courts and reclassified them as didactic legal texts, the *consilia* and *responsa* of English jurists. In this chapter I will show that the justices and clerks who were responsible for this plea roll culture made very subtle changes to the plea roll entry itself in order to transform it into a legal text. At every stage of the process from court case to plea roll collection justices found space to expound the law in order to make their plea rolls more impressive and more worthy of being excerpted for use in educating their successors. Through changes in these texts we can see justices guiding jurors to the “correct” solution, presenting themselves as learned jurists in the Roman mould, and removing the real-life parties to the case from the equation in favor of the legal principles that the case exhibits. By privileging legal knowledge, a type of knowledge that resided exclusively in the royal jurist-justice, the people who wrote these plea roll entries subalternized the types of knowledge possessed by jurors, sheriffs, coroners, and other actors in the dispute-resolution process. They privileged the justices of the royal courts as the sages and oracles of the law.

The changes in the plea rolls were not primarily intended for an external audience, however. The justices and clerks who held up the plea roll as the space where the jurist’s words could be found were writing primarily for the training of other justices and clerks. I will show that one particular justice, Henry de Bratton, who became a judicial clerk around the time many of the case collections must have been made, took to heart the idea that the plea roll was the place to represent oneself as a learned jurist and used his own rolls as a space to try to impress his peers on the judicial bench with his knowledge of the law.

## Setting the Tone: “Choice” Cases and the Making of the *Note Book*

The process of writing a new type of plea roll entry began with plea roll collections. The collection known as *Bracton's Note Book* helped to constitute the new genre. Some of the cases in the *Note Book* may have been crafted by justices who had already seen the potential of the plea roll entry to act as a type of didactic literature. We saw a typical example of a terse, bureaucratic plea roll entry of the late twelfth century in the introduction. But records in the two decades after the civil war records became longer and more involved than they had been in the 1190s, and the records chosen for the *Note Book* were some of the longest. Thus, even before the justices began to excerpt them into other collections, it is possible that they had seen the potential for cases to be a legal literature and that they crafted their rolls accordingly.

But even if justices were not yet writing with the idea of didactic literature in mind, the authors of the *Note Book* were selecting cases for their potential to serve as teaching tools. Only the cases that the excerpter found the most interesting were excerpted. The *Note Book* is not merely a collection of plea roll entries; it is a collection of plea roll entries that have been chosen because they fit within a certain set of parameters set by its creator. It contains original thought to the extent that its maker chose which cases to include and which to exclude. Records of certifications, for instance, are popular in both *Bracton* and the *Note Book*. A certification was a procedure by which the justices of the central courts, if they thought that a case had been decided incorrectly or incompletely by justices on eyre or on a special assize commission in the counties, could have the jury in that case brought either before the king or to Westminster and re-questioned on their verdict. It was somewhat similar to a modern appeal, but it was an appeal as to both fact and law, which indeed were not decisively separate at this time. In theory it was a new decision on the case.

Because certifications involved discussions of what had been done incorrectly in the first

instance, and usually contained detailed exposition of the facts of the case and the steps the court took to reach its decision, they could serve as teaching tools. In a 1231 certification that appears in the *Note Book*, for instance, we see a group of justices who have to explain what, in the first instance, may have appeared as the historian's bane—the general verdict—on the rolls. The general verdict is a modern lawyer's term that, although not a thirteenth century term, can still be useful to the historian of that period. In a general verdict, the jury was only asked the final, dispositive question for the case: “did A disseise B?” We often do not even get their answer, but only hear the court's conclusion from it: “it is considered that B have his seisin and A is in mercy,” does not tell us what facts led the jury to the conclusion that A had disseised B. It need not tell us who had input in the decision. Did the jury debate the matter? Did the justices ask specific questions to lead the jury through the issue of whether there was a disseisin or not? It was these general verdicts that vexed S.F.C. Milsom so much, and which he showed could hide the real issues in the case very effectively.<sup>536</sup> Thus, where the original roll may have told us only that the jurors said that Oliver de Gladefen was the next heir of Roger Gernun, who was seised in demesne as of fee on the day he died, the certification shows us that the case was far more complicated, that there was argument over fine points of law, and that the justices were making decisions about the law that affected the outcome of the case.<sup>537</sup>

The parties to the original suit in the 1231 case were Oliver de Gladefen, the complainant, and the prior of Legha, the tenant of half a carucate of land and another parcel that produced 40 shillings of rent per year. Oliver brought an assize of mort d'ancestor claiming that the land, which the prior was holding on behalf of his priory, had belonged to Oliver's now deceased elder brother. The writ of mort d'ancestor asked the jury two simple questions: “whether [the deceased] was seised [of the land in question] in his demesne as of fee on the day

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<sup>536</sup> S.F.C. Milsom, *The Legal Framework of English Feudalism* (Cambridge: Cambridge University Press, 1976), 5.

<sup>537</sup> BNB, 2:435, no. 564.

he died” and “whether [the complainant] is his next (*propinquior*) heir,” meaning that he is first in line of inheritance.<sup>538</sup> Thus, if Oliver could show that the land had belonged to his elder brother on the day he died and that he, Oliver, was next in line of succession after his brother, he would take the land. In the initial case, Oliver had won and the prior was ordered to return the land to him. The prior, however, complained to the king’s court that “the assize was taken unjustly and against the custom of the realm of England,” and asked that “he have the aforesaid Oliver and the bodies of the recognitors [the jurors] to hear the record of the same assize to certify it.”<sup>539</sup>

We have several parties already—Oliver, the prior, the jurors—but the scribe writing the entry makes it clear that the main parties to the certification are the four itinerant justices who heard the original case, who—in the first line of the entry—are ordered by name to appear “before the justices [at Westminster].”<sup>540</sup> These justices from the original case stood before the justices at Westminster and told their superiors that the prior called Ralph, Oliver’s elder brother, to warrant the priory’s claim to the land. This meant that Ralph was the priory’s lord with respect to that piece of land and that, if they were sued for the land, Ralph would have to defend the case on their behalf. If they lost, Ralph would have to give them equivalent land by a process called *escambium*. But Ralph had not shown up to warrant and Oliver, being the next heir of the deceased, took the land by default, according to the justices and to their plea rolls.<sup>541</sup>

After questioning the itinerant justices, the justices at Westminster turned to the jury and

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<sup>538</sup> This example comes from the *Glanvill* treatise: “*Si O. pater predicti G. fuit saisitus in dominico suo sicut de feodo suo de una virgata terre in illa villa die qua obiit...et si ille G. propinquior heres eius sit.*” GDL 150,vBook XIII, c. 3. The writ asks a third question that is not at issue in this case, “whether he died after my first coronation.” Ibid. This is the limitation date for the writ, barring actions that happened too long ago to be justiciable.

<sup>539</sup> “*Prior queritur quod assisa illa iniuste et contra consuetudinem Anglie capta fuit etc., et quod haberet preditum Oliverum ad audiendum recordum illud et corpora recognitorum eiusdem assise ad certificandum etc.*” BNB, 2:435, no. 564.

<sup>540</sup> “*Preceptum fuit vicecomiti quod venire faceret coram iusticiariis Rogerum filium Osberti, Ralphum de Muncy, Robertum de Colevilla, et Michaellem de Bauent iusticiarios contitutos ad assisam mortis antecessoris capiendam inter Oliverum de Gladefen petentem et Willelmum Priorem de Legha tenentem...*” Ibid.

<sup>541</sup> Ibid.

asked if they agreed with the record the itinerant justices had made. The jurors now told a somewhat different story. Apparently when they heard that Oliver's elder brother had been called to warrant the land, they had smelled a rat, and "doubted whether that Oliver was the next heir or not."<sup>542</sup> This doubtless concerned them, because they knew if there was an elder brother, then the younger brother was not the next heir, since the assize of mort d'ancestor preferred the elder brother over the younger. In other words, Ralph, not Oliver, should be the next heir. Some of the jurors also knew, though, about an earlier case concerning this land in which Ralph had played a role. Osbert, the father of both Oliver and Ralph, had been called to warrant the land in this earlier case, which meant that Osbert had probably given the land to the priory at some point as a gift and remained lord of the land with a duty to warrant it should his gift ever be challenged. Osbert, though, had entered a monastery before the case came to fruition. The prior had sued Ralph, who had succeeded to his father's land, to force him to give him warranty for the land, and "it was held at Westminster that the same Ralph ought to warrant him..."<sup>543</sup>

The jurors were thus confused as to whether Oliver or Ralph could be said to be the next heir. Their confusion was understandable. Oliver could not be considered the deceased brother's next heir because, as they had heard from the prior, he had an elder brother still living who, by the rules of the assize of mort d'ancestor, would be entitled to the land first. Mort d'ancestor followed the rule of primogeniture; an elder brother would completely exclude a younger brother. The jurors only knew this, however, because the prior had told them that the elder brother, Ralph, was the lord of the land. The royal courts, by this period, had developed the "lord and heir" rule, meaning that one could not be both lord and heir to a piece of land. Ralph, as lord, could not also be heir. So Ralph would have possessed a superior claim to Oliver, but Ralph was barred from claiming the land. Should the jury then treat Ralph as if he did not exist and count

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<sup>542</sup> "*Dubitaverunt utrum ipse Oliverus esset propinquior heres vel non...*" BNB, 2:436, no. 564.

<sup>543</sup> "[C]onsideratum fuit apud Westmonasterium quod idem Ralphus ei debuit warentizare." Ibid.

Oliver as the next heir? The jurors were not sure and the itinerant justices seem to have left them in doubt.

The certification is different from most plea roll entries in that the jurors are questioned not just as jurors, but as parties to the case. Even more interesting is the fact that one group that is never questioned in other plea roll entries—the justices themselves—are forced to argue on their own behalf that they did not make a mistake in the original case. A certification thus contains one set of justices acting as justices and one set of justices acting as defendants. In this case the itinerant justices who originally heard the case tried to defend themselves. They contradicted the jurors and “denied this [viz., that they knew that Oliver had an elder brother at the time of the trial] at first and afterwards they recognized that the aforesaid jurors had said that that Oliver had a certain first-born brother.”<sup>544</sup> They were also called to account because they had apparently had dealings with Ralph, who had offered the king a goshawk to have his case heard, and so they surely knew of his existence at the time of the case.<sup>545</sup>

Within the genre of the plea roll entry, the certification format provided room for more people to speak and at greater length than was permitted in other types of entries. As noted above, the general verdict gives little room for the justices, the parties, and even the jurors to speak. In the certification, however, several groups of people are required to speak. The justices in the original case must explain why the case came out the way it did. The jury must tell us whether they agree with the record those justices and their clerks made. If the justices at Westminster think the case was decided wrongly, we might be lucky enough to hear them speaking *ex cathedra* on the correct solution to the case, something we do not generally see in ordinary plea roll entries.

That is precisely what the justices at Westminster did in this case. They tell us that

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<sup>544</sup> “*Et predicti iusticiarii hoc primo dedixerunt et postea cognoverunt quod predicti iuratores dixerant quod idem Oliverus habuit quemdam fratrem primogenitum.*” BNB, 2:436, no. 564.

<sup>545</sup> BNB, 2:436, no. 564.

“Oliver was the next heir to him because Ralph could not be lord and heir, and this, to be lord and heir, certainly looks to the right and not to the possession or to the assize of mort d’ancestor.”<sup>546</sup> What they mean by this is that the issue of whether Ralph should be cut out of the picture—the question that confused the jury—is not one for the assize of mort d’ancestor. The assize of mort d’ancestor only asks whether the person suing is the next heir. The answer to that question is no, Oliver is not the next heir, because Ralph exists, even if he is barred from claiming the land because he is lord. Thus, if Oliver is going to cut Ralph out of the running for this parcel of land, he must sue by a different writ—the writ of right—in which the jury is asked a broader question than they are asked in the assize of mort d’ancestor. Whereas in the assize, they are simply asked whether the person suing is the next heir, in the writ of right, they are asked who, of the parties involved, has the greater right to the land, a more open-ended question under the umbrella of which they could consider the issue of the lord and heir.

