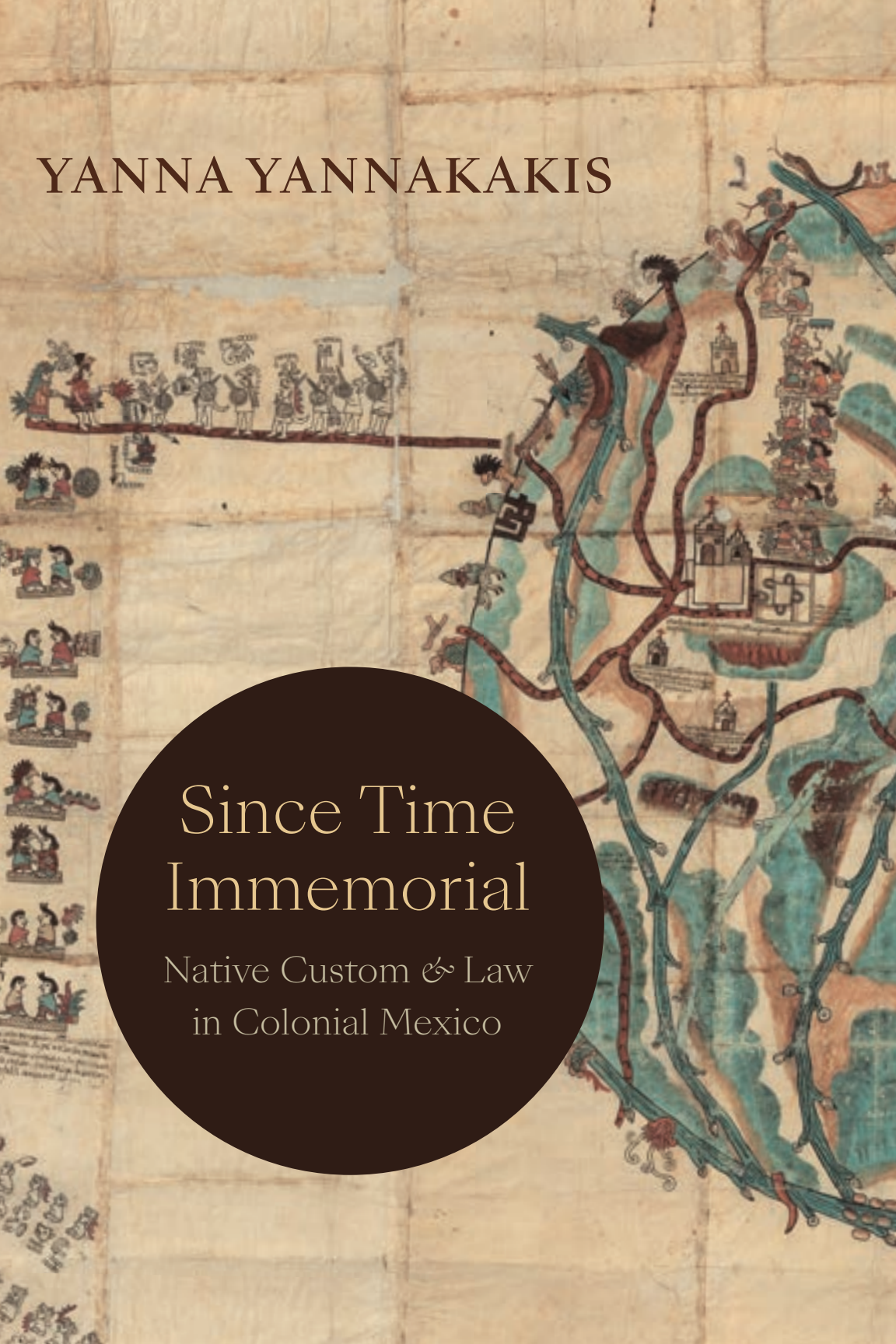
YANNA YANNAKAKIS



# Since Time Immemorial

## Native Custom & Law in Colonial Mexico

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For Maeve, Marianna, and Aiden

Πρέπει να θυμόμαστε και να ελπίζουμε. We must remember and hope.

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*Seventeenth through Eighteenth Centuries*



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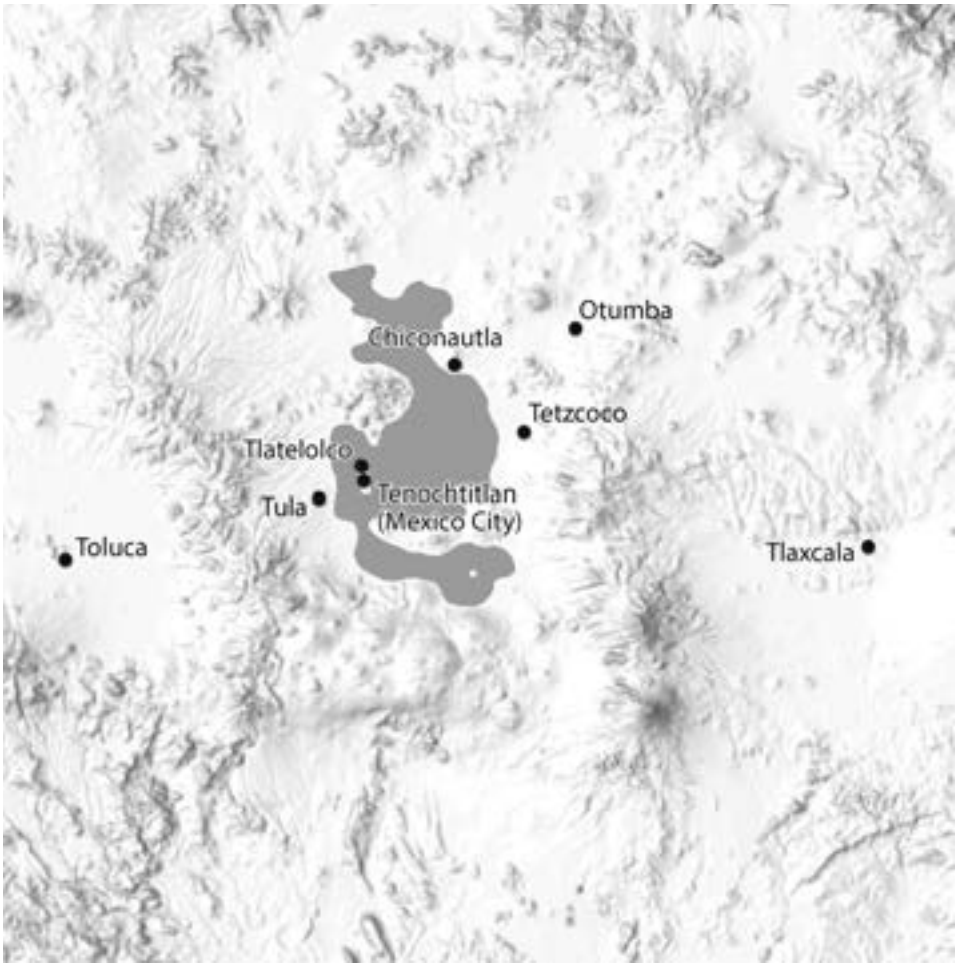
## A Note on Orthography

Historically, and in the present, there are multiple conventions for writing in the many Indigenous languages of Mexico. When I reproduce Indigenous-language words and passages from historical documents, I maintain the original spelling. In the case of Nahuatl place-names, I do not use accents (i.e., Tenochtitlan and Yanhuitlan). For the sake of consistency, I maintain this practice throughout the book, even for the later colonial period when orthographic conventions changed and accents were frequently used in Nahuatl place-names, as they are today. The only exception is when I discuss the case of present-day Teotitlán del Valle, in which case I follow the modern orthography. For the case of Ñudzahui (Mixtec) and Ayuuk (Mixe) place-names, I reproduce the original spellings in the documents. For the case of Tíchazàa (Zapotec), for which there are regional variants and a recent renaissance in Zapotec writing has produced new orthographies, I follow the recent conventions (i.e., San Juan Tabaá and San Juan Yaeé).

