

Christopher St. German and the Law of Custom

R.H. Helmholz†

INTRODUCTION

Christopher St. German (ca. 1460–1540) has been described as the author of “the first critical discussion of the common law of any substance to be published.”¹ That is saying a great deal. So favorable an estimate must take it as a given that Bracton and Fortescue and Littleton were not *critical* enough of the common law to count. However, the description cannot possibly have meant ‘critical’ in the ordinary sense, as in the way that, say, Jeremy Bentham was critical of the common law. Bentham pointed to the many imperfections he saw in the common law and proposed schemes for their reform.² St. German, by contrast, was no detractor of English law’s merits. The description must instead have meant ‘critical’ in the sense of standing somewhat outside the common law and examining its meanings and its worth. In *that* sense of the word, St. German may have some claim to the title “first critic.” He did purport to examine English law from outside. He did not merely extol its excellence or state its rules. And even if one concludes that he does not take the palm among impartial observers, his work deserves the attention of all students of the history of English common law—not least because he wrote on the dawn of development of the law from its medieval form to the form that emerged from its renaissance during the sixteenth and early seventeenth centuries.³

The book upon which St. German’s reputation chiefly rests is known as *Doctor and Student*, although it was by no means his only learned work. Its main part appeared in 1528, and additions to it were

† Ruth Wyatt Rosenson Distinguished Service Professor, The University of Chicago Law School.

¹ Eric W. Ives, *St. German, Christopher*, in A.W.B. Simpson, ed, *Biographical Dictionary of the Common Law* 458 (Butterworths 1984) (short biographical sketch).

² Herbert L.A. Hart, *Bentham, Jeremy*, in Simpson, ed, *Biographical Dictionary* 44 (cited in note 1) (short biographical sketch) (“Bentham became, in John Stuart Mill’s phrase, ‘the greatest questioner of all things established’ but his criticism never merely destructive, was accompanied by detailed plans for the reform of any branch of the law.”).

³ See generally J.H. Baker, *The Dark Age of English Legal History, 1500–1700*, in Dafydd Jenkins, ed, *Legal History Studies* 1972 1 (Wales 1975) (describing legal thought in this era); Samuel E. Thorne, *Tudor Social Transformation and Legal Change*, 26 NYU L Rev 10, 10–11 (1951) (describing the transition from the medieval to the modern world).

made in 1530 and 1531. The whole has been many times republished, most recently and definitively in 1974 by the Selden Society.⁴ About the author we know less than we would like. He has remained a rather shadowy personality. We know he was a member of the Middle Temple, and that he gained a reputation among his contemporaries for uncommon learning in the Roman and canon laws as well as for his expertise in English common law. Bale described him as a man of quite extraordinary probity and piety—indeed Bale thought it not right to say his name without a certain reverence.⁵ By common agreement, St. German was a man of good judgment in worldly matters. However, it was as a scholar, rather than as a man of the world, that he has become best known. Scholarship suited him.

Doctor and Student was written in the familiar if artificial form of a dialogue. On one side stood the Student of the English common law; on the other a Doctor of Theology. The ostensible occasion for their dialogue was the Doctor's desire to know more about the law of England—the common law. He had found so much of it written in French (he said) that he required the aid of an expert guide, and on that account he sought out his friend, the Student, who it turned out was quite willing to provide his aid. They proceeded to exchange information. The Doctor was not a mere interlocutor; he had learned something about English law, and he added what he knew from the *ius commune*. Sometimes he knew quite a bit of both. But the English common law held center stage throughout, and the Student was the principal informant.