The collator chose this entry because it has all of the aspects described above. The assize justices explain their decision. The jurors tell us why they were confused. The justices at Westminster, headed by Martin of Patishall, take the opportunity to pontificate on the correct answer to this question. This serves as an example of an entry that was carefully crafted before it came into the *Note Book*. The author of this entry represented the justices of the central courts as the sages of the law. The itinerant justices and, more importantly, the jurors, are marginalized. The jurors do not bring local knowledge of the rules of succession or inheritance to bear in this case. And this is an area where jurors might be expected to have a great deal of knowledge. The jurors were composed of the local gentry, people who would have had a great interest in how land passed at death. In the twelfth century, the rules had been somewhat fungible. The eldest son was expected to succeed his father in normal circumstances, but when there were no children

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<sup>546</sup> “*Oliverus fuit propinquior heres eo quod predictus Ralphus non potuit esse dominus et heres, et hoc scilicet esse dominum et heredum spectat ad ius et non ad possessionem vel assisam mortis antecessoris.*” BNB, 2:437, no. 564.

to succeed, the situation could become more complex, and the local gentry's knowledge about the custom of the fee would be brought to bear. Instead of being asked who should succeed according to the custom of the lordship, as in the good old days, though, the jurors here are asked to consider the wording of a royal writ. They are turned into cogs in the machine of royal justice, whose role is not to say what norms should govern, but to apply norms supplied to them by the writ to a particular set of facts. Being confused by the writ, they are forced to rely on the king's justices to provide the correct answer to the question posed.<sup>547</sup>

The dynamics of the text show us that, even as it was being written, it was being crafted to make a point that was not strictly about the dispute at issue in the case. The justice's clerk who wrote this case, possibly under the supervision of his master, wanted to convey a message about the knowledge of the knightly class in the counties and the knowledge of the justices who sat at the king's side. Once this case was excerpted and placed in a new context, it took on yet another meaning. An annotator added some indication, in the margin, as to why specifically this entry was excerpted for the *Note Book*. The annotator advises us:

Note that the assize of mort d'ancestor does not lie between a younger brother claiming on account of the death of his brother and any other person; since it was the elder brother who was the lord—although he could not be lord and heir, because this pertains much more to the right and not to the seisin—because the first seisin pertains to the elder and therefore the assize does not lie. But since the elder had seisin, then the younger could

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<sup>547</sup> I will return to this issue of the subalternization of local knowledge in my next project. In *Property before Property* I will look at the ways we can read texts like *Bracton* and other legal treatises of the thirteenth century for the types of aristocratic knowledge that they actively try to suppress. *Bracton* and its Norman cousin, the *Summa de Legibus in Curia Laicali*, attempt to fit the language of seisin and right, used by the Anglo-French aristocracy to talk about their relationship to land, into the Roman law framework of property law. Neither treatise finds any consistent way of combining these two languages. Between the lines of these failed attempts to combine the two languages of the relationship between people and things, we can get a sense of what Anglo-French aristocrats of the twelfth and thirteenth centuries meant by seisin and right. We can read the treatise authors' creative readings of Roman property law through the lens of seisin and right as a way to get at a language that we no longer speak, a language that was suppressed by texts like these treatises.

seek his seisin from the aforesaid elder for this reason: because the elder is always the next heir but right will always expel him.<sup>548</sup>

This case was chosen to highlight this point: that the “lord and heir” rule makes no difference in an assize of mort d’ancestor. Of course, this case never came to the merits: did the monastery have the better claim to the land? The question asked was much more preliminary—did Oliver even satisfy the “next heir” test that would get him to the other issues in the assize of mort d’ancestor, like whether his elder brother was actually seised of the land when he died, a contention that the priory was sure to contest. This case and the marginal note appended to it are all about a very complicated preliminary question, not about the outcome of the case. If the compilers of the *Note Book* had wanted to know more about the dispute between Oliver, Ralph, Osbert, and the prior, there was actually much more about it on the rolls. Several other entries record additional stages of this dispute.<sup>549</sup> The people who made the *Note Book* were not interested in these parties, however. They were interested in what the case could tell them about the law.

Certifications are a type of entry that could be chosen for the *Note Book* simply because the format of a certification allows room for the justices to explain the law. This administrative text was ready to be used as a text that could teach the law. It was not only certifications, though, that justices were excerpting from the plea rolls. Some of these entries show signs that by the 1220s certain justices, or their clerks, were writing their plea roll entries for didactic, rather than purely administrative, purposes. One text in the *Note Book*, for instance, begins:

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<sup>548</sup> “*Nota quod non iacet assisa mortis antecessoris inter fratrem iuniorem petentem de morte fratris sui et quemlibet alium, cum fuerit frater antenate qui dominus est, licet non posit esse dominus et heres, quia hoc pertinet tantum ad ius et non ad seisinam, quia ad antenatum pertinet prima seisisina et ideo non iacet assisa. Set cum antenatus seisinam habuerit tunc poterit postnatus petere seisinam suam ab antenato predicta racione quia antenatus semper est propinquior heres set ius eum eiciet.*” BNB, 2:437, no. 564.

<sup>549</sup> CRR 14: 18, 413, 526, 1331.

Concerning Augustine and Geoffrey de Baddelegha that if he who was impleaded by one person upon the right and by another person concerning the same land upon the possession through the assize of mort d'ancestor, the action on the property will be delayed until such time as the action on the possession will have been pleaded, because Augustine sought land against Geoffrey...<sup>550</sup>

This entry contains more information than it would need if it was simply an administrative record. It starts off by saying that this case concerns two real-life parties—"Concerning Augustine and Godfrey de Baddelegha"—but it quickly switches style to inform us about a general rule of law: if someone is impleaded in two actions, one on the right and one on the possession, the action on the possession will be heard first, followed by the action on the right. The author then tells us what happened in the case of Augustine and Godfrey. The author of this entry is concerned not with Augustine and Godfrey, but with the greater meaning of this case and its application to other cases. It is only after he states the general rule that the author turns to the specific case. He adds information, but it is not additional information about the parties, their dispute, or the stages of argument that preceded the court case. The author does not care who these people are. The information he adds is about the rule that can be extracted from the case. It is about the abstract and general holding that the case supports. The *Note Book's* annotator placed a note in the margin that highlighted the case's usefulness for the legal rule contained in it: "note that first possession should be heard, then property."<sup>551</sup>

Unfortunately the original roll from which this case comes does not survive. Thus, we

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<sup>550</sup> "De Augustino et Gaufrido de Baddelegha quod si quis implacitatus fuerit ab uno super recto et ab alio de eadem terra super possessione per assisam mortis antecessoris, differtur accio super proprietate quousque discussum fuerit super possessione quia Augustinus petiit terram versus Galfridum." BNB, 2:193, no. 240.

<sup>551</sup> "Nota quod prius cognoscendum est de possessione quam proprietate." BNB, 2:193, no. 240.

cannot be sure whether the entry appeared in this form in the plea roll or if it was modified by the copyist who made the *Note Book*, or by the author of one of the earlier collections upon which the *Note Book* was based. After the first few sentences, though, the entry takes the form of an administrative record, telling us that a day was given for the case to be heard, just as one would find on a plea roll.<sup>552</sup> I suspect that the process of writing it as a didactic text began with the justice, Martin of Patishall, and his clerk, William of Raleigh, when they placed this case on the roll.

It is possible even at this early date that the process of turning the plea roll entry into a jurist's *consilium* began with the writing of the plea roll entry. In both of the cases discussed above, for instance, Roman law terms make appearances, something that is extremely rare before the second half of the thirteenth century. In the 1231 case, that of Oliver and Ralph, the justices distinguish between a writ on the right and a writ on the possession, the latter term being a Roman borrowing. The 1224 entry was even more Romanized, using the terms *possession* and *property*, both of which are Roman. Although the right/possession distinction would appear in many law reports—a different type of legal literature that came about in the 1260s—and would occasionally appear in later plea roll entries, these are the only two instances from the first half of the thirteenth century in which these Romanized terms appear on the plea rolls.<sup>553</sup> Who were the justices speaking to when they used this Roman language?

We can see some people in the royal administration writing for an audience beyond the parties in the court and beyond the people who might have to check up on what happened in a particular case later on. They are speaking to an audience that is reading the rolls for the law. Where the first entries contained only the minimum of information necessary for the judicial administration to keep its docket straight, the new plea roll entry was to be a work of legal

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<sup>552</sup> Ibid.

<sup>553</sup> David Seipp, "Bracton, the Year Books and the 'Transformation of Elementary Legal Ideas' in the Early Common law," *Law and History Review* 7 (1989): 204, n. 28.

literature. It added information, but not information about the parties, the stages of the dispute before it came into court, the heated arguments that may have taken place between the parties—in short, all the things that would be of interest to the social historian. The information the plea roll came to encompass was legal information, information about what the king’s justices thought of a particular argument, or why they came to a certain conclusion in a certain case.

The case collections we find in the thirteenth century are thus the product of two developments, both of which show us that justices were starting to think of plea roll entries as more than administrative records. By writing their plea rolls with more “legal” content—more argument about the rules, more Roman doctrines, and more discussion of procedure—justices turned their rolls into something that could be read as legal literature. By choosing a non-representative batch of plea roll entries and singling out those that contained the most “legal” content for inclusion in their collections, the creators of plea roll collections had reconstituted the plea roll entry as an entirely different genre. By taking the cases they found most interesting and placing them in a new context, a collection of similarly interesting cases, they could change a case from an administrative record to a *consilium*, a jurist’s opinion, which was important not because of the parties to the case, but because of the law contained in it.

### **Henry de Bratton as Jurist**

The people who created these collections set a new standard for the normative entry. One particular royal justice, no less than Henry de Bratton, in responding to what he had learned in this environment where clerks and justices were collecting cases to teach other clerks and justices, actually crafted his rolls so that they would be collected and read for the law contained in them. In Bratton’s writing we can see a justice who is thinking about plea rolls not as administrative documents, but as legal literature and as potential authorities. Bratton thus did his

best to shape himself as a jurist in the Roman mould, employing Roman law language—much of which he probably got from *Bracton*—to transform what looks like a document that simply gives the reader the who, what, where, and when of a case into a legal authority like the opinions of the Roman jurists.

We will thus turn to Bratton's rolls as an instructive example of this culture of the plea roll as literature. We saw in chapter two that Bratton was a respected and well-rewarded royal justice. But even if Henry de Bratton had managed to ascend the heights of the legal establishment, he might have felt deprived relative to the people who were closest to him. Simon of Patishall was a great chief justice and the first really "professional" justice in the sense that he spent most of his time working in the judiciary. Martin of Patishall, his clerk, was the justice who brought back the eyres after the civil war and was second only to the justiciar, Stephen of Segrave, in precedence. William of Raleigh, Martin's clerk, had been so senior in the judicial establishment that there is evidence that junior justices looked up to him even when he was a clerk.<sup>554</sup> He was chief justice of both the bench and of the court *coram rege*, wrote several of the most important statutes of the age, and became bishop of one of England's most important sees—albeit after a long fight with the king—at his retirement from royal service. Henry de Bratton may or may not have been Raleigh's personal clerk, but even if he was not, he was certainly very close to Raleigh and probably served him in some capacity. Bratton thus figured within a line of renowned justices—the same people who had worked to make the English royal justice a person who could be compared to the Roman jurist—and he must have felt the pressure to succeed.

Among Bratton's own generation of justices it was Raleigh's other clerk, Roger of Thurkilby, who became chief justice. Towards the end of the thirteenth century, short legal

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<sup>554</sup> C.A.F. Meekings, "Martin Patishall and William Raleigh," *Bulletin of the Institute of Historical Research* 26, no. 74 (November 1953), 170-1.

treatises proliferated for the new profession of pleaders in the royal courts. These treatises often attributed the rules in them to justices, just as *Bracton* did. The author of *Hengham Magna* cites two justices: Bratton's fellow clerk, Roger of Thurkilby, and Henry of Bath.<sup>555</sup> Thorne believed that the author, who follows *Bracton* in his treatise in several respects, might have actually meant "Henricus de Brattone" when he wrote "Henricus de Batone."<sup>556</sup> If this is the case, it is the one and only citation to Henry of Bratton in the treatises that were written in the two generations after his death. In manuscripts of *Brevia Placitata* and *Casus Placitorum*, texts which vary widely from manuscript to manuscript, Roger of Thurkilby and Henry of Bath are popular, as is William of York, but not Henry of Bratton.<sup>557</sup> This might explain why we see Bratton trying so hard to be accepted as a jurist. While Bratton climbed high in the judicial administration, he never quite made it to the top. He was appointed as a justice *coram rege* in 1247, but was never chief justice like Patishall, Raleigh, and Thurkilby.<sup>558</sup> Bratton was a second-tier figure in the judicial establishment of his day. In the eyes of his contemporaries, he was not the heir to the legacy of a line of great chief justices. If anyone was the heir to that legacy, it was Roger of Thurkilby, who became chief justice.