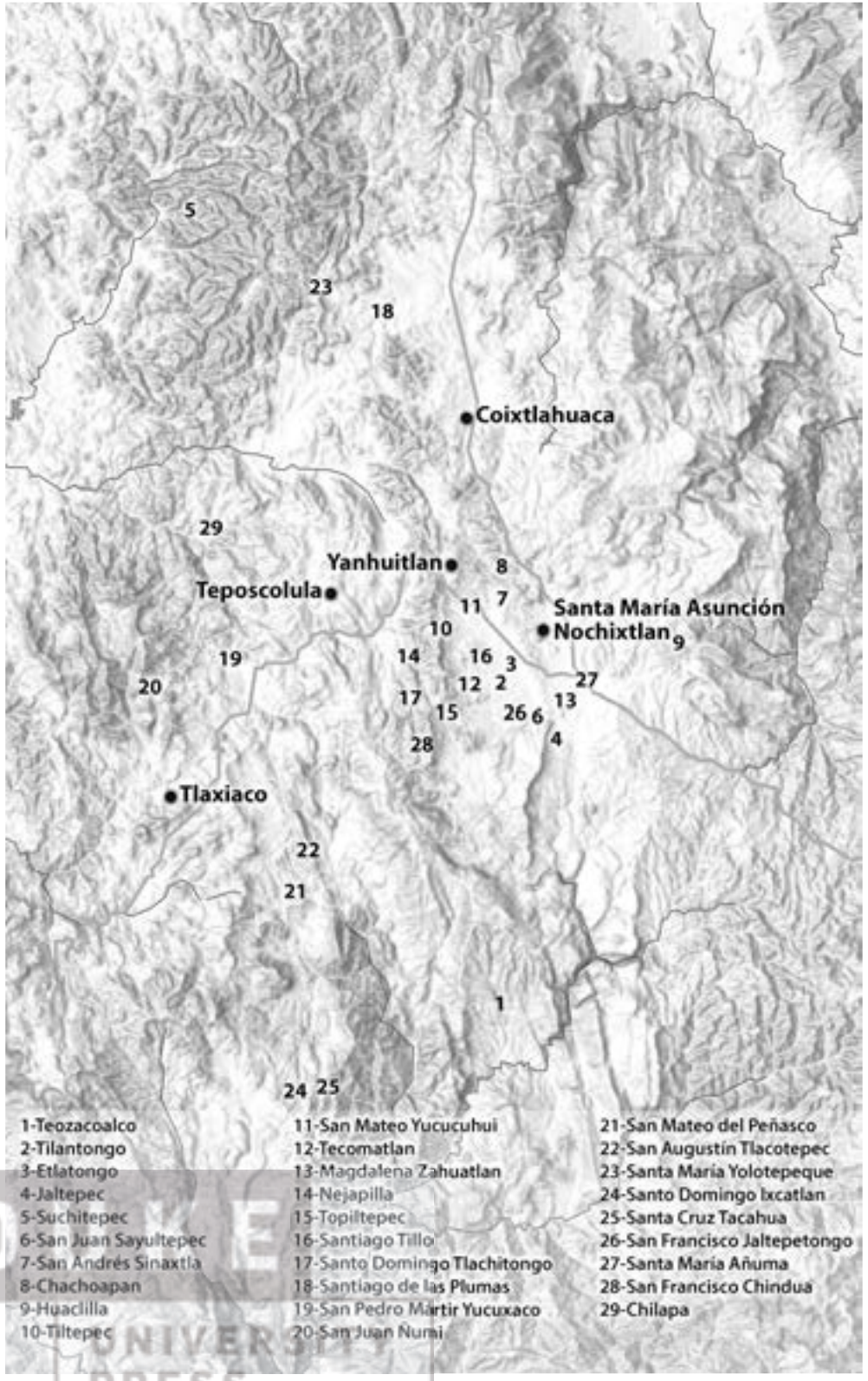

**Map 1** Selected locations in the Mediterranean-Atlantic world.
Map produced by Alexander Cors and Randy Mesa.

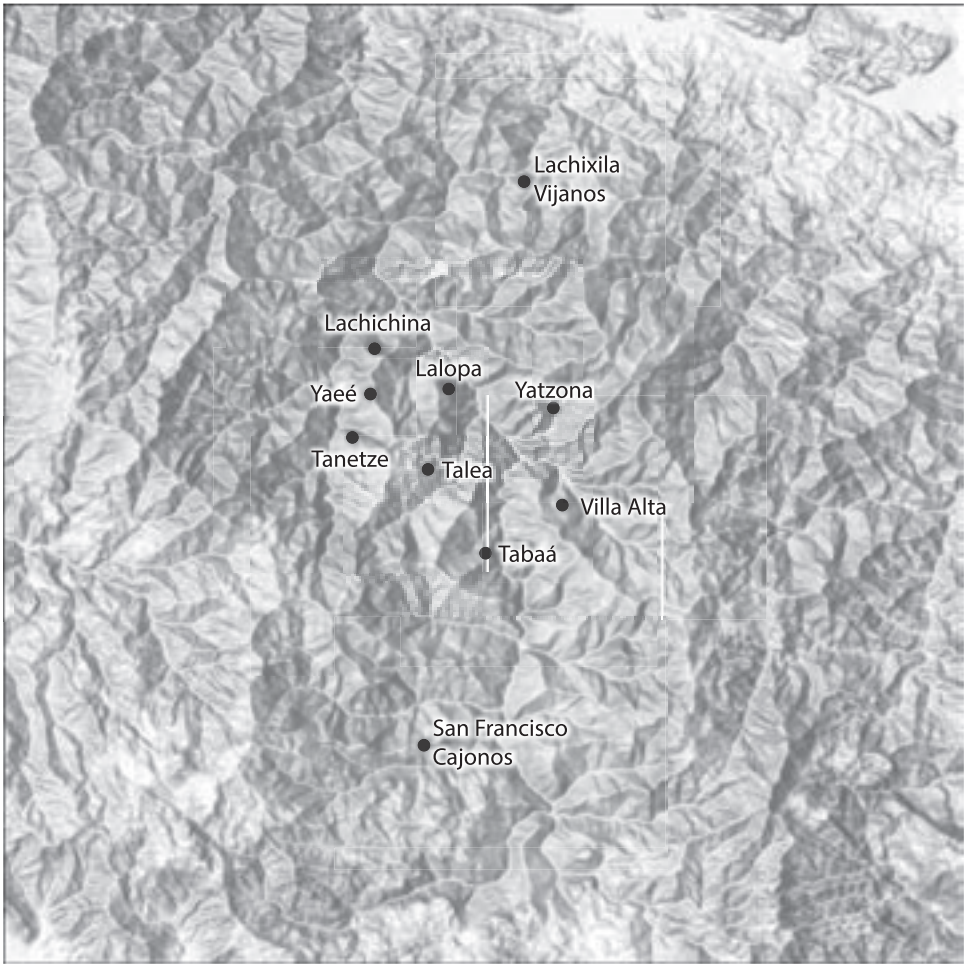



**Map 2** Selected *altepeme* (Nahua ethnic states) of Central Mexico.
Map produced by Alexander Cors and Randy Mesa.


**Map 3 (above)** Selected urban administrative centers and ethnic groups of Oaxaca. Map produced by Alexander Cors and Randy Mesa.

**Map 4 (opposite)** Selected Indigenous towns of the Teposcolula district of Oaxaca. Map produced by Alexander Cors and Randy Mesa.