What was the principal purpose of writing *Doctor and Student*? The answer to the question is not obvious. Legal historians have found it difficult to give a straightforward account of St. German's aims. Indeed they have discovered several purposes. First, St. German managed to convey a great deal of substantive law in the pages of his dialogue, and it was as a repository of learning that the work was most often used by lawyers in the centuries immediately after its publication. "Dr. & St." was a common citation in the English reports of the sixteenth and seventeenth centuries.⁶ Second, the work anticipated the theme to which St. German would turn more aggressively in his later works: the conflict between the common law and the law of the church. On matters like tithes and the powers of Parliament, St. Ger-

⁴ T.F.T. Plucknett and J.L. Barton, eds, *St. German's Doctor and Student* (Selden Society 1974) ("*Doctor and Student*") (printed with the Latin version on one page and the English version on the facing page).

⁵ See John Bale, *Index Britanniae Scriptorum* 53–54 (Oxford 1902) (R.L. Poole, ed)

⁶ See, for example, *Manby v Scott*, 1 Mod 124, 126, 86 Eng Rep 781, 783 (Ex Ch 1663); *Haughton v Wilson*, 3 Keble 203, 204, 84 Eng Rep 677 (KB 1673); *Green v Wilcoks*, Cro Eliz 462, 78 Eng Rep 700 (KB 1596).

man upheld the side of the temporal law.⁷ Thomas More became his great opponent, and a natural one, for More was a clerically-minded layman—St. German was not. Third, the treatise explored the role of conscience and equity in law, both in the court of Chancery and the common law itself.⁸ To this discussion the Doctor added his own perspective, much of it taken from the *ius commune*. Finding a neutral place for equitable principles in the common law of contracts was a continuing (and difficult) preoccupation of the author.

It is true that these three purposes do appear, and even stand out, in *Doctor and Student*. It is no desire of mine to criticize or detract from their significance in understanding the work. It is my desire, however, to add a word about a fourth subject that has not been dealt with much in studies of St. German: the place of the law of custom in his work. This issue has received little scholarly attention. Perhaps custom's virtual eclipse as an independent source of law in our own day⁹ has kept us from recognizing just how prominent it was in the legal world of the sixteenth century and in the mind of St. German himself. But whatever the source of neglect, it is a subject that deserves attention if we are to make progress in understanding the nature of *Doctor and Student* and the contribution its author made to the formulation of the common law.

I. THE LAW OF CUSTOM

To appreciate the place of the law of custom in *Doctor and Student* requires starting with the medieval *ius commune*, the amalgam of Roman and canon law that long furnished the starting point for European legal education and for practice in the courts of the English church. The *ius commune* treated custom as a legitimate source of law. "Custom of long standing is rightly regarded as law," proclaimed a text in the Digest.¹⁰ "The usages of the people of God are to be taken as law in those matters where the sacred Scripture has established no certain rule," stated the *Decretum Gratiani* (ca. 1140), the first and ba-

⁷ He is described as a "publicist for Henry VIII's legal reformation of the English church" in Joan Lockwood O'Donovan, *Theology of Law and Authority in the English Reformation* 68 (Scholars 1991) (noting that his later work adopted the "more blatantly secularist program" of transferring the power of the clergy to the King).

⁸ See, for example, the treatment in W.S. Holdsworth, *Sources and Literature of English Law* 185–87 (Clarendon 1925) (noting that St. German pointed out parts of English law that "needed the help of equity").

⁹ See, for example, *United States v Rizzinelli*, 182 F 675, 682 (D Idaho 1910) (finding an argument that custom supported the building of nonmining structures on mineral-rich land "without significance" in determining the validity of a regulation concerning such structures).

¹⁰ 1 *The Digest of Justinian* 13 (Pennsylvania 1985) (Theodor Mommsen, Paul Krueger, and Alan Watson, eds) (translation of *Digestum Justiniani* 1.3.32).

sic text of the medieval canon law.¹¹ Custom was not simply a “background norm.” For many purposes it was treated as binding law. However, it was also recognized that custom could be a source of harm to important social interests. An evil way of doing things was no less evil for having lasted a long time, and the *ius commune* treated it as a corruption of the law, not a legitimate source of law.¹²

How did one tell the difference? The subject admitted of disagreement about details among the commentators, but in general it is fair to describe the *communis opinio* as holding that before a custom could claim to be a source of law, it had first to be subjected to several tests. First, a custom had to satisfy requirements taken from the law of prescription; it had to be lengthy, open, and uninterrupted. Second, it must have been accepted by the community governed by it, and that community had to be of a sufficient size to sustain the observance. Third, a valid custom had to be consistent with both divine and natural law. And fourth, it was required to pass a test of reasonability.