But Bratton is an interesting figure for several reasons. The fact that he is a relatively minor figure in the judicial administration, who received little notice from his contemporaries apart from the posthumous attribution of *Bracton*, but about whom we know quite a lot because scholars interested in the treatise have scoured the records for references to him, makes him an interesting case study. We also know that Bratton did at least some work on the treatise, and, as we shall see, this work and his probable apprenticeship under William of Raleigh seem to have

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<sup>555</sup> BDL, 1:366.

<sup>556</sup> BDL, 1:366. I say "The Hengham author" because it is now thought that the royal justice Ralph de Hengham did not write this treatise. Misattribution seems to have been rampant in the thirteenth century. ODNB, s.v. "Ralph Hengham."

<sup>557</sup> BDL, 1:367, n.1.

<sup>558</sup> ODNB, s.v. "Henry de Bracton."

deeply affected his thinking as a jurist. He is also interesting in that he seems—like a person who has risen high, but not as high as some of the people whom he counts as his peers—to have tried very hard to use that learning to prove himself in his writing on the rolls. He wanted to prove that he was worthy to be counted among the great jurists, like his predecessors Raleigh and Patishall, whose cases were excerpted into other collections.

We are fortunate to have two rolls of special assizes heard by Henry de Bratton in the 1240s and 1250s in the southwestern counties.<sup>559</sup> Special assizes were a semi-regular part of the judicial administration in the thirteenth century. Justices usually heard cases in one of three contexts: in the bench at Westminster, before the king, and on eyre. The bench was the only one of the three courts that was completely stationary. It met in Westminster Hall and heard cases from every county. The court *coram rege* (before the king), went wherever the king went, although during Henry III's reign this court, too, became more stationary. The eyres were judicial visitations of the counties. The twelfth-century exchequer official Richard FitzNeal billed this as a convenience for the king's subjects, who did not have to travel far from home to appeal to the king's justices and, although the eyre was feared by many because of its tendency to extract all of the gold from the counties it visited by way of amercements and fines, it certainly did make it easier to bring a complaint before the king.<sup>560</sup>

But even the eyre came to the counties only once every seven years, if that often. In between, people who thought they had been wronged and who did not want to bear the expense of several trips to Westminster, possibly with local jurors to put up there, could pay the king an extra fee and have a justice of the central courts sent to his county to hear the case locally. The justice would be given a commission to hear the petty assizes and would usually be given the power to appoint his associates on the bench from among the upper crust of the county. Henry de

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<sup>559</sup> National Archives MSS JUST 1/1178 and 1/1182.

<sup>560</sup> Richard FitzNeal, *Dialogus de Scaccario and Constitutio Domus Regis*, Emilie Amt and S.D. Church, eds. (Oxford: Oxford University Press, 2008), 77.

Bratton received several such commissions during his career, and it is while sitting on special assizes that these two rolls were produced. They are excellent sources for understanding Henry de Bratton for the simple reason that he was the only “professional” justice on the commission. The other two or three justices sitting in any particular case were locals whom Henry de Bratton hand-picked to sit with him. Bratton is thus the chief justice for purposes of these assizes, a role he never plays in any other records. When we hear a justice’s voice on the rolls, we can be reasonably certain that it is Henry de Bratton’s. And we can be absolutely certain that these rolls belonged to Bratton, because he is the only justice who sat on every term contained in them. Even if his associates kept rolls, these were his master rolls. Thus, when Bratton does speak on the rolls, we are not necessarily hearing his voice as it was heard by the litigants standing before him in court, but we are certainly hearing Bratton’s voice as he and his clerks wanted to represent it after the fact, when they had had time to consider the case and its implications.

Of course, there are several reasons why Henry de Bratton might have wanted to shape his plea rolls, and not just for the audience of clerks and justices who might read them as didactic texts. Certifications, like the ones we saw in the *Note Book*, suggest one reason: he may have wanted to cover himself in the event that he was called before the justices of the central courts to explain why he had judged the way he had. These two purposes are not mutually exclusive and in fact reinforce the notion that justices were thinking in legalistic ways. Since Bratton might have to justify his decisions on *legal* grounds in the text, he chose to put his explanations quite literally on the record. That means he could expect the justices to respond to his rolls from within the discourse of law. Given that Bratton had read and worked on texts that used the plea rolls as teaching tools, it seems likely that he had an eye to using his plea rolls to teach new clerks the principles of the law applied by the king’s courts.

These texts thus give us unique access to Henry de Bratton’s thinking about the activities

of the royal courts. We can see in them a justice striving to use the plea roll as a literary space, where he can demonstrate his superiority by showing his mastery of the Romanized and scholasticized discourses about law that we see in contemporary texts like *Bracton*. In the following sections, we will look at several typical, selected entries as examples of the ways Bratton used what he had learned about writing the plea roll entry as legal literature during his time as part of the small circle of justices who were creating texts like the *Note Book* and *Bracton*.

### **Justifying the Decision: Damages and the Manor of Loscumb**

In April, 1251, Henry de Bratton was sitting at Milverton in Somerset with two locals, Henry de Stawell and Roger FitzSimon, as his associates. The three justices heard the case of William de Polhamford, who brought an assize of novel disseisin claiming that William de Ripariis, Thomas de Ho, who was William's bailiff, and six other men had disseised him of some wasteland and meadow in Loscumb and then let it out to William's men to "till it and cut wood."<sup>561</sup>

In this entry we can see that Bratton adopted as his model the same textual aesthetics we saw in the *Note Book*. His plea roll entries are longer and more complete than most. This particular plea roll entry runs to 45 lines and takes up an entire side of a membrane.<sup>562</sup> Bratton, or his clerk, used this space to give us a great deal of information about the parties and what they claimed in court. This is something that Bratton and his clerk could, to an extent, have crafted themselves. Many plea rolls leave out the details of the parties' arguments, preferring instead to follow the wording of the writ closely: A claims that B disseised him unjustly and without judgment of his free tenement, B claims that the assize ought not to be made because A never

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<sup>561</sup> "Ad excolend[um] et ad faciend[um] baticium." JUST 1/1178, m. 3; Charles E.H. Chadwyck Healey, ed., *Somersetshire Pleas* (London: Harrison and Sons, 1897), 392.

<sup>562</sup> National Archives MS JUST 1/1178, m. 3.

had seisin, the jurors award seisin to A, and B is in mercy. Bratton's rolls expand upon this and contain details of the parties' allegations. William de Polhamford claimed that he had been seised of the land by his father as a free tenement. William de Ripariis claimed that the land was his and he merely allowed William de Polhamford and his father to cut furze from the land under pledges, as part of a temporary deal. The two fought over whether the land belonged to the fee of Wynesford or the fee of Loscumb. The authors describe their dispute in great detail, including specific amounts of money that changed hands in the course of the dispute between the Polhamfords and the de Ripariis.<sup>563</sup>

The narrative of the debate is necessary to set us up for the most important part of the entry: the jurors' verdict. The entry repeats the phrase, "the jurors were asked," several times. As we have seen, jurors could be asked to answer a very general question: Does A or B have the greater right? Did X disseise Y? Is Z the next heir? The entry in these cases will end with a yes or no answer, a general verdict. The jury's reasoning is not recorded in these cases; we only know that they decided one way or the other. Sometimes, however, the justices asked the jurors very specific questions. The justices could use the jurors' answers to these questions to make their own determination on the general question. This is what modern lawyers would call a special verdict. It is between the lines of these specific questions that one can see the law developing. When the jury was left alone to give a general verdict, much of the reasoning about right and wrong, about who should be in seisin and who should not, and about who should be found guilty and who should be acquitted, was left to that jury. Local norms found their way into the decisions of the courts through the jurors' own thoughts about what constituted disseisin. The *Glanvill* treatise leaves much of the thinking in the area of felonies, for instance, up to local norms, as its author tells the reader that he need not discuss topics like arson and robbery because

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<sup>563</sup> Ibid.

crimes of this sort “raise no special problems.”<sup>564</sup>

Bratton does not leave much to the jury, however. By asking questions that lead the jury through what he thinks is relevant to the decision, Bratton is setting the bounds of what is relevant and irrelevant in a very particular way. These special verdicts are thus evidence of a growing consciousness that the things the royal courts were being asked to do were complex and required professional skill. We will see in the next section that the courts’ activities are also considered *legal*, as Roman law terms find their way into the speech of the litigants and the jurors, at least as they are presented on the plea rolls. Justices were trying to control the jury’s verdict and were, in a nascent way, dividing the workload of the court in the way common law systems divide it today: the jury finds facts and the judge finds law. To confine the jury to those facts that were legally relevant, Bratton had to make decisions about what was legally relevant. By using Roman law terms in his plea rolls, Bratton indicates that he thinks about the work of the court as specifically legal. He thus takes a method of jury control that we see in numerous plea rolls going back to the early thirteenth century—the specific question—and places it in a legal context. The judge’s questions mark him off as the person who controls the legal norms that will decide the case, while the jury’s answers limit them to being finders of fact.

There is another level on which Henry de Bratton is shaping the relationship between fact and law in this case. He had to make the decision to ask the jury specific questions and to reserve to himself the question of what the significance of their answers was. But he also had to make the decision to present this case as a special verdict on the rolls. He might have recorded this case in the format of a general verdict. Legal historians have long suspected that many plea roll entries leave out key parts of the trial, and in the most formulaic of entries, this is a certainty.<sup>565</sup> There must have been more conversation than the case entry records. In this case, Bratton chose

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<sup>564</sup> “*Crimen quoquo roberie sine specialibus intercurrentibus preteritur.*” GDL, 175, Book XIV, c. 5.

<sup>565</sup> Milsom, *Legal Framework*, 5.

both to control the contours of the transactions between justice and jury in court and to *represent* himself as controlling the contours of the transaction on the rolls.

When we look at the questions asked by Henry de Bratton, they line up very closely with the arguments made by the parties earlier in the roll. It could be that Bratton was merely asking the jury to confirm or deny the litigants' stories. When William de Polhamford said that "the tenement belongs to Loscumb' and not to Wynesford, which are different fees and different baronies," and the jury is later "asked whether Wynesford and Losham (sic) be of one and the same barony and of one fee," and then "asked to what fee the tenement for which the view was made belonged," Bratton may simply be confirming William's story.<sup>566</sup> But the fact that the elements of the story told by William line up so perfectly with the story told by the jury and with the questions posed by Bratton to the jury implies something different. William may have said much more than is recorded on this roll. Although it is possible that William would have had a professional pleader, a serjeant, to help him make his plea, pleaders were still a rarity in 1251.<sup>567</sup> Complainants tend to tell the judge much that is very important to them, but which is often entirely irrelevant to the judge. When we read the questions Bratton asks, we know we are reading something crafted by Bratton, either through what he actually asked in court, or through what he saw fit to record in the plea roll entry. When we read William of Pollhamford's complaint to the court on this roll, we may be reading either a faithful reproduction of what William said or Bratton's edited version of what William said. The complaint's parallel construction to the questions asked by Bratton suggests the latter. Bratton is selectively editing the words of William de Polhamford to present only those parts of his story that he deemed

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<sup>566</sup> "*Et quod tenementum illud pertinet ad Loscumb et non ad Wynesford qui sunt diversa feoda et diverse Baroniae.*" National Archives MS JUST 1/1178, m.3; Healey, *Somersetshire Pleas*, 392; "*Et requisiti si Wynesford et Losham sint de una et eadem baronia et uno feodo...et ad quod feodum pertineat tenementum illud unde visus factus est vel Wynesford vel Losham...*" National Archives MS JUST 1/1178, m. 3, Healey, *Somersetshire Pleas*, 393.

<sup>567</sup> Paul Brand, *Origins of the English Legal Profession* (Oxford: Blackwell, 1992), 54-67.

relevant to the case.