Coixtlahuaca
Yanhuitlan
Teposcolula
Santa María Asunción
Nochixtlan
Tlaxiaco
1-Teozacoalco
2-Tilantongo
3-Etlatongo
4-Jaltepec
5-Suchitepec
6-San Juan Sayultepec
7-San Andrés Sinaxtla
8-Chachoapan
9-Huaclilla
10-Tiltepec
11-San Mateo Yucucuhui
12-Tecomatlan
13-Magdalena Zahuatlan
14-Nejapilla
15-Topiltepec
16-Santiago Tillo
17-Santo Domingo Tlachitongo
18-Santiago de las Plumas
19-San Pedro Mártir Yucuxaco
20-San Juan Numi
21-San Mateo del Peñasco
22-San Augustín Tlacotepec
23-Santa María Yolotepeque
24-Santo Domingo Ixcatlan
25-Santa Cruz Tacahua
26-San Francisco Jaltepetongo
27-Santa María Añuma
28-San Francisco Chindua
29-Chilapa




**Map 5** Selected Indigenous towns of the Villa Alta district of Oaxaca. Map produced by Alexander Cors and Randy Mesa.

# Introduction

BUILDING FENCES STRONG ENOUGH to restrain cattle and oxen from trampling communal cropland is hard work. Until recently in Teotitlán del Valle, an Indigenous Zapotec town in the southern Mexican state of Oaxaca, the men of the community built and repaired the fences together as part of a customary practice of mutual aid and reciprocal labor.[1] Teotitlán del Valle sits at the gateway between one of Oaxaca's seven central valleys and the formidable Sierra Juárez to the north. Some of the town's communal lands are dispersed in the mountains above the village center. Until the 1940s when most residents were full-time farmers, it was worth the steep climb to access a small communal plot and the trouble and sweat to patch a breached fence. The labor exchange for corral construction, and for other agricultural needs like planting, weeding, and harvesting, allowed the men in the community to earn their subsistence and circumvent the exploitative practice of debt peonage.[2]

According to historical documentation, during the eighteenth century in San Juan Tabaá, a Zapotec town deep in the mountains above Teotitlán del Valle, the commoners of the town built fences around communal lands in order to keep oxen and mules of the well-to-do members of the community from trampling the crops that the commoners farmed. Although the commoners felt the custom was unjust since the livestock was not theirs, the livestock owners countered that the arrangement was reciprocal and part of the mutual bonds of obligation that held the community together. They pointed out that they allowed the town to use their draft animals to carry crops to

market to earn currency to support the fiestas that punctuated the Christian ritual calendar and transport Spanish administrators when they visited the town on official business. Furthermore, they argued, the practice was just because it was ancient custom. Unable to resolve the dispute through the purview of village justice, the opposing parties brought their case to a Spanish colonial court for resolution.[3]

These examples of community norms of collective labor separated by more than two hundred years reveal distinct modes of Native custom in Mexican history: one that produced horizontal bonds of reciprocity and another that upheld social hierarchy. Broadly construed, custom refers to social practice that over time takes on the normative power of law within a territorially based community. In historical contexts across the globe, custom was at times equivalent to law; in others, a source of law; and in others, an alternative legal framework.[4] In the example from twentieth-century Teotitlán del Valle, custom regulated labor for collective benefit. Despite the onerous nature of the work, the community's peasant farmers considered the labor exchange to be worthwhile because it allowed them to expand production into marginal lands and insulate themselves from exploitation by wealthy landowners. In eighteenth-century San Juan Tabaá, the custom of building fences to protect communal lands reinforced divisions of wealth and status within the community, serving the interests of elites at the expense of commoners. When the commoners went to court to challenge the custom, they did so on moral grounds, claiming that it did not serve equity or the common good, two fundamental principles of colonial justice. The historical, social, and economic circumstances in these cases—defined by whose interests the labor exchange served—applied sharp divergences in meaning to what on the surface appears to be a similar custom across time. In both cases, however, custom's power as a communal norm and a mode of organizing labor was underwritten by the moral force of its claim to antiquity and reciprocity. The capacity of custom to produce social cohesion was in constant tension with the community's internal hierarchies and the broader economic and political systems in which the community participated. As a result, custom—in dynamic relationship with history—was subject to change and contestation.

Custom, a category of European law with origins in medieval Roman law, has not always been understood as historical, dynamic, and changing. In language evocative of timelessness and primordiality, a well-known historian of medieval Europe characterizes custom as a nexus of blood, land, and time, the coagulation of enduring communal values, and a primitive unwritten law.[5] The European idea of custom as the expression of an authentic, autochtho-

nous popular will can be traced to the rise of nationalism in the nineteenth century and a move among elite functionaries to nationalize law according to a mythic national character. In this romantic guise, custom predates law on an evolutionary continuum in which the latter represents the apex of a process of legal modernization. Critics argue that this formulation of custom persists and reinforces a problematic association with a timeless primordiality while reproducing hierarchies between local and state-centered norms.[6] Woven into such binaries are assumptions regarding custom's irrationality versus law's basis in practical reason.[7] According to these logics, peasant communities are locked in time, fettered to tradition, and governed by norms of popular justice. As such, they are objects to be modernized and brought into line with written, codified, state-centered law.

In the context of European empire, the custom–law opposition bolstered and generated social inequalities through the production of hierarchies of difference evidenced by categories like "native." National and imperial elites have justified and consolidated violent conquest and political domination from the era of the Roman Empire to the present moment by casting the laws and norms of conquered peoples as custom, and subordinating their customs to imperial or state-centered law. The earliest generations of European and North American social scientists supported the logic of empire by characterizing the social conventions of "primitive" and "simple" societies as customs, and those of "complex," urban ones as law. Legal anthropologists have critiqued the stark opposition between law and custom by arguing that all peoples living under nation-state or imperial regimes must contend with both legal and customary norms, and that the alleged boundary between them has always been much more porous than conventional wisdom has suggested.[8] Despite this, the dichotomy between custom and law—a vestige of the romantic and primordial notion of custom—persists in the popular and scholarly imagination. Until recently, this was especially true in Latin America where anthropologists and social scientists characterized Indigenous customary law as an essential aspect of ethnic and communal identity, fundamentally opposed to state-centered positive law.[9]

Historians and anthropologists have been whittling away at these deeply ingrained assumptions for the last few decades, pointing to how peasant communities in diverse settings across time forged a dynamically plural legal culture through a synthesis of custom and law.[10] Scholars of medieval and early modern Europe, where studies of custom are densely concentrated, have revised earlier romantic formulations, demonstrating that far from being an oral tradition locked in time, custom served as a terrain for the nego-

tiation of social norms, was often written down, and could become law or indistinguishable from it.[11] On a parallel track, scholars have disentangled the presumed linkage between custom and autochthonous Native practice in colonial and postcolonial societies. Africanist scholarship has yielded seminal work on custom as a tool of European empire, contending that rather than representing Indigenous norms based in antiquity, customary law was often an invention of Native elites, colonial authorities, and anthropologists who used it to justify indirect rule and social control.[12] For the case of Latin America, constitutional reforms across the region during the 1990s prompted a wave of research on legal pluralism that reassessed earlier positions, pointing to how law and Native custom have always influenced one other, while shaping and being shaped by the same historical processes.[13]

Taken together, recent scholarship has overturned the custom–law opposition and custom's identification with a purported peasant and Indigenous primordiality, characterizing it instead as a multifaceted legal, political, and social strategy. Depending on the historical context, it served as a tool of domination, claim regarding the allocation of privileges and obligations, and resource for local justice. It is important to note, however, that one axiom holds true across custom's many guises: historical actors across time and space have recognized that associating custom with antiquity and community lends it considerable moral force.

## Indigenous Custom and Law in Pre-Hispanic Mesoamerica and Colonial Latin America

This book is about the invention, translation, and deployment of Native custom as a legal category and imperial strategy in colonial Mexico. Custom represented the primary framework through which Mexico's and more broadly Latin America's Native communities governed themselves and interfaced with authorities outside the community from the first decades following the Spanish conquest until independence from Spain. The Spanish Crown recognized the right of Native authorities to rule their communities according to their laws and customs provided that they did not contradict Christianity or Spanish law. Over three hundred years, Native communities synthesized Indigenous and Spanish norms regarding self-governance, justice, landholding, labor, sexuality, morality, and ritual life to produce the realm of colonial Indigenous custom. Through analysis of laws and legislation, missionary sources, Inquisition records, Native pictorial histories, royal surveys, and Spanish- and Native-language court and notarial records, I show how the

idea of custom was given local meaning, how it became part of the fabric of Native communal life and a potent claim in Spanish courts, and how its purview changed and narrowed over time. In the hands of Native litigants, claims to custom, which on the surface aimed to conserve the past, ultimately provided a means with which to contend with rapid change in the present and the production of new rights for the future.