Today, it may be thought that these requirements are question-begging. What is meant by reasonability? How is one to know if the community accepts a custom? How large must the community be in any specific case? These inevitably require a policy choice made by a judge. But at the time St. German wrote, these tests were accepted as workable by the great majority of jurists. They often left room for argument in particular cases, but that much can be said of some legal standards in any age, and no one supposes they can be discarded simply because they cause uncertainty in outcomes.

The heart of the law thus involved first, establishing the existence of such a general usage as would satisfy the requirements of prescription and then, determining whether it also met more general requirements of reasonability and consistency with natural law—requirements drawn from outside the positive law. One had to know what the purpose of a custom was and what its likely result would be, as well as determine whether it had been used for long enough by a large enough group. That was one of the merits of the jurists’ approach: It clarified the workings of any custom and it tested them

¹¹ *Decretum Gratiani*, Distinctio 11, canon 7.

¹² See generally Udo Wolter, *Die consuetudo im kanonischen Recht bis zum Ende des 13. Jahrhunderts*, in Gerhard Dilcher, et al. *Gewohnheitsrecht und Rechtsgewohnheiten im Mittelalter*, 87, 104–14 (Duncker & Humblot 1992); Peter Landau, *Die Theorie des Gewohnheitsrechts im katholischen und evangelischen Kirchenrecht des 19. und 20. Jahrhunderts*, 77 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung* 156, 158–68 (1991); John P. McIntyre, *Customary Law in the Corpus iuris canonici* (Mellen Research 1990); André Gouron, *Coutume contre loi chez les premiers Glossateurs*, in André Gouron and Albert Rigaudière, eds, *Renaissance du pouvoir législatif et genèse de l'état* 117 (Montpellier 1988); John Gilissen, *La Coutume* 24–33 (Brepols 1982); René Wehrlé, *De la coutume dans le droit canonique* 110–97 (Recueil Sirey 1928).

against standards of reasonability. Indeed the method was not wholly different from what happens with judicial review of statutes in American courts.

It is particularly noteworthy that in the *ius commune* a custom could validly derogate from written law as well as supplement it. A community could establish a custom *contra legem*. This custom could thus contradict enactments in the positive law, typically those contained in the legislative commands of pope or emperor, as long as the custom met the tests just outlined.¹³ This was to become a controversial area of the law, and attempts were made to bring custom within the principles of sovereignty by supposing that law-givers had tacitly authorized customs they had not expressly reprobated. Such attempts would lead ultimately to Austin's supposition that customs became binding law only when they were recognized as such by the sovereign.¹⁴ But this was a development in its infancy at the time St. German wrote.¹⁵ He took note that Parliament could change a rule of custom,¹⁶ but the doctrine that custom must have the approval, even the tacit approval, of Parliament was not part of his approach to the law.

II. CUSTOM IN *DOCTOR AND STUDENT*

It is the thesis of this Essay that the law of custom just outlined played a significant role in *Doctor and Student*, and that this role helps us to understand St. German's purpose in writing the treatise.¹⁷ Two initial points should be made. First, St. German knew something about the *ius commune*—perhaps not a great deal, but something! He cited the *Summa Angelica*, written by Angelo Carleto de Clavasio (d. 1495) and the *Summa Rosella*, written by Baptista de Salis (or Trovamala) (d. ca. 1494) with some frequency.¹⁸ These *summae* were alphabetically arranged guides to the law; they gave the general rules without the complex wrangling of the jurists and were not hard to use. He also cited a few of the great names in the field, notably Raymond

¹³ See *glossa ordinaria* ad X 1.4.11 s.v. *rationabilis* and *legitime sit praescripta*; *glossa ordinaria* ad Cod. 8.52(53).2 s.v. *aut legem* for the medieval understanding of the subject.

