10

Legal Treatises as Perceptions of Law in Stephen's Reign

BRUCE R. O'BRIEN

J. H. ROUND's account of the burial of Geoffrey de Mandeville provides us with a point of departure for a discussion of law and its recorders in the reign of King Stephen. Geoffrey's body, Round tells us, was, according to one account, wrapped in lead and hung from a fruit tree in the Old Temple's burial ground, where it dangled for twenty years until the earl was allowed a Christian burial. Round underlined the irony of Geoffrey's gravesite: 'around the nameless resting-place of the great champion of anarchy, there was destined to rise, in later days, the home of English law'.[1] Here we see the perfect counterpoint – disorder and law; the one giving birth to the other; their symbiotic relationship symbolized by body and gravesite. Both ends of Round's irony are based on misperceptions. English law did not begin at the Temple, nor was Geoffrey so typical of the violent and lawless barons of the Anarchy. English law – the written tradition recording it – had begun with the first Anglo-Saxon kings to convert to Christianity in the early seventh century. Rebellious barons may have rejected royal authority as had Geoffrey de Mandeville, but when called upon to govern their territories, did so at times with remarkably royal best practices.

The irony, nevertheless, appeared clearer to Round than to us because, although a critical reader of charters of Stephen's reign, he was an uncritical user of the chronicles, and so without filter repeated their prejudices and distortions. To cite only one of countless instances, consider Round's description of Geoffrey's actions at Ramsey and Ely in 1144. His prose mostly consists of unmarked (though referenced) verbatim translations and paraphrases of passages from the *Liber Eliensis*, *Liber de Fundatione Cenobii de Waledena*, the Ramsey Chronicle, *Gesta Stephani*, and William of Newburgh's and Henry of Huntingdon's histories.[2] Round even repeats, without hint of disbelief in his prose, Gervase of Canterbury's comment that when Geoffrey rested on his way to the

1 J. H. Round, *Geoffrey de Mandeville: A Study of the Anarchy* (London, 1892), 226.
2 Ibid., 207–19.

siege of Burwell, in Round's words 'the very grass withered away beneath the touch of his unhallowed form!'[3] Nowadays, no one would read the Anglo-Saxon Chronicle's account or any other as anything other than the dark glass through which we perceive the events of Stephen's reign.

Round thought Earl Geoffrey characterized the period of violence and rebellion that marred most of King Stephen's reign, and Round was not alone in his belief. His teacher, William Stubbs, had already cast this position in concrete in his monumental *Constitutional History* in 1874.[4] Round's credulousness with chronicles may be due to Stubbs's reliance on these records in the construction of his own portrait of the age. Despite the *Select Charters*, Stubbs was a chronicle man.[5] For the better part of a century from the days of Stubbs and Round, few historians have desired or tried to shift this interpretation. Only since H. A. Cronne's work in 1970 has there been any sustained attempt to overturn or amend it, work joined by a number of scholars in the later years of the twentieth century, including, most notably, Edmund King.[6] The most recent additions to this revisionist tradition are the study by Graeme White of the aftermath of Stephen's reign, which includes a lengthy prelude covering the administration of justice under Stephen, and David Crouch's recent biography of the king.[7]

There is no need at present, consequently, for another consideration of the functioning of justice during Stephen's (and Matilda's and Count Henry's) reign. I think that work has been done and done well. I want to consider, nevertheless, a part of the legal territory rarely explored, but which I think will shed some light on the times. What I will be talking about is law, not justice. I will be looking at law when it was self-consciously conceived of as law, and at, albeit briefly, the perception of order and disorder that inevitably inform our interpretation of the normative statements that make up the law.

Historians who study law are usually less concerned with the development of legal principles, and more interested in their application. For that reason, they have studied the administration of justice much more than they have law, or

3 Ibid., 220, citing and quoting in full in the note Gervase of Canterbury's *Chronica: The Historical Works of Gervase of Canterbury*, ed. W. Stubbs, 2 vols. (RS, 1879–80), i, 128.

4 1874 was the date of the first edition; for his final relatively unchanged word, see W. Stubbs, *The Constitutional History of England*, 3 vols. (6th edn, Oxford, 1897), i, 353–4. See also H. W. C. Davis, 'The Anarchy of Stephen's Reign', *EHR*, 18 (1903), 630–41.

5 Such a dependence on chronicles is why Stubbs sets up the interpretative frame for each reign by arranging select passages from the chronicles before providing the documentary records: *Select Charters and Other Illustrations of English Constitutional History*, ed. W. Stubbs, 9th edn rev. H. W. C. Davis (Oxford, 1913), 134–44. The first edition came in 1870. In the 9th edition, William of Malmesbury dominates, with Henry of Huntingdon and the worst slice of the 1137 annal from the Peterborough Chronicle making up most of the rest.

6 H. A. Cronne, *The Reign of Stephen 1135–54: Anarchy in England* (London, 1970), 245–82; E. King, 'The Anarchy of King Stephen's Reign', *TRHS*, 5th ser., 34 (1984), 133–54.