The jury's speech also contains words that were probably not spoken by them. For instance, when Henry de Bratton asked the jurors which of the litigants had carried off furze from the land justly and which had carried it off unjustly, they responded:

[I]t seems to them that the said William de Polhamford did this justly because the tenement is his, and that the said William de Rypariis did it unjustly because he has no right in the tenement nor any seisin otherwise than by force and his power...and that William de Ripariis could acquire nothing for himself *by such use in the tenement of another* (emphasis mine).<sup>568</sup>

These lines, which appear in *Bracton*, have their origins in Roman law. The use in the tenement of another (*usum in tenemento alieno*) echoes the words of a *ius in re aliena*, a right in another's thing, and of the usufruct, the right to the use of a piece of property, both of which are Roman law concepts. If the jurors actually said these things, they were a pretty high-brow lot. Henry de Bratton, however, would have been familiar with this terminology from *Bracton*, if not straight from Roman and canon law texts. It is thus far more likely that these words were put into the jury's mouths by Henry de Bratton or his clerk. Perhaps Henry de Bratton did think more of the jury than the author of the case in the *Note Book*: he credits them with knowledge of the Roman law doctrines he seems personally and professionally to have admired. On the other hand, he does not give the jury any autonomous authority. He leads them to the correct solution, reserving to himself the question of relevance. He uses them in this passage as a mouthpiece for his own

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<sup>568</sup> "Dicunt quot videlicet ois? Quod predictus Willelmus de Polhamford hoc facere? iuste quia ten illud suum est et quod predictus Willelmus de Ripariis hoc fecit iniuste quia nihil iuris haberet in tenemento illo nec aliquam seisinam nisi per vim predictam suam et quia nihil usus haberet (ht) in tenemento illi nec ...et quod Willelmus de Ripariis nihil sibi (s with an I over it) acquirere possunt (p with a t over it) per talem usum in tenemento alieno." National Archives MS JUST 1/1178; Healey, *Somersetshire Pleas*, 393.

doctrines. Henry de Bratton pays no more heed to local knowledge than the author of the case in the *Note Book*. He reduces local notables to abstract players in his story.

At the end of most plea roll entries, the clerk tells us what damages were assessed against the losing party, if any. Usually the entry ends with something like “*dampnum 20 s,*” as we see in other places on this roll, for damages of 20 shillings. In this entry, however, the damages are not the end of it. This case ends with the impersonal “it was considered” (*consideratum est*). The clerk explains why whoever it is behind the “*consideratum est,*” presumably Henry de Bratton, set the damages at that amount: “because for so much have they let that tenement, and they have received so much.”<sup>569</sup> The disseisors in this case, after disseising William de Polhamford of his land, had rented it out to someone else for 20 shillings. Why should the amount of rent collected by the disseisors matter? In *Bracton*’ tractate on novel disseisin, the author discusses the damages that accrue to the disseised party. In order to assess the damages, he tells us, the jurors “ought to inquire what has been taken in issues, crops, and rents and other profits of the land and to estimate carefully what profit the disseisee would have had if he had not been ejected from the tenement.”<sup>570</sup> This is a restitutive theory of damages, which sets the limit of damages at the disseised party’s loss due to the disseisin—the value of the goods taken away from the land, and the profits he lost on account of not being able to use the land. But the authors of this tractate had other concerns:

The judge ought to see that all damages are restored to the disseisee, [that is]... He ought to be sufficiently diligent in this matter, that damages be restored with the thing itself, lest by his negligence future disseisors be given the desire and the means for offending by disseisin, and *lest from another's damage they obtain gain or advantage*. We must see

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<sup>569</sup> “*Dampnum XX s. quia pro tanto locaverunt tenemento illud et tantum receperunt.*” National Archives MS JUST 1/1178, m.3; Healey, *Somersetshire Pleas*, 393.

<sup>570</sup> BDL, 3:76.

what ought to be restored to the disseisee. It is clear that it is the thing itself, *with all the profits taken in the interim*, that is, from the time of the disseisin to judgment...<sup>571</sup>

The author of this passage gives us a different theory of damages: unjust enrichment. The disseisors must return any profits they unjustly took from the land. The damages deter future disseisors, since they know that there is no possible way they can profit from a disseisin. Since the king's court seeks to discourage disseisin, the court will ensure that the disseisor can never profit from it. The author's theory is not restitution, but deterrence.

The author of the *Glanvill* treatise had awarded the profits taken by the disseisor to the rightful tenant of the land.<sup>572</sup> Some cases of the early thirteenth century follow *Glanvill*'s lead.<sup>573</sup> The author of the treatise, though, places the origins of these doctrines in the law of the schools; he quotes both Justinian's *Digest* and Gratian's *Decretum* in this part of the text, not *Glanvill* or earlier English justices.<sup>574</sup> The members of this school thus placed this practice of the courts firmly within the realm of the *ius commune*.

Whether or not the author of this plea roll took his law from *Bracton* is uncertain, since the *Bracton* authors' Romanized theories of remedies lined up with those in use in the royal courts. The roll does not use specifically Roman language to refer to the damages. But the tractate on novel disseisin shows Henry de Bratton's hand. It was almost certainly written by the original author and reworked by Bratton, as it contains many *addiciones* and at least one case that came from Bratton himself.<sup>575</sup> Bratton was, at the very least, familiar with it. We would not

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<sup>571</sup> “*Debet iudex diligenter providere quod omnia damna restituantur disseisito... Et ita diligens esse debet in hac parte quod damna restituantur cum ipsa re, ne disseisitoribus in posterum ex negligentia eorum detur voluntas vel materia delinquendi per disseisinam, et ne ex alieno damno lucrum reportent vel commodum. Videndum est igitur quid debeat restitui disseisito. Et sciendum quod ipsa res cum fructibus omnibus medio tempore perceptis, scilicet a tempore disseisinæ usque ad iudicium perceptis et percipiendis.*” BDL, 3:75.

<sup>572</sup> GDL, 169, Book XIII, c. 38.

<sup>573</sup> See Donald Sutherland, *The Assize of Novel Disseisin* (Oxford: Clarendon Press, 1973), 53.

<sup>574</sup> C.23, qu.4, ca.33; D. 5.3.38: ‘ex aliena iactura lucrum facere;’ D. 4.3.28.

<sup>575</sup> BDL, 3: 196.

have this tantalizing evidence that Bratton and his clerk may have been thinking back to the treatise when they were crafting the roll if we did not have this phrase explaining why the damages were assessed. It is the fact that the clerk felt the need to explain the damages that is so exceptional about this entry. Normally we are only told what the damages were, not why they were assessed at that level.

The case of the manor of Loscumb is less important as a window into Henry de Bratton's court and how he ran it than as an example of how he presented his court, his decisions, and his reasoning through his rolls. It illustrates the new thinking about the plea rolls in the circle of Patishall and Raleigh. Henry de Bratton did not have a choice in the number of certifications that appeared on his roll, because when he was called to account by the justices at Westminster, he had to respond and presumably had to keep a record of the proceedings. He did have a choice in the number of questions he asked of the jury. He also had a choice as to whether those questions would appear on his rolls. Bratton preferred to keep control over the jury's verdict, to ask the questions, and to lead them to the right answers. More importantly, Bratton thought it was important to include the questions and the reason for the damages in his plea roll. Who was he writing for when he included these pieces of information in the roll? It might have been his superiors in the central courts at Westminster. He might have been preparing for the possibility that the justices would call him to Westminster for a certification, in which he would have wanted to show how complete his interrogation had been. In the next section, we will look more closely at the possibility that Bratton was writing for an audience that would treat his cases as legal literature.

### **Putting Words into the Litigant's Mouth: The Case of the Clyffords**

Henry de Bratton explained what he was doing on his rolls in a way that was unusual for

the middle of the thirteenth century. He wove a strand of teaching into the rolls themselves. We saw in the last section how Bratton emphasized the part of the entry where one would find the most “legally” interesting material: the questions to the jury. He seems to have shaped the litigants’ stories, as he recorded them, to fit with the questions he later asked of the jury. We even see him putting words in the jury’s mouth, providing them with a Roman law tag in response to one of his questions.

This is not the only time he put words into a party’s mouth. In 1251, the two Clyfford brothers, both claiming the same Devonshire estate, came before his court. John Clyfford had died and left his younger son, Godfrey, holding his estate at Efterclyfford. His first-born son, Roger, brought an assize of mort d’ancestor. We have already seen that the assize of mort d’ancestor required the jury to find: 1) that the deceased was seised of the land in question as of fee on the day he died and 2) that the claimant was the deceased’s next heir (*propinquior heres*). Roger claimed that his father, John, had died seised of the land and that he was John’s next heir, and should therefore be put in seisin of the estate. Godfrey came and claimed that his brother had no claim. Their father had given him the land during his lifetime, and had therefore not died seised of it, the first requirement of the writ. Godfrey produced a charter from John claiming that John had given him the land.<sup>576</sup> Roger admitted that John had made the charter but “he never went out from that land by body or by mind (*corpore nec animo*).”<sup>577</sup> John had indeed taken Godfrey to the land, had taken him to do his homage to the chief lord of the fee, and had put him in seisin. But John had never actually given up seisin. When the chief lord of the fee died, it was John who went and did his homage to the new lord at Efterclyfford, not Godfrey.

This was probably a fairly common case. In the twelfth century, inheritance rules had not yet been ossified into law. It would be more correct to speak of succession in this period. Upon a

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<sup>576</sup> National Archives MS JUST 1/1178, m. 11.

<sup>577</sup> *Ibid.*

vassal's death, his land usually, but not always, would go to his eldest son.<sup>578</sup> When Henry II introduced the assize of mort d'ancestor, he turned primogeniture into law. The courts would recognize only the right of the "next heir" to succeed and developed their own hierarchy of next and further heirs, starting with the eldest son. Thus if a father passed over his eldest son in favor of a younger one, the elder son could sue on an assize of mort d'ancestor, and the court would give him the land. The only way to keep land away from a spendthrift, ne'er-do-well, or just plain unloved eldest son would be to transfer the land during the tenant's lifetime with livery of seisin. A transfer to a younger son would ensure that the father died without being "seised as of fee," keeping the action outside of the wording of the assize. He could thus circumvent the inheritance rules and pass the land to his younger son. In this case, John was probably trying to set up his own inheritance scheme, which favored Godfrey over Richard.

The key to the case was that the charter was fictitious. Documentary evidence was not considered completely dispositive in thirteenth-century courts. It was merely written evidence of an oral and physical transaction that had taken place. One could therefore challenge a charter on the ground that it did not represent a real transaction. In John's charter to Godfrey he claimed that he had given up seisin and had put Godfrey in seisin. According to Roger, however, he had done nothing of the sort. Roger's precise words here, that John had not gone out of the land "by body or by mind" (*corpore nec animo*), are as important as they are improbable.<sup>579</sup> *Animo et corpore* is an important phrase in the Roman and canon law of property: the phrase appears in the *Institutes*, *Digest*, and *Codex*. In order to have the interest in land known in Roman law as

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<sup>578</sup> The plot of the 12th-century *chanson Raoul de Cambrai* revolves around a succession dispute. Although Raoul is the eldest son of the count of Cambrai, the Emperor Louis gives Cambrai to another of his other servants. In exchange, Louis eventually gives Raoul the fief of another count, Herbert, passing over Herbert's four sons to give it to him, leading to a war between Raoul and the sons of Herbert. Sarah Kay, ed., and William Kibler, trans., *Raoul de Cambrai* (Paris: Livre de Poche, 1996).

<sup>579</sup> National Archives MS JUST 1/1178, m. 11.

*possessio*, you had to take *possessio* by mind and body (*animo et corpore*).<sup>580</sup> This meant that you had to put yourself physically in possession of the land and also have the intent to take possession of the land. Once *possessio* had been obtained *animo et corpore*, it could only be lost *animo et corpore*. If someone came and ejected you from your land, you did not lose legal *possessio* because you had not withdrawn from *possessio* by mind, only by body.<sup>581</sup>

The authors of *Bracton* were obsessed with this idea. It was clearly one of their favorite Roman law doctrines, as it appears throughout the treatise, in several of the tractates.<sup>582</sup> It probably helped a generation of jurists who were trying hard to understand the mysteries of seisin and right to explain why a person ejected from land could bring an assize of novel disseisin to recover it. If seisin is equivalent to the Roman *possessio*, then the disseised person never fully loses his seisin. He loses his seisin *corpore*, but this is insufficient to completely disseise him. Once disseised, he still has a seisin worth protecting.

These words are so closely connected to *Bracton*, which was probably not available to anyone outside of Henry de Bratton's circle in 1251, that it is hard to believe that they actually came from Roger and not from Henry de Bratton himself. It is always possible that Roger de Clyfford knew that Henry de Bratton was the type of justice who would respond well to a Roman law argument and made these arguments to impress him. It is also possible that Roger had a lawyer. There certainly were serjeants for hire by the 1250s, although they were still the exception rather than the rule.<sup>583</sup> Given the nexus between Henry de Bratton, the roll, and the treatise he was editing at the time, in which this phrase occurs repeatedly, it seems more likely that Henry de Bratton had it added as a flourish of his own. Whether Roger de Clyfford actually said it or Henry de Bratton put it into his mouth later is beside the point; even if Roger did use

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<sup>580</sup> D.41.2.3.1

<sup>581</sup> Joshua Getzler, "Roman Ideas of Landownership," in *Land Law: Themes and Perspectives*, ed. Susan Bright and John Dewar. Oxford University Press, 1998: 95-6.