¹⁴ See John Austin, *The Province of Jurisprudence Determined*, Lecture I 30–32 (Noonday 1954) (“[B]efore [a custom] is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality.”).

¹⁵ See Wehrlé, *De la coutume* at 273 (cited in note 12).

¹⁶ See Plucknett and Barton, eds, *Doctor and Student* at 48–49 (cited in note 4) (“There are . . . customs of the realm of England which have the force of law, and cannot be changed without parliament.”).

¹⁷ There is an instructive parallel with St. German's use of the canon law to justify the equitable jurisdiction of the Chancellor. See Mark Beilby, *The Profits of Expertise: The Rise of the Civil Lawyers and Chancery Equity*, in Michael Hicks, ed, *Profit, Piety and the Professions in Later Medieval England* 72, 74 (Alan Sutton 1990).

¹⁸ See Index under “*Summa Angelica*” and “*Summa Rosella*” in Plucknett and Barton, eds, *Doctor and Student* at 346 (cited in note 4) (listing numerous cites to each).

of Peñafort (d. 1275), the compiler of the Gregorian Decretals; Baldus de Ubaldis (d. 1400), the famous commentator on civil, canon, and feudal law; and Panormitanus (d. 1463), the greatest of the fifteenth-century canonists.¹⁹ He cannot have been truly familiar with their works, however. He cited each of these three men only once, and it is possible that he knew them only second hand, as by seeing them cited in one of the *summae*. St. German also cited, and more than once, the opinions of Jean Gerson (d. 1429), the famous Chancellor of the University of Paris, moral theologian, and knowledgeable critic of aspects of the medieval canon law.²⁰ He undoubtedly knew Gerson's works at first hand. But again, it was not the kind of knowledge acquired by an expert.

Second, custom as a source of law is one of the most often mentioned subjects in *Doctor and Student*. It recurs constantly. Custom was, for example, the third ground of the laws of England (the first two being the law of reason and the law of God).²¹ What St. German described as "general customs of old time used throughout all the realm, which have been accepted and approved by [the English Kings] and all their subjects" were for him an immediate source of English law.²² This was not an original idea, of course, among English lawyers. The medieval treatises known as *Glanvill* and *Bracton* had so characterized the English law in their descriptions and in their own titles.²³ However, St. German returned to the theme of custom's place in English law again and again—so much so, that it was clearly more than one possible source of that law for him. It was, for example, "by the old custom of the realm"²⁴ that eldest sons inherited to the exclusion of their younger siblings, that lords of land held by knight service had the right of wardship over the children of their tenants, and that livery of seisin was necessary to validate a feoffment of land. If a statute stated a rule, normally St. German described it as 'confirming' a rule

¹⁹ See *id.* at 310 (reference to "Raymond"); *id.* at 119 (citing Panormitanus); *id.* at 321 (citing "Baldus de Perusio"). For a brief introduction to work of Raymond of Peñafort, see James A. Brundage, *Medieval Canon Law* 222–23 (Longman 1995) (biographical sketch). For Baldus de Ubaldis, see *id.* at 207 (biographical sketch). For Panormitanus, see J.A. Clarence Smith, *Medieval Law Teachers and Writers: Civilian and Canonist* 94 (Ottawa 1975) (biographical sketch).

²⁰ See Index under "Gerson, John" in Plucknett and Barton, eds, *Doctor and Student* at 344 (cited in note 4).

²¹ See Plucknett and Barton, eds, *Doctor and Student* at 45 ("The third ground of the law of England stands upon diverse general customs.") (spelling modernized).

²² *Id.* (spelling modernized).