7 G. J. White, *Restoration and Reform, 1153–1165: Recovery from Civil War in England* (Cambridge, 2000), 12–69; Crouch, *Reign of Stephen*.

rather, statements of black letter law, as a modern law student would put it. In fact, the last half century of anthropologically driven scholarship in customary law, dispute settlement and feud has left such statements, when they occur, in an evidentiary limbo – cited, but often avoided as unauthorized or unrepresentative, passed over in favour of what purport to be records of actual cases.[8] Some scholars act as if the records of disputes are themselves transparent and thus unproblematic. That they are anything but this is clear. So before the creation and survival of routine government records like pipe and plea rolls, scholars have only two types of non-anecdotal sources available: charters and law codes or treatises.[9]

This chapter will discuss law in Stephen's reign by considering contemporary statements in legal treatises of what the law was supposed to be. Such a focus inevitably changes the shape of how we understand and describe what we study. Justice, for instance, is about governing and control, not norms, in medieval contexts. And if we ask about government and governing, we are, for England during Stephen's reign, evaluating Stephen's rule. By looking at law through this lens, we implicitly accept law as king-centred – even if we plead that this is a limitation of our evidence.[10] Law, on the other hand, is a bigger thing, though often less evidenced in written records. It is the totality of rules concerning right and wrong, reinforced by strong censure or coercive force, and includes also the beliefs behind those rules. It includes what people wrote about law, believed the law to be, and what the law actually was. It is the unspoken and spoken norms that governed conduct. It is the personnel as well as the policies of law makers and judicial administrators. And it is always in flux.

So if we ask about law during Stephen's reign, we are not principally evaluating Stephen as a judicial administrator. We are asking instead about the norms governing conduct, the customs in the localities, their application, interpretation, enforcement, sometimes as performed by the king, sometimes done by someone else.[11] The sources that help answer these questions are many. One type that has not been much explored for Stephen's reign is, as mentioned, written statements of what the law was, or was supposed to be. The difference here between what was and what should be, between the ideal and reality, is immaterial, as all medieval statements of the law are normative, not descriptive. There are reasons to take another look at such sources since they may be able to offer a fresh

8 One work that does not do this and gives the codes serious attention is P. Hyams, *Rancor and Reconciliation in Medieval England* (Ithaca, NY, 2003).

9 Royal writs and charters, however, provide a sounder base for general kingdom-wide perceptions of royal justice as working, since subjects sought out its remedies: White, *Restoration*, 22–36. By treatise, I mean any legal text that is not official or authoritative in its origin – for example, a text that describes the kingdom's laws and is attributed to a king, but is not that king's nor necessarily a description of the kingdom's law.

10 Almost all works dealing with law during the Anarchy have this as their goal.

11 Consider White, *Restoration*, 36–69, who analyses the rule by the empress, her son Henry, and the magnates (including the church).

perspective for thinking about law, norms, and the administration of justice under Stephen.

There is a good case to be made that two twelfth-century legal treatises were written during Stephen's reign. These works were privately composed, selective in their coverage, and, for the most part, original – i.e., not derived from specific texts. The first, and perhaps the earlier of the two, is the *Leges Edwardi Confessoris* in versions one and two.[12] This treatise is framed as a royal code that recorded a council held in 1070, where men 'learned in the law' swore to the *laga Edwardi*, the laws that had held force before the Conquest. After hearing these customs, King William I is said to have confirmed them and authorized the collection. Version 1 consists of thirty-four chapters which are divided between three concerns of the author: the first (chapters 1–11) treats the laws and customs of the church; the second (chapters 12–19) covers the king's peace, or royal rights; and lastly, chapters 20–33 describe how the law was to be administered and both church's and king's peace ensured. Seen through this scheme, the list of topics appears less miscellaneous: (part one) peace of the church, the judicial liberty of ecclesiastical courts, sanctuary, tithes, ordeals, Peter's Pence, exemption from danegeld; (part two) the king's peace, assault, homicide, treasure trove, murder fines, pardons, culpability of wives of murderers and traitors; (part three) frankpledge, suretyship of lords who have sake and soke, culpability through hospitality, publicizing discovery of stray animals, protection of the Jews, court of the *decanus*, hundred and wapentake courts, trithings and shire courts, reeves, and small hundreds and their fines.

The legal contents of the *Leges* are derived from no known Old English legal sources, or, with few exceptions, any texts for that matter.[13] This is particularly striking given the trend of legislative composition from 1066 to the 1130s, where all but one legal treatise were either translations of older English laws or principally derived from those old laws.[14] The one exception, in fact, may be in origin not a private treatise like the rest, but a version of original legislation of William I.[15] The contents of the *Leges Edwardi* show a remarkable similarity not to Old English law codes but to the kinds of things found in charters and writs, and which one would, as a holder of privileges, be asked to know about or administer. If it was derived from any texts, it was derived from an actual collection of charters and writs, to which it stood as a commentary to explain the various rights, exemptions, and procedures.

This origin helps narrow the number of places where the treatise might have been composed. Since the *Leges* covers those points of law that would govern

12 For much of the following, see B. R. O'Brien, *God's Peace and King's Peace: The Laws of Edward the Confessor* (Philadelphia, 1999), chs. 3 and 4.