<sup>582</sup> BDL, 2:102, 107, 122, 130, 133, 134, 140, 225; 3: 14, 165, 247, 270; 4: 143.

<sup>583</sup> Brand, *English Legal Profession*, 54-67.

the phrase, it was Henry de Bratton and his clerks who decided what was included and excluded from the entry. They chose to include it. I know of no other roll in the thirteenth century on which this formula appears. Henry de Bratton did something unique by including it.

### **Rewriting the Facts to Make Better Law: The Manor of Dulverton**

Henry de Bratton was not above putting words into the mouths of jurors and litigants. As we will see, he was also not above completely rewriting the facts of a case when it suited him. In the following case more was at stake than the ability of some students to read the rolls as legal literature. Bratton's professional reputation was on the line. He was scolded by his superiors and he wanted to show that, if his superiors had only read the case correctly, they would have come to the same conclusion he did. As someone who, as we have seen, generally presented himself in his writing as a learned jurist, a challenge to his knowledge of the law would have been particularly threatening. We thus see Bratton striking back by rewriting a case to show that, according to Roman law, he was right.

One of the pleas Bratton heard while sitting in Somersetshire in 1254 was that of Roger of Reyni, who claimed the manor and hundred court of Dulverton by yet another writ of mort d'ancestor. Roger claimed that his brother, Richard of Turberville, had died seised of the manor of Dulverton and the hundred court that was attached to the manor. Hundred courts had started as a type of royal court in the Anglo-Saxon period, through which the people of a hundred—a division of land and people below the level of the county—could have their claims heard before the other residents of the hundred. Over the course of the twelfth and thirteenth centuries, many hundreds fell into private hands by royal grant. In these grants the hundred court was often attached to a manor, and the lord of that manor could collect the fines and fees generated by the court. Thus, many were the private property of a lord, in this case the lord of Dulverton. Roger

also claimed that he was his brother's next heir. By the language of the writ of mort d'ancestor, this meant that he should get the land.<sup>584</sup>

However, the current holder of the land, Robert of Schete, produced a charter, signed and sealed by the deceased Richard of Turberville, which said that Richard had gifted the manor to Robert during his lifetime, meaning that Richard did not, in fact, die seised of the land. Robert had solid evidence of the transfer. Prior to Richard's death, this gift by charter had been confirmed in a lawsuit—probably a collusive one—which Richard and Robert settled in the king's court by way of a fine. The fine amounted to a royally sanctioned settlement of the parties' claims to the land. He produced a written record of that fine, a chirograph, made in the king's court. Robert probably thought that he had his case won, being in seisin of the land and having good documents to prove that he should be in seisin. He was so confident in his seisin that he said he would be willing to forgo his claim based on the chirograph and fine and put the question of his seisin entirely to the jury.<sup>585</sup>

This was not the end of the discussion, however, because possession, or in this case seisin, is only nine-tenths of the law, and a chirograph does not always tell the truth. Roger claimed that his brother's transfer of the manor at Dulverton to Robert of Schete was a sham and that the records were fraudulent.<sup>586</sup> Roger maintained that, while his brother had given the charter and made the fine with Robert, as Robert claimed, he never handed the manor over to Robert, and had therefore died seised of the land. If these facts sound familiar, it is because Roger's claim that the charter was fictitious and that his father had, in fact, died seised of the land is precisely the claim made three years earlier by Roger Clyfford. Clyfford's case was probably a bit more common than that of Roger of Reyni, since the fictitious transfer in that case was made in favor of another family member. We do not know if Robert of Schete was related to

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<sup>584</sup> National Archives MS JUST 1/1182, m. 4.

<sup>585</sup> Ibid.

<sup>586</sup> Ibid.

Richard of Turberville, but he is certainly not said to be Richard's son or brother, as Roger of Reyni is. Henry de Bratton seems not to have been terribly interested in the family relationships and so does not tell us in this document why Richard of Turberville would want to disinherit brother in favor of Robert. We learn much about the law and little about the circumstances.

At some later hearing of the case, at Bridgewater, Henry de Bratton called a jury of the neighborhood, a group of people who were expected to know something about the state of the manor and who was in charge of it, to tell the truth as to whether Richard ever left it before he died. At this stage of the proceedings, it turned out that Robert's confidence in his fine, chirograph, and seisin was misplaced. When the jury returned their verdict, they said that the deceased Richard did indeed give his charter to Robert, that he even took Robert's homage for the land and made the free tenants of the manor do homage to Robert, and that, as a final touch, he took Robert to the manor and physically placed him in seisin. There was an important "but" coming, though. After recounting to Henry de Bratton that all of the formalities of a land transfer had taken place as they should, the jury did a complete turnaround and told Bratton that once Richard had brought Robert to the land, "they were together in the house of the aforesaid Richard for *one night* and on the next day they all went out, both Robert and Richard and the latter's wife, to the land of Robert at Cumbe."<sup>587</sup> Richard and his wife stayed with Robert for a while, and "when they had been out of seisin for some time," which the scribe wrote in the margin as "two months," they, meaning Richard and his wife, "returned and remained in seisin as before." Richard was indeed in seisin at his death.<sup>588</sup>

It is at this point that we begin to hear Bratton's voice on the roll. In this case, as in the

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<sup>587</sup> "*Ita quod fuerunt simul in domo predicti Ricardi pro unam noctem et in crastino recesserunt omnes tam predictus Robertus quam Ricardus et uxor sua ad terram ipsius Roberti apud Cumbe.*" National Archives MS JUST 1/1182, m. 4; Healey, *Somersetshire Pleas*, 430.

<sup>588</sup> "*Et cum predicti Ricardus et uxor sua sic essent extra seisinam pro aliquid temporis (saltem duos mensis) redierunt et remanserunt in seisinam ut prius.*" National Archives MS JUST 1/1182, m. 4; Healey, *Somersetshire Pleas*, 430.

manor of Loscumb case, Bratton asked the jurors a series of questions. Bratton asked who remained on the land while Richard and Robert were gone from it for those two months. The jurors said that *Richard's* familia and servants, not Robert's, remained in seisin and that they used Richard's ploughs to till the soil. He asked with whom the jurors associated the seisin of the manor. They said that they associated it with Richard, "and in all things they looked towards Richard."<sup>589</sup> After this series of leading questions, the jury finally said that Richard had died seised of the land. Henry of Bratton then awarded seisin of the land to Roger as Richard's next heir.

This was not the end of the case of the manor of Dulverton. At some later time, the justices of the central courts, Bratton's superiors, called the jurors to Westminster to certify their verdict. As we have seen, certification was a procedure by which the judges could bring the jury to Westminster to answer further questions if they thought the jury had not answered completely or had been unclear in their verdict. The justices at Westminster were apparently not as satisfied with the jury's answers as Henry de Bratton had been.

What exactly happened at Westminster is not clear, because Bratton's plea roll, the only source for it, has two—or really two and a half—versions of what happened, all written in different hands. In the first version, which, oddly, appears in two slightly different variant readings in different places on the roll, the judges start out by praising Henry de Bratton, which is not surprising since it is his own roll. They make it clear that in the record that Henry de Bratton showed them there is "no obscurity, nothing doubtful, nothing wanted, nor too little answered, but everything is plain and sufficiently examined, and according to the record, the

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<sup>589</sup> "*Et quisiti nomine cuius utrum nomine Roberti vel predicti Ricardi dicunt quod seisina illa [illegible] fuerint nomine Ricardi et non nomine Roberti et per omnia fuerunt intendentes ipsi Ricardo...*" Ibid.

judgment is just, and there is no place for certification.”<sup>590</sup> Paradoxically, however, they turn from saying that Bratton left nothing out and that there is no need for certification to saying that, while Bratton had handled the issue of the manor correctly, he had completely forgotten to deal with the hundred court that was attached to the manor, and that this required certification.

The second version confuses the matter even more. Here the roll says that Henry de Bratton *did* ask the jurors about the hundred court and that the jurors told Henry that Robert held it during Richard’s life, but had given all of the profits to Richard, and did not take even a ha’penny from it.<sup>591</sup> In this version it was only when the case came to certification that the jurors changed their story and told the justices at Westminster that Robert kept all the profits for himself and had given none of them to Richard. Although the two versions disagree as to how they got there, both agree that the justices at Westminster resolved the case by splitting the difference, awarding the manor to Roger and the hundred court to Robert, partially undoing Henry de Bratton’s resolution of the case.

It is never a good idea to anger someone who has an unfinished treatise in his possession. While Bratton might have been content to let posterity judge his detractors, he had an opportunity to guide posterity to the right conclusion. In *Bracton*’s tractate on gifts, the author—who in this case was probably not Henry de Bratton—includes a section titled, “How one ought to use his seisin” (*Qualiter quis uti debeat seisinam*), which he begins by telling the reader that even if someone has acquired land by gift he must then use his seisin in order to show that the gift is not “imaginary” (*imaginaria*), the implication being that an imaginary gift would be

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<sup>590</sup> “*Et quia in recorde illo nihil obscurum nihil dubium nihil minus requisitum... sed omnia plana et sufficienter examinata et secundum recordum iustum iudicium et... non fuit locus certificationis ideo remaneat iudicium.*” National Archives MS JUST 1/1182, m. 4; Healey, *Somersetshire Pleas*, 431.

<sup>591</sup> “*Jurores, quaesiti qualiter seysinam idem Robertus habuit in vita ipsi Ricardi, dixerunt quod idem Robertus tenuit aliquando hundredum illud et quaesiti quis cepit explecta et proventer eidem hundredum dicunt quod praedictus Ricardus, quia dicit quod idem Robertus aliquod inde perciperet quamdiu ipse viveret non ad valenciam unius obol.*” Ibid.

invalid.<sup>592</sup> As an example of an imaginary gift, the treatise authors mention the donor who withdraws from seisin of most of the gift, but retains a portion of it, which he does not hand over to the donee. This gift is considered imaginary *even if* “homage has been taken, a charter made and seisin transferred with the proper ceremonies.”<sup>593</sup> Thus, when the donor retains seisin or possession of some part, but not all, of the gift, the entire gift is imaginary and of no effect, no matter what formalities the donor and donee undertook. This goes back to the Roman law doctrine of *animo et corpore* discussed in the Clyffords’ case. The treatise authors quote from a section of the *Digest*, the opinion of the jurist Paul: “However much it suffices to enter into a part of his land, while by mind and by thought it may be, he who wants to possess the land must use the whole piece of land up to the boundary.”<sup>594</sup> Medieval jurists generally held that, if the donor did not leave the entire parcel of land, it showed that he did not have a real “intent to give” (*animus donandi*), a phrase that occurs in *Bracton*,<sup>595</sup> and thus did not withdraw from the land *animo*.

It is in the middle of this discussion of imaginary gifts that we find an addition to the text, almost certainly added by Henry de Bratton himself, about the case of Roger of Reyni and Robert of Schete. Bratton tells us in the treatise that the case was “badly decided to the contrary” because “it was held that by such use Robert retained the hundred, where Richard... had never withdrawn from the land to which the hundred was appurtenant,” the manor that Richard was living on at his death. Bratton adds the “proper solution:” the fact that Robert held the hundred was irrelevant, because the manor and the hundred together constituted one, single gift, and

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<sup>592</sup> “*Cum autem possessio fuerit adquisita, quamvis donatarius statim habeat liberum tenementum, tamen ad declarationem possessionis ne imaginaria sit donatio, quamvis inducatur in vacuam possessionem, oportet uti seisisina sua.*” BDL, 2:149-50.

<sup>593</sup> “*Quamvis homagium et carta intervenerit et seisisina cum solemnitate.*” BDL, 2:150.

<sup>594</sup> “*Sed sufficit quamlibet partem eius fundi introire, dum mente et cogitatione hac sit, uti totum fundum usque ad terminum velit possidere.*” D.41.2.3.1.

<sup>595</sup> “*Item non valet donatio nisi tam dantis quam accipientis concurrat mutuus consensus et voluntas, scilicet quod donator habeat animum donandi et donatarius animum recipiendi.*” BDL, 2:62 ; “*Et quod donator habeat animum donandi et donatarius animum possidendi...*” BDL, 3:173.

