

**THE HISTORIOGRAPHY OF THE VILLAGE COMMUNITY
IN MEDIEVAL LAW**



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ABSTRACT

This thesis explores the English medieval village community as both a lived historical reality and as a legal historical concept. It traces the study of the village community from the historical studies in the early nineteenth century, and through to current research on the topic. It does so in order to make the following claims: first, the village community remains an interesting and valuable object of legal historical study in demonstrating a 'bottom-up' notion of law, despite having fallen out of favour; secondly, the early scholarship still has some interesting concepts to offer in the form of a focus on community-led decision making and its role in the early common law, despite many of its premises being disproved in the intervening one-hundred-and-fifty years; thirdly, a definitional framework other than legal positivism, which does not accommodate concepts emerging from custom unless and until they are given the authoritative weight of a sovereign authority, is required in order to describe these customary law concepts. This partly explains why today's legal theory, often dominated by legal positivism, does not tend to engage with customary law, but doing so is a valuable enterprise as one of many enlightening models of law. A detailed consideration of the substantive customary laws of village communities demonstrates alternative ways of making and conceiving of law not dependent directly on state authority, and property rights not focused on individualistic aims. It engages in a discussion as to whether medieval customary law ought to be considered 'law', concluding in favour and arguing that this enables a more fulsome consideration of the English medieval legal landscape.

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INTRODUCTION

The study of the manor and the village community was a major topic in English legal history from the mid-nineteenth century until the beginning of the twentieth, given initial momentum by the scholarship of the German historical school¹ and Sir Henry Maine.² However, in twentieth-century legal history the village community became a largely unexamined phenomenon. This drastic shift in focus begs questions: was it because the concept was inherently exhausted, or no longer interesting, or due to other, external factors? The answer lies in a variety of causes, but a key element was that the perceived domain of legal history was deliberately narrowed in reaction to the early village community debate, with later investigations often excluding the village community, local custom, and local government. The early debate had been law-centric, focusing on the relative importance of Germanic and Roman heritages in English law, land usage, and democracy, and the philosophical potential of ‘historical jurisprudence’. However, early studies were a battleground between those looking for the origins of Western democratic society, particularly in England and Germany, in either a ‘Romanist’ or a ‘Teutonic’ past. In the twentieth century, this debate faded and attention shifted to investigation of medieval agriculture, economic efficiency, and demography – all of which often used legal sources for information and evidence, but not legal concepts or institutional studies.

This thesis will explore answers offered to the legal historical questions posed by the village community and set out a historiography in order to reveal common themes and expose problems with our understanding of the subject. The village community was a place where law was made,

¹ Friedrich Karl von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (Mohr und Zimmer 1814; English edition Abraham Hayward tr, Littlewood 1831).

² Maine produced several books and a considerable body of journalism. The most relevant are: *Ancient Law* (1861; 5th edn, John Murray 1873); *Village Communities in the East and West* (1871; 3rd enlarged edn, Henry Holt 1889); *Lectures on the Early History of Institutions* (1875; 7th edn, John Murray 1897); *Dissertations on Early Law and Custom* (John Murray 1883).

and legal institutions existed: it is worth study as such, notwithstanding that some previous studies have been disproven or discredited over time.

A. CHAPTER OUTLINE

First, Chapters 1, 2, and 3 discuss the works of leading figures who wrote on the village community. Maine, Seebohm, Maitland, and Vinogradoff will be considered in roughly chronological order.

Chapter 1 begins with Maine and Seebohm. The ‘village community’ emerged as a key concept in new mid-nineteenth century ‘social sciences’. Whilst European scholarship, especially in Germany, was not new to the concept, it was the work of Sir Henry Maine (1822-1888) which invigorated its study in England. Maine posited that the village community was an early stage in the development of society, wherein property rights gradually evolved from a basis in ‘status’ to one in ‘contract’. He made use of Roman law, Germanic history, and contemporary understanding of India in order to describe this. Maine’s popular success stimulated both followers and criticism,³ the cumulative effect of which was an entire generation of scholarship across multiple disciplines focused on the use of the ‘comparative’ and ‘historical’ methods, ancient law, and the village community.⁴ One of the earliest scholars to respond at length was Frederic Seebohm (1833-1912), who focused on economic history,⁵ and of subsequent scholars was most similar to Maine, considering broad themes and long historical arcs. Seebohm was a Romanist, and used Roman law

³ Raymond Cocks, *Sir Henry Maine* (CUP 1988) 143; Peter Stein, *Legal Evolution* (CUP 1980) 110.

⁴ Stefan Collini, Donald Winch, and John Burrow, *That Noble Science of Politics* (CUP 1983) 209-210.

⁵ Frederic Seebohm, *The English Village Community* (1883; 4th edn, Longmans, Green 1890).

and the history of the Romans in Britain to attempt to explain the village community as a descendent of Roman inhabitants and social structures.

Chapter 2 describes the more precise historical work of Frederic W Maitland (1850-1906) and Sir Paul Vinogradoff (1854-1925) and how they reframed the village community debate. Maitland applied the technical skills of a lawyer in relation to the authority and corroboration of sources, and prioritised the study of legal doctrine and primary evidence in legal records.⁶ Vinogradoff attempted to synthesise both legal studies of the type Maitland pursued and the broader social questions studied by Maine and Seebohm.⁷ He was willing to make use of a wide variety of sources in order to do so, and was more open to speculation via comparative observation than Maitland. It was in Vinogradoff's work that a potentially useful model of 'historical jurisprudence' - which used history to verify models of what law was and should be - was developed, but on his death the method was largely abandoned in favour of a split between doctrinal approaches – meaning here studying the history of legal doctrine analytically; and sociological jurisprudence – meaning the study of law in relation to philosophy, history, anthropology and other social sciences, but not only analytically or in the abstract.⁸ The two can, of course, be used together – and historical jurisprudence sought to do so, demonstrating that they are not necessarily opposing methodologies and can profitably interact.

Chapter 3 considers Maitland and Vinogradoff's contributions to questions about the village community's legal personality and origin, and to scholarship on medieval English manorial and local custom – i.e. custom which was created and enforced in distinct territorial areas,

⁶ See especially Frederic William Maitland, *Domesday Book and Beyond* (CUP 1897) ('*DBB*').

⁷ Sir Paul Vinogradoff, *The Growth of the Manor* (1905; 2nd edn, George Allen & Company Ltd 1911).

⁸ This is to paraphrase Roscoe Pound: 'The Scope and Purpose of Sociological Jurisprudence (1911) 24(8) Harvard Law Review 591. Nowadays 'socio-legal studies' might be more apt a label.

sometimes as large as a county or region, sometimes as small as a single street, but which was linked to that geographical unit and not of general application. This forms a firmer foundation for modern studies.

Chapter 4 presents an overview of some key twentieth-century scholarship on the village community and medieval custom. Scholars like Warren Ault, Ada Levett, Helen Cam and Frank Stenton appear in both the earlier chapters and the later, in their respective guises as students of the older scholars and contributors in their own right. The village community remained of interest to twentieth-century social historians, who often used (and continue to use) manorial records and village community history in demographic studies of medieval England.⁹ The village community was also studied by those interested in Marxist history, and (somewhat uniquely in the focus on collectivities themselves) by Susan Reynolds in the same vein as the original village community scholars: to demonstrate group affinity and how this affected medieval legal and economic relationships.¹⁰

Chapter 5 considers English medieval customary law. Even if the focus of legal history has been the common law and its rules and institutions, there remains an important role for local custom. Relatively little work has been done in legal history per se on local custom, especially when contrasted with the body of work on medieval common law, but a number of authors have considered what sort of 'law' was being created and enforced in the village community and in manors from a jurisprudential perspective.¹¹ However, in light of recent studies examining the

⁹ Including Rodney Hilton, *The English Peasantry in the Later Middle Ages* (Clarendon Press 1975); Phillip R Schofield, 'Dearth, Debt and the Local Land Market in a Late Thirteenth Century Village Community' (1997) 45(1) *The Agricultural History Review* 1; James Ambrose Raftis, *Tenure and Mobility* (Pontifical Institute of Mediaeval Studies 1964); Lawrence R Poos and Richard M Smith, 'Legal Windows onto Historical Populations?' (1984) 2(1) *LHR* 128; Zvi Razi, 'The Use of Manorial Court Rolls in Demographic Analysis: A Reconsideration' (1985) 3(1) *LHR* 191.

¹⁰ Susan Reynolds, *Kingdoms and Communities in Western Europe 900-1300* (1984; 2nd edn, Clarendon Press 1997).

¹¹ John S Beckerman, 'Customary Law in English Manorial Courts in the Thirteenth and Fourteenth Centuries' (DPhil thesis, University of London 1972); Richard M Smith, 'Some Thoughts on "Hereditary" and "Proprietary" Rights in Land Under

juristic nature of ‘customary law’ in the early English legal system and its role there,¹² the nature of law within the village community is ripe for reconsideration. Leading works including Sir John Baker’s key textbook on English legal history and John Hudson’s *Oxford History of the Laws of England* express the idea that the village community may have had some self-governing role, that this may or may not have involved the use of a local manor court or utilisation of the features of the parish, and then note that the customs and practices within such communities varied so much that little more can be said with any certainty.¹³ Whilst it is true that over-generalisation is a risk when there are so many distinct local customs and sources, it is possible to extract a great deal of detailed information about the law created and enforced on this smallest of scales in medieval life from legal records, especially manorial ones. The limited interest in doing so – many manorial records are available, even published and translated, but not studied for their legal content – relates in some cases to the accepted definition of law. A researcher with a legal positivist framework in the analytical jurisprudential tradition might ignore these details as ‘positive morality’ and not law.¹⁴

Customary Law in Thirteenth and Early Fourteenth Century England' (1983) 1 LHR 95; Lloyd Bonfield, 'The Nature of Customary Law in the Manorial Courts of Medieval England' (1989) 31 Comparative Studies in Society and History 514; John Beckerman, 'Procedural Innovation and Institutional Change in Medieval English Manorial Courts' (1992) 10 LHR 197; idem, 'Toward a Theory of Medieval Manorial Adjudication' (1995) 13 Law and History Review 1; Paul R Hyams, 'What Did Edwardian Villagers Understand by "Law"?' in Zvi Razi and Richard Smith (eds), *Medieval Society and the Manor Court* (OUP 1996); Lloyd Bonfield, 'What did English Villagers mean by "Customary Law"' in ibid; Phillipp R Schofield, 'Peasants and the Manor Court: Gossip and Litigation in a Suffolk Village at the Close of the Thirteenth Century' (1998) 159 P&P 3; idem, *Peasant and Community in Medieval England, 1200-1500* (Palgrave-Macmillan 2003) 175.

¹² Recent work includes Paul A Brand, 'Local Custom in the Early Common Law' in Pauline Stafford, Janet L Nelson, and Jane Martindale (eds), *Law, Laity and Solidarities* (MUP 2001); David Ibbetson, 'Custom in Medieval Law' in Amanda Perreau-Saussine and James B Murphy (eds), *The Nature of Customary Law* (CUP 2007); Paul Brand, 'Law and Custom in the English Thirteenth Century Common Law' in Per Anderson and Mia Münster-Swendson (eds), *Custom: the Development and Use of a Legal Concept in the Middle Ages* (Proceedings of the Fifth Carlsberg Academy Conference on Medieval Legal History 2008, 2009); Sir John Baker, 'Prescriptive Customs in English Law 1300-1800' in Harry Dondorp, Eltjo J H Schrage, and David J Ibbetson (eds), *Limitation and Prescription* (Berlin 2019); Paul Brand, 'Limitation and Prescription in the Early English Common Law (to c.1307)' in ibid.

¹³ Sir John Baker, *Introduction to English Legal History* (5th edn, OUP 2019) has a brief section on pre-Conquest institutions, and notes that local institutions were permitted to continue, but does not discuss further: 11. John Hudson, *The Oxford History of the Laws of England*, vol 2 (OUP 2012) refers to village and manor courts together: 288. More specific texts such as Warren Ault’s publications consider the nature of customary law in detail, but not the legal history in general: Warren O Ault, 'Open Field Husbandry and the Village Community: A Study of Agrarian By Laws in Medieval England' (1965) 55(7) Transactions of the American Philosophical Society, New Series 23; idem, *Open Field Farming in Medieval England* (Allen & Unwin 1972). Similarly, John Beckerman: 'Customary Law in English Manorial Courts' (n 11).

¹⁴ The broader question if 'what is law', whilst not directly addressed in this thesis, remains an important question in legal theory relevant to any legal study.

Another, who is interested in social history and demography, might be less interested in the legal rules or practices than what they reveal about a past society and its demography. The substantive law, therefore, has a tendency to fall through a research gap.

Chapter 6 seeks to demonstrate these system qualities through the use of several case studies of particular manorial rolls, as well as printed collected sources. Legal historical work towards the end of the twentieth century did begin to explore the role of custom as discussed in common law records, especially the Year Book cases. But custom did more in medieval society than common law records show: the local manorial records demonstrate that local custom had its own institutions and officials, regulations, and relationships. This deserves much more study as a system of law than it has hitherto received, particularly in light of the enormous number of primary sources available to illuminate this area in the form of manorial records. The enquiry is limited to the period from the beginning of the thirteenth century until the Black Death in 1348, at which point population change significantly altered the economic landscape and any study of the village community would be an investigation of a significantly altered phenomenon. How much of an impact this had on the lives of those living on manors and on the common law in general is open to debate – which is precisely why it was chosen as the stopping point.¹⁵

B. TERMINOLOGY

When referring to English peasants – where ‘peasant’ itself is used as a nonspecific term denoting agricultural labourers – it is conventional to contrast the free and the unfree. The latter were not chattel slaves, but exhibited a variety of differentiating features. Different terminology

¹⁵ Robert Palmer, *English Law in the Age of the Black Death, 1348-1381* (University of North Carolina Press 1993); Lawrence Poos and Lloyd Bonfield (eds), *Select Cases in Manorial Courts, 1250-1550: Property and Family Law* (1998) SS vol 114, p xxvi.

reflects the focus, at any one moment, on these different factors. Four different aspects produced sub-categories of unfree villagers: social standing, economic condition, services performed, and land holding. Terms referring to social standing included '*villanus*', a person in servitude - but whether this meant personally unfree *and* holding unfree land or only the latter was unclear from the word alone, in part because there was no specific term to denote a personally free person holding land in villeinage tenure. The less technical Latin '*rusticus*' was similarly used, often in non-legal sources.¹⁶ '*Servus*' could be used interchangeably with '*villanus*' and denoted personal unfreedom. '*Nativus*' was sometimes used to mean the same as '*villanus*', especially since a female villein was a '*nieve, nativa*'. However '*nativus*' pointed to status, rather than tenure: a *nativus* was personally unfree, and might or might not hold unfree land.