²³ See *Bracton De Legibus et Consuetudinibus Angliae (Bracton on the Laws and Customs of England)* (Harvard 1968) (George Woodbine, ed, and S.E. Thorne, trans); *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (Nelson 1965) (G.D.G. Hall, trans).

²⁴ Plucknett and Barton, eds, *Doctor and Student* at 46–47 (cited in note 4) (spelling modernized).

based on custom.²⁵ He drew the same distinction between local customs and general customs that appeared in the *ius commune*.²⁶ In sum, custom was a consistent theme.

III. COMMON LAW RULES UNDER SCRUTINY

His invocation of custom had a purpose beyond simple description. St. German turned to the law of custom as it had been developed in the *ius commune* in order to explain and to justify the English common law.²⁷ After the general introduction, *Doctor and Student* took up individual rules of the common law and submitted them to analysis. He largely used the same test as the *ius commune*. As the Doctor said, a law based on custom was the surest kind of law, but only if the custom in question did not contradict “the law of God” or “the law of reason.”²⁸ It was St. German’s design to examine English rules of law and then to demonstrate that, once their purposes were fully understood, they passed that test. It was this method that allowed him to make a “critical” examination of its tenets. It enabled him to examine the justification for some rules that then looked (and some still look) suspect at the outset. Here are three examples.

A. The Law of Tithes

St. German examined some of the disputed issues of his own day. Among them, the law of tithes, and the place of custom within it, occupied a particularly contentious place. It was agreed by all that “the tenth part of the increase, yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants” was owed to the church.²⁹ It was also agreed that customary methods of paying tithes were perfectly lawful; for example, tithes of grain or animals might lawfully be commuted to money payments. Parsons preferred to have an equivalent sum of money in place of a pig or a sheaf of wheat. The contention between clergy and laity (and between canon law and common law) came in deciding what scope to

²⁵ See, for example, Statute of Marlborough, 52 Hen III (1267), in 1 *Statutes of the Realm* (William S. Hein 1993) (providing that individuals shall receive justice in the King’s Courts, and thus prohibiting individuals from seeking unlawful revenge or distress), mentioned in Plucknett and Barton, eds, *Doctor and Student* at 48–49 (cited in note 4) (stating that “this custom is confirmed by the statute of Marlborough”) (spelling modernized).

²⁶ See Plucknett and Barton, eds, *Doctor and Student* at 46–47 (cited in note 4) (stating that the general customs of the realm are the ground of different courts in the realm); id at 70–71 (noting that there are different customs in different areas). This had the consequence that the judges determined general customs, whereas local customs had to be found by verdict of a jury.

²⁷ See id at 74–75 (“quod lex illa nichil vult contra rationem nec contra legem dei”).

²⁸ Id at 56–57 (spelling modernized).

²⁹ William Blackstone, 2 *Commentaries on the Laws of England* 24 (Chicago 1979). For the canon law, compare Hostiensis, *Summa aurea*, Bk IV, tit *De decimis*, no 1.

give these customs. A custom to pay no tithes whatsoever was invalid, but what about a custom not to pay full tithes on particular items?

St. German discussed this question in the context of tithes on so-called “great wood,” that is trees of over twenty-years growth. When one of them was cut down, did the person whose wood it was owe a tenth of its value? English custom, backed in this case by a statute enacted in the fourteenth century, said no.³⁰ The canon law said yes.³¹ At no point in his discussion did St. German address the question simply by pitting the relative powers of church and state against each other.³² There was no test of brute strength. Instead he asked whether the custom was valid under the *ius commune* itself. He did not slavishly follow the canonists, most of whom would have held the custom invalid, but he made use of their methods.

First, he looked at biblical texts, which showed the diversity of ways in which tithes had been paid in past ages. Thus, the law could not require an automatic answer. Second, he noted that the purpose of the tithe—to provide a sufficient maintenance to the clergy—could be met perfectly well without this particular form. Tithing should be considered in light of its purpose. Third, he attempted to show the absurdity to which the canonists’ position might lead. They claimed a tenth of the yearly increase was owed under the canon law. But if one took that argument seriously, every tree would have to be cut down every year. The law should not reach such results. His conclusion was that this English custom must be valid. No tithe was owed on “great wood.”