Richard never gave up the manor. Thus, the entire gift should have failed.<sup>596</sup>

The treatise and the plea roll here work together to present Bratton as the type of justice he would like to be. The record in the treatise gives only the briefest summary of the case. It does not tell us that Henry de Bratton was the judge or that the people who decided the case badly were his superiors. This is not unusual. The treatise contains over 500 references to cases from the rolls and very few of them are summarized at all. The few that we can be reasonably sure Henry de Bratton added himself as he was editing the treatise usually contain so little information about the case that they seem to assume the reader will have access to the roll and the ability to read the full case. Bratton's inclusion of this case reference indicates that he expected his readers to reference the cases on the rolls themselves, where he had written the rest of his defense.

### **Bratton Shaping Bratton**

We have little direct evidence for the way the plea rolls were made. Some evidence from existing rolls suggests that the entries were written down within a short time of the sitting of the court they record, possibly even while the action in court was taking place.<sup>597</sup> There is also evidence, however, that rolls were written, or even redrafted, after the events that took place in court. We have direct evidence of this from a later period: the reign of Edward I. In the 1290s, during the corruption trials of several of Edward's justices, Chief Justice Hengham's clerk was accused of doctoring a plea roll entry after the fact.<sup>598</sup> This would be difficult to do without the changes being obvious on the face of the plea roll—with cancellations and writing in the

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<sup>596</sup> BDL, 2:150-151.

<sup>597</sup> We can even see this on several membranes of Henry de Bratton's second assize roll. On one membrane, two cases from Somersetshire are followed by two cases from Cornwall in a very different hand. Bratton seems to have had two different clerks with him when the record was made. National Archives JUST 1/1182, m. 2d.

<sup>598</sup> Paul Brand, "Medieval Legal Bureaucracy: The Clerks of the King's Courts in the Reign of Edward I," in *The Making of the Common Law* (London: Hambledon Press, 1992), 179.

margins—if there was not some editing process, either from notes or from a first draft of the roll, which preceded the finished product. In 1306, the clerk Henry of Hales consulted Justices Howard and Stanton about the wording of an entry, suggesting that he was working on a final copy of the roll after the case took place.<sup>599</sup> We have circumstantial evidence, from the ways the rolls are constructed, that they were being written after the fact in Henry III's reign, as well. When we are fortunate enough to have two surviving rolls from the same term of the same court—i.e., rolls that come from two different justices who were hearing the same set of cases—the cases rarely appear in the same order.<sup>600</sup> If cases were being recorded as the cases came up, one would expect all of the rolls to have the cases in the same order. Bratton's rolls provide us with evidence that in the 1250s, even if some entries were written shortly after the events they describe, justices and clerks were editing rolls after the fact. As we have seen, several versions of the tale of Roger of Reyni and Robert of Schete appear on different membranes of the same roll. Plea roll entries required some crafting to represent the words that were spoken and the events that transpired in a case.

Bratton's early experience was likely as a clerk to William of Raleigh, from whom he may very well have learned that important justices had their cases excerpted and treated as authorities. Bratton might then have expected that his rolls would be read by future generations of clerks and justices and have wanted to present a specific picture of himself. The genre of the plea roll entry had some very strict conventions, however. There was only so much room to present oneself. The certification in the case of the manor of Dulverton illustrates the limitations of the plea roll genre. Bratton and his clerks were unable to write a plea roll entry that adequately expressed his attempt to assert his superiority over the other justices by virtue of his Roman law learning. They created several different versions of the case, some of which had to tell different versions of the

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<sup>599</sup> Ibid., 175; British Library MS Hargrave 375, ff. 162r-v.

<sup>600</sup> G.D.G. Hall, review of *Curia Regis Rolls of the Reign of Henry III: 9-10 Henry III*, ed. C.A.F. Meekings, EHR 74 (1959): 108.

facts in order to make Henry's hands look clean. But they were not able to make a complete retort to the justices on the roll. In a plea roll entry recording a certification, there was no extra space to insert Henry de Bratton's voice, no room for Bratton to refute his superiors. It was therefore the treatise that Bratton had to turn into a guide to deciphering his rolls. It is only when we take the roll and the treatise together that we get a complete picture of what Henry de Bratton was getting at. Stephen Greenblatt has argued that authors in the Renaissance engaged in self-fashioning by, on the one hand, submitting the self to some kind of authority and, on the other, posing the self in opposition to some kind of alien or hostile other.<sup>601</sup> In the cases we have seen above, Bratton submits himself to the authority of Roman law texts. In his account of the manor of Dulverton in the treatise, he poses himself in opposition to some unlearned other who is unable to interpret the law correctly, an other whom he identifies in the *introductio* to *Bracton* as the unlearned *maiores*, the senior justices of the courts who get their kicks by pushing around their more learned inferiors. Bratton's rolls suggest that he actively wanted to be understood as the learned Roman jurist who was cleverer and more learned than his superiors. We thus see Bratton constructing his rolls for an audience beyond the courtroom and beyond the clerk's table, an audience that would read his rolls for the legal principles contained in them, not just for information about the parties in the cases.

## Conclusion

Bratton used the case record—sometimes in conjunction with the treatise—as a literary space to shape his image as a justice and jurist. In doing this he was following in a tradition that had started much earlier in the century, possibly with his forebear Martin of Patishall, but certainly by the time of his more immediate mentor, William of Raleigh. These earlier justices

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<sup>601</sup> Stephen Greenblatt, *Renaissance Self-Fashioning From More to Shakespeare* (Chicago: University of Chicago Press, 1980), 9.

chose cases from the plea rolls for the “legal” information they contained and, in the process, helped to shape the plea roll entry as a genre of legal literature. Entries that contained the most information that could be imagined as legal became the normative plea roll entry, and Bratton, as a justice who wanted to present himself as a learned jurist, copied their style. As clerks turned to the plea rolls for knowledge of the law, and as justices like Bratton and his forebears sought to establish themselves as authoritative jurists in the learned laws mould, the plea rolls were elevated to the level of legal literature, to the place where doctrine was expounded. The Richards, Roberts, and Rogers of the world took second place as mere instruments of doctrine.

But what of Henry de Bratton? Was he successful in using the plea rolls to present himself as the jurist whom future generations of clerks and judges should look to as an authority? The answer is no, he did not. Bratton did become famous, though, albeit not for the reason he would have thought. As we have seen, while some of his contemporaries, like Roger of Thurkilby, are cited in the treatises of the late thirteenth-century, Bratton appears very rarely. He did, in a way, win out in the end, though. Ironically, it was for the treatise, most of which he did not write. And, if it was recognition as a learned jurist who knew his Roman law that he wanted, he got it in the one manuscript of the treatise, copied thirty years after his death, that named the treatise’s author as “Henry de Bratton, doctor of civil and canon law and afterwards chief justice of King Henry for twenty years and more.” None of this is actually true, as far as we know, except, perhaps, in Henry de Bratton’s dreams.<sup>602</sup>

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<sup>602</sup> “*Explicit liber qui vocatur Bretun, et componebatur a quodam magistro Henrico de Bractone, doctore in iure civili et canonico, et postea iusticiario capitali Henrici regis per XX annos et amplius.*” Worcester Cathedral Library MS F. 87; BDL, 1:18.

## Conclusion

### An End or a Beginning?

In this project, I have used *Bracton* to help us understand how a small, but important, circle of readers created an identity for themselves in dialogue with the plea roll entries. I would like to return, though, to the issue that originally brought me to this topic. *Bracton* was a popular text in the late thirteenth century—if we can judge by the approximately fifty manuscripts that survive from the 1270s to the early 1300s—and seems to have appealed to many different types of readers. Those readers transformed the text in various ways from the *Bracton* that existed at Henry de Bratton's death. Just as *Bracton* shows us the way one set of readers responded to the plea rolls, the epitomes and copies of *Bracton* show us how readers responded to the case-collecting culture in *Bracton*. Parts of *Bracton* were excerpted and turned into some of the plethora of short treatises that inhabit the lawyers' statute books of the late thirteenth century.<sup>603</sup> Three larger works draw from *Bracton*, as well. An unknown author, claiming to be one of the justices placed on trial for corruption by Edward I in 1290-1, wrote an epitome of *Bracton* which is called *Fleta*.<sup>604</sup> Gilbert de Thornton, the first professional pleader to become chief justice, also tried his hand at an epitome, which is generally referred to as *Thornton*.<sup>605</sup> A third text, called *Britton*, draws on *Bracton*, although this text also uses many other sources.<sup>606</sup> For all that these three texts copy *Bracton* and even retain some of its archaisms, all three cut the cases out of the treatise completely.<sup>607</sup> What then happened to the culture of case collecting at the end of the thirteenth century?

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<sup>603</sup> The short treatise called *Cadit Assisa* ("The assize falls") is a revised excerpt from *Bracton*. George Woodbine, *Four Thirteenth Century Law Tracts* (New Haven, CT: Yale University Press, 1910), 1-2.

<sup>604</sup> H.G. Richardson and G.O. Sayles, *Fleta*, Vol. II (London: Selden Society, 1953).

<sup>605</sup> See S.E. Thorne, "Gilbert de Thornton's *Summa de Legibus*," *University of Toronto Law Journal* 7 (1947): 1-26.

<sup>606</sup> F.M. Nichols, *Britton* (Oxford: Oxford University Press, 1865).

<sup>607</sup> John Barton noted several writs and doctrines copied from *Bracton* into *Fleta* that, although he did not think they were archaic because of his view that old law was better in the thirteenth century, were at least very old by the time *Fleta* was written. J.L. Barton, "The Authorship of *Bracton*: Again," *Journal of Legal History* 30 (2009): 129, 151.

The case collectors and the authors of *Bracton*—who by this time had been elided into the now legendary Henry de Bracton—had left a legacy for their successors to engage with. They had created legal literature out of administrative records and created jurist-judges out of royal administrators. Justices and judicial clerks were now clearly differentiated from other types of royal servants as a group of specialists working within a legal sphere that was separate from the political or the administrative, and people outside of legal circles were buying into this rhetoric of the independent legal profession, as we saw with the justices who were trusted equally by Henry III and by Simon de Montfort’s barons. As early as the *Glanvill* treatise, the king had been trying to convince his subjects that his justices were impartial in their dealings; by the end of the century, the justices had convinced *the king* that they were impartial in their dealings between him and his subjects.

Cutting the cases was far from the only way to engage with *Bracton*. Cambridge University Library Manuscript Dd.7.14, one of the surviving copies of the *Bracton* from the turn of the 14th century, contains some clues as to what was important to the people who consumed *Bracton*. In the first decade of the 14th century, an annotator added notations in the margins, giving us some clue as to what he was interested in. More importantly, though, this annotator—and possibly a second scribe—added an alphabetical index to both the marginal notes and to the treatise itself.<sup>608</sup> This manuscript did not just sit on a shelf. It was used by someone who needed to refer to the materials in it. An alphabetical index at the beginning shows us that it was designed to be useful and later additions to this index show us that it actually was useful. Some of the headings in the index, like *debitum* and *de nova disseisina*, have entries under them written

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<sup>608</sup> The annotator often draws small tables breaking down complex discussions into a few elements, showing a subsets emanating from a legal term. He also includes cross references, as at fo. 64r, where he places notes in the margins with a folio number and a title: “fo. lxx de vacua possessione.” Cambridge University Library MS Dd.7.14, fo. 64r.

in a different hand than the chapter heading itself.<sup>609</sup> This would make good sense if the treatise was actually being used as a reference. The person using it found more material on a particular point, in this case, two areas of the law that were prominent around the turn of the 14th century, and included those further references so he would be able to find them again. It was not a handy desk reference. The manuscript is very large, even when one cuts out the quires that must have been added to it after 1305.<sup>610</sup> It was nevertheless used by someone, and seems to have been useful to someone, in the early 14th century.

The person who used this manuscript used the cases. They appear in the margins of *Bracton* and in the collections of law reports in the manuscript. The law reports were a new genre of writing in the late thirteenth century which, in the form they established around 1300, purported to be verbatim accounts of what happened in court. They recorded the words of the lawyers for both sides and the words of the justice and differed from the plea roll in their textual aesthetics. Where the plea roll entry, particularly as developed by the circle of Patishall, Ralegh, and Bratton, had an aesthetic of authority, where the justice led the parties and the jury to the “correct” answer, the law reports had an aesthetic of debate. The lawyers made their arguments and answered the justice’s objections. Often the reports contained no resolution to the case. These texts appear to me to express the values and priorities of a class of professional pleaders, the serjeants who were just coming onto the scene at the end of the thirteenth century. This genre of legal writing eventually did establish itself and is continuous with our modern practice of case reporting. When the collections found in Cambridge MS Dd.7.14 were made, the genre’s conventions had not become fixed. We see law reports in this text that masquerade as plea roll entries. In one place, a Latin plea roll entry is placed at the end of a series of French law

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<sup>609</sup> Ibid., fo. 5r, 5v. On 5r, sandwiched in between two references in the normal hand of the index are two references in a much smaller hand.