Spanish missionary priests and conquistadors destroyed the pre-Hispanic pictographic manuscripts that recorded the laws, legal institutions, and judicial proceedings of the Aztec city-states (*altepeme*, pl.; *altepetl*, sing.) of central Mexico during their violent campaign against Native religious authority, which as in the case of Europe was inextricably linked to political and legal authority. Ironically, the same agents of destruction who burned Native libraries, archives, and scriptoria later sought to recover Indigenous knowledge for the purposes of more effective evangelization. Friars Toribio de Benavente (Motolonía), Juan de Torquemada, Alonso de Zorita, Diego Durán, and Bernardino de Sahagún commented extensively on pre-Hispanic law and custom based on ethnographic observations and their discussions with Indigenous intellectuals.[14] So too did the descendants of Indigenous rulers, some of whom were the products of unions between Indigenous noblewomen and Spanish conquistadors, such as Fernando Alva de Ixtlilxochitl and Juan Bautista Pomar.[15] The mestizo chroniclers had their own axes to grind, including the vindication of the actions of their forebears before and after the Spanish wars of conquest. Indigenous painter-scribes (*tlacuiloque*) of the colonial period also recorded pre-Hispanic norms regarding crime and punishment in the pictorial *Mapa Quinatzin*, created in 1546.[16] Ethnohistorians have carefully cross-referenced these texts to produce histories of the laws and legal institutions of the pre-Hispanic era, most fulsomely for the cases of Tenochtitlan and Tetzcoco, the dominant altepeme of the Aztec Triple Alliance.[17]

Prior to the Spanish conquest, royally controlled legal and political bodies as well as local institutions and customs regulated matters concerning land tenure, property, inheritance, kinship relations, business, trade, contracts, slavery, crime and punishment, and local and imperial administration in Tenochtitlan and Tetzcoco. Missionary friars and mestizo chroniclers devoted special attention to the legal system of Tetzcoco, crediting the *tlatloani* (ruler, literally "speaker") Nezahualcoyotl, who governed from 1429 to 1472 with the development and expansion of the city-state's laws and court system. According to their accounts, he was responsible for a body of eighty laws divided into four parts. He designed a legal system to administer these laws that concentrated royal power while incorporating distinct social sectors

through the creation of lower-level courts. Two tribunals overseen by the tlatoani sat at the apex of the system. Below these, four supreme councils, one of which was designated a Supreme Legal Council, rendered judgments that could be appealed to two higher judges who pronounced sentence with royal approval. The jurisdiction of the four councils was determined by the nature of the dispute or offense in question rather than the quality of the person being judged or the territory from which he or she hailed. In addition to these high courts, there were local-level courts overseen by the city's wards (*calpulli,* singular, *calpolleque*, plural), temples, schools for youth, and kinship groups. There were also separate legal fora for merchants, artisans, and the dependent towns subject to the authority of Tetzcoco.[18]

The jurisdictional complexity of the system, designed to control diverse ethnic groups and multiple local rulers in an era of imperial expansion, was complemented by its strong class character. Nobles and commoners had separate courts, and nobles could only be judged by other nobles. Criminal cases followed a process of official accusation, investigation of the facts of the case, sentencing, and punishment. Judgments were often rendered swiftly—cases were limited to eighty days—and punishments were harsh, especially for the crimes of theft, adultery, drunkenness, and rebellion.[19] More recent scholarship argues that missionaries and mestizo chroniclers portrayed the legal system of Tetzcoco favorably—as rational, secular, and civilized—in relation to that of Tenochtitlan, which they glossed as violent, expansionist, and religious, in order to justify the Spanish conquest of the latter. But in reality, these comparisons were overdrawn, and many of the institutions and principles of justice at work in Tetzcoco were generalizable across the Basin of Mexico.[20]

A shared feature of pre-Hispanic Nahua legal culture was the importance of local institutions, rules, and sanctions in regulating social life. In Tenochtitlan and Tetzcoco, ward officials, schoolmasters, merchant and craft guilds, and families taught and enforced proper comportment and the duties and obligations of their members.[21] As was true in Europe during the same period, custom rather than formal law provided the primary framework for dispute resolution, local justice, and social control.

Within the first years following the conquest, Spanish authorities had to confront the challenge of how to incorporate sovereign Indigenous peoples and their political and legal institutions into an imperial order. In a time of violence, dispossession, and uncertainty, Spanish officials knew one thing for sure: in order to subjugate the Indigenous population, they had to destroy Native institutions at odds with their economic and religious objectives, while maintaining those that served them. For their part, the Native

ruling elite navigated between Spanish expectations and local pressures as they adapted their institutions to colonial demands. An important body of scholarship on Mesoamerica and the Andes focuses on the sixteenth-century transition from Indigenous authority, based on the customary control of Indigenous lords over land and labor to a colonial system grounded in two separate administrative and legal jurisdictions: the republic of Spaniards and the republic of Indians. The territorial jurisdictions overseen by Spanish magistrates and the jurisdiction of Indian cabildos (Spanish-style municipal councils) gave institutional expression to this hierarchical caste-based system. The dissolution of Native territory, which had provided the basis of elite Indigenous dominion, made the transition possible. The overall trajectory charted by this literature is one of destruction of the politically and socially complex autonomous Indigenous world of the sixteenth century to the making of a less stratified Native peasantry administered by their municipal councils and subordinate to Spanish colonizers in the two centuries that followed. In the process, Native custom gave way to Spanish norms of landholding, labor, and self-governance.[22]

Ethnohistorians of Mesoamerica have tempered this narrative with an emphasis on synthesis and adaptation.[23] Relying on Native-language sources produced by Indigenous authorities, scholars working in the tradition of the New Philology, an influential school of ethnohistory, have argued for greater continuity in Mesoamerican spatial-territorial organization, household composition, political authority, officeholding, kinship, religion and ritual, and gender relations.[24] Others have analyzed Indigenous-language sources to demonstrate continuities in Indigenous intellectual life, including moral philosophy and history.[25] More recently, intensive research in local archives across Mesoamerica and the Andes and imperial archives in Spain points to the production of a legal order characterized by the dynamic interplay of Indigenous and Spanish forms of justice and self-governance.[26] These studies show that rather than being divided into two republics, colonial Spanish America was a constellation of cities, towns, and diverse ethnic and racial communities that constituted their own individual republics with semiautonomous jurisdiction, governed by a wide range of imperial and local norms.[27]

Indigenous litigation in Spanish courts was a dominant feature of colonial life and a primary mode through which Native peoples sought to protect old privileges and rights or advocate for new ones. Native people appeared with frequency in front of local Spanish magistrates and in higher viceregal courts to make legal claims against Spanish colonists and other Native individuals and communities. Scholarship on Native society and colonial law

contends that the law served a hegemonic function by providing a common terrain, recognized by all parties as legitimate, on which colonial authorities and Native communities struggled between and among themselves over competing interests.[28] In this context, litigation represented a form of politics at varied scales, from the local to the imperial, across the civil and ecclesiastical jurisdictions, and in fora specifically designed to facilitate Indigenous access to justice such as the General Indian Court and the Protector of Indians.[29] Law and litigation also responded to and shaped changes in colonial governance and social order, including gendered and racial hierarchies, and interethnic loyalties and allegiances.[30] In some instances, Native authorities and commoners strategically combined extralegal means, such as violence or rebellion, with legal processes to achieve diverse objectives.[31] In others, Native petitioners, claimants, and litigants—noble and commoner alike—played upon their identity as imperial subjects, sometimes in the court of the king himself or in metropolitan courts, to demand justice and protection.[32]

The Spanish Crown afforded Indigenous people special legal jurisdiction in Spanish courts dedicated to Indian litigation and in Native courts of first instance in their communities. Woodrow Borah's seminal study of the General Indian Court, which operated from 1585 to 1820, reveals how the Crown attempted to facilitate access to justice to its Native subjects by streamlining the huge volume of Native litigation, reducing its cost, and providing greater fairness in legal procedures. Borah contends that the founding of the General Indian Court marked a transition from the Crown's attempts to preserve and accommodate Native custom to a more aggressive policy of incorporating Native subjects into the imperial order through the legal category of *miserable*, which entitled them to the same protections as widows, orphans, the poor, and the wretched in Europe.[33] More recently, scholarship on local justice and the jurisdiction of Native cabildos has shown that although Spanish judges may have increasingly discounted Indigenous custom over time in disputes that reached the colony's higher courts, custom remained central to the local affairs of Indigenous communities. As evident in Native town council records, some of which were written in Indigenous languages, and legal documents from the local courts of the Spanish magistrates, Native authorities actively produced imperial legal culture by forging local ideologies of justice, participating in networks of legal knowledge, and braiding together pre-Columbian, colonial Indigenous, and European legal traditions.[34] Focus on Indian jurisdiction as constitutive of early modern legal pluralism provides an important corrective to studies that have often ignored the role of Native peoples as producers of imperial legal orders.[35]