13 The exceptions are c. 2, which comes from a continental text of the Peace of God, and c. 5 on sanctuary, which derives in part from the *Capitulare legibus additum* of 803.

14 See below, 191.

15 The so-called Ten Articles of William: see P. Wormald, *The Making of English Law: King Alfred to the Twelfth Century. Volume I: Legislation and its Limits* (Oxford, 1999), 402–3.

contact between clerics and the outside world (royal or otherwise), and does not mention monks, it likely originated in an episcopal household.[16] If it was indeed a commentary based on the archival records of the see, then it would best fit with the charters and writs of Lincoln and Coventry, with Norwich, York, and Worcester also possible. Because the treatise is interested in the customs of the Danelaw, and in particular its curious small hundreds, Lincoln provides the best circumstantial fit.[17] Among the household of Lincoln (or any of the other cathedral communities), many might have had the time, skill, and inclination to produce the treatise. The archdeacons are possible authors, as well as the deans and household clerks. The most likely suspect in Lincoln, however, was the lay steward of the bishop – either Goslin or Walter de Amundeville. Their duties would be most closely aligned with the contents of the treatise.

A strong case can be made for a date of composition early in Stephen's reign. The most likely period was in the year or two after 1136, since it looks like the treatise is a response to King Stephen's general charter of that year at Oxford. Neither the physical evidence of the manuscripts, nor the contents, disagree with this date, and the later development of the text in the last years of Stephen's reign or early under Henry II argues for it.[18] And although King Stephen at the start of his reign invoked the *laga Edwardi* as his legal benchmark, the legal minds of the day appear already to have shifted to the first half of the twelfth century as their measure of good law, choosing to compose new treatises rather than translate the old. After Henry II's accession, there are no more references to a restoration of the laws of King Edward in coronation charters.

The text grew during Stephen's reign, adding five new chapters. The original text was also revised slightly. These revisions and additions may have occurred in two stages, though the sole manuscript witness to the intermediate stage might just as easily show contamination of the original by a copy of the second version, or vice versa. Nevertheless, the reviser – whether or not the same person as the author – added items that may tell us where and how the treatise was being used. Ignoring for the moment chapter 35, which is a rhetorical continuation of the original version's chapter 34, four legal chapters were added. Chapter 36 is about what to do when someone was executed for theft, but was believed by some to be innocent. Chapter 37 prohibits usury and recounts Edward the Confessor had banned it. Chapter 38 prohibits the buying or selling of animals without good witnesses; 39 is a qualification of 38, because the butchers from the cities and boroughs claimed the right to slaughter buy and sell animals every day, and the citizens and burghers claimed 'as their own customs that around the feast of St Martin they used to purchase animals without pledges in order to do their butchering in preparation for Christmas'. The king agreed the citizens could keep their custom.

16 O'Brien, *God's Peace*, 49.
17 Ibid., 53–60.
18 Ibid., 47–8, 106. The third version was finished by 1170, based on manuscript evidence, but may have been done significantly earlier.

Where might these chapters have been added? Or rather, to where had the treatise travelled? A case can be made for London. Here we should be cautious. London is a magnet for sources. Nevertheless, London may have been where the *Leges* was in the late 1130s or 1140s. Let me revisit an old theory of mine.[19] The revision and enlargement of the *Leges* may be evidenced by one manuscript witness, BL MS Cotton Cleopatra A.xvi, which ends at chapter 37 on usury. In the 1130s, Osbert of Clare, prior of Westminster, had first reported Edward the Confessor's dislike of usury in his *Vita sancti Edwardi*, written to support the unsuccessful bid at that time to have Edward canonized.[20] Earlier works on Edward do not mention usury. The full second version of the *Leges* adds titles that are distinctly urban – they only make sense in a market town or city where the slaughter of animals could be regulated. Lincoln of course fits the bill, but so do many English towns, especially London. It is the story of the Confessor, however, that provides an extra reason for seeing the *Leges* in its later version as a London text.

If the text were in London by the late 1130s, it may have played a role in the soured relationship between the Londoners and the Empress Matilda. One source from the period may hint at this. The Gloucester continuator of the *Chronicle* of John of Worcester, discussed in Edmund King's contribution to this volume, tells us about Matilda's difficulties in London. This continuation provides unique details explaining why the relationship between the Londoners and the empress soured. The crucial line relevant to the *Leges* is the following: 'The lady was asked by the Londoners that they might be allowed to live under the excellent laws of King Edward, and not the oppressive ones of her father, Henry.[21] She did not listen to good advice but harshly rejected their petition, and there was great disorder in the city'.[22]

What if the Londoners had used this basic text as a statement of the *laga Edwardi*, and had added to it a few items of local importance. And what if when they approached Matilda in 1141 to ask for confirmation of the *laga*, it was this text they presented to her, rather than a simple oral plea for the good old law? Her rejection of it may be because the Londoners trashed her father's laws as *graues*. It might also be because the *leges optime* were credited to Edward and William I, rather than to Henry I, whom the Angevins made their legal benchmark. It is impossible to know whether or not the Londoners had a text in hand. Despite the

19 Ibid., 39.

20 Osbert de Clare, *Vita Beati Edwardi Regis Anglorum,* c. 1, in M. Bloch, ed., 'La vie de s. Édouard le Confesseur par Osbert de Clare', *Analecta Bollandiana*, 41 (1923), 67.