<sup>610</sup> There is a letter dated 10 Edw. II, or 1317, at Ibid., fo. 426v.

reports.<sup>611</sup> In another place we are told, again in Latin, that “William le Brumton [a royal justice of the late thirteenth century] said in his eyre at Lincoln that...” This is followed by a case where the parties have been transformed into the abstract A and B.<sup>612</sup> A series of cases in French begins with *Nota T. de Weyland*, and tell us what the justice Thomas de Weyland did in particular situations.<sup>613</sup> In another case, placed in the margin of the *Bracton* text, the report is in French, but the clause at the end that identifies the justices is in Latin.<sup>614</sup> Cases and justices were obviously quite important to the people who made these early law reports and to the people who put together this manuscript.

This type of thinking about cases was widespread in the late thirteenth and early fourteenth centuries, as we can see from the ways copyists and their patrons used the page to construct authority. Trinity Hall Ms. 9, a manuscript that contains only an abridged (sixty-folio) version of *Bracton*, retains the case references, but moves them to the margins. How this happened is not clear, since practically all of the references are written in the same hand as the main text. Did the copyist initially copy from a manuscript that had cut the cases and then find a copy that added them back in? Perhaps, but considering the modification that had to be done to the text of *Bracton* to create this manuscript, and the fact that the cases are, for the most part, in the same hand as the main text, it seems more plausible that a conscious decision was made to move the cases from the text to the margin.

Why would someone literally marginalize the cases? The answer may be that he did not think that they were marginal, in the figurative sense, at all; in fact, placing the cases in the margins is a sign that they are actually quite central to the treatise. This book is not heavily glossed, so the case references stand out very starkly and are thus much easier to locate. And

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<sup>611</sup> Cambridge University Library MS Dd.7.14, fo. 242v.

<sup>612</sup> “*Willelmus le Brumton dixit in itinere suo apud Linc’ quod...*” Cambridge University Library MS Dd.7.14, fo. 266r.

<sup>613</sup> *Ibid.*, fo. 266v.

<sup>614</sup> *Ibid.*, fo. 62v.

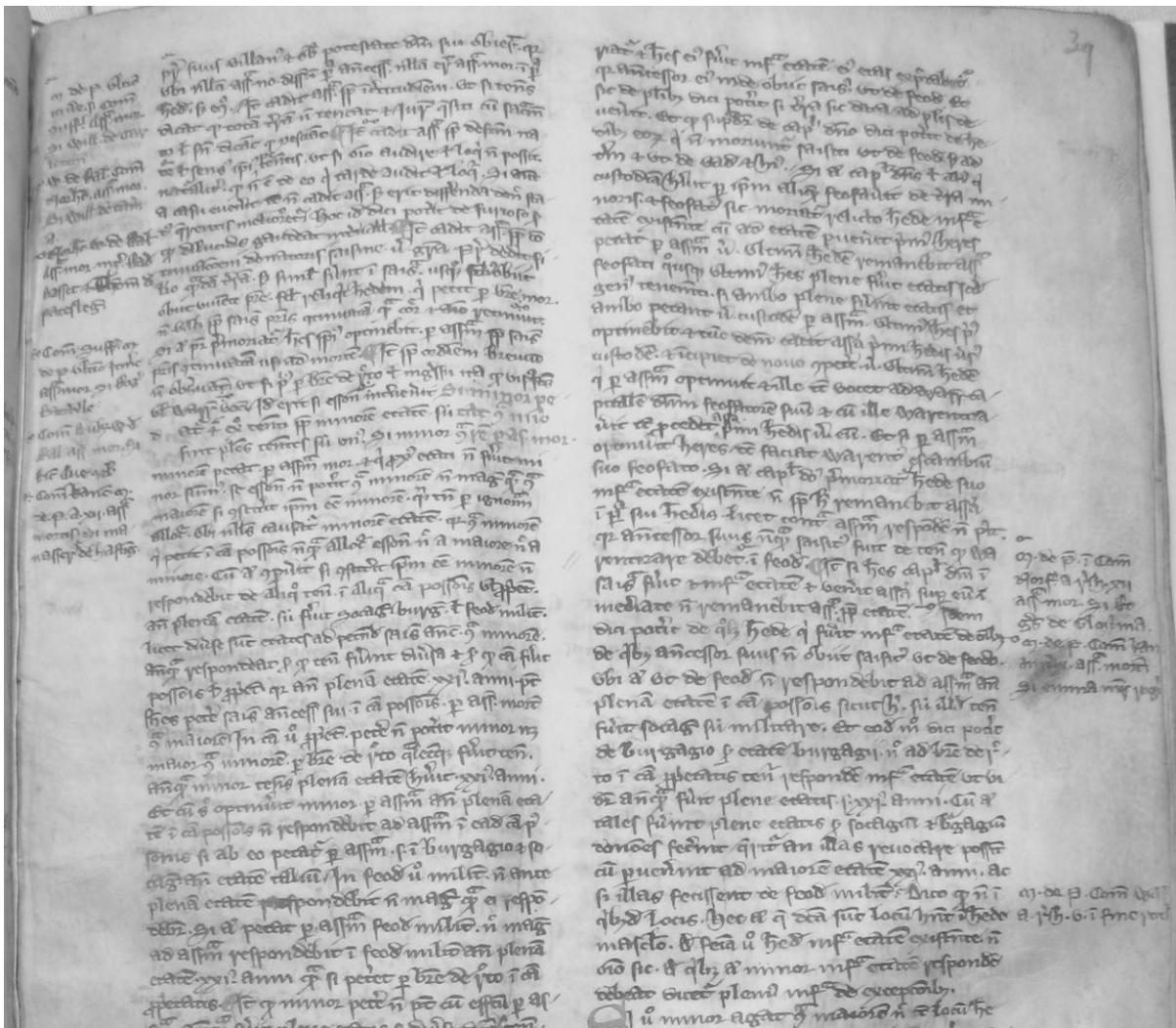


Illustration 1. Trinity Hall MS 9, f. 39. This copy of the *Bracton* treatise written around the turn of the fourteenth century has most of the case references moved to the margins. This folio, which corresponds to pages 3:299-304 in Thorne's edition of the treatise, contains no less than ten cases in the margins. Appears by permission of the Master and Fellows of Trinity Hall, Cambridge.

when the case references do appear in the text rather than the margin, they are often marked prominently. On several folios in the middle of the manuscript, the word “*casus*” in red or in black with a red border appears either in the margin or at the end of a section where a case appears.<sup>615</sup> Cases were important as authorities to this author. The case references make up the

<sup>615</sup> Trinity Hall MS 9, fos. 37v, 39v, 40r, 44v. Some of these, like that on fo. 37v, are abstract cases, where the author gives the reader a fact pattern rather than a citation to a case from the rolls. These cases, however, are different from the marginal references. They are cases in the abstract—fact patterns used as illustrations—not

majority of the marginal material. Very few of them add any additional information about the case, other than the reference to when it happened and before which justice: “*M. de P. com War a.r. H.v. in fine rotuli*,” or “Martin of Patishall in the county of Warwick in the fifth year of the reign of Henry, at the end of the roll.”<sup>616</sup> We see a similar project in an early 14th-century manuscript of *Bracton*, now held by the British Library. Every case in the treatise is underlined in red, and, although the author occasionally underlines a word here or there that is not part of a case reference, the case references make up the vast majority of the underlined material in this copy of the treatise. As in the Trinity Hall manuscript, these references are generally just that: references. The underliner generally only underlines what we might call the citation. When the author says “that this is so is proved as of Trinity term...” he will begin to underline at the “as” or the “of.”<sup>617</sup> He will sometimes, but not always, underline the description of the case that comes after the citation.<sup>618</sup> Despite the minimalist type of commentary an underline provides, the underliner actually does show us why he thought the case references were important. At one point he underlines something that is not quite a case citation in the format we see elsewhere. From the phrase “as happened to Albert in the county of Somerset,” which appears in part of the

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authorities. Some, though, have marginal references to the term and year in which that fact pattern was heard and decided by the court. See, e.g., fo. 40r.

<sup>616</sup> Trinity Hall MS 9, fo. 39r.

<sup>617</sup> British Library MS Harley 653.

<sup>618</sup> When Woodbine described this manuscript, he said that “Most of the cases, and some of the other parts, have been marked through with red ink.” BDL, 1:10. In some places the red ink is underneath the text and in others it runs straight through the text. We cannot discount the possibility that the author meant to cross out these parts of the text. This seems inconsistent, though, with the ways he uses red ink in other parts of this manuscript. In places he will put a line through a few words which are key to the sentence, and would take away its sense if removed. On one folio he places a line through all the Old English words, which the treatise author provides in order to explain them. This section would make no sense at all if the Old English words were removed. It seems, rather, that the underlining is there to highlight the Old English words. British Library MS Harley 653, fo. 78v. Another page of the manuscript shows both of these types of material underlined together. At fo. 146r, the underliner struck through the Old English word “*atheswurthe*” (“oath-worthy”) in the first column, in a sentence that says that a man who perjures himself will never again be considered oath-worthy. This clause would have no meaning at all without that word. In the second column, he strikes through a case reference together with its description. British Library MS Harley 653, fo. 146r. The same occurs on fo. 158r, where the word “*gavelkinde*” is struck through, as is the case that appears closely below it. It seems that the red underlines and strike-throughs are the medieval equivalent of the yellow highlighter pen.

treatise, he underlines the Latin words “*Alb in com Somer.*”<sup>619</sup> This does not tell us in what roll or what term we can find the case, which, if it had been a famous case before, had probably long been forgotten by the time this underliner was doing his work in the early 14th century. This reference, although it is not helpful for finding the case, assures us that it did *happen*, and that seems to be what is important to the underliner. The case citations—and I think we can safely say that the creators of these two treatises constructed them as citations, even if they were not intended to be in the first place, by disconnecting them from the main text—are what show us that things had been done this way before, and that this mattered to the person who underlined this copy of the treatise and to the person who placed the cases in the margins of the Trinity Hall copy.

The manuscripts I have described are some of those that diverge most from the “original” text recreated by Woodbine and Thorne—actually the text of the second recension of *Bracton*, created after the third phase of writing, which seems to be the only *Bracton* that ever circulated outside of the small circle in the courts—and therefore required the most thought on the part of the creator. The epitomes had the cases removed. The Trinity Hall Manuscript has material moved to the margins. The Cambridge University Library manuscript has new cases in the margins of the treatise and bound together with the treatise. These texts could not have been copied in a rote manner. Rather, the patrons of these copying projects must have made some decisions about what to cut, what to add, and what to move. It is in this intentionality that we can see how the case is still being constituted and reconstituted as an authority in the late thirteenth century. The creator of the Trinity Hall manuscript, who took the time to move the cases to the margins, might also have taken the time to include references to the legislation of the period, but he did not. He might have placed the writs in the margins, but he did not. The creator of the

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<sup>619</sup> British Library MS Harley 653, fo. 146r.

British Library manuscript—who did include references to statutes that postdated the writing on the treatise—might have underlined them as he did the cases, but he did not. He might also have underlined the writs, but we see only a few words of a single writ underlined in this work, compared to hundreds of underlined cases. The patrons, scribes, and annotators of these two manuscripts singled out the cases as the most important part of the laws and customs of England. At least some among the legal establishment were viewing the case as important, and probably as an authority.

### **Authority in the Late Thirteenth Century**

The only thing that is clear about authority in the common law at the end of the thirteenth century is that things were still unclear. Where did legal authority come from? The scholastic methods that the author of *Bracton* had employed to explain English law had the concept of *auctoritas* at their heart. But where does it come from? Plucknett suggested that the author of *Glanvill* had answered this question: it came from writs. The *Glanvill* author, though, shows no signs of thinking in the schools-influenced way that the author of *Bracton* would. The writs in *Glanvill* are certainly important: they begin litigation and they are orders from the king. In this sense they have authority. This is authority over the parties in the case, however; it is not legal authority.