Economic terminology was less common, but included words like '*niet*' or '*neat*', following Saxon '*geneat*': arable cultivators performing services with standard sized holdings. These tenants were more free than a '*cottar*' - an unfree tenant holding a dwelling but no arable, but only in having more economic weight, rather than legally. Briefly after the Conquest there was also '*burns*' and '*buriman*', after Saxon '*gebur*', to mean either the leading villeins of a township, or the smaller tenants (in confusion with Norman '*bordarius*'). The Danish term '*bondus*', meaning cultivator, evolved into terms like 'bondman', 'bondage'.

Terms referring to agricultural work were also common, like '*operarii*', '*consuetudinarii*', '*custumarii*'. These focused on the customary services due from the person, and when used in contrast to '*villein*' probably indicated a person of free status holding in villeinage tenure via such services. Groups of tenants with small plots who had to perform the service of following the

¹⁶ Paul Vinogradoff, *Villainage in England* (Clarendon Press 1892) 140.

ploughs were referred to as '*akermanni*' or '*carucarii*', and '*gersumarii*' were peasants who paid a marriage fine, and were probably personally unfree given its association with unfreedom.¹⁷

Finally, some terms reflected holdings: a '*hidarii*' often held only part of a hide, with services due from the whole. '*Virgatus*', '*yerdling*', or subsets of these, 'half villein' or 'full villein', and '*ferlingseti*' all reflected landholding. Those with little or no arable in the common were '*cotter*, *cotsetle*, *cottagiarii*, *cottarii*'. '*Bordarii*' appear in Domesday Book as an equivalent, to disappear later, unlike the widely adopted Latin derived '*villanus*', which was also a Norman introduction.

'*Villanus*' is by far the most common term in the legal sources, reflecting centralisation and organisation by general legal concepts from above rather than expressing the many local variations. This term adopted the lens of lordly interests, classifying according to services owed, although landholding was also important insofar as it affected services. The later legal disabilities of the villein were cemented when the multiplicity of rules and terms based on economic and political status were subjected to an artificial simplification for the sole purpose of testing the lord's power without engaging with other details.¹⁸ For instance, most thirteenth-century peasants were '*villeins*', most often defined not in relation to land, but by personal dependence on a lord.¹⁹ In doing so, the nuances of each individual's social and economic position, and how that related to their local community, were obscured.

C. KEY THEMES

¹⁷ *ibid* 141-7. See also 'landsettus'.

¹⁸ *ibid* 83.

¹⁹ *ibid* 43-4.

The village community debate has hitherto focused on three broad strands: first, the origins and nature of the manor and village as institutions; secondly, the socio-economic origins of medieval field systems, and their operation; and thirdly, the legal and personal status of peasants at common law, and the impact this had on their lives. The institutional, economic, and legal historical aspects can be separated for analysis, but are always interdependent in reality.

1) *Political Context*

The village community debate was shaped by notions of national identity and origins as much, if not more than, interest in ‘scientific methods’ and history. The concept of the village community in its highly influential Indian iteration was mostly invented by Maine and other colonial administrators, under the influence of shared intellectual interest in European village communities,²⁰ and deployed in myriad political contexts relating to imperial rule, land reform in Ireland, and legal codification.²¹ The history of English law was so hotly contested in contemporary politics that it was questioned whether some aspects of it were even safe to teach.²² Whilst this context has little relevance to the modern framing of village community questions, many of the assumptions related to that context remain unexamined.²³

Twentieth-century political appetite for village community studies was limited: the First World War meant new political debates, and the policy of indirect Imperial rule meant less pressing need to understand local custom in places like India. Without the impetus of political interest, the

²⁰ Karuna Mantena, *Alibis of Empire* (Princeton 2010) 138; see also generally Clive Dewey, ‘Images of the Village Community’ (1972) 6(3) *Modern Asian Studies* 291.

²¹ *ibid*; Maine, *Village Communities* (n 2) 66.

²² John W Burrow, *A Liberal Descent* (CUP 1981) 98-99.

²³ Recently, Bernhard Zeller et al, *Neighbours and Strangers* (MUP 2020) has considered the impact of these perspectives on early medieval community scholarship.

scholarship declined in prominence and popularity. Dyer has also suggested an active choice was made, and that revisionism ‘sought to diminish the importance of the English village community’.²⁴ This began with Maitland’s scepticism, was continued by Alan Macfarlane’s early work focusing on individualism, and in modern historical studies is represented by a focus on landlords in, for example, Bruce Campbell’s work.²⁵ In Maitland’s case, this was arguably an attempt to produce genuinely scientific history in response to the inappropriately broad generalisations made by Maine and Seeböhm, but it was also based on his philosophical and methodological commitments: he felt neither politics nor vaguely defined community concepts were appropriate in writing about history and law.

2) *The ‘Scientific Method’ in History*

Nineteenth-century scientific history emphasised the utilisation of primary historical evidence, and legal history after Maine was an exemplar of this turn to the sources. The written manorial records produced from the early thirteenth century onwards could be used alongside contemporaneous common law sources to provide the material for a new understanding of English history.²⁶ However, the volume of material was so great, and its use so logistically challenging, that it was difficult to know where to begin.²⁷ There was a flourishing of editing and publication of these sources in the final quarter of the nineteenth century: a survey of the publication of manorial rolls shows that this scholarly effort peaked in the period from the 1880s

²⁴ Christopher Dyer, ‘Power and Conflict in the Medieval Village’ in Della Hooke (ed), *Medieval Villages* (OUP 1985).

²⁵ See Chapter 2 and 3 below in relation to Maitland’s views; Chapter 4 in relation to Macfarlane; for Campbell see e.g. *English Seigniorial Agriculture 1250–1450* (CUP 2000).

²⁶ Manorial courts only developed a document-focused mindset or culture during the reign of Edward I, relying up until that time on oral evidence and community memory: Michael T Clanchy, *From Memory to Written Record* (Wiley-Blackwell 2013).

²⁷ Frederic W Maitland, ‘Why the History of English Law is Not Written’ (1888), reprinted in Herbert A L Fisher (ed), *Collected Papers of Frederic William Maitland*, vol 1 (Cambridge 1911) 480.

to the 1920s.²⁸ This coincided with and enabled the production of sophisticated studies of English medieval history which revolutionised the field: Pollock and Maitland, for instance, noted that ‘at least half of the materials that we have used as sources of first-hand knowledge have been published for the first time since 1800’.²⁹ Whilst the situation has improved since, especially in the production of the Manorial Documents Register, it remains true that the huge volume of medieval English manorial records, including manorial court rolls, accounts, custumals, and other miscellaneous documents, have been little used and remain largely unpublished.³⁰

Further, the documents themselves are Latin records of proceedings conducted in English,³¹ and it is a concern that the writing may not always accurately represent what actually happened. However, there is often little that can be done about this issue other than be aware of this risk, in light of the fact there are rarely other records to supplement or confirm manorial evidence.³² The sources themselves also impose some limitations, especially as they tend to be best preserved in relation to large ecclesiastical landowners. This makes it difficult to avoid models biased towards that type of landlord. For instance, key sources for early studies included the earliest known manorial court records (embedded in some of the earliest known manorial accounts) from Winchester Cathedral in 1209, St Albans Abbey in 1236, and Ramsey Abbey in 1239. There is also the oldest surviving court roll, from Bec Abbey estates, dated 1246.³³ These were all large, wealthy, ecclesiastical landlords who had the need, resources, and inclination to produce and preserve

²⁸ Razi and Smith (n 11) 2.

²⁹ Frederick Pollock and Frederic W Maitland, *The History of English Law Before the Time of Edward I*, vol 1 (1895; 2nd edn, CUP 1905) xlv.

³⁰ Razi and Smith (n 11) 2.

³¹ Paul D A Harvey, *Manorial Records* (British Records Association 1984) 42.

³² For a discussion of the risks, see Quentin Skinner, ‘Meaning and Understanding in the History of Ideas’ in idem, *Visions of Politics* (CUP 2002); for this as a problem specifically in legal history, see Robert Gordon, ‘Historicism in Legal Scholarship’ (1981), reprinted in idem, *Taming the Past* (CUP 2017) esp 186.

³³ Frederic W Maitland, *Select Pleas in Manorial and other Seignorial Courts* (1888) SS vol 2.

written records. Those of St Albans Abbey are particularly detailed and extensive, including a Register of the Court Rolls of the Manor of Winslow covering the reigns of Edward III and Henry IV (but not the twenty-two-year period between them),³⁴ a formulary book, an Extent for the Manor of Codicote, and a small cartulary. It was by compiling these materials and more that Levett was able to produce her groundbreaking work on the courts of St Albans in 1924, utilising entries from as early as 1236.³⁵ But comparison with other manors both lay and ecclesiastical is necessary if St Albans is to provide generalisable evidence for medieval England. This includes, as an essential step, consideration of the local economic arrangements which impacted on local legal rules, as these varied between landlords and according to the geography of the area within which the manor was situated.

3) *Economics*

The economic historian William Ashley (1860-1927) and Vinogradoff disagreed on many things, but shared a belief that to understand the village community required investigation of both law and economics.³⁶ They were in the minority, perhaps because, as Michael Postan pointed out, contemporary historians were generally trained in politics or law, not economics.³⁷ Maitland, for instance, argued that an economically connected village community was not otherwise a closely connected group,³⁸ underestimating the importance of agricultural ties, and emphasising the role

³⁴ This summarises court roll entries and presents business in abbreviated form. Seebohm used it without apparently realising this: *Village Community* (n 5) 20.

³⁵ Ada E Levett, 'The Courts and Court Rolls of St Albans Abbey' (1924) 7 *Transactions of the Royal Historical Society* 52, 53.

³⁶ William J Ashley, 'Introductory Chapter: The English Manor' in Fustel de Coulanges, *The Origin of Property in Land* (1st edn (French) 1889; in English Margaret Ashley (trs), S Sonnenschein 1891) vii. See further Chapter 2.

³⁷ Michael M Postan, *The Medieval Economy and Society* (Weidenfeld & Nicolson 1972) 136.

³⁸ Maitland, *DBB* (n 6) 407.

of seigneurial and governmental pressure at the expense of investigating economic regulation.³⁹ But the village community was a legal, administrative, and economic institution fundamentally connected by rights in land,⁴⁰ and were connected by these things as well as (often) having the same lord.⁴¹ The village community was a mode of economic management which combined equally well with free and unfree personal status – primarily defined by reference to the ability to direct one's own labour - and irrespective of whether any one community faced many, few, or no seigneurial demands for rent and/or services (which might be backed by actual violent coercion, the threat thereof, or manifest as simple fiscal demands). It responded to the prevailing social and economic conditions without being derived exclusively from any one condition, whether demands from lords, community and/or egalitarian sentiment, or economic incentives.⁴²

To investigate the village community and the manor means engaging with both the nature and operation of legal customs, and with the economic problems presented by commons regulation which they often governed. English agriculture from c. 1200 was, for much of the country, operating using a highly regulated common field system.⁴³ Medieval England had 'open fields', meaning agricultural land not divided by fences or other boundaries, and 'common fields', meaning the mode of land ownership and management entailing some degree of communal agriculture which utilises the physical layout of open fields to enable shared resource access. A system of crop rotation was followed which moved crops and animals around two or three open fields in a village and intermittently left land fallow to restore nutrients. Villages and manors

³⁹ Vinogradoff, *Growth* (n 7) 188; Maitland, *DBB* (n 6) esp 374-415.

⁴⁰ See generally Hoffmann, 'Medieval Origins of the Common Fields' in William N Parker and Eric Jones (eds), *European Peasants and Their Markets* (Princeton University Press 1975).

⁴¹ Vinogradoff, *Growth* (n 7) 86.

⁴² Vinogradoff, *English Society in the Eleventh Century* (Clarendon Press 1908) 477; Maitland, *DBB* (n 6) 181. For a reiteration, see Susan Reynolds in Chapter 4.

⁴³ The map in Hoffmann (n 40) 26 shows a rough distribution.

required regulation or management so as to avoid the ‘tragedy of the commons’ – where one user took or withheld more than their fair share to the detriment of all other users - and other abuses of the system such as ‘freeloading’, i.e. taking the benefits of the commons without bearing any of the costs. Mechanisms were needed to determine the pattern of crop rotation, the ploughing dates each year, and the harvest dates. These allocative regulations were essential and important features of the legal life of the village community, and of the manor which relied on it.⁴⁴ This was not a free-market system based on property and contract, but a system of internal – perhaps corporate - decision-making.

Part of the difficulty of dating these institutions is that open field agriculture seems to have fully developed at roughly the same time as the manorial system, and also alongside the newly developing monarchical ‘state’ of England, and the flourishing of written records in the mid-thirteenth century. This makes it extremely difficult to say where cause and effect lie. Did manors create pressure and cause the development of open field farming and village regulation, or simply make use of an existing structure?⁴⁵ In the nineteenth century, dating open fields and common agriculture was directly connected to the vital questions of which culture had produced them, and whether they originated amongst a free or unfree populace – with these terms again defined by reference to the power to direct labour, and sometimes by reference to full chattel slavery on the Roman model. For example, common field farming under a variety of lordship conditions might be explicable because the system pre-dated lordship, and/or was essential for the survival of the

⁴⁴ Vinogradoff, *Villainage* (n 16) 4, 11.

⁴⁵ These difficulties are discussed in Christopher Dyer, ‘The English Medieval Village Community and its Decline’ (1994) 33(4) *Journal of British Studies* 407, 414. For seigneurial administration, a combination of Exchequer practice and inflation combined to create formal and informal regulation and accountability for manorial officials, with some overlap with village community practices - for instance presentment of manorial officials, see Amir Licht, ‘Lord Eldon Redux: Information Asymmetry, Accountability and Fiduciary Loyalty’ (2019) 37(4) *OJLS* 770; Joshua Getzler, ‘Magna Carta Chapters 4 and 5 and the Origins of Accountability’ in Catherine MacMillan and Charlotte Smith (eds), *Challenges to Authority and the Recognition of Rights* (CUP 2018); John Sabapathy, *Officers and Accountability in Medieval England 1170-1300* (OUP 2014), and Chapter 6.

communities from which lords extracted wealth and labour.⁴⁶ There is evidence of open field farming all over medieval Europe, and whilst Victorian scholars did not know exactly how old it was, they speculated that it may have significantly pre-dated the Norman Conquest: there was some evidence of open-fields in Anglo-Saxon charters and laws. Two opposing sides emerged: the ‘Romanists’ and ‘Germanists’ argued that medieval institutions were, respectively, Roman and German/Teutonic in origin. Germanists were constrained to a later date of emergence than Romanists, in order to avoid the possibility of Roman influence on later institutions.⁴⁷ Vinogradoff placed the date in the fifth or sixth century, based on a lack of evidence for earlier. Although there were incentives to nucleate villages at least as early as the Roman period, the ongoing establishment of both nucleated villages and dispersed hamlets showed that both were still viable until after the Germanic invasions provided more persuasive incentives to nucleate for both cultivation and defence – hamlets required lower population density and a larger supply of land.⁴⁸ Maitland doubted the evidence could even go so far as to prove open fields any earlier than the ninth century,⁴⁹ and argued that common rights were a later, fourteenth-century, addition.⁵⁰

The date of emergence of this agriculture remains an active research question,⁵¹ but with less political baggage. By the thirteenth century, if not earlier, many English villages had collective agriculture in large open fields nominally divided into smaller plots possessed by villagers. All but the poorest tenants held a number of long, thin, unenclosed plots (strips) scattered non-adjacently across different fields. Entire fields were enclosed by fences or hedges whilst crops were growing

⁴⁶ See, e.g. Henry S Bennett, *Life on the English Manor* (CUP 1937) 100.