21 Note the similar scene in the *Leges Edwardi Confessoris* (hereafter ECF), c. 34–34.1a, where the barons of England (here Englishmen who were learned in the law) objected to foreign laws (which were familiar to William's nobles) and asked for King William I to confirm the laws of King Edward. Their objection is based on the fact that Edward's laws were traditional and familiar, while Norwegian law (which William had praised) was new and unfamiliar. William, unlike Matilda, acquiesced. This chapter of the *Leges Edwardi* appears to belong to the earliest recension, and not to the later additions.

22 *John of Worcester*, iii, 296–7.

abundance of London texts of the *Leges Edwardi* used in this way in the thirteenth and fourteenth centuries, earlier citations of the laws of Edward the Confessor appear often to be general labels for the good old law, in or out of texts.[23] But if they did have the text, which is at least a possibility, then this would be the entrance of the *Leges Edwardi* into the realm of national politics, a place it was certainly to hold near the time of Magna Carta, if not earlier, a topic to which I will return at the end of the article.

While the Londoners in 1141 are conjectured users, other eyes and hands are certain. The second version of the *Leges*, as mentioned earlier, attracted a reviser sometime after the 1140s, but before 1170. This reviser improved the style of the treatise overall and enlarged it slightly. The legal contents change hardly at all. Another reader, the reviser of the fifth edition of Henry of Huntingdon's *Historia Anglorum* had the text in hand as early as 1149. He inserted a copy of the *Tripartita*, a frequently found grouping of the Ten Articles of William I, the *Leges* in its third version, and a Norman genealogy, into Henry's text as an illustration perhaps of the general tenor of William I's governance of England as well as of his legitimacy.[24] Both of these users may, in fact, postdate Stephen's reign; the manuscript witnesses to the revision of the treatise and to its incorporation in Henry's history are, while rough, the only certain dates we have. They would place the revision no later than *c*. 1175 and its insertion into Henry's text no later than *c*. 1190.[25]

What is as interesting for our purposes here is what is not in the treatise. First, there is no occurrence of *violentia* as commonly understood by either the proponents of England's place in the 'feudal revolution' – the exercise of power by castle-dwelling lords and their retinues, not restrainable by law – or in the more general or common meaning of acts that cause harm. Despite the church fussing about diminished tithes and lost exemptions from some taxes, there are no *malae consuetudines* in what is a treatise on customs. When tithes are withheld, for example, it was not bad lords who were at fault, but the Devil – which is a typical

23 W. Ullmann, 'On the Influence of Geoffrey of Monmouth in English History', in *Speculum Historiale: Geschichte im Spiegel von Geschichtsschreibung und Geschichtsdeutung Johannes Spörl dargebracht,* ed. C. Bauer, L. Böhn, and M. Miiller (Freiburg, 1965), 257–76; J. C. Holt, *Magna Carta* (2nd edn, Cambridge, 1992), 93–5, 115–20, and idem, 'The Origins of the Constitutional Tradition in England', in *Magna Carta and Medieval Government* (London, 1985), 1–22; J. Catto, 'Andrew Horn: Law and History in Fourteenth-Century England', in *The Writing of History in the Middle Ages: Essays Presented to Richard William Southern*, ed. R. H. C. Davis and J. M. Wallace-Hadrill (Oxford, 1981), 370–2, 387.

24 *Huntingdon*, clii–clv. The intention to illustrate a royal reign by inserting a law code is clearer in version 5B, where the *Instituta Cnuti* has been inserted at the end of Cnut's reign, immediately before his death.

25 The earliest copy of the third version is in Paris, BN fons lat. 4771, datable to the third quarter of the twelfth century: Liebermann placed it *c*. 1160; I would date it slightly later, *c*. 1175: see B. R. O'Brien, 'The *Instituta Cnuti* and the Translation of English Law', *ANS*, 25 (2003) 184 and note 40. The earliest copy of Henry of Huntingdon's version 5A is London Lambeth Palace MS 118, copied at the end of the twelfth century: *Huntingdon*, cxxxiv–v.

Anglo-Saxon response to bad events and was inherited by some of the Anglo-Norman historians writing under Stephen.[26] This attitude resembles that of Wulfstan's early eleventh-century sermons on the Viking invasions and destruction they wrought – these disasters were all a result of sin and thus constituted God's punishment of the Christians.[27] Wulfstan was no forgotten homilist in the mid-twelfth century: his sermons were still being copied and read.[28] While then there was no *violentia* committed by renegade lords and their followers, there were still problems in the world of the author. Men and women stole, committed assaults, and murdered one another. But the author assumes that the bishop is usually the person to take care of things legally and by himself, and that one went to the king only as a last resort for enforcement with contumacious folk.[29] There is no hint that such a final appeal would go unanswered.