Writs did not become the authorities of the Common law. But what did? The authors of *Bracton* and some of the people who copied his work would have us believe that it was the work of the royal justices, the cases they decided in court, the “ancient judgments of just men.” The author of the treatise hoped, by their example, to teach the reader how to become one of them and to “sit in the royal chamber, on the very seat of the king, on the throne of God, so to

...as though in the place of Jesus Christ.”<sup>620</sup> The authors thought that the royal justice had an authority all his own, and that he was a necessary conduit in that great channel of justice that flowed from God, through the king, through the justice, and finally to the subject. Some people in the legal establishment of the mid- to late-thirteenth century were staking out an independent ground for the royal justice, a ground where he could stand as a specialist in a field called law, which was independent of the king’s will.

But then there is the *Thornton* treatise. Gilbert de Thornton was the first of the new profession of serjeants to become chief justice, after the spectacular fall of Ralph de Hengham during Edward I’s judicial housecleaning of 1290. Thornton was a well-respected serjeant before he became a justice and was also a well-respected justice. We can be fairly certain that when we call the epitome of *Bracton* by his name, it is actually his own work and not a misnomer like *Bracton* or *Glanvill*. There is a heavily abridged copy of *Bracton* at Lincoln’s Inn library that seems to be Gilbert de Thornton’s first draft or recension of the epitome, and it can be placed in his household, since his son wrote notes to himself about managing the Thurkilby estate on open spaces in the margins.<sup>621</sup> In addition to this first recension, there is one copy of the second, much shorter, recension at Harvard Law Library, and evidence that John Selden owned another, now lost, copy of the epitome. We can put aside the old notion that Thornton’s treatise never circulated, then, particularly in light of a manuscript in Cambridge University Library which begins with the words “This is the Treatise which is called Breton which Gilbert de Thornton translated into French.”<sup>622</sup> This manuscript is actually a copy of the treatise called *Britton*—a very popular text which relies heavily on *Bracton*—not a copy of Thornton’s epitome, and Thornton’s work was in Latin, not in French. But the idea that someone thought

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<sup>620</sup> “*Et sedere in aula regia et in sede ipsius regis quasi in throno dei, tribus nationes, actores et reos, ordine dominabili iudicantes, vice regis quasi Ihesu Christi, cum sit vicarius dei.*” BDL, 2:20.

<sup>621</sup> Thorne, “Gilbert de Thornton’s *Summa de Legibus*,” 4.

<sup>622</sup> Cambridge University Library MS Additional 3584, fo. 3r.

this could plausibly be a copy of a work by Thornton—or that he could pass it off as a work by Thornton—tells us that contemporaries were aware that Thornton had taken on some project related to *Bracton*.<sup>623</sup> Thornton's epitome seems, then, to have been known, and to have been copied several times, even if it did not rival the popularity of *Bracton* itself or of its competitor *Britton*.

So we can be reasonably sure that Gilbert de Thornton wrote the epitome that bears his name and that there was some demand for it, even if it might have been rather small. What were Thornton and his readers looking for in a treatise? Well, first of all we know that it was not cases. Thornton cut every one of the cases out of the treatise. He added an offhand reference to one that he himself decided, but without the kind of identifying information one would need to find it on the roll or to cite to it.<sup>624</sup>

Perhaps the cases were terribly outdated. Of course, we have seen that the authors of *Bracton* were not so concerned with the age of their cases. The cases came from ancient, just men whose opinions formed a body of knowledge that was internally consistent. When it looked like it was not consistent, it was best to reconcile the two opinions rather than choose one over the other. When the system broke down, and when the authors could not seem to reconcile the competing cases, they sometimes preferred the earlier case to the later one. Thus, chronology was not a concern for the authors of *Bracton* and if it was for Gilbert de Thornton, we are already seeing a change in the way legal actors are relating to authority.

If the cases were merely outdated, why not include newer ones? Gilbert de Thornton, Chief Justice, surely had access to his own rolls, and this would be the perfect opportunity to pull a Henry de Bratton and promote himself a bit by including his own cases. Why not choose some of his own cases and immortalize his own decisions? This was not, after all, a period when

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<sup>623</sup> Of course, on the other hand, it means that the person who misidentified the manuscript was not familiar enough with Thornton's work to correctly identify it.

<sup>624</sup> George E. Woodbine, "The Summa of Gilbert de Thornton," 25 *Law Quarterly Review* (1909): 49.

people were shy about writing about cases decided in courts. The first of the surviving law reports date from 1268 and increased in volume as the century went on until they became established in the 14th century as one of the premier forms of legal literature. Additionally, Thornton was certainly not averse to the case references because he was averse to the Roman law style. After all, *Thornton*, being an updated *Bracton* without cases, looks even more like a Roman law *summa* than *Bracton* did. Remember that *Bracton* was written in a hybrid style, claiming both to be something akin to a *Digest* of English law and a *summa* on that *Digest*. *Thornton* is pure commentary of a type masters in the schools would recognize.

The crisis of—or, perhaps more accurately, attempt to create—authority, which Plucknett thought was settled by the beginning of the thirteenth century with the rise of the writ as the quintessential authoritative text of the English common law, was still going on at the beginning of the next century. There was no consensus on how best to learn English law, or what sources one should turn to to do so. For some, such as the person who heavily glossed MS Harley 3416, first principles were important. This annotator was interested in learning the abstract intricacies of *possessio*. For others, cases, like the *causae* of Gratian's *Decretum*, were important.<sup>625</sup> One group of people had tried to cast the Roman-inspired jurist-judge as the champion of the Common law, as its quintessential authority, and the plea roll entry as the text through which that jurist-judge spoke, the equivalent of an opinion from the *Digest*. But this view of authority was certainly not the only one held by members of the legal establishment in the decades after *Bracton* was written. Some members of the establishment turned to the abstract Roman-inspired text, the *summa*, and abandoned the *Bracton*' authors' attempt to create a hybrid *summa –Digest* of English law, which would contain both the authorities and the commentary on those authorities. Gilbert de Thornton and the author of *Fleta* represent this school of thought. Authors

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<sup>625</sup> See British Library MS Harley 3416, for the hands pointing to the word *Casus*.

like the person who wrote *Britton*, which is written in the king's voice, thought royal authority was the focus of the law. In one sense, the attempt to turn plea roll entries into a type of case law and into a type of legal literature that is written for an audience beyond the administrators who need the information in them for purposes of finance, enforcement, and *res judicata* never really got off the ground. Plea roll collecting seems to have been a phenomenon from roughly the 1220s to the 1280s, when we no longer see evidence for collections of plea roll entries being made.

The small group of justices and clerks who made collections of their plea roll entries, who wrote *Bracton*, and who crafted their plea rolls in new ways was finally unable to reproduce itself. When Edward I arrested most of his justices for corruption in 1290, he replaced them mostly with serjeants who had served as pleaders in the king's courts. This was a new path to the bench in 1290 and the justices who came to the bench in this way would have had different backgrounds and values than the people who came to the bench through a clerkship. The serjeants were laymen, not clerics. A few had some training in Roman or canon law, but this type of training was certainly not as prevalent as it was among the group who wrote the texts we have been looking at. They were trained as advocates and debaters, not as administrators and judges. It is perhaps symbolic of the shift from the plea roll to the law report as the form of legal literature that Edward replaced Chief Justice Ralph de Hengham, a cleric who had come to the bench through a clerkship, with Gilbert de Thornton, one of the most prominent of the serjeants. The people who collected plea roll entries were eclipsed and so was their literature.

In another sense, though, England's first flirtation with case law seems to have started something. It was not a complete historical dead-end. The law reports, which are accounts of cases, took off in the 14th century and are indeed the lineal antecedents of the modern judicial opinion, which developed out of collections of law reports called year books. In some of the

earliest law reports, as we have seen, the authors mix reports of cases together with cases taken directly from the plea rolls. Indeed, as we have seen, some even try to disguise their reports as plea roll entries, adopting the conventions of the plea rolls to create a new genre. There must have been a reason to do this. One could have drawn on other literary conventions to create law reports, such as accounts of scholastic *disputations* which, indeed, later law reports tend to look like. But some of our law report authors found the plea roll style more amenable. Perhaps the authors were judicial clerks who were used to writing this way. But perhaps the plea roll entry had gained a reputation as a genre with authority. The authors of the law reports may very well have read their *Bracton*, already known as *Bracton* when Justice Metingham admonished a lawyer to read his *Bracton* in 1294, which would have impressed upon them the importance of cases drawn from the plea rolls, particularly if they had read one of the manuscripts that had the cases underlined or sidelined.<sup>626</sup>

There is another, more important sense in which the plea rolls and plea roll collectors created a continuous tradition. Even if people in the late thirteenth century did not think scholastically, they did think legally. The serjeants and attorneys of the late thirteenth century, the people who would take over the judiciary and who would drive the production of legal literature, did not use the scholastic dialectic to create new knowledge. They did not engage with Roman and canon law thinking on nearly the same scale as their predecessors had. They developed a self-consciously independent tradition. Some of the *Bracton* authors' Roman borrowings survived. For instance, the lawyers of the late thirteenth century combined the Roman language of possession and property and the Anglo-French language of seisin and right,

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<sup>626</sup> Paul Brand, "Courtroom and Schoolroom: The Education of Lawyers in England Before 1400," in *The Making of the Common Law*, ed. Paul Brand (London: Hambledon Press, 1992), 73.

and made a distinction between writs on the possession and writs on the right.<sup>627</sup> By this time, however, they were not borrowing from Roman law. Possession had become part of the lexicon of the English courts.

But this small textual community of justices and clerks who saw the plea rolls as a didactic space cannot be the whole story. After all, references to the plea rolls disappeared from legal texts by the end of the thirteenth century. The textual community seems to have been unable to reproduce itself. And yet this idea that law occupies an independent space survived the death of this group and of its preferred literary genre. By the 14th century, lawyers and justices were being referred to in the parliament rolls as “men of law,” marking them off as belonging to the legal sphere.<sup>628</sup> How did the idea of the legal sphere survive?

This dissertation arose out of work on the *Bracton* treatise and the plea rolls. The sources I have chosen to use have led me to emphasize their authors as key players in the process of legal development. Other groups played important roles in that development and, in future projects, I hope to shed some light on the relationship between those groups and the royal justices. We know that the jury played an important role in the development of English law. Justices were in a position to try to impose their own discourses on juries, but juries, at times, resisted the imposition of royal law. Thomas Green’s study of homicide cases shows juries expanding the definition of self-defense beyond what the justices would have accepted.<sup>629</sup> More research is required into the ways juries responded to the justices attempts to control the narrative of the legal case. We know that juries resisted royal homicide law, but what about other types of law, like the law of inheritance, which changed in a dramatic way with the introduction of writs like

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<sup>627</sup> David J. Seipp, “Roman Legal Categories in the Early Common law,” in *Legal Record and Historical Reality, Proceedings of the Eighth British Legal History Conference, Cardiff, 1987*, ed. Thomas G. Watkin (London: Hambledon Press, 1989), 9.

<sup>628</sup> Musson, *Medieval Law in Context*, 44.

<sup>629</sup> Thomas A. Green, “Societal Conceptions of Criminal Liability for Homicide in Mediaeval England,” *Speculum* 47 (1972): 683.

mort d'ancestor, cosinage, and aiel. Are there ways we can read the plea rolls and other texts against the grain for the narrative of the jury, which the justices and their clerks marginalized so effectively?

And, of course, the lawyers, the “men of law,” who made their money at the law, must have played a major role in popularizing the idea of a separate legal sphere. The lawyers who began to write new types of literature in the second half of the thirteenth century seem to have readily adopted the discourse of the legal sphere. They adopted it so readily that it is hard for us today to see that the sphere of the legal was something that needed to be invented. It appears so naturally in the language of the lawyers of the late thirteenth century that it seems like it had always been there. The relationship between the new profession of lawyers of the late thirteenth century and the quasi-professional justices of the early thirteenth century requires more study. Did the lawyers adopt the discourses of the justices before whom they argued? What kinds of discontinuities do we see in the late thirteenth century, particularly when lawyers, instead of judicial clerks, began to be appointed to the bench? How close are the connections between the justices' plea roll literature and the lawyers' law report literature?

The historical debates about the influence of Roman law on the common law have revolved around the borrowing of specific rules and doctrines. I have suggested that, while the justices who wrote *Bracton* and the plea roll collections did borrow specific rules and doctrines, most of which did not make their way into legal practice, they also adopted an entire way of thinking about the work done in the royal courts, which did make its way into legal practice. Law was a discourse that a group of middle managers adopted for talking about their work, in order to give the prestige of the universities and of Rome to the tasks they performed for the king. We may think it natural to call the work of the royal courts *law*, but we only think it natural because the justices and clerks who collected cases made it natural for us to think in this artificial way.

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