⁴⁷ Postan (n 37) 89.

⁴⁸ Vinogradoff, *Growth* (n 7) 18; 147.

⁴⁹ Seebohm, *Village Community* (n 5) 109, Maitland, *DBB* (n 6) 425.

⁵⁰ Frederic W Maitland, ‘Review of *Commons and Common Fields* by Thomas Edward Scrutton’ (1888) 3(1) EHR 568, 568.

⁵¹ For instance, Helena Hamerow, *Rural Settlements in Anglo-Saxon England* (OUP 2012); Chris Wickham, *Framing the Early Middle Ages* (OUP 2005).

to prevent animals from entering, but were opened for grazing after the harvest. The small portions of land immediately attached to houses were privately enclosed.⁵² Patches of uncultivated land at the ends of fields provided turning room for the large ploughs required to churn the heavily clay soil common in the central belt of England - where this mode of agriculture was most common.⁵³

Common field farming was less typical in the east and furthest west of England, where irregular field systems or a complete lack of communal cropping were more frequent.⁵⁴ However, even outside regular common field farming communities, arrangements with a strong communal element existed in the form of management of drainage and commons (including 'waste',⁵⁵ marsh, and woodland) in communities across England.⁵⁶ Thus, whilst the village community might be more necessary and more fully realised in the 'central' region, it had a role in communal agriculture in any locality with a common pool resource system, i.e. a system of finite resources large enough to make excluding potential beneficiaries difficult, so that there is free access, but where mechanisms like stinting, or sometimes privatisation or corporatisation, are used to prevent exhaustion of the resource from overuse.⁵⁷ This regional variation does, however, mean that it is necessary to be cautious in generalising to 'all manors' or 'all village communities'.

⁵² Vinogradoff, *Villainage* (n 16) 233.

⁵³ Some areas had extensive open fields before the Norman Conquest, for example a charter from Charlton, Berkshire in 956 AD refers to open fields: Tom Williamson, *Shaping Medieval Landscapes: Settlement, Society, Environment* (Windgather 2003) 6.

⁵⁴ David Hall, *The Open Fields of England* (OUP 2014) 1.

⁵⁵ 'Waste' in this context could mean either uncultivated or uncultivable land and was a word with roots shared across Old French, Old High German, and Latin: see 'waste, adj' in *OED Online*. September 2020. Oxford University Press. <https://www.oed.com/view/Entry/226028> (accessed September 14, 2020).

⁵⁶ Hall (n 54) 128.

⁵⁷ For a detailed consideration of the economics of commons see Elinor Ostrom, *Governing the Commons* (1990; 2nd edn, CUP 2015).

The Victorian scholars could not see how common field agriculture was economically efficient: the customary rules governing common field systems seemingly discouraged and prevented innovation and investment. Scattered strips meant wasted time moving between them, and each holding was so intertwined with neighbours', with a corresponding impact on weed growth, boundaries, and rights of way,⁵⁸ that they were incapable of independent action: they all had to follow the same timetable and plant the same crops.⁵⁹ Some historians viewed the result as 'absurdly uneconomical'. Seebohm speculated that the inconveniences must have once been worthwhile, but this did not amount to a defence.⁶⁰ Vinogradoff said English peasants were particularly entrepreneurial, notwithstanding the limitations of custom,⁶¹ for example in cultivating new land ('assarting').⁶² But even Vinogradoff argued that only a strong communal sentiment could explain the endurance of the common field system. Landlords would have gained a more efficient economic instrument to exploit, labourers would have been able to maximise productivity, and the whole system of administration, stewards, bailiffs, reeves, accounts and archaic procedure could have been dispensed with otherwise.⁶³ It seemed that efficiency was deliberately sacrificed to social equality, but Maitland found this so implausible that *his* stated aim was to overturn the entire idea of an egalitarian village community.⁶⁴

Since then, twentieth-century economics scholarship has shown how intermixed strips could be an economically efficient mode of agriculture in context. If each landholder had two primary concerns, (1) to keep themselves and their households alive via subsistence agriculture,

⁵⁸ Seebohm, *Village Community* (n 5) 15.

⁵⁹ Frederic Seebohm, *Customary Acres and Their Historical Importance* (Longmans, Green 1914) 2.

⁶⁰ Seebohm, *Village Community* (n 5) 15-6.

⁶¹ Vinogradoff, *English Society* (n 42) 459, 477; idem, *Villainage* (n 16) 181.

⁶² Vinogradoff, *Villainage* (n 16) 332.

⁶³ *ibid* 230-237.

⁶⁴ Deidre McCloskey, 'The Persistence of English Common Fields' in Parker and Jones (n 40) 97.

and (2) to meet exactions imposed from above, and each had similar resources, households, and demands to meet, it made sense to co-ordinate their agricultural practices.⁶⁵ Common field farming did not maximise individual productivity, but it did minimise the risk of any one person failing to meet the minimum standard. It may have also provided disincentives to waste and carelessness of the sort that would later encourage individual and choice of centralised discipline under factory production.⁶⁶ This has significant impact on our understanding of the village community as a legal and economic institution: politics and material survival were both acting on it in complex ways.

⁶⁵ Hoffmann (n 40) 28.

⁶⁶ For consideration of the latter, see Gregory Clark, 'Factory Discipline' (1994) 54(10) *The Journal of Economic History* 128.

CHAPTER 1

THE EARLY VILLAGE COMMUNITY DEBATE

Sir Henry Maine (1822-1888) aspired to legal and historical writing which was ‘scientific’ in the sense of using evidence to prove the truth of its representations and the causal models built thereon. He is the starting point for a historiography of English writing on the medieval village community. However, like other eighteenth- and nineteenth-century ‘Whig’ legal historians,¹ Maine’s purpose was not strictly historical or legal, but political. The intense contemporary relevance of the village community debate cannot be overstated. Maine’s overtly practical aim was to understand the village community to improve the stability and success of imperial rule in India: the Sepoy Mutiny (1857) had undermined faith in colonial administration, and his ideas had a direct and powerful impact on imperial policy in India and elsewhere.² Increasing industrialisation also generated romantic interest in agriculture and ‘primitive’ communities. At home, Maine advocated the use of history to understand and facilitate the codification to organise the law more rationally (but not reform in the sense of changing the rules) of the common law. Maine’s broader theoretical claim to demonstrate the stages through which society progressed from ‘barbarism’ to ‘civilisation’ also responded to nineteenth-century economic and political changes, including the impact of the revolutions in France and America. Political concerns directed academic inquiry towards the ‘seeds’ of modern institutions, to be deployed in contemporary debate, rather than encouraging direct engagement with the village community as an object of historical interest in its own right.³

¹ See further n 46 below.

² See generally Karuna Mantena, *Alibis of Empire* (Princeton University Press 2010) esp 50, 96; George Feaver, *From Status to Contract* (Humanities Press 1969) 153.

³ Paul Vinogradoff, *Villainage in England* (Clarendon Press 1892) 18; Bernhard Zeller et al, *Neighbours and Strangers* (MUP 2020) 5.

The effect of its acute sensitivity to nineteenth-century politics was a corresponding decline in interest in village community studies when the practical impetus dwindled. By the late nineteenth century, British imperial policy was indirect rule (under Maine's influence), and as such Imperial administrators no longer felt a need to understand the workings of native institutions.⁴ William Ashley, writing towards the end of the century, was unconvinced of the importance of the hitherto much discussed question of the legal position of the peasantry once this political element was removed: if peasants were defined in law as free – i.e. they were generally neither chattel slaves nor was their labour directed by a lord - before the Norman Conquest but unfree after, this was neither reflected in nor explained any economic changes, so it was not particularly significant. If there was no formal centralised 'state', any disability in appealing to it because the law defined a person as 'unfree' and therefore outside the jurisdiction of the law in the royal courts was far less significant than in later centuries.⁵ It seemed the interest in the topic had been almost entirely driven by its contemporary political relevance. When this died away, other research questions came to the fore, as the following chapters will demonstrate. First, this chapter outlines some of the early village community debate to provide context for what follows.

A. EARLY GERMANISTS AND THE MARK

Medieval history was extensively deployed in nineteenth-century debates about the origins of social structures seen later in English society. Amongst English writers, the debate began at least as early as Blackstone, who described the beginnings of 'feudalism'⁶ as Saxon, and the fully developed version as Norman.⁷ 'Romanists' saw a line of historical development from Roman law

⁴ Mantena (n 2) 148.

⁵ William J Ashley, 'The History of English Serfdom' (1893) 3 *The Economic Review* 153, 166-7.

⁶ The definition and usefulness of the term 'feudalism' is so controversial that I will seek to avoid it except in quotations.

⁷ William Blackstone, *Commentaries on the Laws of England*, vol 2 (1765; 8th edn, Oxford 1765-9) 46-58; 77-85; *ibid* vol 4, 413.

and practice to medieval counterparts: specifically, they believed the Roman villa developed into the medieval manor.⁸ They argued Roman slaves and ‘*coloni*’ - late Roman personally free tenant farmers with small holdings, who were bound to their land by debts to their landlords and legal regulations – later became unfree peasants.⁹ The ‘Germanists’¹⁰ argued to the contrary: tribal invasions broke continuity with Rome after the Imperial withdrawal, and the manor and other medieval institutions originated in Germanic tribal arrangements. The Germanists held, in one form or another, that free peasant communities pre-dated manors, and those communities were gradually subsumed under a ‘feudal superstructure’. It was possible to hold a Germanist viewpoint and argue either that landholders were individual peasant proprietors, or the land was held in common by free village communities - the latter view was more politically controversial.

The early nineteenth-century scholarship of German historical scholars Savigny (1779-1861) and Eichhorn (1781-1854), and the English historian Francis Palgrave (1788-1861) brought together elements of Roman and German history, but it was Savigny’s Romanism which stimulated a divergence within the German historical school.¹¹ This was partly because more research generated more evidence enabling both sides to assert their claims and disprove some of the adversaries’. It was also partly a product of contemporary French and German politics, especially responses to the French Revolution.¹² The Germanists came to challenge not only the Romanists,

⁸ See further Chris Wickham, *Framing the Early Middle Ages* (OUP 2005).

⁹ The majority in England would be accurately called ‘villeins’, but a number of terms were used: see further below.

¹⁰ A Germanist need not necessarily speak or read German: Maitland, Vinogradoff, and Seeböhm certainly did, however. Maine utilised a great deal of German literature, including texts not translated into English editions, but his level of proficiency is unclear. All the parties in the early debate can be assumed to have had a good understanding of Latin.

¹¹ Friedrich Karl von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (original in German as ‘Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft’ (Mohr und Zimmer 1814); English edition Abraham Hayward (trs), Littlewood 1831); Hermann Kantorowicz, ‘Savigny and the Historical School of Law’ (1937) 53 LQR 326; Karl Friedrich Eichhorn, *Deutsche Staats- und Rechtsgeschichte* (Göttingen 1808-1823); idem, *Einleitung in das deutsche Privatrecht mit Einschluss des Lehnrechts* (Göttingen 1823); Francis Palgrave, *The Rise and Progress of the English Commonwealth* (John Murray 1832); idem, *The History of Normandy and England* (Macmillan 1851-64).

¹² Vinogradoff, *Villainage* (n 3) 10-16; idem, ‘The Teaching of Sir Henry Maine’ (1904) 20 LQR 119, reprinted in Herbert A L Fisher (ed), *The Collected Papers of Sir Paul Vinogradoff*, vol 1 (Clarendon Press 1928) 173, 180.

but also the German Romantic school Savigny and Eichhorn represented. The Romantic school prized national tradition embodied in historical antecedents and (national) social psychology, and this led it to reject conscious attempts to reform law.¹³ But the later Germanists wanted to re-evaluate these claims to have identified a national psychology and the immutable law that went with it, in light of the idea that the foundations of social life were in the freedom of the majority of people, with village community studies one aspect of that agenda.¹⁴

At the core of this debate was the question of whether the unfree were originally free, with their own institutions and communities, and later subjected to the control of a military aristocracy; or if they had always been unfree and their institutions formed as a result of downward societal pressure and exploitation creating a need for co-operation. There was a stark political dichotomy: was the medieval peasant enviable, an independent and self-governing member of a free community carrying the germs of the perceived exceptionalism of English parliamentary democracy, or an eternally oppressed dependent labourer without real freedom of action?

Nineteenth-century English village community scholars broadly followed Germanist scholarship. A ‘mark’ community of free equals, with interdependent politics and economy, rights in common land as attributes of community membership, and democratic assemblies,¹⁵ was imported into English history by John Mitchell Kemble (1807-1857), Bishop William Stubbs (1825-1901), and Edward Freeman (1823-1892) in a broadly uncritical way.¹⁶ Economic historian William Ashley (1860-1927) described the theory as a dogma or ‘collective mental process’ which blossomed in the 1870s alongside new approaches to higher education and Maine’s *Village*

¹³ Vinogradoff, ‘Maine’ (n 12) 180.

¹⁴ *idem*, *Villainage* (n 3) 17.

¹⁵ Clive Dewey, ‘Images of the Village Community’ (1972) 6(3) *Modern Asian Studies* 291, 302-3.

¹⁶ For a detailed study of their intellectual scope, see John W Burrow, *A Liberal Descent* (CUP 1981).

Communities in East and West: it was both a tidy idea and compatible with the prevailing views in Conservative politics, not necessarily engendering widening democratic participation or radical change.¹⁷

Kemble, for instance, discussed field layouts, periodic redistribution of land, and the mark using German research, assuming that because England was also ‘Teutonic’ it was no different. Kemble’s free Saxons farmed English land cooperatively, held common property in land,¹⁸ and made their own community-wide rules. The only feature Kemble refused to transplant was shifting cultivation, which he believed would overlook the special value Englishmen attributed to permanent property rights.¹⁹ But Kemble’s description was vague, and the reasoning about social groups was confused and based on incoherent sources. He did, however, focus for the first time in English writing on some of what would come to be the most important questions, placing the law of real property centre stage.²⁰

Stubbs, Freeman, and John Richard Green (1827-1883) followed Kemble’s lead, although Stubbs was more cautious than the rest. Helen Cam argued that Stubbs did not really believe in English mark communities, but because he relied on German evidence to supplement his English sources he gave a misleading impression, especially where he made extensive use of George von Maurer’s (1790-1872) work.²¹ Burrow has argued for a stronger position: that Stubbs did not believe the mark was the basis of Old English local government – an unorthodox stance for the

¹⁷ Ashley, ‘Serfdom’ (n 5) 153-4.