Again, it is likely during Stephen's reign that a second legal treatise was composed. This one, the *Leis Willelme*, the first legal treatise or code to appear in French anywhere in Francophone Europe, combines chapters that appear for the most part to be original with translated selections from Cnut's laws.[30] It is difficult to date. Like the *Leges Edwardi*, it acknowledges Edward the Confessor and William I as its authorizing kings; it does not speak of Henry I at all.[31] This, I think, places it earlier than 1154, when Henry I became the standard legal benchmark. It is interesting to note about both of these texts, that their attributions to older kings reduces any partisan response to them – these are not the *Leges Henrici I* (for which we have no early copies – only one is twelfth-century) or the *Leges Stephani Magni*.[32]

The *Leis Willelme* is similar in many ways to the contents of the *Leges Edwardi*, covering the kinds of issues an ecclesiastical body (whether regular canons or bishop's household) might have encountered. It starts with the

26 ECf 8.3a; Henry of Huntingdon, for one, saw the operation of God's judgment in the events of his world, *Huntingdon*, lix, and, for example, the prologue to book v.

27 Wulfstan, 'Sermo Lupi ad Anglos', in *The Homilies of Wulfstan*, ed. D. Bethurum (Oxford, 1957), 255–75 (no. XX); M. Godden, 'Apocalypse and Invasion in Late Anglo-Saxon England', in *From Anglo-Saxon to Early Middle English: Studies Presented to E. G. Stanley*, ed. M. Godden, D. Gray, and T. Hoad (Oxford, 1994), 130–62.

28 *Homilies of Wulfstan*, 2 (MS Bar), 5 (MS H), and 7 (MS V). See also the works in M. Swan and E. Treharne, *Rewriting Old English in the Twelfth Century* (Cambridge, 2000).

29 For example, ECf 6, 8.2

30 Wormald, *Making*, 407–9; O'Brien, *God's Peace*, 28–9; J. Wüest, *Die 'Leis Willelme': Untersuchungen zur altesten Gesetzbuch in französischer Sprache*, *Romanica Helvetica*, 79 (Bern, 1969). Still useful is F. Liebermann, 'Über die Leis Willelme', *Archiv für das Studium der neueren Sprachen und Literatur*, 106 (1901), 113–38.

31 Leis Wl prol.

32 The author of the *Leges Henrici Primi* composed introductory sections to his *Quadripartitus* that were meant to cover both books. These sections comment directly on the contemporary legal scene as seen from the position of a writer seeking royal patronage: see Richard Sharpe's analysis and translation in 'The Prefaces of "Quadripartitus" ', in *Law and Government in Medieval England and Normandy: Essays in Honour of Sir James Holt*, ed. G. Garnett and J. Hudson (Cambridge, 1994), 148–72.

inviolability of church sanctuary. This is followed by the king's peace (including the accountability of royal officials and barons); the obligations of suretyship of those accused of robbery or larceny; obligation to raise hue and cry against thieves and to exhibit strayed livestock; procedure for paying wergeld; wounding; false judgment and compurgation; breaking into churches and homes, breach of the archbishop's protection, Peter's Pence; rape; attachment of allegedly stolen livestock; murder fine; modes of proof in select cases; crimes on the four highways; forfeiture of thieves' goods; guarding the roads; and heriots.[33] Certain elements of this list should sound familiar. They read like the litany of complaints by chroniclers and ecclesiastics about aristocratic misbehaviour under King Stephen.[34] The last item in the list, heriots, highlights one of the sources of danger during this time; heriots would have been a matter of concern to what David Crouch has called affinities – nobles and their retinues tied under pressure of war to greater lords in larger coalitions.[35] Following this original section of the *Leis*, there is a hodgepodge of five chapters,[36] a collection of rules and a couple of odd case scenarios taken, it appears, from Roman law, and then a translation of much of II Cnut.[37] Considering the whole, the relationship of lords and men figure more prominently here than in any other post-Conquest legal treatise. Is this a reflection on the increasing pressure such relationships were under in the twelfth century, especially when the large affinities identified by Crouch were taking shape?

So, circumstantially, the text makes most sense written not so early in Stephen's reign, when there was no civil war in England, but later, perhaps broadly 1139–1150, or after the cataclysms of 1141. But a circumstantial case can easily be driven by wishful thinking. There is really very little to go on to help tie this treatise down chronologically. Both of these datings – of the *Leges Edwardi* and *Leis Willelme* – are best cases, not only or certain cases. Dating either text as I have depends on my assumption that the author was rational, honest, and responding to events. Too often this is the unspoken bedrock of our interpretation of anonymous texts; only sometimes can it be independently confirmed.

Stephen's reign, then, likely saw the composition of two legal treatises, both pretending to be royal, which neither is. Both seem to show us law in some locality – the *Leis* in old Mercia and the *Leges* in the Danelaw.[38] Both focus on the administrative ground level of law and provide some comment on its reasoning

33 Leis Wl 1–28.2, though note that in the earliest manuscript, BL Additional MS 49366, c. 20, on heriots, is placed after c. 28.

34 For example, the less shrilly anecdotal, more generalizing section of the 1137 entry in *The Peterborough Chronicle, 1070–1154*, ed. C. Clark (2nd edn, Oxford, 1970), 56.