Across the deep literature on Native people and the law in colonial Mesoamerica and the Andes, Native custom appears frequently as a point of reference for arguments about continuity and change during sixteenth-century transitions in colonial governance. However, it is rarely the focus of sustained in-depth analysis in legal settings and beyond, and over the *longue durée*. In studies of custom in colonial law and society in Spanish America more broadly, Indigenous custom tends to be treated tangentially.[36] On the other hand, recent groundbreaking work on colonial law and justice in Afrodescendant communities focuses on custom as a terrain for regulating and navigating the large gray zone between slavery and freedom, pushing scholars to ask new questions about how custom took on specific meanings and uses in the lives of colonial subalterns.[37]

In his seminal study of the "power of custom" in Spanish colonial law, Víctor Tau Anzoátegui demonstrates how custom became fully integrated into the thinking of elite jurists and animated the theory and practice of colonial Spanish American law. He argues against entrenched ideas that custom was subordinate or contrary to law, or outside of it, positing instead that law and custom were part of a continuum in a colonial world regulated by a plurality of norms and sources of law. This was a crucial contribution to the field of the *derecho indiano* school of historiography, in which he was a central figure. Although Indigenous custom does not feature centrally in his work, he addresses its significance to the development of Spanish colonial law. But he does so from the perspective of royal legislation, law, and the writings of jurists and legal scholars. Indigenous views of custom do not figure much in his analysis.[38]

When Native custom appears at the center of colonial historiography, it surfaces in small-scale, microhistorical, and article-length studies, most of which are concentrated in the early colonial period.[39] A pioneering work in the tradition of derecho indiano argues that Native laws and customs held the same weighty status in colonial law as did the *fueros* (laws and charters specific to localities and persons) of Castilian law. The hierarchy of legal sources for colonial judges, then, began at the top with the laws of the Indies, followed by Indigenous custom, and finally, the laws of Castile (primarily *Las Siete Partidas* and the *Recopilación de las leyes de Castilla*).[40] Subsequent studies built upon this foundational insight, arguing that due to the centrality of local custom to Iberian law and the casuistry of the judicial process that foregrounded local conditions and weighed the particularities of individual legal cases with recourse to a plethora of legal sources (including local custom), pre-Hispanic Indigenous law and custom significantly impacted colonial leg-

islation. This vein of scholarship focuses mainly on Spanish laws, legislation, and legal treatises that equated the status of Native custom with local custom in the Iberian and Roman tradition as well as the commentaries of colonial chroniclers, jurists, and administrators who observed Native law and custom and evaluated it in relation to Spanish and Christian norms.[41] As in Tau Anzoátegui's work, Indigenous views and uses of custom remain largely invisible.

Historians have remedied this imbalance by moving from the lofty perch of legislation, law, and legal treatises to the archives of colonial courts that recorded Indigenous disputes. Important studies of sixteenth-century colonial Mexico emphasize how Native custom's validation by Spanish judges facilitated the consolidation of colonial rule through the incorporation of Native elite landholding and authority into a Spanish normative order. A preliminary work tests the argument that Native custom shaped colonial law through a sample of early sixteenth-century Indigenous disputes brought before the Real Audiencia of Mexico. The judges often found in favor of Native customary claims, which served to incorporate Native custom into colonial law and the Native elite into the colonial ruling order, while further subordinating both over time.[42] Subsequent scholarship modifies this argument through analysis of elite Native claims in Spanish courts to patrimonial lands based on custom during the 1530s, which resulted in favorable decisions for the claimants and the legitimation of Native ancestral landholding more broadly.[43] A recent study moves beyond royal legislation and the courts to explore the many meanings of Native custom produced in diverse settings in sixteenth-century central Mexico and Yucatán, including the missionary context. The authors argue that custom's conceptual and practical flexibility facilitated the legitimation of the political authority of Native elites and the consolidation of colonial rule.[44]

For the case of the sixteenth-century Andes, the scholarship suggests that colonial jurists and authorities selectively recognized elements of Native custom in keeping with their private or political interests, tipping the balance of forces more definitively toward Spanish colonists than was the case in New Spain. In northern coastal Peru, Spanish judges recognized the validity of Andean custom inconsistently, overturning it in a case regarding an ethnic lord's sexual monopoly over his wives, with the objective of removing a powerful and uncooperative Native ruler.[45] In the central Andes, when Spanish economic interests were at stake, litigation provided an impulse for Spanish jurists, officials, and *encomenderos* (recipients of royal grants of Indigenous towns) to unearth and record Inca custom, allowing for its partial recogni-

tion, distortion, and politically motivated application.[46] Beyond the purview of Spanish courts, custom served as a framework for Native self-governance and dispute resolution in the Andes, including the customary management of land, labor, and communal assets, and the changing ends to which they were directed over time.[47] Recent scholarship on the northern Andes shows that the category of custom served as a terrain for the creation of an interdependent colonial order in which Native people retained considerable power especially at the margins of empire. Indigenous and Spanish litigants invoked custom in quotidian conflicts, forging deep cross-cultural relationships and networks that transcended the purported divide between Native and Spanish worlds.[48]

Although the bulk of scholarship on custom focuses on the sixteenth century, recent studies move forward in time to the seventeenth and eighteenth centuries when Indigenous claims to custom in Native and Spanish courts centered on colonial-era as well as—or instead of—pre-Hispanic practice for their legitimacy, and written documents took precedence over claims to custom in oral testimony.[49] Multiple norms come to the fore in some of these cases, as Native authorities used Spanish and pre-Hispanic Inca law to adjudicate land disputes in the seventeenth-century central Andes, and as Native authorities navigated between local custom and law to manage communal resources and lands in eighteenth-century Oaxaca.[50] In the Northern Andean province of Quito, a series of legal cases over the same Native lands from the sixteenth through eighteenth centuries shows how the temporal referent for customary claims shifted from the pre-Hispanic period, to the conquest, to a vague invocation of time immemorial. Rather than oral testimonies recounting Indigenous knowledge of pre-Hispanic rights that was typical of sixteenth-century claims, litigants in later years presented Spanish legal instruments as proof of Native customary practice, resulting in a transformation of Native land rights and diminution of Native land tenure.[51] A comparative study of Oaxaca and the northern coast of Peru demonstrates how, during the eighteenth century, Native litigants deployed different referents for custom in disputes over local governance and elite hereditary privilege that yielded new conceptions of time, history, and merit. In the process, they produced Enlightenment discourse whose origins scholars have traditionally located in Europe.[52]

*Since Time Immemorial* builds upon the insights of these studies by widening the lens chronologically, spatially, and analytically to examine Native custom's entangled history as a legal category, colonial governing strategy, framework for Native self-rule, and claim for Native rights and protections in

Spanish courts. Throughout, I pay close attention to the interplay between Native custom's changing meaning as a cultural and legal category and its use by Native litigants as a strategy to claim power and resources in local courts. In this regard, my analysis tempers notions of colonial Indigenous agency that have taken hold in recent ethnohistorical scholarship. When Native litigants made claims to custom in court, they reinforced the position of the Native subject within the Spanish legal-administrative structure, a process that had consequences beyond the case at hand and that reinforced a wider system of inequality.

The narrative focuses on three crucial historical periods that move across a broad geography: transformations in medieval European and Iberian law that incorporated the Roman and Islamic legal traditions; sixteenth- and seventeenth-century cross-cultural encounters and struggles in ecclesiastical and legal settings in central Mexico and Oaxaca; and first-instance disputing in late seventeenth- and eighteenth-century Indigenous communities in Oaxaca. Juxtaposition of the Nahua altepeme of Tlatelolco, Tetzcoco, and Tenochtitlan, and of Oaxaca's ethnolinguistically diverse Native polities puts into relief the different modes in which custom developed in the century after conquest. During the early colonial period, intense cross-cultural interaction in the three Nahua city-states resulted in some of the richest documentation on pre-Hispanic Mesoamerican legal systems. These places also concentrated Indigenous, missionary, and Spanish administrative power and served as testing grounds for the creation of new colonial legal institutions based in part on Native custom. At the same time, the weight of Spanish power meant that central Mexican ethnohistorical documentation bore the heaviest imprint of Spanish colonial objectives. In Oaxaca, Spanish presence was thinner on the ground, and Indigenous ethnic states were smaller and more numerous. These factors, combined with a long-standing tradition of local autonomy, allowed multiple versions of Native custom to flourish and develop in local practice and social memory. Ethnohistorical and legal documentation about custom was therefore more diffuse, diverse, and idiosyncratic. For these reasons, the final chapters dive deeply into focused case studies from Oaxaca to analyze how Native litigants mobilized legal claims and generated rich evidence regarding custom's manifold and changing meanings and uses. By moving away from exclusive focus on central Mexico and toward Oaxaca's diversity of Indigenous places and politics, I attend to continuities in Indigenous experience across Mesoamerica's vast space while highlighting the importance of locality in the making of colonial legal institutions.