¹⁸ John M Kemble, *The Saxons in England*, vol 1 (1st edn, Longman, Brown, Green & Longmans 1849) 53.

¹⁹ *ibid* 39-40; Dewey (n 5) 301.

²⁰ Vinogradoff, *Villainage* (n 3) 21.

²¹ Helen Cam, *Law Finders and Law Makers in Medieval England* (Merlin 1962) 193.

time.²² It is true that Stubbs only described local self-government in the village community in relation to non-arable land (woods, meadow, pasture) in communal ownership. Arable land, by contrast, was always treated as individual private property. In his account, the community had rights and duties in policing, justice, and husbandry, and was absorbed as a subsidiary unit in the manorial system. This allowed the community to survive even when society changed around it.²³

Maine went beyond the practice of importing German ideas by directly relating English historiography to George von Maurer's 'scientific' observations of agricultural usage and land tenure, and Erwin Nasse's (1829-1890) village community studies.²⁴ The mark community had affected land law, agricultural custom, and the territorial distribution of landed property in Germany. If it also existed in England, it might explain some features of English property law, too.²⁵ For instance, Maurer's definition of the mark was an organised and 'self-acting' township formed from a group of families exercising common ownership over a defined tract of land, cultivating crops on a commons system, and functioning as a self-sustaining unit. Maine argued this was the proprietary and political unit of early English society, later absorbed into larger territorial aggregations like the manor and parish.²⁶

²² John Burrow, 'The Village Community and the Uses of History in Late Nineteenth-Century England' in Neil McKendrick (ed), *Historical Perspectives* (Europa 1974) 280.

²³ Vinogradoff, *Villainage* (n 3) 24.

²⁴ Henry Maine, 'New Materials for the Early History of Institutions' in *Lectures on the Early History of Institutions* (1875; 7th edn, John Murray 1897); idem, 'The Tribe and the Land' in idem, *Village Communities in the East and West* (1871; 3rd enlarged edn, Henry Holt 1889) 100; Georg von Maurer, *Geschichte der Markenverfassung in Deutschland* (Erlangen 1856) (no English translation); Erwin Nasse, *Über die mittelalterliche Feldgemeinschaft und die Einhegungen des sechszehnten Jahrhunderts in England* (Adolph Marcus 1869), translated as *On the Agricultural Community of the Middle Ages* (Henry Aimé Ouvry (tr), Macmillan & Co 1871).

²⁵ Maine, *Village Communities* (n 24) 11.

²⁶ Maine, *Village Communities* (n 24) 10. Freeman had talked about marks becoming parishes: *Comparative Politics* (Macmillan & Co 1873) 116.

Whilst Palgrave, Kemble, Stubbs, and Freeman had used the mark, they did not explain why it was no longer possible to see traces of it in England. This was especially problematic, as Nasse argued English property law was premised on a notion of discontinuity with such institutions. For instance, The Enclosure Select Committee of 1844 had followed the conventional assumption that at some point (often the Norman Conquest) all land in England was confiscated and returned to the lord of each manor as demesne, ending whatever communal ownership had existed prior. These nineteenth-century national conversations about enclosure meant increased attention was paid to how commons were created and managed, and Maine saw potential explanatory power in the mark. Unenclosed commons were recast as the places that exhibited traces of this historical phenomenon.²⁷ The intermixed fields; the three-field system; shifting severalty; pasture on green baulks; and communal officers all became vestigial practices based on ancient Teutonic traditions.²⁸

By the mid-nineteenth century, English scholarship offered both strong and weak versions of the mark theory. All posited the manorial lord as a late intruder, beginning the process of oppressing tenants into serfdom between the Germanic and Norman conquests.²⁹ It was an attractive theory, but none of the individual parts were grounded in fact,³⁰ instead relying on generalisations and assumptions. When few historians made direct use of primary sources, it was easier to make such assertions. Maine's claims, for instance, were entirely speculative – a response to political concerns rather than a conclusion based on evidence. However, as more research was produced, generalisations of any sort became harder to maintain.

²⁷ Maine, *Village Communities* (n 24) 82-87.

²⁸ *ibid* 98.

²⁹ Ashley, 'Serfdom' (n 5) 153.

³⁰ Vinogradoff, *Villainage* (n 3) 29.

Like many contemporary historians, Maine wrote little based on English historical materials.³¹ They were difficult to use: some early common law books were only available in manuscript, and the printed ones were difficult to read in style and language.³² Even if English law materials had been widely available, Maine would likely have preferred Roman law for making his universal claims in *Ancient Law*.³³ Stein has argued that many of Maine's basic concepts were also linked to ideas about legal education in the 1850s, and reforms seeking to make the law more rational and remove antiquarian relicts. The study of 'scientific' Roman law offered a way to illustrate general principles, which the case law method of the common law could not offer without the significant reform and rationalisation Maine called for.³⁴

Maine's account was imbued with modern political concepts and prescriptions, designed to engage with his own political context. He thought it straightforward that the Indian village community and the ancient European village community were 'in all essential particulars identical' (with differences of detail).³⁵ Comparative philology had already established a common 'Aryan' language group, and Maine thought 'comparative jurisprudence' could show a common institutional heritage, too.³⁶ Maine utilised historical, psychological, anthropological, and legal sources – what might now be referred to as 'external legal history'.³⁷ If Europe and India represented different stages in the same process of development from 'primitive' to 'progressive',

³¹ He actively avoided primary materials, apparently due to their lack of organisation and usability: Frederick Pollock, *Introduction and Notes to Henry Maine's Ancient Law* (John Murray 1914) xii, 10. Freeman supposedly never visited a public library or consulted a manuscript, relying solely on his family's private collection: Herbert A L Fisher, 'A Memoir' in *Vinogradoff Collected Papers*, vol 1 (n 12) 3.

³² Henry Maine, *Ancient Law* (1861; 5th edn, John Murray 1873) 116.

³³ Frederick Pollock, 'Maine as a Jurist' (1893) *Edinburgh Review* 1, 10; Pollock, *Ancient Law* (n 31) xiv; 1.

³⁴ Peter Stein, 'Maine and Legal Education' in Alan Diamond (ed), *The Victorian Achievement of Sir Henry Maine* (CUP 2006) 195-9.

³⁵ Maine, *Village Communities* (n 24) 12; 103.

³⁶ *ibid* 6.

³⁷ For the latter see Robert W Gordon, 'J Willard Hurst and the Common Law Tradition in American Legal Historiography' (1975) reprinted in *idem, Taming the Past* (CUP 2017) 19.

answers to questions about European medieval institutions could be found by looking to the same institutions in India. These shared features could be used both to reveal historical truths and to guide modern political choices – a stadial theory of law to illuminate both past and future.³⁸

The turn to India gave Maine the key to release English scholarship from its reliance on German technical dominance and invigorate a new wave of writing. The German historical school neither used the comparative method nor considered Maine's supposed truth that a 'large part of ancient Europe survives in India'.³⁹ Clive Dewey has argued this was vital: Maine's comparative method provided English writers with their own source materials instead of demanding that they develop the technical competence the German historical school cultivated,⁴⁰ and in which the educational institutions to train did not even exist in England. This was a 'scientific' approach in the sense of claiming to be evidence based, like the German school, but newly adapted for and by English scholarship. The intellectual baggage of the Teutonic mark community in the form of Roman and medieval law also became optional when the focus was India, helping to avoid challenges to English exceptionalism as the home of Parliamentary governance. Mantena describes Maine's 'singular achievement' in combining Roman property law, the history of medieval agricultural communities, German historical research, and contemporary forms of landholding in Russia, Ireland and India into a general theory of property.⁴¹

³⁸ Henry Maine, 'Kinship as the Basis of Society' in *Institutions* (n 24) 78-88; see generally Peter Stein, *Legal Evolution* (CUP 1980).

³⁹ Henry Maine, 'The Effects of Observation of India on Modern European Thought' in idem, *Village Communities* (n 25) 223.

⁴⁰ Dewey (n 15) 306.

⁴¹ Mantena (n 2) 127-133, with reference to in particular to Kovalevsky and Marx.

However, Maine was not really an historian: he was a synthesiser searching for theories.⁴² The main value of his writing was its presentation of new ideas ‘at every turn’ to challenge other scholars and the public at large, not factual truths.⁴³ Seeing Maine as interested in the origins of types of social institutions,⁴⁴ rather than as writing history per se, helps to resolve the difficulties with many of his claims and address the many criticisms of his work highlighting its inaccuracy. Nonetheless, some of his key themes endured in village community studies for decades. The sections below set out those most relevant to the study of medieval custom and customary law.

1) *History of Property*

The Germanist account had ancient kinship groups holding land in common in a voluntary mark community of free people with internally organised law and agriculture.⁴⁵ It was used in coteremporary politics by ‘Whig’ historians: thinkers who believed in a linear development of English history towards ‘progress’, where the latter represented democracy and greater individual liberty as well as the development of scientific knowledge.⁴⁶ They deployed the village community and the ancient free constitution as the supposed heritage of modern Whigs, and as illustrations of the consistent march of progress.⁴⁷ The mark theory was part of a broader project to explain the village community as a ‘seed’ of later democracy, freedom, political stability, and English exceptionalism. However, its decline was described as inevitable in the pursuit of those same

⁴² William S Holdsworth also accused Maine of not being an historian in *The Historians of Anglo-American Law* (Columbia University Press 1928) 81.

⁴³ James F Stephen, (1861) 114 *Edinburgh Rev* 456, 482.

⁴⁴ As, for instance, Kingsley B Smellie, ‘Sir Henry Maine’ (1928) 22 *Economica* 64, 81.

⁴⁵ Kemble (n 18) 35.

⁴⁶ For a general discussion of Whig history see Herbert Butterfield, *The Whig Interpretation of History* (G Bell and Sons 1931; reprinted Penguin 1973) and Burrow, *Liberal Descent* (n 16).

⁴⁷ See generally Burrow, *Liberal Descent* (n 16).

markers of ‘progress’: Stubbs argued communal institutions would fail once any individual achieved more success than their neighbours, and that population growth and land shortages would require more intensive cultivation, causing a breakdown of the communal in favour of the individual’s interest in productivity maximisation.⁴⁸ Politically conservative thinkers like Maine, who prized private property, freedom of contract, and the modern economy as the height of ‘progress’, had to somehow reconcile this with their Germanism.

For Maine, the village community was paradoxically associated with both social cohesion and order, and economic inequality, oppression, and rigid hierarchy and custom.⁴⁹ The Victorian Whig concept of ‘progress’ provided the necessary conceptual bridge: progress meant moving from a society where property rights were based on status to one where they were based on contract, and without ‘progress’ the village community and its customs meant societal stagnation. But radicals and reformers held up the village community as a lost paradigm of liberty and equality – an argument in favour of communalism (if not communism) and, by illustrating an effective system of public constraints on private actions, which they believed could in the present-day justify some level of state intervention mitigating laissez faire economics. The heritage of the village community in medieval law could provide both legitimation and practical models with immediate political impact, affecting governance in India⁵⁰ and Irish land reforms.⁵¹

⁴⁸ William Stubbs, *The Constitutional History of England*, vol 1 (1874; 3rd edn, Clarendon Press 1880) 50. Caution is necessary in using different editions of Stubbs, as he constantly updated and revised until the posthumous 6th edition in 1903-6.

⁴⁹ Dewey (n 15) 295.

⁵⁰ As well as being amply evidenced by Maine’s work, Dewey has argued that the idea of a village community was the creation of a late nineteenth-century Anglo-Indian tradition: *ibid* 291-2.

⁵¹ Burrow, ‘Village Community’ (n 22) 256.

Maine was particularly interested in, and repeatedly wrote about, the history of the forms of property and tenures.⁵² Ironically, he argued the history of property in land had been ‘greatly obscured’ by passing over or misconstruing all forms of proprietary enjoyment which could not be explained by the historian’s research agenda,⁵³ and especially by focusing on Roman law ideas about possession. The latter rested on a developed notion of property in later Roman jurisprudence, but assuming it was applicable across different societies rested on a mistaken assumption that people would behave the same way in completely different social contexts. For example, in Indian village communities, Maine believed property began as shares in assemblages of co-proprietors, founded on a core of family co-ownership.⁵⁴

Maurer and Nasse had reframed German and English narratives on the development of individual property by describing an ancient community of patriarchal family groups holding village land. Customary laws and usages were key to this, as they regulated relations between groups and community: communal land rights were subject to the rights of every other family, the community rules about crops and pasture, and monitoring by an elected or hereditary officer. This was ‘careful and complicated’ tillage, especially since the arable land was occasionally redistributed for equality, as in contemporary Russian and Indian villages.⁵⁵ Russian villages also had ‘ancient’ organisation underneath lordship, although the big difference for Russia was periodic redistribution – Maine thought this was introduced via early Eastern European law.⁵⁶ When a system abandoned shifting land ownership, it was a step towards the development of individual

⁵² Henry Maine, *Dissertations on Early Law and Custom* (John Murray 1883) vi.

⁵³ Henry Maine, ‘The Chief and his Order’ in *Institutions* (n 24) 119.

⁵⁴ Maine, *Ancient Law* (n 32) l; 243-246; 252.

⁵⁵ Maine, *Village Communities* (n 24) 77-81.

⁵⁶ Maine, *Ancient Law* (n 32) li; 255.

private property and ‘progress’. It was only as a product of the gradual dissolution of economic family dependency and a growth of individual legal obligation that personal property of the Roman type emerged.⁵⁷ Property was therefore communal before it was individual, Maine said.

However great the role of custom, and however the administration of justice was organised in a society, Maine’s kings were always judges. Even if there was an independent system of law courts, kings had supplementary or residual jurisdiction which even supposedly immemorial usage could not exclude. For example, early Germanic kings had enforcement power even in the hundred, which was a court of arbitration found ‘practically universal[ly]’ amongst Germanic tribes. However, in England, Maine said some of the early power of the hundred court was relocated to the larger county and shire courts, and another part returned to the local village community under the guise of the manor.⁵⁸ The latter was unlike any of the older communal organisations: not just a mode of property, but a political body.⁵⁹ It was autocratic, not democratic, with relationships within it based on tenure, not households,⁶⁰ encompassing both free and immediately dependant demesne tenants.⁶¹ But Maine thought the ‘germs of feudalism lay deep in the more ancient social forms’, and the growth of lordly authority was one part of that development.⁶² Each of chief, tribe, lord, and community were different sources of positive institutions which eventually coalesced.⁶³

⁵⁷ *ibid* 163.