35 Crouch, *Reign of Stephen*, 153–5. Both the *Leis Willelme* and the *Instituta Cnuti* amend Cnut's law on heriots, strengthening the case that this was of more than passing interest to contemporaries; *Quadripartitus* and the *Consiliatio Cnuti* do not amend the law.

36 Leis Wl 29–36, covering the tenurial security of farmers and obligations of peasants; and feudal rights.

37 Leis Wl 33–8; Wormald, *Making*, 409.

38 Leis Wl 2 and 3; ECf 12.3–4, 18.3a, 20, 27.1–2, 30–1, 33 and 34.

and enforcement. Both are primarily original texts, having no known textual sources. For comparison, in Henry I's reign, the *Quadripartitus*-*Leges Henrici Primi* author was at work – though there is no sign that anyone read the contemporary description in the *Leges Henrici* until the thirteenth century (it may have been too big to justify the time and materials copying it).[39] There may also have been two other translators at work – the *Instituta Cnuti* was done by 1123, and the *Consiliatio* may have been done under Henry (or possibly Stephen). So for all the attention Henry I receives as a lion of justice, the legal works of his reign are almost wholly derivative of Old English legal texts.[40] A large proportion of the *Leges Henrici* is a translation.[41] But in Stephen's reign, we have the first original treatises describing English law since the Norman Conquest.

Was the production of these texts, with their focus on peace and destructive crimes, inspired or provoked by the war and violence of Stephen's reign? Were these treatises insistent restatements of the norms in the face of the behaviour of now unrestrained lords? Are they a plea for good governance that is now lost, a call back to earlier kings who administered justice, a sign that bad times encourage hard thinking about law?[42] This was how the extensively doctored fourth (or London) version of the *Leges Edwardi* was used in the early thirteenth century.[43] Or are these treatises evidence of functioning government, trust in royal law and its administration, a sign that less of a breakdown occurred than some contemporary observers claimed? It all depends on how we read the Anarchy. Do we trust the Peterborough chronicler's account of endless tortures between 1139 and 1154, or the *Gesta Stephani*'s implication that all that occurred were the misdeeds here and there of a few traitors? And for our related purpose, then, there is the linked question of how significant it is that these two legal treatises were likely composed in a period of some disorder. How are we at this

39 H. G. Richardson and G. O. Sayles, *Law and Legislation from Æthelberht to Magna Carta* (Edinburgh, 1966), 45. The *Quadripartitus*, on the other hand, was read and copied: see P. Wormald, 'Quadripartitus', in *Law and Government in Medieval England*, 111–47.

40 *Quadripartitus* and *Leges Henrici Primi* are a translation of Old English laws and a statement of current law (*c*. 1115) that drew heavily on Old English texts; the *Instituta Cnuti*, completed by 1123, is a revision and translation of Cnut's laws and other Old English laws; the *Consiliatio Cnuti* is likely to have been created around the same time, though its dating probably needs to be revisited. It consists of a translation of Cnut's laws along with a few other titles from older kings. As mentioned above, the one exception to this trend is the so-called *Willelmi articuli decem*, which looks like a compilation made from legislative writs. On all of these, see Wormald, *Making*, 402–6, 411–14; O'Brien, *God's Peace*, 27–9; O'Brien, 'The *Instituta Cnuti*', 177–8, 184–6.

41 For example, Hn 41.9, on the procedure for a lord to clear himself of complicity in the flight of one of his men after an accusation, is a close translation of Cn 31.1a – note that this is almost verbatim how the author had translated the same passage in Cnut for his *Quadripartitus: Die Gesetze der Angelsachsen*, ed. F. Liebermann, 3 vols. (Halle, 1903–16), i, 336–7; *Leges Henrici Primi*, ed. L. J. Downer (Oxford, 1970), 148–9, 350.

42 Cf. Holt, *Magna Carta*, 93–6.

43 O'Brien, *God's Peace*, 118–19; F. Liebermann, *Über die Leges Anglorum saeculo xiii ineunte Londoniis collectae* (Halle, 1894).

remove to measure twelfth-century disorder, which is larger than the issues in this paper and has captured the attentions of generations of historians, not just medieval but for all periods?[44] The core of the problem is what to label as violence, as signs of disorder. In the scholarly contributions to this issue, there has been one I think glaring absence from the calculations. Here I only wish to offer some observations on this issue, since it does colour our interpretation of the legal treatises, before turning back to interpreting the context of the legal treatises.