My argument aims to underscore the historical nature of Indigenous custom by grounding it in place and time. It unfolds as follows. During the sixteenth and seventeenth centuries, Indigenous authorities, missionaries, and Spanish officials translated and aligned Indigenous and Spanish norms through cross-cultural knowledge production, violence, and legal conflicts to produce new rights and protections categorized as Indian custom. The dismantling of noble polygyny was one of the most important outcomes of this process since it destroyed the means by which Native state structures and elite forms of property cohered. By the end of the sixteenth century, Native customary claims were increasingly anchored to practices and rights generated in the postconquest period and were relegated to issues that most affected the colonial economy and administration: land tenure, labor, and Native self-governance. Customary claims in these realms, however, still tended to be framed in ways that benefited the Native elite.

From the second half of the seventeenth century through the dawn of the nineteenth, Native officials and litigants reoriented the terms through which the colonial balance between exploitation and protection was legitimized, away from relations of unequal reciprocity rooted in antiquity and noble privilege and toward new forms of mutual obligation based on economic utility and defense of communal interests. A growing cadre of legally literate Native officials of commoner status challenged the old laws and customs that bolstered the position of the Native elite with new customs untethered from inherited status and tied instead to the economies and governing norms of smaller, individual pueblos. In an effort to assert their interests against those of the Native nobility, the Native officials of these reconfigured communities framed customs of communal land tenure, self-governance, and labor as contractual rather than primordial obligations to the community. The legality and instrumentality of customary arrangements came to take precedence, pointing to the ways in which Native people participated in the transformation from a justice- to law-centered Atlantic legal culture during the eighteenth century while reproducing Native difference and local particularity.

## Chapter Summaries

*Since Time Immemorial* is organized thematically, and broadly speaking, chronologically and geographically. Part I provides a legal-intellectual history of the concept of custom that developed in the villages, towns, universities, and palaces of medieval Europe; intersected with the religious and

legal pluralism of Islamic and Christian Iberia; and extended into the ethnic states and Christian missions of sixteenth- and seventeenth-century Mexico. Chapter 1 traces the elaboration of custom as a juridical category during the twelfth-century European legal revolution and Christian military expansion in Iberia. The legal, social, and political transformations of this period culminated with *Las Siete Partidas*, the Castilian legal code of Alfonso the Wise in which custom was defined as the local law of a territorially bounded community based in long-standing practice and popular will, and oriented toward the common good. The narrative then moves forward in time to analyze the use of custom as a measure of Native civility during the conquest of the Americas and the decades that followed. Although key figures in the debate over the Indies such as Francisco de Vitoria and Bartolomé de Las Casas acknowledged the civility of Native laws and customs and the sovereignty of Mexico's Indigenous lords, they did so with a strong dose of paternalism that resulted in the incorporation of Indigenous people into the empire as apprentices of Christian social and political order. These two faces of Native custom—as an extension of Spanish medieval law, and a means by which to underscore Spanish cultural superiority—were foundational to its translation in the Spanish American context.

Chapter 2 expands beyond the transatlantic networks of theologians, jurists, and administrators into the realm of Christian evangelization of the Native population in central Mexico and Oaxaca. In this crucible of the colonial encounter, Christian missionaries and Native elites generated knowledge about one another and built an ideological and practical foundation for the elaboration of intercultural ideas about justice and morality. In short, they were key players in the production of colonial legal consciousness. Translation across Spanish and Indigenous languages was central to this process since it facilitated an alignment of Spanish and Indigenous normative categories and produced a Native vocabulary tailored to the Spanish legal-administrative context characterized by the interpenetration of civil and ecclesiastical jurisdictions. While the missionaries and their elite Native interlocutors produced their bilingual dictionaries, grammars, and catechisms, they evaluated the norms and practices of the preconquest past in relation to Christianity and natural law and assigned them moral valence. The sorting of "good" and "bad" customs in these early years of the colony had long-lasting impact on how Native custom was understood and deployed in colonial courts in the following centuries.

Part II examines the production of knowledge about pre-Hispanic Native law and custom in response to debates regarding the sovereignty and civil-

ity of Native peoples and their place in the colonial order. As Native religious and sexual norms were criminalized and relegated to a "barbaric" past over the course of the sixteenth and seventeenth centuries, the ambit of legitimate colonial Native custom narrowed and was further subordinated to Spanish law and economic objectives. Chapter 3 analyzes how Indigenous and Spanish subjects framed and evaluated pre-Hispanic Native law and custom through comparison of two colonial ethnographic projects. The first is the Codex Mendoza, a Native-produced history and ethnography of the Aztec capital of Tenochtitlan, created sometime during the 1540s or early 1550s. Unlike the Florentine Codex, the monumental ethnographic work that brought together Franciscan friars led by Fray Bernardino de Sahagún and elite Nahua intellectuals, the Codex Mendoza was created by Nahua tlacuiloque (painter-scribes) of the artisan class. As such, it adopts a commoner perspective on the city's laws and customs that blends Mesoamerican sensibilities with European notions of political and social order to portray Tenochtitlan as a civilized Native republic. The Relaciones geográficas—royal geographical surveys administered in the Native provinces of New Spain and Peru from 1579 to 1585—were intended to assess the natural and human resources of Native communities so that the Crown could more efficiently exploit them. The survey also asked about pre-Hispanic customs, laws, and forms of governance. In the case of Oaxaca, the survey responses provided a more ambivalent and often negative perspective on the region's pre-Hispanic institutions, reflecting late sixteenth-century shifts in Spanish attitudes toward Native custom.

Chapter 4 traces the legal and social process of dismantling Native marital and sexual norms through analysis of Inquisition cases brought against Native lords in central Mexico and Oaxaca during the 1530s and the 1540s and criminal cases from Native tribunals in seventeenth- and early eighteenth-century Oaxaca. Elite polygyny was crucial to the production and maintenance of state-level Indigenous alliances as well as the laws of royal succession and property prior to the conquest. As such, its vigorous suppression by Christian missionaries and Spanish officials represented an attack not only on elite Native marital and sexual norms but also on the very fabric of Indigenous political order. Despite its criminalization, polygyny persisted in central Mexico in clandestine form for at least the first few decades after the conquest, and in some other regions much longer. In tandem with the missionary project of evangelization, the Inquisition applied the discourse of the "old law," used by Christian authorities in the Iberian Peninsula to characterize the customs of Jewish and Muslim converts, to the practice of Native polygyny.

Native authorities adopted the concept of the "old law" as a means of persecuting rivals who did not conform to Christian sexual morality or norms of governance. Criminal records in the Zapotec language redacted in Native courts of first instance in Villa Alta, Oaxaca, point to the ways in which the "old law" continued to be politicized until the early eighteenth century.

Part III moves forward in time to the late seventeenth and eighteenth centuries to consider how Native custom was legislated, contested, and deployed in courts of first instance in disputes over Native land, self-governance, and labor. In these final chapters, the southern Mexican region of Oaxaca takes center stage. Its large and ethnically diverse Indigenous population overseen by only a few Spanish administrators and colonists made Native custom especially important for the ongoing negotiation of colonial order. In contrast with the sixteenth century, when Native litigants made claims to custom connected to Native antiquity and noble privilege, in this later period, claims to custom were based in colonial practices and framed as contractual obligations. Crucially, over the course of the eighteenth century, communal interests were increasingly defined against those of the Native nobility. Chapter 5 shows how Native authorities deployed custom to claim or create common lands in late seventeenth- and eighteenth-century Oaxaca. From colonialism's inception, Native people appeared in front of the Spanish judges to claim and dispute land tenure based on pre-Hispanic custom. Viceroys and judges often upheld Native customary claims until the 1570s when the Crown's fiscal troubles meant that colonial demands for revenue and exploitation of Indigenous labor trumped customary claims to use rights or exemption from tribute. A second wave of customary claims to land emerged during the late seventeenth and eighteenth centuries with the Crown's land titling program that targeted Indigenous communities. In Oaxaca, where Native landholding persisted throughout the colonial period in an unparalleled fashion, Native authorities used customary claims to joint possession and usufruct as a strategy for securing the territorial integrity of their communities. They enshrined these customs in partnership agreements drawn up before Spanish judges that conferred plural ownership and shared territorial jurisdiction, thereby producing new communal property rights, often at the expense of Native caciques (hereditary lords).