⁵⁸ Henry Maine, ‘The King and Early Civil Justice’ in *Dissertations* (n 52) 160-170.

⁵⁹ Henry Maine, ‘Decay of Feudal Property in France and England’ in *ibid* 302.

⁶⁰ Maine, *Village Communities* (n 24) 133.

⁶¹ Maine, ‘Royal Succession’ (n 83) 130.

⁶² Maine ‘Civil Justice’ (n 58) 166.

⁶³ *ibid* 119.

Dissertations in Early Law and Custom aimed to connect existing institutions with ‘primitive’ or ancient usages and the ideas associated with them.⁶⁴ Maine’s account of ancient Ireland noted that Irish ‘rundale’ holdings had been a form of occupation rather than property: there was always some person above the occupier who was legal owner and could theoretically change the method of holding. Practically though, popular feeling would make that very hard to do. It was a ‘grave misconception’ to suppose that a chief/lord as legal owner of tribal land, or portions of it, could alter customary occupation and cultivation.⁶⁵ In fact, the institutions of ‘primitive’ people like village communities would be actively preserved because they provided useful facilities for civil and fiscal administration.⁶⁶ Maine thought it unlikely that any English law was directly descended from, for example, Celtic usage, preserved in this way, because Roman origins could be argued for many of the institutions conventionally considered English or Germanic - but all shared common descent from original ‘Aryan’ customs.⁶⁷

Whilst Maine’s ideas about the history of property were largely based on speculation, his attention to the relation between legal definition and reality spoke to a practical understanding of property – presumably gained during his time in the Indian administration – which is often absent in legal historical accounts. However, Maine was not enthusiastic about legal systems with a large role for customary practices.

2) *Custom and Stagnation*

⁶⁴ Maine, *Dissertations* (n 52) v.

⁶⁵ Henry Maine, ‘The Tribe and the Land’ in *Institutions* (n 24) 102.

⁶⁶ Maine, ‘India’ (n 39) 236.

⁶⁷ Henry Maine, ‘The Primitive Forms of Legal Remedies’ *Institutions* (n 24) 295-6.

Maine's views on custom were particularly important in his politics. Custom was antithetical to the central goal of 'progress', he said, because it prevented the necessary movement from status to contract. By the fifth edition of *Ancient Law* (1873) his discussion of customary law was supplemented by *Village Communities in the East and West* (1871) and the latest German studies.⁶⁸ Centralisation, formalisation, and fixity over flexibility were the proposed remedy for customary stagnation, and the comparative method was employed in an attempt to reveal the right conditions for ending custom's 'stranglehold' on behaviour.⁶⁹

However, despite his intended relevance to contemporary English politics, Maine had little interest in the substance of the customary law of medieval England itself, or how it affected later English law: he was more interested in the origins of legal rules than rules themselves.⁷⁰ For example, Maine's discussion of prescription, whereby customs become enforceable via long usage, is short and does not make the later distinction between custom and prescription. He claimed that, initially, common law legislation worked via a principle of limitation, barring legal actions for wrongs occurring before a particular fixed date, as in the common law's 'time immemorial'.⁷¹ He attributed a reluctance to allow for prescription to church influence, which was disinclined to allow that privileges they conferred could lapse.⁷² However, he made no reference to substantive law on rights obtained by prescription, of which there is a substantial body of medieval case law.⁷³

⁶⁸ Maine, *Ancient Law* (n 32) I; idem, *Village Communities* (n 25) viii; 10; 37.

⁶⁹ Smellie (n 44) 64.

⁷⁰ Vinogradoff, *Villainage* (n 3) 29-30.

⁷¹ Maine, *Ancient Law* (n 32) 151.

⁷² *ibid* 277.

⁷³ See the discussion in John W Salmond, *Essays in Jurisprudence and Legal History* (Stevens & Haynes 1891) 15; Joshua Getzler, 'Roman and English Prescription for Incorporeal Property' in idem (ed), *Rationalizing Property, Equity and Trust* (OUP 2003); Harry Dondorp, Eltjo J H Schrage, and David J Ibbetson (eds), *Limitation and Prescription* (Berlin 2019).

Maine's lack of engagement with English law and history meant his claim that only 'feudal' lordship provided the momentum to end customary stagnation was based on his comparative observations of India.⁷⁴ He did, however, make a little use of William Marshall's study of English agricultural customs to show common fields were 'singularly alike' across different places, and custom was often treated as legally enforceable.⁷⁵ Marshall thought collective agriculture was easily managed via simple rules which both made bad husbandry obvious and the community better prepared both to defend against attacks and manage emergencies.⁷⁶ But Maine believed the village community was an institution ill-suited to produce more food and meet the needs of a growing population, with both war and commerce acting as dissolving forces.⁷⁷ Economic competition was a relatively modern phenomenon – at least based on Maine's observations in India.⁷⁸ It was to be expected that adventurous members of the community would rebel and make their own fortunes, or want to use their share of the common stock differently.⁷⁹ However, because they were 'enslaved to custom', villagers were not ready to adopt new crops or methods, making 'feudal' autocracy a better mode of management for increasing output. The problematic perspective of a colonial administrator is clear here.

Also characteristic of 'progressive' societies was the separation of different kinds of power. In the early history of ownership, Maine could see no distinction between political and proprietary power: the right to tax, for instance, was not considered distinct from the right to demand rent.⁸⁰

⁷⁴ Maine, *Ancient Law* (n 32) 23.

⁷⁵ Marshall (1745-1818), a rival of Arthur Young, produced detailed surveys of eighteenth-century English farming, sensitive to the historical roots and survivals present therein: *Rural Economy of England*, 12 vols (1787-98).

⁷⁶ Maine, *Village Communities* (n 24) 86-90.

⁷⁷ Maine, 'House Communities' in *Dissertations* (n 52) 237.

⁷⁸ Maine, 'India' (n 39) 227.

⁷⁹ *ibid* 264.

⁸⁰ Maine, 'India' (n 39) 228. See also Frederick Pollock and Frederic W Maitland, *The History of English Law Before the Time of Edward I*, vol 2 (2nd edn, CUP 1905) 3 for a similar notion.

In this ‘infancy of ideas’ legislative, judicial, executive, and administrative powers were not separated.⁸¹ It was possible to pass a law, affirm a rule, try an offender, carry out a sentence, or prescribe a set of directions to an official, all without distinguishing what sort of power was being exercised.⁸² This conflation of property and sovereignty was supposedly introduced by the ‘barbarian conquerors’ of the Roman Empire (and hence was not Roman in origin).⁸³ But societies where these concepts were blended together were liable to stagnation and lacked rational legal systems.⁸⁴

Maine argued the earliest laws were not commands, or even statements of principle, but the decision of a judge in a particular case. A custom then developed when a subsequent judgment affirmed or punished breach of a pre-existing rule. However, control of customs was appropriated by different groups in society: first by kings, then aristocracies who monopolised knowledge of customary law. The use of writing made it harder to simply assert custom, and legal codes became the norm because written law provided a better record than individual memory, and protected against fraud. When precisely this codification occurred was important for ‘progress’: the Romans codified at the right time to prevent the growth of unreasonable customary usages.⁸⁵ It was also possible to have both written law and unwritten custom in one system, both imbued with the same underlying principles.⁸⁶

⁸¹ Henry Maine, ‘The Early History of the Settled Property of Married Women’ in idem, *Institutions* (n 24) 314; idem, *International Law* (John Murray 1888) 19.

⁸² Susan Reynolds returned to this theme much later: see Chapters 4-6.

⁸³ Henry Maine, ‘Royal Succession and the Salic Law’ in idem, *Dissertations* (n 52) 148.

⁸⁴ Maine, ‘Ancient Irish Law’ in idem, *Institutions* (n 24) 26.

⁸⁵ Maine, *Ancient Law* (n 32) xvi-ii; 11-19.

⁸⁶ Maine, *Village Communities* (n 24) 20.

This meant the definition of 'law' given by the legal positivism of John Austin (1790-1859), which premised law on the command of an authoritative sovereign and held up legislation as the primary form of lawmaking, was inappropriate for early law.⁸⁷ Maine argued there was no 'difficulty in allowing that laws have the character given to them by Austin, so far as such laws have proceeded from formal legislatures'. The problem, however, was that there was also customary law, especially the English common law. Austin was forced to hold that whatever the sovereign permitted they also commanded in order to explain custom, but this required an additional step in the form of court enforcement for a custom to become a law. Until then, it was a 'positive morality' - a rule enforced by opinion.⁸⁸ However, in early society, Maine believed there were no commands or sanctions at all, only habits: in India, law took the form of declarations, and the authority of rules derived from their age, not their source. There were no wrongs to individuals, only public order offences, and there were no sanctions, only community disapprobation. All in all, the command theory would find that India had only morality, not law, until kings gradually came to consolidate power and issue sanctions.⁸⁹ But this was not an adequate practical description: India clearly did have law, it just looked different to Austin's vision.

Legislation was not naturally associated with innovation, either: an innovating legislature seemed to be a feature of societies with broken up social groups and centralised government.⁹⁰ Little compulsion or constraint was needed to secure conformity with customary usage: people conformed because of public opinion, superstition, and instinct - even blindly - but once rules emanated from an external source, they changed character and Austinian coercion became

⁸⁷ John Austin, *The Province of Jurisprudence Determined* (1832; Wilfrid E Rumble (ed), CUP 1995).

⁸⁸ Maine, 'Sovereignty' in *Institutions* (n 24) 563; Maine's student Seebohm also drew a line between positive morality and positive law, aligning him with Maitland on this point: *On International Reform* (Longmans, Green and Co 1871) 80.

⁸⁹ Maine, *Village Communities* (n 24) 68; Maine, *Dissertations* (n 52) 36-8.

⁹⁰ Maine, 'Irish Law' (n 84) 27.

necessary, Maine thought. If the source of rules was at a great distance from the bulk of the population, the sovereign had to deal with people as classes, not individuals: laws would then be more 'indifferent', 'inexorable', and 'general'. The generality of law, and dependence on coercion, were therefore a result of the great territorial area of modern states, which grew by the combination of sub-groups, and under Roman influence.⁹¹ Austin's concept of law was appropriate only for such societies.

Many of Maine's ideas here deserve a second look: his emphasis on the lack of precise definitions in early law is particularly valuable as it avoids the positivistic framework imposed by (anachronistic) demands for ahistoric legal definition which characterise some later studies, including Maitland's. However, Maine's discussion of custom, although empirically based, was primarily concerned to further his political and philosophical aims and not to provide historical or legal description of how custom practically functioned.⁹² This was also true of his discussion of the origins of the manor and village community.

3) *Manor and Village Community*

Maine believed the manor had evolved from a village community of free tenants without lordship, and that the homage of the later manor was composed of their descendants.⁹³ Although a large amount of waste land was newly cultivated in the thirteenth century, so Maine could not assume all manors were based on formerly free villages, he argued this was nonetheless often the

⁹¹ Henry Maine, 'Sovereignty and Empire' in idem, *Institutions* (n 24) 392-4.

⁹² These aims are discussed further in Burrow, 'Village Community' (n 22) 272-3.

⁹³ Maine, 'Decay' (n 59) 306; 315.

case. The free village community had contained all the elements found in the earliest manors, and the leet court jury and ability to elect officials were supposed vestiges of that freedom.⁹⁴

The lord's control of waste, for instance, was connected in Maine's mind with the transfer of legislative and judicial power away from the community.⁹⁵ What had formerly been commonly held by the community became seigneurial private property, and although tenants were granted some rights to pasture and firewood, the lord could enclose and exclude all others.⁹⁶ Any customary rights not traceable to explicitly 'feudal' principles – and a number of these existed as to use of land, enclosure, and lordly involvement in the manor – must have developed unsystematically and unconsciously through the tolerance of those lords and their successors.⁹⁷

One explicitly 'feudal' custom was primogeniture. Primogeniture was neither Roman nor 'barbarian' but arose as an adaptation combining previous customs. The custom had always been that official roles passed by primogeniture, Maine said, so when officeholding came to depend on landholding, the primogeniture custom was transplanted and became a custom relating to land tenure.⁹⁸ This also caused a differentiation between noble holdings with offices, and non-noble holdings which might continue to use other inheritance customs – although even without the demonstrable benefit in having a military tenants' property pass to a single male heir, primogeniture was popular with tenants.⁹⁹ Maine believed this explained why parage was the normal inheritance custom in France, where primogeniture was rare and restricted to knightly

⁹⁴ Maine, *Village Communities* (n 24) 135-9.

⁹⁵ *ibid* 162.

⁹⁶ In respect of waste, the Statute of Merton both confirmed this and limited the right: *ibid* 135.

⁹⁷ *ibid* 84; 136.

⁹⁸ Maine, *Ancient Law* (n 32) 226.

⁹⁹ Maine, 'The Chief' (n 53) 120; *idem*, 'Ancient Divisions of the Family' in *idem*, *Institutions* (n 24) 185-224.

tenures. In England, primogeniture had extended from knightly use to general use (with the exception of Kent's gavelkind and other local customs) between *Glanvill* and *Bracton*.¹⁰⁰

These customs were enforced in the manorial court, which came to have three parts: the court leet, the court baron, and the customary court.¹⁰¹ The court baron was a survival, the remnant of the ancient village assembly appropriated by manorial lords for the administration of justice, subordinating the other roles it had performed earlier so that the lord presided, the free tenants only advised, and the villeins attended without any right to share in the proceedings.¹⁰² The court had wide criminal and civil jurisdiction, and administrative and regulatory powers amounting to the power to legislate.¹⁰³ The latter was originally a power of the village community council.¹⁰⁴ Whilst the manorial lord had different kinds of authority over free and unfree tenants, both kinds were exercised through the court baron. If there were no free tenants, the only court which could be held was the customary court, which received and assessed customary dues.¹⁰⁵ These dues were in their nature taxes (political duties), not rent (property duties) and derived from a mix of oppression by the lord, agreements with them, and, most often, the regulation of force and assertion of sovereignty.¹⁰⁶ Beyond these doubtful points, Maine had little to say about local courts or custom in medieval England. However, both Vinogradoff and Maitland sought to add evidence-based history to this, eschewing the universal theories and generalisations Maine was famous for.

¹⁰⁰ Maine, 'The Chief' (n 53) 122.

¹⁰¹ Maine, *Village Communities* (n 24) 139.

¹⁰² Maine, 'Decay' (n 59) 303.

¹⁰³ Maine, *Village Communities* (n 24) 139.

¹⁰⁴ Maine, 'Sovereignty and Empire' (n 91) 388; idem, *International Law* (n 81) 19.