Consider the murky relationship between justice, authority, and violence or disorder. If medieval justice worked, and we accepted that its results were fair – meaning, you go after a thief and catch one (and not someone else) – then the fact that Henry I is praised for enforcement of a judicial peace in his kingdom would stand in stark contrast to Stephen's failures. This understanding of medieval justice is the basis for many of the harsh judgements by Stephen's contemporaries. It is also implicit in many modern analyses. If on the other hand, you may have some doubts about the fairness of a system of justice that makes Texas look enlightened, where many of the accused (by later records) fled out of fear of justice rather than have their day in court, where proofs like the ordeal, while anthropologically understandable, would not likely lead to the truth of an event and therefore a fair verdict, what do you do to measure the level and consequences of state-inflicted violence? Is the hanging of a convicted thief an act of violence even if the thief was guilty and death was the penalty? How would the execution be perceived by onlookers in the man's village?[45] What if the man had been seized during a time of famine, and the theft was of the lord's food rents? Can we assume that most people executed were innocent (consider the state of Illinois's 2003 admission that the majority of its death row inmates were likely innocent)? Round attributed the rebellions of Stephen's reign to Henry I's tough justice.[46] Ignoring the jingoistic rhetoric of how safe Henry made England for wandering widows and merchants, one could see him as a violent tyrant, abrogating rights, arbitrarily imprisoning and fining, and lashing out at invisible foes with the power of his state, rather than as a due process king interested in treating every man fairly.[47] Round would not disagree with this negative appraisal of

44 This has been an issue for some time; consider the following attempts: A. MacFarlane, *The Justice and the Mare's Ale: Law and Disorder in Seventeenth-Century England* (Oxford, 1981); L. Stone, 'Interpersonal Violence in English Society, 1300–1980', *Past and Present*, 101 (1983), 22–33; J. A. Sharpe, 'The History of Violence in England: Some Observations', *Past and Present*, 108 (1985), 206–15; J. S. Cockburn, 'Patterns of Violence in English Society: Homicide in Kent, 1560–1985', *Past and Present*, 130 (1991), 70–106; and the debate between Thomas Bisson and Dominique Barthélemy, Stephen White, Timothy Reuter, and Chris Wickham in *Past and Present* between 1994 and 1997.

45 Andrew Reynolds's archaeological work makes clear how visible a hanging would be to the local communities: *Later Anglo-Saxon England: Life and Landscape* (Stroud, 1999), 105–10 and fig. 37.

46 Round, *Geoffrey de Mandeville*, 35.

47 Cronne recognized this back in 1970: *Reign of Stephen*, 247–8.

Henry I.[48] What would this perspective do to comparisons of the violence during the two reigns? Perhaps our expectations for justice under Henry I are too high, our perception of its diminution under Stephen too extreme. But we should at least recognize that by any modern standard – ideal or real – both kings likely failed to provide anything like justice the majority of times it was called for. For those on the receiving end, royal justice was hardly distinguishable from the violence of a cavalcade.

Violence and disorder are in the eye of the beholder and the receiver. Violence is, after all, a relative experience that varies not only by time and location, but also by class and education. Thus the lack of many complaints about violence before Stephen and their increase thereafter should not make us think that life for peasants and the church was not already violent before. Rather, what was probably a violent world became even more violent. The change was visible to observers; its true scope, based on a fair comparison with what had gone on before, was not what they aimed to understand. Yet I do not think the change was so easily perceptible to those living through it in 1139 or in 1150. It was not so much of kind as of geographic spread, and in an age where travel and writing were not so easily indulged in, it would take some time before enterprising historians (for the most part) heard from enough sources and produced their evaluations of the reign. It is worrying that these mostly took place after the reign was over, during the triumphant days of Henry II.[49] Perhaps the best comparison is with the downfall of the Lancastrians and their replacement by the Tudors, whose propaganda machine effectively controlled historical views of the fifteenth century for long ages to come.[50]

So why did a number of contemporary observers describe the actions of England's nobles in a way that could not avoid reminding readers of continental nobles out on cavalcades? They described England as awash with noble violence

48 See Round, *Geoffrey de Mandeville*, 28.

49 The sixth version of Henry of Huntingdon's *Historia*, which introduced the most strident criticisms of Stephen's rule, was produced after the 1153 Treaty of Westminster or the accession of Henry II in 1154: *Huntingdon*, lxxvi, lxi (citing a *c*. 1155 copy of version 6). The hypercritical passages in the *Peterborough Chronicle* were composed in a single block sometime 'in or after 1155' according to Dorothy Whitelock and Cecily Clark: *The Anglo-Saxon Chronicle: A Revised Translation*, ed. D. Whitelock (New Brunswick, NJ, 1961), xvi, and *The Peterborough Chronicle*, xxv. William of Malmesbury was from the start a client of the empress's party: *Historia Novella*, 1 (pref. to Robert of Gloucester). Orderic, writing mostly from 1136 on, avoided political commitment, no doubt because of the vulnerable position of St Evroul on the Norman frontier with Anjou: *Orderic*, vi, xviii, xxv. John of Worcester, compiling his last version between 1140 and 1143, found it wise only at that date to insert an account of the council of London where Henry I had his barons swear fealty to his daughter (*John of Worcester*, iii, xxxii, 166–7). Note that the Gloucester version puts this in different text in 1128: ibid., 176–83.

50 M. McKisack, *Medieval History in the Tudor Age* (Oxford, 1971). The success of the Angevin story can be read in almost all of the chronicles produced after 1154: for example, the Battle Abbey Chronicle, where the official line is starkly repeated: *The Chronicle of Battle Abbey*, ed. E. Searle (Oxford, 1980), 210–13.

because that is how they framed their world. Such a social ordering is where their metaphors and *topoi* came from – the language generated by the breakdown of the Carolingian world and its replacement by something less clean.[51] They also acted out of innocent ignorance: they could not have known that the Old English state inherited by the Normans had deep roots and greater recent continuity of power and stability than other states of Europe, including Francia or any of its parts, which had long been independent by the mid-twelfth century.