B. The Right to Notice of Process

St. German did not shrink from taking on hard cases. The Doctor asked whether it was true that the King took the goods of men who had been outlawed after failing to appear in a lawsuit, even though they had been unaware of the process against them.³³ The Student answered that it was. It was “an old custom” in the law. But was it a valid custom? The defendant’s right to a legitimate citation was an important right under the *ius commune*.³⁴ Even Adam had been given that right after having eaten the forbidden fruit in the Garden of Eden (Genesis 3:9). The right to be summoned before being judged was re-

³⁰ See 45 Edw III, ch 3 (1370–71), in 1 *Statutes of the Realm* (cited in note 25).

³¹ See William Lyndwood, *Provinciale (seu Constitutiones Angliae)* 190–91 (1679), for the contemporary understanding from the canonical point of view.

³² See Plucknett and Barton, eds, *Doctor and Student* at 300–14 (cited in note 4).

³³ *Id* at 181–84.

³⁴ See, for example, Charles J. Reid, Jr., *The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry*, 33 *BC L Rev* 37, 64–65 (1991) (arguing that thirteenth-century canon law contained the concept of a right, liberty, or privilege).

garded as a part of natural justice, and it seemed, therefore, that this English custom would not pass muster.³⁵

St. German nevertheless found the custom valid. It has been used “time out of mind,” and the King, as the font of justice, was obliged to make writs available to his subjects whether their complaints were true or false. The purpose of this custom was to guarantee that there would be due administration of justice according to that oath, for if the King could not offer strong sanctions, he would not be true to his oath and his responsibility to do justice. Moreover, St. German added, all property had been granted to men by positive law, not by natural law. By the natural law all property was held in common. Hence, positive law could set reasonable conditions on the grant of property. Indeed there are many such limitations—for example, laws barring claims to property after the passage of a certain period of time. This was a perfectly permissible encroachment on property rights, one recognized by all the jurists. In addition, the English law sets up numerous stages in any lawsuit before property could be forfeit to the Crown for a defendant’s non-appearance; there must first be attachment, *capias*, *alias*, *pluries*, and a summons *in exigent*. Fully considered, the Student concluded, the custom could not be said to be contrary to either reason or the law of God. Everything the “policy of man could reasonably devise to make the party have knowledge of the suit” was done in the English law.³⁶ Indeed, if the worst happened, the person whose property was taken might have a remedy against the person who caused him to be summoned without good cause into the royal courts.

C. The Practice of “Giving Color” to a Claim

Some of the customs St. German examined and discussed were quite technical. For instance, in assizes of novel disseisin—actions brought to recover possession of land—it became customary during the fourteenth century for defendants to “give color” to the plaintiff’s claim.³⁷ It was a way of keeping a legal issue out of the hands of a jury and submitting it to the judges instead. But it required making use of a fiction. When a tenant (defendant) was sued by a stranger to recover land that was in his possession, instead of pleading what amounted to

³⁵ See Kenneth Pennington, *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition* 142–43, 161–64 (California 1993).

³⁶ Plucknett and Barton, eds, *Doctor and Student* at 183 (cited in note 4) (spelling modernized).

³⁷ See generally Donald W. Sutherland, *Legal Reasoning in the Fourteenth Century: The Invention of “Color” in Pleading*, in Morris S. Arnold, et al, eds, *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne* 182–94 (North Carolina 1981) (describing the requirement of color in pleading).

the general issue (“no wrong and no disseisin”), he would plead that the plaintiff had himself received a deed of the same land from the tenant’s grantor prior to the time the defendant entered by deed and livery of seisin. In other words, the plea raised a legal issue: whether an earlier deed *without* livery prevailed over a later deed *with* livery. For that reason, the judges would be competent to determine the outcome.³⁸ However, the prior deed was pure invention. It only gave “color” to the plaintiff’s title. As St. German himself noted, “[T]he truth be that there were no such deed of feoffment made to the plaintiff as the tenant pleadeth.”³⁹