Chapter 6 surveys first-instance disputes among Native communities over customs of self-governance and communal labor in late seventeenth- and eighteenth-century Oaxaca. In a sampling of eighty-three cases, I focus on the common language deployed by Native authorities and litigants to make their

customary claims. Categories that were integral to the European framework of natural law came to the fore, including tyranny, servitude, force, consent, free will, and the common good. Although these concepts informed Native legal claims in earlier periods, they took on new meaning in the eighteenth century. Through their legal arguments, Native town councils, whose social makeup tilted toward commoner status as the eighteenth century wore on, sought to recalibrate the uneasy balance between the Crown's exploitation and protection of the Native population. They also sought to undermine relations of unequal reciprocity linked to the past and the prerogatives of the Native elite and replace them with new forms of mutual obligation based on economic utility and defense of communal interests through litigation. I argue that over the course of the eighteenth century, Native authorities redefined customs of self-governance and labor as contractual, a strategy that devalued inherited privilege and foregrounded a vision of communal interests anchored to a collective of commoners.

Chapter 7 trains the lens on two long-term disputes over customary labor in eighteenth-century Oaxaca, which began early in the century under the umbrella of village justice, moved to the Spanish court of first instance, and were ultimately settled in the 1760s and 1770s. In both cases, Native officials drew up a contract in their Native languages that detailed the labor expected of commoners or dependent communities and bound them to perform it by requiring them to sign. They did this because the commoners or officials of the dependent communities no longer consented to performing the labor. Aligning themselves with the interests of Native notables in one case and a powerful administrative center in another, the town officials turned to Spanish judges to uphold the contract and impose social discipline. The commoners and the officials of the subject communities continued to resist and provided legal arguments of their own against these old, customary privileges tied to the Native elite and administrative center. In one case, the town officials eventually switched sides and supported commoner claims against elite privilege. These legal battles over custom's meaning and force provide an encapsulation of the process through which unwritten norms became binding contracts, and ultimately, a provisional form of local law that served the interests of the powerful in Native communities. The existence of the Native-language contracts demonstrates that contrary to conventional wisdom, Native custom was not an exclusively oral code.

My analysis of the changing meanings and uses of Native custom answers a call to globalize legal history by focusing on the cross-cultural production

of legal meaning and the engagement of Native people with a plurality of imperial institutions from the center of the viceroyalty of New Spain to its most remote corners.[53] In doing so, my narrative encompasses historical actors who have been traditionally marginalized from legal histories, including Indigenous authorities, interpreters, artisans, and peasant farmers, as well as Spanish lexicographers, missionary priests, and Inquisitors. Legal meaning issued forth from palaces, high courts, and council halls, and from the desks of jurists and theologians. But it was also forged in Native communities, parishes, missionary schools, workshops, town halls, and courts of first instance. By expanding into the social networks and spaces that coproduced colonial legal culture, I show how imperial legal orders were not just imposed from above but also built on the ground through translation and vernacularization of legal concepts and procedures, and struggle over power and resources at the local level.

*Since Time Immemorial* contributes to our understanding of the past while inviting the reader to consider how the legacies of imperial and colonial law continue to impact the present moment across the Americas and the so-called Global South. By historicizing the link between Indigenous identity and customary law and challenging the essentialization of Indigenous communal norms, we can move beyond the impulse to recover a romanticized Indigenous past prior to European contact. This is especially relevant for the present context of Mexico and other Latin American countries where constitutional reforms of the 1990s recognized the right of Indigenous communities to govern themselves according to local custom, much of which has been cast as ancestral and timeless. Despite the frequent association of Native custom with resistance to state-centered injustice, local governance through custom has had ambiguous effects. The Mexican state of Oaxaca provides a poignant example. By the early 2000s, 418 of Oaxaca's 570 municipalities were officially operating according to local custom, originally glossed as *usos y costumbres* and now referred to as *sistemas normativos indígenas* (Indigenous normative systems). Concretely, this meant that Oaxaca's state government recognized the right of the General Assemblies of the vast majority of its rural, Indigenous municipalities to conduct local elections, distribute communal land, organize diverse forms of mutual aid and community service, and adjudicate minor crimes and local disputes according to customary practices, as long as these did not contradict state and federal law.[54] Although it has contributed to greater autonomy and local control in some regions, in other cases it has reinforced and reproduced internal inequalities within Indige-

nous municipalities.[55] In light of this, we need to ask whose interests custom serves in particular historical moments, how it has endured over time, and why it is reanimated at certain moments as a legal and governing strategy. By addressing these questions for the past, I hope to illuminate their importance for the present and future.

# Notes

## Introduction

1. Customary practices of mutual aid and reciprocal labor are glossed as *guelaguetza* in Zapotec.

2. Stephen, *Zapotec Women*, 137–38. For a broader survey of Indigenous customary law in the Tlacolula Valley of Oaxaca during the twentieth century, see Cordero Avendaño de Durand, *Supervivencia de un derecho consuetudinario en el Valle de Tlacolula*.

3. AHJO, VA Civil, Leg. 9, Exp. 15, 1766, Sobre que permanesca el potrero de bestias en Tabaá.

4. Bonfield, "Introduction."

5. Grossi, *El orden jurídico medieval*, 102–3.

6. Miceli, "Derecho consuetudinario y memoria"; Fitzpatrick, *The Mythology of Modern Law*; Fitzpatrick, *Modernism and the Grounds of Law*.

7. Perreau-Saussine and Murphy, "The Character of Customary Law."

8. As early as the 1920s, the anthropologist Bronisław Malinowski mounted this critique. Malinowski, *Crime and Custom in Savage Society*. For foundational work on legal pluralism, see Merry, "Legal Pluralism."

9. Stavenhagen and Iturralde, *Entre la ley y la costumbre*.

10. Burbank, *Russian Peasants Go to Court*; Sommer, *Polyandry and Wife-Selling in Qing Dynasty China*.

11. Grossi, *El orden jurídico medieval*; Howell, *The Marriage Exchange*; Astarita, *Village Justice*; Mauclair, *La justice au village*; Turning, *Municipal Officials*; Hespanha, *Como os jurstias viam o mundo, 1550–1750*; Teuscher, "Document Collections"; A. Wood, *The Memory of the People*.

12. Channock, *Law, Custom and Social Order*; Moore, *Social Facts and Fabrications*; Fitzpatrick, "Custom as Imperialism"; Ibhawoh, *Imperial Justice*; Mamdani, *Citizen and Subject*.

13. Nader, *Harmony Ideology*; Chenaut and Sierra, *Pueblos indígenas ante el derecho*; Sierra and Chenaut, "Los debates recientes y actuales en la antropología jurídica."

14. Motolinía, *Historia de los indios de Nueva España*; Torquemada, *Monarquía indiana*; Zorita, *Relación de los señores de la Nueva España*; Durán, *Historia de las Indias de Nueva España*; Sahagún, *Florentine Codex*.

15. Pomar, "Relación de Texcoco"; Ixtlilxochitl, *Obras históricas de Don Fernando de Alva Ixtlilxochitl*; Schwaller, "The Brothers Fernando de Alva Ixtlilxochitl and Bartolomé de Alva"; Brian, *Alva Ixtlilxochitl's Native Archive*.