¹⁰⁵ Maine, *Village Communities* (n 24) 134.

¹⁰⁶ Maine, 'Decay' (n 59) 304.

4) *Maine: Evaluation and Legacy*

To produce better ‘scientific’ scholarship it was necessary to be more careful in analysing single examples, more critical in investigating, less prompt in generalising, and less eager to reach universalizable results than Maine.¹⁰⁷ Raymond Cocks has argued that dissatisfaction with Maine’s technical and philosophical claims fostered a more restricted understanding of the appropriate scope of legal history, and discouraged claims that the legal past contained lessons the future: it is true that in modern legal studies, history and philosophy are rarely used together. A changing political agenda was also to the disadvantage of Maine’s enduring legacy: without a perceived need to explain or improve Imperial hegemony there was less need to use law the way Maine had, or to engage with it from other disciplinary perspectives.¹⁰⁸

His legacy was that ‘the history of the manor in England, both legal and economic’ underwent ‘a thorough re-examination’. Maine had popularised George von Maurer, Nasse, and Kemble – the Germanists whose views he uncritically accepted and built on. A reaction against the Germanists began, represented in England by Seebohm, but it was not yet clear when Maine died whether that reaction had gone too far. The Germanist position was sustained by Vinogradoff’s ‘moderate and critical’ Germanism, supported by Charles Elton (1839-1900),¹⁰⁹ and to a lesser extent by Maitland.¹¹⁰ Maine’s ideas were also used by political opponents, like John Stuart Mill, and even though Maine did not approve, it helps demonstrate his impact as the standard bearer for ‘scientific’ history.¹¹¹

¹⁰⁷ Vinogradoff, ‘Maine’ (n 12) 189.

¹⁰⁸ Richard Cosgrove, *Scholars of the Law* (New York University Press 1996) 208.

¹⁰⁹ Pollock, ‘Maine’ (n 33) 21; Charles Elton, ‘Villainage in England’ (1892) 8 LQR 117.

¹¹⁰ Burrow, ‘Village Community’ (n 22) 275-6; Pollock and Maitland (n 80) vol 2, 240-5.

¹¹¹ John Stuart Mill, ‘Maine on Village Communities’ (1871) 9 Fortnightly Review 543.

The fact that hindsight shows Maine was over-ambitious does not mean his work is now valueless.¹¹² He was central in fostering the atmosphere of promise that permeated the mid-Victorian attitude to learning.¹¹³ A whole generation of students of law and history engaged, directly or indirectly, with Maine's ideas: 'cheap criticisms' of Maine based on his factual accuracy failed to appreciate his impact on European thought.¹¹⁴ He gave an impulse to the intelligent 'scientific' study of law in England and America, forging a new relationship between history and the emerging social sciences, and turning jurisprudence from a study of rules to a consideration of the living growth of human society.¹¹⁵ It was not possible to make bold, even global, claims about law and history and fully ground them in evidence and the scientific method. However, as Maitland said, it was only through learning deep and wide, thorough and technical, that later writers could safely approach Maine's questions or criticise his answers.¹¹⁶ Further, as other chapters will demonstrate, village community studies would be shaped by Maine's research questions for many years.

Firstly, however, it is worth briefly considering that Maine's claim to depart from the narrative history which characterised the writings of Freeman or Stubbs exposed him to a new kind of criticism which he was not prepared to meet: the historicist one. Narrative history was not susceptible to historicist criticism because it was not evidence-based, but Whiggish ideas of

¹¹² *ibid* 376.

¹¹³ George Feaver, 'The Victorian Values of Sir Henry Maine' in Diamond (n 34) 38; Stefan Collini, Donald Winch, and John Burrow, *That Noble Science of Politics* (CUP 1983) 209.

¹¹⁴ Vinogradoff, 'Maine' (n 12) 174.

¹¹⁵ Mountstuart E Grant Duff, *Sir Henry Maine* (Henry Holt 1892) 76; Pollock, *Ancient Law* (n 31) v.

¹¹⁶ Smellie (n 44) 94; Frederic W Maitland, 'Why the History of English Law is not Written', reprinted in Herbert A L Fisher (ed), *Collected Papers of Frederic William Maitland*, vol 1 (Cambridge 1911) 480; Letter from Maitland to Pollock (21 January 1901) in Cecil H S Fifoot, *The Letters of Frederic William Maitland* (Selden Society 1965) 222.

progress which claimed to be based on history were exposed to exactly this,¹¹⁷ as Seebohm demonstrated.

B. SEEBOHM: A ROMANIST VIEW

The focus on primary sources in the ‘scientific’ method in history led some to argue those sources did not support the prevailing Germanist narrative. After a generation of English writers echoing German assertions about the uniqueness of Teutonic history, the momentum of research produced a reaction, sometimes called the ‘manorial school’, using different evidence to highlight Roman influence. The reaction was in part driven by European politics: the Franco-Prussian war (1870-1) incentivised scholarship which did not explain history in terms of the special nature of Germanic culture at a time when German history and historians dominated the writing of European history. In Romanist hands, the village community morphed from a model of Teutonic freedom and equality to one of servility and hierarchy.¹¹⁸

Maine, although drawing heavily on the work of Germanists, had argued that Teutonic ideas had combined with Roman ideas to produce medieval institutions like ‘feudal’ property rights, which were strongly influenced by, if not derived from, Roman law.¹¹⁹ ‘Feudal’ societies had been built on land grants made by the tribes who conquered Rome, which in turn resembled Roman provincial land grants to soldier cultivators.¹²⁰ Both came with conditions like military service attached and were hereditary.¹²¹ There was also a similarity between Roman ‘*villae*’ estates

¹¹⁷ Burrow, *Liberal Descent* (n 16) 20 briefly considers this point.

¹¹⁸ Dewey (n 15) 304.

¹¹⁹ Maine, *Village Communities* (n 24) 21.

¹²⁰ Maine, ‘Classifications of Real Property’ in idem, *Dissertations* (n 52) 342.

¹²¹ Maine, *Village Communities* (n 24) 132.

cultivated by ‘*coloni*’ and slave labourers and the medieval manorial estate with villein cultivators.¹²² For instance, Roman agriculture made use of servitudes owed to neighbours for things like rights of way (an ‘*emphyteusis*’), which came to be very important in medieval landholding. Whilst comparisons showed the similarities, Maine did not think they explained the drastic changes to the idea of property: the privately held Roman ‘*dominium*’ was quite different to ‘feudal’ property. The possibility of successive, co-existing property rights meant that property had to be understood on a new basis, and although ideas like the Roman ‘*emphyteusis*’ were sources for this, other factors like tribal rules concerning moveable property were also part of the medieval concept.¹²³

Frederic Seebohm (1833-1912) attended Maine’s lectures, and shared the manuscript of his *The English Village Community* (first published in 1883) with him.¹²⁴ Seebohm’s discussion of medieval social life and property followed Maine closely,¹²⁵ and Maine’s influence was visible when Seebohm claimed that Roman and Teutonic elements combined in Roman provinces to produce the manor. Seebohm also made use of German scholarship connecting agriculture and community, particularly Nasse’s comparison of English and German land systems, and used this as a basis for his examination of the open field system as the ‘shell’ of the English medieval village community. That *The English Village Community* opens with a literature review is in itself a sign of the increased rigour of English scholarship after Maine.

Seebohm’s work on the village community might better be categorised as economic history, rather than legal history, but his discussants and intellectual context were the legal historians:

¹²² In German codes ‘*villa*’ was used to describe a village community, Maine said: ‘Decay’ (n 59) 332.

¹²³ Maine, ‘Real Property’ (n 120) 342-7.

¹²⁴ Paul D A Harvey, ‘Seebohm, Frederic (1833–1912), historian and banker’ *Oxford Dictionary of National Biography*. 23 Sep 2004; Accessed 16 Sep. 2020. <https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-36005>; Frederic Seebohm, *The English Village Community* (1883; 4th edn, Longmans, Green 1890) xv.

¹²⁵ Frederic Seebohm, *The Tribal System in Wales* (1895; 2nd edn, Longmans, Green 1904) x.

Maine, Maitland, and Vinogradoff. However, it must be noted at the outset that Seebohm was often focused on tribalism or the details of agrarian management rather than the broader implications on the village community and its legal and economic structures. Using the comparative method, Seebohm thought to use economic history to reveal truths about the evolution of English society.¹²⁶ This evolution was in accordance with deterministic universal laws of economics resembling Maine's laws of progress, which were both inevitable and to be actively pursued¹²⁷ - an apparent contradiction also present in Maine's work.¹²⁸

Seebohm followed Maine's comparative method, but the 'apostle' of the 'retrogressive method' added a tenet: he worked through sources backwards in time, often not very rigorously. His work continued in the tradition of making wide generalisations, this time based on a series of chronological case studies.¹²⁹ For example, in *The Tribal System in Wales* he compared Welsh with German, Roman, and other continental tribal practices. Like Maine, Seebohm advocated cautious comparison and presented his work as a 'stepping stone for further research' on tribal Wales – not the definitive description.¹³⁰ But Seebohm often made uncritical generalisations based on observations from other cultures and time periods. It is also strange, given that he depended for 'retrogression' on sources dated earlier and earlier in time, that Seebohm argued that 'the actual date of a law or custom is not so important as its own intrinsic character... an economically early trait may well be preserved in a document of later date'.¹³¹ Whilst this may sometimes be true, it requires careful investigation of each source in a way Seebohm was neither methodologically

¹²⁶ Seebohm, *Village Community* (n 124) xiii-xiv.

¹²⁷ *ibid* 440.

¹²⁸ And in most teleological history, e.g. Marx. See Seebohm, *Reform* (n 88) 140-1 and generally John Burrow, 'Henry Maine and Mid-Victorian Ideas of Progress' in Diamond (n 34).

¹²⁹ Seebohm, *Village Community* (n 124) 1.

¹³⁰ Seebohm, *Wales* (n 125) 234.

¹³¹ Seebohm, *Village Community* (n 124) 190.

equipped nor inclined to do. Throughout *The English Village Community*, he leapt between time periods, with no method or rationale for taking something to be true in one period when it was only evidenced in another. His default assumption, based on Maine's view of custom as tenacious and slow to change,¹³² was that there was no change, even across long stretches of time, without positive evidence of such.¹³³

Seebohm also sought to make use of enduring agricultural tradition, customs, and moral and mental habits.¹³⁴ The manor court roll was, he said, 'something like an economic section of the manor, revealing with unusual clearness the various economic strata in which its holdings were arranged'.¹³⁵ Written records revealed how community operated in an open field system, and how the land was shared. Because, as the thirteenth-century treatise known as *Fleta* explained, a manor was a territorial unit with its own courts and customs known only locally, landlords needed locally produced extents and in order to understand their own rights. Seebohm knew this implicitly meant that the lord's rights, agricultural management, and the local condition of unfree tenants were affected by local custom. But whilst he consistently recognised and noted local variation, he dismissed it as irrelevant to his general description of the village community - it was not 'needful to dwell' on them. For instance, he utilised the Winslow manor court book, and extrapolated from it to make claims to describe all of central England. This source was itself an extract produced under a large and wealthy ecclesiastical landlord, making its usefulness as a source for general claims at least doubtful. However, Seebohm argued that since land was physically laid out in similar

¹³² Maine, 'Primitive Ideas' in idem, *Institutions* (n 24) 225.

¹³³ Seebohm, *Village Community* (n 124) 245.

¹³⁴ Frederic Seebohm, *Customary Acres and Their Historical Importance* (Longmans & Co 1914) 11.

¹³⁵ Seebohm, *Village Community* (n 124) 21.

patterns across England, local variations as to the management of land or people were insignificant, as was the type of landlord.¹³⁶

Following Maine, Seebohm distinguished between tradition and customary law: if a tradition was old enough, and was backed by ‘outward and visible signs’ it would in time come to have the force and strength of customary law, and then it could be applied to other contexts. Adapted customary law became fixed by both repetition and household and tribal tradition,¹³⁷ eventually ending up codified.¹³⁸ The simplicity of this account is reflected in the lack of evidence for it. It took Seebohm more than three hundred pages to turn to English evidence of Anglo-Saxon custom in his book of the same name because he used so much comparative evidence.¹³⁹ That book is, despite its title, more like a comparative sweep of European customs on the topic of murder and marriage, and (to a lesser extent) on property ownership, with little discussion of customary law or rules in general. It was reviewed poorly, described as having little new to say at a ‘lower level of excellence’ than his other work.¹⁴⁰ By the time of its publication, Maitland had pointed out that, in both the common law and written versions of customary rules, features could originate in the legal and economic conditions of different times, such that the body of recorded written custom was unlikely to have all been in force at the same time.¹⁴¹ Seebohm’s methodological refusal even to attempt to untangle the dates of different parts of the Welsh codes was therefore a problem if they were to be used as evidence of specific historical practices.

¹³⁶ Seebohm, *Village Community* (n 124) 35. The Winslow court book is a useful and interesting source, and one which I return to in later chapters. However, I endeavour to use it only alongside other sources and as illustrative material: it is clearly not representative of every manor in central England.

¹³⁷ Seebohm, *Wales* (n 125) 85.

¹³⁸ Frederic Seebohm, *Tribal Custom in Anglo-Saxon Law* (Longmans, Green and Co 1902) 39.

¹³⁹ *ibid* 321.

¹⁴⁰ Paul Vinogradoff, ‘Obituary: Frederic Seebohm’ (1912) 22(86) *The Economic Journal* 338, 341.

¹⁴¹ Frederic W Maitland, ‘Review: Frederic Seebohm, *The Tribal System in Wales*’ (1895) 5(2) *The Economic Journal* 589, 594.

Seebohm interpreted this as a good opportunity to make use of the comparative method: in Welsh custom the rules were not always consistent as to the rights of the '*gweily*' family unit, so Seebohm used comparative study of Germanic custom to help clarify matters¹⁴² - borrowing too readily¹⁴³ and arguing that the strong resemblance to other tribal societies was in itself evidence of the authenticity of the Welsh sources.¹⁴⁴ Based on German evidence, Seebohm reached a number of conclusions for Wales, including on the role of family holdings and individualism, succession, and ancestor worship.¹⁴⁵

This use of Maine's comparative method was not an approach Maitland would have approved of, nor would he have been impressed by Seebohm's dismissal of the problems with the sources he had highlighted. Seebohm did not expect, for instance, that special laws issued by Old English kings would be comprehensive - instead they showed practical modifications of custom.¹⁴⁶ But if a collection of custom mixed newer and older rules, Seebohm did not see a problem: later additions did not discredit the older rules and he could distinguish the two using the comparative method.¹⁴⁷ If Germany and Wales had differences, it was unimportant: tribes everywhere had to deal with the same tendencies and had the same goals, and in any case Welsh custom must have been old because it *looked* like the result of traditional and immemorial usage.¹⁴⁸

¹⁴² Seebohm, *Wales* (n 125) vii.