The question was whether this form of pleading, treated as a custom of English law by St. German, was a legitimate one. It was a lie. On hearing it so described, the Doctor distinguished between *mendacium perniciosum* and *mendacium officiosum*, but his initial view was that whichever of the two it was, the custom was a sin and to be avoided.⁴⁰ However, the student answered, taking a page from the Doctor’s own book, by recalling the lie told by the Hebrew midwives to Pharaoh in order to save the male children of the Israelites (Exodus 1:18–20). God had approved that lie. Its purpose was meritorious and its outcome was a praiseworthy increase of the nation of Israel. Moreover, this custom avoided the possibility of a greater peril, that of perjury among the jurors. It was common ground that jurors were not experts in the law. If forced to give a general verdict, they might decide wrongly. If they did, they might be erring out of ignorance, but this would not altogether excuse them. They would have been false to the oath they had taken nonetheless. Thus the legal fiction by which decision was given to the judges, although false, was consistent with both divine law and reason. And that was the real test.

IV. LIMITATIONS OF THE METHOD

These three examples show how St. German approached the common law. It was very like the method developed in the *ius commune*. However, the parallel could not have been exact—and it was not. This is true because within the continental traditions, particular customs were tested against the laws found in the *Corpus iuris civilis* and the *Corpus iuris canonici*, the basic sources of the *ius commune*. The question would be whether custom could lawfully prevail against the texts and what was stated in them. In England, by contrast, there was no *Corpus* of the law to be contrasted with custom. The common

³⁸ See F.W. Maitland, *The Beatitude of Seisin II*, 4 L Q Rev 286, 295 (1888) (noting that courts limited juries to matters of “only the purest fact”).

³⁹ Plucknett and Barton, eds, *Doctor and Student* at 294–95 (cited in note 4).

⁴⁰ *Id.* at 295.

law was custom. It was all that existed. Only when particular customs could be set against national custom could the method used by the civilian commentators be adopted with more exact fidelity. Of course, this happened. Borough customs, the customs of merchants, and ecclesiastical customs would be “tested” against the rules of the common law.⁴¹ The tests turned out to be the same as those used by St. German.

In one sense, then, what St. German did was only half of what the continental jurists did; he used the concepts of rationality, natural law, and divine law to test the validity of English customary law, but he did not have the alternative—the texts of the Roman and canon laws—to fall back on if the English custom proved to be illegitimate. Luckily (it seems) St. German found few flaws in the English rules he examined under the lens of the academic law of custom. This was in fact a quite common situation wherever English common lawyers sought to make use of the resources of the *ius commune*. The fit was not perfect. There would have to be some pushing and pulling—some serious efforts at adjustment—if intelligent use were to be made of what one learned from the Continental sources. From *Bracton* to *Coggs v Bernard*,⁴² loose ends would always appear.

However, those loose ends should not cause historians to close their eyes to the attempts of lawyers like St. German to make productive use of “alien” legal habits. A modern observer once suggested that in *Doctor and Student*, “legal rules are put in the witness-box and cross-examined to credit.”⁴³ True enough in a sense. What this observer said vindicates the view of St. German’s preeminence as an early critic of the common law. At the same time, the modern observer’s statement misses the vantage point from which St. German “cross-examined” the legal rules. That was a vantage point adapted from the law of custom derived ultimately from the *ius commune*.

⁴¹ See, for example, Carleton K. Allen, *Law in the Making* 123–44 (Oxford 5th ed 1951) (discussing the application of custom).

⁴² 2 Ld Raym 909, 914–15, 92 Eng Rep 107, 110–11 (KB 1703).

⁴³ Percy H. Winfield, *The Chief Sources of English Legal History* 322 (Harvard 1925) (describing St. German’s work).