16. Betancourt, *Códice Mapa Quinatzin*.

17. Offner, *Law and Politics*; Kellogg, *Law and the Transformation*.

18. Offner, *Law and Politics*, 55–86, 121–282.

19. Offner, *Law and Politics*, 59, 123–24, 147, 250, 285.

20. Lee, *The Allure of Nezahualcoyotl*, 96–127.

21. Kellogg, *Law and the Transformation*, xxvii–xxix; Burkhart, *The Slippery Earth*, 35–38.

22. Menegus Bornemann, *Del señorío indígena*; Sempat Assadourian, *Transiciones hacia el sistema colonial andino*; Sempat Assadourian, "Los señores étnicos"; García Martínez, *Los pueblos de la sierra*; Quezada, *Pueblos y caciques yucatecos*; Mendoza and Augusto, *El cacicazgo muisca.*

23. Seminal studies include Gibson, *The Aztecs under Spanish Rule*; Farriss, *Maya Society under Colonial Rule*.

24. For an overview of the New Philology, see Restall, "A History of the New Philology." The foundational study in the New Philology is Lockhart, *The Nahuas after the Conquest.* For the case of the Maya and the Mixtecs, see Restall, *The Maya World*; Terraciano, *The Mixtecs of Colonial Oaxaca*.

25. Burkhart, *The Slippery Earth*; Townsend, *Annals of Native America*.

26. Puente Luna, "Presentación."

27. Graubart, "Learning from the Qadi"; Graubart, "Competing Spanish and Indigenous Jurisdictions in Early Colonial Lima"; Graubart, "Containing Law within the Walls"; Yannakakis and Schrader-Kniffki, "Between the Old Law and the New"; Premo and Yannakakis, "A Court of Sticks and Branches"; Deardorff, "Republics, Their Customs, and the Law of the King"; Masters, "The Two, the Many, the One, the None."

28. Stern, *Peru's Indian Peoples*; Spalding, *Huarochirí*; Kellogg, *Law and the Transformation*; Yannakakis, *The Art of Being In-Between*; Owensby, *Empire of Law*; Ruiz Medrano and Kellogg, *Negotiation within Domination*; Ruiz Medrano, *Mexico's Indigenous Communities.*

29. Borah, *Justice by Insurance*; Yannakakis, Schrader-Kniffki, and Arrioja Díaz Viruell, *Los indios ante la justicia local*; Traslosheros and de Zaballa Beascoechea, *Los indios ante los foros*; Traslosheros, "El tribunal eclesiástico"; Cutter, *The Protector de Indios*; Cunill, *Los defensores de indios.*

30. Dueñas, *Indians and Mestizos in the "Lettered City"*; O'Toole, *Bound Lives*; Rappaport, *The Disappearing Mestizo*; Echeverri, *Indian and Slave Royalists*; Kellogg, "From Parallel and Equivalent to Separate but Unequal"; Sousa, "Women and Crime"; Premo, "Before the Law"; Premo, "Felipa's Braid"; Uribe-Urán, "Innocent Infants or Abusive Patriarchs"; Pizzigoni, "'Para que le sirva'"; Pizzigoni, "'Como frágil y miserable'"; Masters, "A Thousand Invisible Architects."

31. Serulnikov, *Subverting Colonial Authority*.

32. Puente Luna, *Andean Cosmopolitans*; van Deusen, *Global Indios.*

33. Borah, *Justice by Insurance*. For more recent work on the General Indian Court, see Owensby, *Empire of Law*.

34. Graubart, "Learning from the Qadi"; Graubart, "Competing Spanish and Indigenous Jurisdictions"; Yannakakis and Schrader-Kniffki, "Between the Old Law and the New"; Cunill, "'Nos traen tan avasallados'"; Connell, "'De sangre noble y hábiles costumbres'"; Dueñas, "Cabildos de naturales en el ocaso colonial"; Jones, "Chinamitales"; Puente Luna and Honores, "Guardianes de la real justicia"; Mumford, "Las llamas de Tapacarí"; Premo and Yannakakis, "A Court of Sticks and Branches"; Yannakakis, Schrader-Kniffki, and Arrioja Díaz Viruell, *Los indios ante la justicia local*.

35. Premo and Yannakakis, "A Court of Sticks and Branches"; Belmessous, *Native Claims*. On the centrality of jurisdictional competition to the making of colonial legal orders, see L. Benton, *Law and Colonial Cultures.*

36. On custom in colonial Latin America generally, see Tau Anzoátegui, *El poder de la costumbre*; Traslosheros, "Orden judicial y herencia medieval"; Rosenmüller, *Corruption and Justice in Colonial Mexico*; Rosenmüller, *Corruption in the Iberian Empires*.

37. McKinley, *Fractional Freedoms*; Chira, *Patchwork Freedoms*.

38. Tau Anzoátegui, *El poder de la costumbre*.

39. For an overview, see Herzog, "Immemorial (and Native) Customs."

40. Manzano, "Las leyes y costumbres indígenas."

41. Díaz Rementería, "La costumbre indígena en el Perú hispánico"; Suárez Bilbao, "La costumbre indígena en el derecho indiano"; Ramos Núñez, "Consideración de la costumbre"; Cuena Boy, "La prueba de la costumbre."

42. Menegus Bornemann, "La costumbre indígena en el derecho indiano."

43. Villella, "'For So Long the Memories.'"

44. Cunill and Rovira-Morgado, "Lo que nos dejaron nuestros padres, nuestros abuelos."

45. Ramirez, "Amores Prohibidos."

46. Mumford, "Litigation as Ethnography in Sixteenth-Century Peru."

47. Puente Luna, "That Which Belongs to All."

48. Muñoz Arbeláez, *Costumbres en disputa*.

49. See for example Yannakakis, "Costumbre" for analysis of an eighteenth-century dispute in the district of Villa Alta, Oaxaca in which one side accused the other of inventing new customs in order to overturn old hierarchies, while the other side claimed that their antagonists justified their despotism with claims to ancient

custom. By the time the case concluded, colonial officials were disinclined to respect customary claims and based their decision instead on the presentation of Spanish legal instruments.

50. Puente Luna and Honores, "Guardianes de la real justicia"; Arrioja Díaz Viruell, "Entre costumbres y leyes."

51. Herzog, "Colonial Law and 'Native Customs.'"

52. Premo, "Custom Today"; Premo, *The Enlightenment on Trial*. On centering Spanish America in the history of the Enlightenment, see Cañizares-Esguerra, *How to Write the History of the New World*; and Stolley, *Domesticating Empire*. On centering Indigenous people in eighteenth-century intellectual history, see Díaz, "The Indigenous Archive." For additional work on late eighteenth-century Native custom, see Portillo Valdés, *Fuero indio*.

53. Black, review of *Human Rights and Gender Violence*; Levitt and Merry, "Vernacularization on the Ground"; L. Benton, "Introduction"; L. Benton and Ross, "Empires and Legal Pluralism"; Yannakakis, "Making Law Intelligible"; Yannakakis, "Beyond Jurisdictions"; Duve, "European Legal History"; Duve, "Global Legal History"; Owensby and Ross, *Justice in a New World*; Premo and Yannakakis, "A Court of Sticks and Branches"; Banerjee and Von Lingen, "Law, Empire, and Global Intellectual History."

54. Poole, "Los usos de la costumbre."

55. J. Martínez, *Derechos indígenas en los juzgados*, 58–59; Eisenstadt, "*Usos y costumbres*"; V. García, "Los derechos políticos"; A. Benton, "'Participatory Governance.'"

## Chapter One. Custom, Law, and Empire in the Mediterranean-Atlantic World

1. Grossi, *A History of European Law*, 1–38; Hespanha, "The Law in the High and the Late Middle Ages"; Herzog, *A Short History of European Law*; Reynolds, "Medieval Law."

2. Kelley, *The Human Measure*, 109–13.

3. Gilby, *Summa Theologiae*.

4. Gelinas, "Ius and Lex in Thomas Aquinas."

5. Aristotle, *Politics*.

6. Murphy, "Nature, Custom, and Reason."

7. Kelley, *The Human Measure*, 113–21; Brundage, *Medieval Canon Law*.

8. Stein, "Custom in Roman and Medieval Civil Law," 338. Here, Peter Stein cites Cicero's *De inventione*, 2.67.

9. Stein, "The Sources of Law in Cicero," 21–23.

10. Miceli, "Derecho consuetudinario y memoria," 108.

11. Stein, "Custom in Roman and Medieval Civil Law," 339.

12. Freir, *The Codex of Justinian*, Book VIII, Title LII, "What Is an Old Custom" ("Quae sit longa consuetudo"), Bas. 2.1.50–52, Dig. 1.3, 2218–21. See also Fred H. Blume's headnote for "Quae sit longa consuetudo" in his translation of the Justinian