¹⁴³ Maitland, Review (n 141) 594.

¹⁴⁴ Seebohm, *Wales* (n 125) 237.

¹⁴⁵ *ibid* xvi-xx; xxxi; 86

¹⁴⁶ Seebohm, *Custom* (n 138) 337.

¹⁴⁷ Seebohm, *Wales* (n 125) 236.

¹⁴⁸ *ibid* 51.

But unlike Maine, Seebohm thought that Roman influence was much greater than German.¹⁴⁹ Maine was unsurprisingly critical of this: he said the title of Seebohm's book was a misnomer, since his goal was not to describe the English village community but to prove there was no such thing.¹⁵⁰ Where Maine had held that even Roman slaves must have had their own institutions, Seebohm thought that village community institutions developed only after and as a product of serfdom. Whilst Maine thought it was reasonable to connect the organisation of the villa with the development of the manor, this was alongside the self-governing village community – not instead of it. But Seebohm argued that since the Teutonic tribes who settled in Britain came from too far north in Europe to bring manors with them, some Roman or pre-Roman influence had to be the origin of the manor.¹⁵¹ Fustel de Coulanges (1830-1889) was at the same time arguing that German scholarship was open to challenge on similar grounds.¹⁵² Coulanges argued that the Germanist claims were unfounded, that conversely there was good evidence that Roman *coloni* were more important under Roman rule than had been realised, and that there was no self-governing village community with common ownership of land at any point.

Seebohm, despite 'reservations' about the mark theory, saw it as a valuable hypothesis to test in England, but he claimed to show it was entirely wrong. Kemble and Freeman's attempt to Anglicise the mark had failed, in part because they did not take into account the multiple distinct forms the open field system could take in Germany in response to local economic conditions.¹⁵³ The main objection, however, was that even Stubbs' work showed that other, non-Teutonic,

¹⁴⁹ Seebohm, *Village Community* (n 124) 316.

¹⁵⁰ Feaver, *Maine* (n 2) 188n.

¹⁵¹ Maine, 'Decay' (n 59) 332-3; Seebohm, *Village Community* (n 124) 368.

¹⁵² Fustel de Coulanges, *The Origin of Property in Land* (1889; translated into English as Margaret Ashley (trs), S Sonnenschein 1891).

¹⁵³ As Landau, Hanssen, and Meitzen had shown: Seebohm, *Village Community* (n 124) x-xii.

elements had been more important factors in English economic history.¹⁵⁴ Anything which looked like an English mark was simply a barbarised Roman villa/manor, as adapted by Germanic invaders¹⁵⁵ – the Roman influence underlay it all. In highlighting Roman influence on medieval institutions instead, Seebohm knew he was on tenuous ground.¹⁵⁶ It was not received well in Oxford, where Germanist historians congregated, but in Cambridge, Maitland took it seriously.¹⁵⁷ Ashley also agreed: the mark had served as a useful nucleus around which to accumulate facts, but it was time to let it go in favour of a focus on tribal society and Roman influence.¹⁵⁸

Notwithstanding his rejection of the mark, Seebohm focused on agricultural arrangements as the ‘shell’ within which the medieval English village community in serfdom fitted. This ‘shell’ was traced back to Roman villas and beyond.¹⁵⁹ Late Roman institutions had begun to develop features in common with medieval manors in the French and German provinces, he noted. A villa estate was worked by slaves and semi-servile ‘*coloni*’ labourers who were attached to the land and had their own houses and small pieces of land for private use – like medieval villeins. The ‘*dominus*’ of a villa, like a manorial lord, might lease portions of land to freedmen in return for a fixed rent paid in produce,¹⁶⁰ and the modes of surrender of land and the types of labour services owed were similar in both.¹⁶¹ Because of this ‘barbarisation’ of the villa, a semi-servile labouring class of villeins developed encompassing two older social groups: the *coloni* and the smaller freemen.¹⁶² The

¹⁵⁴ See generally Stubbs (n 48).

¹⁵⁵ Seebohm, *Village Community* (n 124) 335. See further below.

¹⁵⁶ *ibid* xiii.

¹⁵⁷ Ashley, ‘Serfdom’ (n 5) 156.

¹⁵⁸ *ibid* 172.

¹⁵⁹ Seebohm, *Village Community* (n 124) xiv.

¹⁶⁰ *ibid* 247-66.

¹⁶¹ *ibid* 334.

¹⁶² *ibid* 266.

latter had been settled on land and equipped to farm it by the Empire, but gradually sank into a semi-servile condition because of exorbitant services and rents, or voluntary acceptance of obligations in return for protection from local imperial officers rather than distant imperial machinery.¹⁶³

Whilst Seebohm was liable to deliberately ignore evidence which did not fit his narrative, some elements, particularly in relation to medieval agriculture, had a lasting impact. And Seebohm ultimately argued that however it originated, the demeaning legal status of villeinage was only one component in the history of the English peasantry: villein tenants enjoyed the advantages of settled government, a powerful and unified 'state', the extension of commerce, and law and order as a result of the same conquest which he thought had caused their decline in legal status.¹⁶⁴ This kept him firmly in Maine's tradition, and was consistent with Maine's ideas about progress and legal change over time.

Where Maurer had not even considered the origin of the village community he described, and whilst Maine had considered the origin at length in connection with Indian evidence, Seebohm pushed Germanists and others to fully engage with this question. He 'minutely analysed' the institution Maine described in general terms and argued, contrary to his teacher, that there was no evidence of free village communities before the Conquest. If unfreedom could not be explained without reference to Roman slavery, it was hard to see how the Germanist narrative could be maintained and the integrity of Teutonic history as containing the 'seeds' of modern democracy defended. Seebohm had presented a new picture of medieval serfdom and villeinage under a despotic lord, with the manor as the principle feature and the village community in serfdom under

¹⁶³ *ibid* 288; 302.

¹⁶⁴ Frederic Seebohm, 'Villeinage in England' (1892) 7(27) *EHR* 444, 457.

it. This was the opposite of Maine's free village community which gradually lost out to individualism.

However, Seebohm was fighting against a strong nineteenth-century orthodoxy, which he failed to overturn. As early as 1912 Stenton declared his contribution important but mostly obsolete.¹⁶⁵ His willingness to explain by reference to Roman villas without good evidence was viewed with suspicion by contemporaries:¹⁶⁶ Maitland worried Seebohm went too far beyond the evidence to describe things which were unknown, and perhaps even unknowable. He was also concerned that Seebohm artificially simplified the village community by separating study of its institutional structure from a description of how those institutions worked and their purpose, leaving his account incomplete and his conclusions open to easy attack.¹⁶⁷ Seebohm's use of sources was too obviously biased: he ignored Saxon evidence concerning courts and over-emphasised the oppressiveness of services,¹⁶⁸ disregarding whatever data did not suit him, including that village community members had rights in land, controlled community membership, had specific restrictions on alienation, and collectively regulated. Not all of these features were evidenced all the way back in time, as Seebohm claimed serfdom was, but it was all potentially relevant and unexamined.¹⁶⁹ Ashley, in a typically critical review, said the 'whole argument... calls for thoroughgoing criticism, and demands more documentary support'.¹⁷⁰ Vinogradoff's assessment was similar: his friend had attempted to explain how medieval agriculture worked, and the attempt was an achievement in itself, but he was too eager to make claims without properly

¹⁶⁵ Frank M Stenton, 'Frederic Seebohm' (1912) *Reading University College Review* 4, repr. in idem, *Preparatory to Anglo-Saxon England* (Clarendon Press 1970) 18; Paul D A Harvey, 'Founders: Frederic Seebohm' (2010) 11(2) *Landscapes* 73, 76.

¹⁶⁶ Review (1884) 969 *The Nation* 24 January (1884), 79.

¹⁶⁷ Maitland, 'Review' (n 141) 590-1.

¹⁶⁸ Vinogradoff, 'Obituary' (n 140) 339-40; Anon, *Athenaeum* No 2741 (8 May 1880) 604.

¹⁶⁹ Edward P Cheyney, 'Review of *The Tribal System in Wales*' (1896) 7(3) *Annals of the American Academy* 112, 114.

¹⁷⁰ William J Ashley, 'Review: Frederic Seebohm, *The Tribal System in Wales*' (1896) 11(2) *Political Science Quarterly* 310, 312.

proving them using available evidence.¹⁷¹ Another Russian medievalist, Evgeny Kosminsky (1886-1959), accused Seebohm flatly of using only one type of source and selecting only facts which supported his views.¹⁷²

Seebohm had ‘both the merits and the defects of being a self-taught man’: he challenged orthodox beliefs and progressed the conversation, but he did so ‘without paying much attention to what had been done or was done before by others’, and this sometimes led him into difficulties.¹⁷³ He denied the existence of a medieval golden age and used new materials to try and develop Maine’s theory of social evolution, presenting new ideas for the scholarly community to respond to. He took Maine’s idea of a communal bond in the medieval village and challenged assumptions about it, exposing Germanist ideas to the criticisms of being overly romantic and unsupported, anachronistic even. Seebohm and Fustel de Coulanges represented a general reaction against the dominance of Germanist conceptions. They stimulated a recognition of potential Roman influence on medieval institutions, especially in relation to property in land. After this Romanist reaction, a more middling ground was reached which recognised the influence of both tribal and Roman elements.¹⁷⁴

C. CONCLUSION

Maine and Seebohm, despite their differing opinions as to the respective influence of Roman and Germanic culture, represented a new kind of scholarship on the medieval village

¹⁷¹ Paul Vinogradoff, *The Growth of the Manor* (1905; 2nd edn, George Allen & Company Ltd 1911) v.

¹⁷² Eugene A Kosminsky, ‘The Hundred Rolls of 1270-80 as a Source for English Agrarian History’ (1931) 3(1) *Economic History Review* 16, 20.

¹⁷³ Vinogradoff, ‘Obituary’ (n 140) 338.

¹⁷⁴ *ibid* 338-341.

community. This work was not purely narrative, as most earlier historical work had been, but claimed to be evidence-based and comparative, making use of a range of sources to attempt to reach general conclusions about both historical and timeless features of social life. As early specimens of the method, they retained a tendency to fictionalise the past from the older tradition which meant that they sometimes ignored or misinterpreted evidence in order to ensure the story was what they wished it to be. These stories involved numerous assumptions about matters of both detail and wider scope, like 'status to contract', but they set trends and ignited debates examined in much greater detail by Maitland and Vinogradoff.

CHAPTER 2

REFRAMING THE VILLAGE COMMUNITY

By the mid-nineteenth century, historians were consistently referring to the village community as a fundamental building block of early society. However, this changed by the end of the century. The village community was initially an object of active political interest, a battleground between those advocating bigger or smaller states and more or less individualism or democracy in modern politics. Seebohm and Fustel de Coulanges led a Romanist and individualist reaction, which instead prioritised great estates and landowners, making use of the ‘retrogressive’ and comparative methods.¹ But it was not this reaction which cooled the debate. As politics moved on and research methods became more exact, the myth of the Teutonic free community gave way to the more juridical and technical study of medieval law and economics. Frederic Maitland (1850-1906) and Sir Paul Vinogradoff (1854-1925) reshaped inquiry into the legal life of the village community using a more precise set of investigative tools, with less overt political and philosophical ideology.

Maitland and Vinogradoff agreed over much of the material they studied: both rejected models of society composed of numerous identical units and urged that medieval manorial practice varied. Generalisations of the sort Maine and Seebohm pursued were appealing and provided a sense of order, but these convenient simplifications often resulted in false claims and a refusal to consider the complexity of multiple causations and historical change.² John H Round’s (1854-1928) account, for instance, artificially ordered his evidence by heavy reliance on structured surveys

¹ Paul Vinogradoff, *Villainage in England* (Clarendon Press 1892) 37.

² Paul Vinogradoff, *The Growth of the Manor* (1905; 2nd edn, George Allen & Company 1911) 5.

like Domesday Book which did not reflect day-to-day reality. Seebohm's work was simply chaotic and in need of a broader perspective.³

However, Maitland and Vinogradoff often disagreed as to the implications of the evidence they studied - Maitland even despaired that in village community studies 'almost every fact seem[ed] capable of two opposite interpretations'.⁴ Section A considers their respective methodologies. Whilst Vinogradoff sought philosophical understanding in history, and refined Maine's comparative and historical method for doing so, Maitland was highly critical of Maine. Maitland was less focused on the modern political implications of historical facts, or in the power relationships in the medieval period. The reception of his ideas has often led to a narrowing of focus within the 'classical' legal history tradition which has prevailed in England. The latter has most often followed Maitland's emphasis on the common law and its institutions, notwithstanding his later work on the importance of corporations and collectivities – and whether he would have wanted that or not.⁵

Maitland and Vinogradoff's ideas responded to each other so closely that this chapter will only seek to separate them where it lends explanatory clarity, combining their thoughts on themes where the two men shared common ground or interests. Rather than the politically loaded debate about the Romanist or Teutonic origin of the village community, they asked precise questions about its legal and economic features. These will be considered in more detail below, but can be broadly categorised as follows:

³ *ibid* vi; John Horace Round, *Feudal England* (1895).

⁴ Patrick N R Zutshi (ed), *Letters of F W Maitland*, vol 2 (1995) 11 Selden Society Supplemental 39.

⁵ For a recent evaluation of the impact, see e.g. Bernhard Zeller et al, *Neighbours and Strangers* (MUP 2020) 3.

- (1) What methodology was to be applied when considering ‘survivals’, as Maine and Seebohm did, in order to avoid anachronistic assumptions?
- (2) How much personal freedom or unfreedom, *de facto* and *de jure*, was there in the village community? Was there really a binary choice between an originally servile population and an originally free Teutonic village community, as Maine and Seebohm had argued?
- (3) Was the village community a legal person, and/or a ‘land-owning corporation’, as Maine had claimed, such that land was owned by communities before it was ever owned by individuals? If not, how was the relation between land and community better explained?
- (4) How communal or individualistic was the village community in practice? What evidence was there of communal sentiment or individualistic action by community members?
- (5) Did the village community have a court? That is, did it have jurisdiction and/or legal institutions for self-governance? What evidence was there for or against the existence of a village court and village self-government, and when did it come from?

The final question will be reserved for Chapter 3, after considering Maitland’s reframing of the village community concept, and Vinogradoff’s response to it.

A. NEW METHODS IN LEGAL HISTORY

The nineteenth-century ‘complete revolution in the treatment of all questions concerning man and society’ meant a shift from storytelling, assumptions, and guesses to testing, sifting, and classifying original materials - from narrative to history as a type of reasoned knowledge.⁶

⁶ Vinogradoff, *Villainage* (n 1) 2; ‘Jurisprudence, Comparative’ in *Encyclopædia Britannica*, vol 15 (11th edn, CUP 1911) 580.