Our legal writers probably would have moved in these circles, but they show no similar bias. They describe their law without obvious connection to the allegedly lawless world in which they lived. There are at least three reasons for this. First, one should remember that disorder was localized and of limited duration in England's Anarchy.[52] The composition of a legal treatise that aimed to explain local law might have perceived no significance in the rare and often distant political or criminal actions on a description of law. Second, these writers chose a frame that, while retrospective, was aimed at a different target than that of the contemporary chroniclers. While their chronicling contemporaries took the post-1154 agenda of the victor back into the balance of events under Stephen, the legal writers took the law of their own day and projected it back on the Norman Conquest. Here were Edward the Confessor's laws confirmed by William I, his heir.[53] And no one could really say otherwise. The third reason why the legal writers show no political bias is that they were governed by England's long tradition of written royal laws (and their private recording), which created the mould into which they poured their contemporary observations.[54] In a different but related way, the traditions of churchmen lamenting the nasty ways of lay lords created a narrow language of description for chroniclers of the woes of Stephen's reign.

Law does not so easily respond to our prodding. Is the production of an orderly structured view of the world that is implicit in most medieval law codes a sign of disorder? Are they inversely related? Or is the treatises' existence a reflection of business as usual? One can't say based on two texts potentially composed at the time, and neither of which is transparent about the intention or purpose of the author. But two things we can say about where they came from and where they

51 E. Magnou-Nortier, 'Les mauvaises coutumes en Auvergne, Bourgogne méridionale, Languedoc et Provence au XIe siècle: un moyen d'analyse social', *Structures féodales et féodalisme dans l'Occident méditerranéen, X–XIIIe siècles: bilan et perspectives de recherches* (Rome, 1980), 135–72; J.-P. Poly and E. Bournazel, *La mutation féodale, Xe–XIIe siècles* (2nd edn, Paris, 1991).

52 A perusal of any of the primary sources conveys this impression.

53 ECf 34.1; Leis Wl prol.

54 In contrast to the French world, where Carolingian precedents and practices must have seemed distant by the twelfth century and in any case, though still read and copied, sparked no contemporary secular imitation. See O'Brien, *God's Peace*, 19–21; consider the evidence of late eleventh- and twelfth-century manuscripts of Carolingian laws described in the catalogue of H. Mordek, *Bibliotheca capitulorum regum Francorum manuscripta*, MGH Hilfsmittel, 15 (Munich, 1995).

were going. First, the survival of the tradition of written law codes, attributed to kings regardless of whether they deigned to actually make law, is a testament to the power and resilience of the Old English state. Its habits had a momentum that carried them past 1066 and deep into the twelfth century: the recording of royal law was only one of these.[55] Second, we can say that this legal activity during Stephen's reign, embracing not only the composition of new treatises, but the copying of old, and their spread in further copies in the third quarter of the twelfth century, prepared the way for the course the Becket conflict took.[56] It is to these laws that bishops had recourse during the dispute, and whose existence in the anti-royalist arsenal likely inspired *Glanvill*'s canard that English law was unwritten.

[55] J. Campbell, 'The Late Anglo-Saxon State: A Maximum View', *Proceedings of the British Academy*, 87 (1994), 39–65; Wormald, *Making*, 398–415, 481–3.

[56] B. O'Brien, 'The Becket Conflict and the Invention of the Myth of *Lex Non Scripta*', in *Learning the Law: Teaching and the Transmission of Law in England, 1150–1900*, ed. J. A. Bush and A. Wijffels (London, 1999), 1–16.

9 This chapter will discuss law in Stephen's reign by considering contemporary statements in legal treatises of what the law was supposed to be. Such a focus inevitably changes the shape of how we understand and describe what we study. Justice, for instance, is about governing and control, not norms, in medieval contexts. And if we ask about government and governing, we are, for England during Stephen's reign, evaluating Stephen's rule. By looking at law through this lens, we implicitly accept law as king-centred -even if we plead that this is a limitation of our evidence. 10 Law, on the other Thomson/West, 2012. â€” 567 p. In this groundbreaking book, Scalia and Garner systematically explain all the most important principles of constitutional, statutory, and contractual interpretation in an engaging and informative style with hundreds of illustrations from actual cases. Is a burrito a sandwich? Is a corporation entitled to personal privacy? If you trade a gun for drugs, are you using a gun in a drug transaction? The authors grapple with these and dozens of equally curious questions while explaining the most principled, lucid, and reliable techniques for deriving meaning from authorit Treatise on Law is Thomas Aquinas' major work of legal philosophy. It forms questions 90â€“108 of the Prima SecundÃ¦ ("First [Part] of the Second [Part]") of the Summa TheologiÃ¦, Aquinas' masterwork of Scholastic philosophical theology. Along with Aristotelianism, it forms Aquinas' notion of law. Aquinas defines a law as "an ordinance of reason for the common good, made by him who has care of the community, and promulgated.".