However, it was necessary to properly develop the evidence for legal and economic history by examining documents systematically: otherwise, the new historians risked unscientific anachronism.⁷

1) *Vinogradoff's External Legal History*

Vinogradoff described comparative jurisprudence of the sort Maine developed as a study of the evolution of law. It meant seeking principles regulating the development of legal systems in general, explaining the origins of legal institutions, and the conditions in which they existed.⁸ Like Maine, Vinogradoff's core questions were explicitly related to his politics: he asked 'how far can and should legislation act upon the social development of agrarian society?'.⁹ Legislation was being thought of, in this sense, as state-made, abstract law which proscribed rules for the future and could innovate, in contrast to custom, which was often very specific in application socially and geographically, and was rooted in past practice and tradition. Nineteenth-century Russia seemed to be at an earlier stage than England and other Western states, but if those stages of legal development could be described, it could be used to understand and plan for Russia's future.¹⁰ However, despite his political interests, Vinogradoff was in some ways more interested in method than substance. 'Social history'¹¹ was a good testing ground for the new scientific historical methods, particularly those of the German historical school: this was already proving fruitful in economics, but legal doctrine had even more clearly defined objects to utilise. Medieval England was also a promising area of study because there was plenty of surviving source material, and the

⁷ Vinogradoff, *Villainage* (n 1) 38.

⁸ Vinogradoff, 'Jurisprudence, Comparative' (n 6) 584.

⁹ Frederick M Powicke, 'Sir Paul Vinogradoff' (1926) 41(162) *The English Historical Review* 236, 237.

¹⁰ Vinogradoff, *Villainage* (n 1) v.

¹¹ Defined by Vinogradoff as the economic development of nations, and studies of both class and forms of co-operation.

content was similar enough to continental practice to be able to compare effectively and identify variations.¹²

One of Vinogradoff's most valuable scholarly contributions was his sustained attempt to improve upon Maine's comparative and historical jurisprudence by giving it a stronger evidence-based foundation. He urged that, at least in medieval history, it required a reasonably settled sequence of facts, derived from both surviving evidence and comparative suggestion for evidential gaps; and speculating about agencies and motives for change¹³ - all whilst consciously seeking to avoid one-sided examination of historical facts and 'uncritical accumulations' which discredited the method.¹⁴

In the entry 'Jurisprudence, Comparative' in *Encyclopædia Britannica* (1911)¹⁵ Vinogradoff reflected on the method he had developed over the previous three decades. Like Maitland,¹⁶ he thought a simple way to improve comparative jurisprudence was to start from a better position, namely a 'common basis obtained from direct observation'. Without this, scholars too often began comparing without first establishing common ground or a connecting link.¹⁷ It was also inappropriate to carry fully developed notions back into past contexts, and many errors had arisen in doing so – but there was dissent, often resting on individual judgment, about how much use of traits from later data was allowed. Vinogradoff urged caution: when inferring backwards, or

¹² Vinogradoff, *Villainage* (n 1) v-vii.

¹³ Vinogradoff, *Villainage* (n 1) 398.

¹⁴ Sir Paul Vinogradoff, 'The Study of Jurisprudence' (1913) reprinted in Herbert A L Fisher (ed), *The Collected Papers of Paul Vinogradoff*, vol 2 (Clarendon Press 1928) 205, 208.

¹⁵ See (n 6).

¹⁶ Frederic Maitland, 'The Materials for English Legal History' (1889), reproduced in Herbert A L Fisher (ed), *Collected Papers of Frederic William Maitland, Downing Professor of the Laws of England*, vol 2 (CUP 1911) 20.

¹⁷ Paul Vinogradoff, *Custom and Right* (H Aschehoug and Co (W Nygaard) 1925) 16.

assuming that a later feature was fully developed at an earlier time, it was possible that even if later institutions had developed from particular origins, they would have ‘hardened and sharpened’ through use.¹⁸

Vinogradoff’s approach distinguished him from earlier thinkers seeking universal laws in history, and would have elements in common with twentieth-century historical methodology, which prioritised the examination of documents (and, to a lesser extent, physical artefacts) in order to generate data from which general conclusions about human action and human ideas could be extrapolated.¹⁹ In his early career, Vinogradoff had thought ‘scientific’ history could find laws of development or generalisations which would explain the complexity of human culture.²⁰ However, by the end of his life he favoured an organic conception of law and social change which had been developed in the German school, particularly by Otto Von Gierke (1841-1921): not a predictable, generalisable system, but something which changed and interacted with many factors.²¹ Maine’s historical jurisprudence was predicated on false necessary chronological stages of history – a ‘Whiggish history writ large’.²² Instead, Vinogradoff asked how, precisely, apparently similar processes developed in different contexts. The comparative method could be naturally deterministic: a feature regularly appearing across different times and places might (falsely) seem essential or inevitable, like Maine’s ‘status to contract’,²³ and Seeböhm’s communism and individualism. Instead of postulating one of these frameworks and searching for confirmatory

¹⁸ Vinogradoff, *Growth* (n 2) 4-5.

¹⁹ See e.g. Robin G Collingwood, *The Idea of History* (OUP 1946) – Collingwood mentioned Maitland and Mommsen as ‘masters of detail’ but seems not to have been aware of Vinogradoff: 153; Edward H Carr, *What is History?* (Penguin 1964) discusses the limitations of this methodology and the inescapability of unconscious assumptions.

²⁰ Vinogradoff, *Villainage* (n 1) vi; 3.

²¹ Christopher Parker, ‘Paul Vinogradoff, the Delusions of Russian Liberalism, and the Development of Russian Studies in England’ (1991) 69(1) *The Slavonic and East European Review* 40, 48, referring generally to Vinogradoff, *Growth* (n 2).

²² Joshua Getzler, ‘Law, History, and the Social Sciences: Intellectual Traditions of Late Nineteenth- and early Twentieth-Century Europe’ (2003) 6 *Current Legal Issues* 215.

²³ Karuna Mantena, ‘Inventing Traditional Society’ in idem, *Alibis of Empire* (Princeton University Press 2010) 82.

details in history, Vinogradoff argued that research should proceed from detail outwards. He sought to begin with local evidence and build to studies of institutions and politics,²⁴ because 'landmarks in the course of social development' should be examined for 'small changes just as important as... revolutions... usually seen as history's turning points'.²⁵ Only once a data-set of historical facts had been assembled was it appropriate to begin drawing conclusions which best fit that information, and those conclusions would be limited in scope: because law and society changed, precise snapshots and vague long-term trends were the most that could be achieved. However, combining these was a route to a more accurate description than using either one alone.

The goal was to establish and explain similarity, and to enumerate and explain differences. This involved examining local conditions, particularly economics and politics, to understand one period of time in comparison with later ones. Because historical events had a plurality of causes, including the social context in which they occurred, too much historical abstraction involved demanding a degree of precision hardly ever met in real life: 'reasonable inferences and probable explanations' were the best to realistically hope for. It was possible that alongside the customs and institutions derived from one 'stem', others could exist as competing forces, as survivals, or as new developments. It was more historically interesting and accurate to consider how principles with different origins combined and related to each other, and in what directions such combinations were undergoing change, than to seek to generalise from them.²⁶ Whilst common combinations clearly existed, general conclusions were inappropriate, given so much variation.²⁷

²⁴ Vinogradoff, *Villainage* (n 1) 12.

²⁵ *ibid* 43.

²⁶ Vinogradoff, *Growth* (n 2) 6-7.

²⁷ Vinogradoff, 'Jurisprudence, Comparative' (n 6) 586.

Unsurprisingly,²⁸ Vinogradoff also disliked Marxist over-simplifications which turned all social life into economics.²⁹ Economic analyses linking economic stages with ‘necessary’ institutional features (as opposed to frequently occurring ones) were unsound. For example, in many places and cultures there had been domination of agricultural labourers by a ruling class. But it did not follow that particular ways of life were necessitated by this, as Seebohm argued.³⁰ One illustration of this was that even within medieval England, inheritance customs with seemingly opposite aims existed side-by-side in communities with near identical economic and lordship conditions. This helped disprove that any given economic condition would rigidly determine legal customs and social structures. It was, however, possible to identify patterns of common features.³¹ The fact that the inheritance custom of Borough English - the youngest son inheriting, rather than the eldest under primogeniture, was common amongst the medieval unfree was part of why it came to be associated with tests of unfreedom: the unfree were not absolutely required to use this custom, but often did, and discovering if this was caused by their preferences or lordship pressures (or both) revealed something of medieval ideas even if it did not expose any universal economic laws.

Vinogradoff also taught many English scholars the research methods of the German historical school: it was in him that the English and German schools fully met. His intention was to combine the comparative method with minute local historical research and utilise the best of both, going beyond what had already been achieved by applying the German method to English

²⁸ Vinogradoff's liberal views led to him being forced out of Russia in 1901, and although he continued to visit for many years after, 1917 decisively severed his political ties and precipitated an application for British citizenship: Herbert A L Fisher, ‘A Memoir’ in *Vinogradoff Collected Papers*, vol 1 (n 14) 29.

²⁹ Fisher, ‘Memoir’ (n 28) 67; Vinogradoff, *Villainage* (n 1) 31.

³⁰ Maxime Kovalevsky made the same point in relation to Seebohm: ‘The Origin and Growth of Village Communities in Russia’ (1888) 1(4) *The Archaeological Review* 266.

³¹ Vinogradoff, ‘Jurisprudence, Comparative’ (n 6) 586.

materials.³² And whilst Maitland may have been ‘intensely cosmopolitan’ and attuned to what foreign historians were saying,³³ Vinogradoff was particularly suited to synthesise: his ‘knowledge of the early history of England and English law was possessed by no continental historian or lawyer; and his knowledge of continental history and law was possessed by no English historian or lawyer.’³⁴ He had studied Russian, German, and Lombard Italian history before turning to English legal history in around 1883, and was uniquely able to deploy both continental and English material.³⁵ He was Maitland’s ‘foreign critic’ who could fill the ‘great opening’ in scholarship produced by the traditional isolation of English lawyers from continental knowledge.³⁶ According to Vinogradoff’s student, William Holdsworth:

[the introduction to *Villainage in England*]³⁷ was especially valuable to his English readers, both because it brought the English writers and the English theories into line with continental writers and theories, and because it broadened their vision and let in new light upon insular controversies and insular estimates of their own writers.³⁸

Maitland also declared that:

...all that you say about Stubbs and Seebohm and Maine is, I dare say, very true if you regard them as European, not merely English, phenomena and attribute to them a widespread significance - and doubtless it is very well that Englishmen should see this - still looking at England only and our insular ways of thinking I see Stubbs and Maine as two pillars of conservatism, while as to Seebohm I think that his book is as utterly devoid of political importance... But you are cosmopolitan and I doubt not that you are right. You are putting things in a new

³² Letter from Frederic W Maitland to Paul Vinogradoff (20 Feb 1889) in Herbert A L Fisher and Frederic W Maitland, *A Biographical Sketch* (CUP 1910) 49.

³³ Patrick Wormald, ‘Maitland and Anglo-Saxon Law: Beyond Domesday Book’ (1996) 89 *Proceedings of the British Academy* 1, 8.

³⁴ William S Holdsworth and Brian Pares, ‘Sir Paul Vinogradoff’ (1926) 4(12) *Slavonic Review* 529, 530.

³⁵ *ibid.*

³⁶ *Maitland Letters*, vol 2 (n 4) 129; Frederic W Maitland, ‘Why the History of English Law is not Written’, reprinted in *Collected Papers*, vol 1 (n 16) 480, 490.

³⁷ Vinogradoff’s first book-length English-language work. He had already published a number of English articles, including the letter identifying Bracton’s Note Book: ‘A Note-Book of Bracton’ *The Athenaeum* 19 July (1884). For the most complete bibliography of Vinogradoff’s work see William E Butler (ed), *On the History of International Law and International Organization: Collected Papers of Sir Paul Vinogradoff* (Lawbook Exchange 2009).

³⁸ Holdsworth and Pares (n 34) 532.

light—that is all—if “the darkness comprehendeth it not”, that is the darkness's fault.³⁹

Despite his apparent praise, Maitland disapproved of wide use of the comparative method,⁴⁰ particularly when Roman law ideas were used to explain English history. When regarding the uncritical use to which Maine and Seebohm put this, Maitland's reservations are justified, but Vinogradoff's approach was more nuanced. The comparative method enabled illustration of the development of legal doctrines and comparison of similar processes and institutions to extend from specific examples to general conclusions without departing from the scientific commitment to evidence-based claims.⁴¹ Maine had realised that examining ‘kindred processes’ helped fill the inevitable gaps in historical evidence in any strictly local approach.⁴² If Dewey is correct that Maine's expansive comparative method was in part a response to the inability of English scholarship to compete with German research,⁴³ Vinogradoff's version narrowed the method by requiring that comparison be used *as well as*, not *instead of*, technical historical research. Comparison was suggestive, not conclusive: it suggested possibilities where there were breaks in recorded history.⁴⁴ If an inference was unsupported by evidence, or the evidence was ambiguous, Vinogradoff generally said so – but because he knew more continental history than most (if not all) of his English contemporaries, he was able to make those comparisons more confidently. For instance, in respect of the much debated origins of the institution of the jury, it seemed there might

³⁹ Letter from Frederic W Maitland to ‘a friend’ (12 March 1889) in Fisher and Maitland (n 32) 50.

⁴⁰ Frederic W Maitland, *Domesday Book and Beyond* (Cambridge 1897) 403, henceforth ‘DBB’. John W Burrow, ‘The Village Community and the Uses of History in Late Nineteenth-Century England’ in Neil McKendrick (ed) *Historical Perspectives* (Europa 1974) 258-9 shows how unconvinced Maitland was by juxtaposing two letters to Vinogradoff.

⁴¹ Paul Vinogradoff, ‘The Teaching of Sir Henry Maine’ (1904) 20 LQR 119, reprinted in *Collected Papers*, vol 1 (n 28) 173, 184; idem, ‘Jurisprudence, Comparative’ (n 6) 580.

⁴² Vinogradoff, ‘Maine’ (n 41) 185; this was also Bryce's approach to comparative jurisprudence, see Peter Stein, *Legal Evolution* (CUP 1980) 119.

⁴³ Clive Dewey, ‘Images of the Village Community: A Study in Anglo-Indian Ideology’ (1972) 6(3) *Modern Asian Studies* 291.

⁴⁴ Vinogradoff, ‘Jurisprudence, Comparative’ (n 6) 584.

be Scandinavian influence on later English social and legal developments, but Vinogradoff was very clear that this was only a possibility.⁴⁵

His method did not, as Roscoe Pound (1870-1964) claimed, break with Maine's 'historical jurisprudence' in favour of fact-based 'legal history'.⁴⁶ Vinogradoff argued the latter was an essential foundation for the former. Legal custom and precedent were the data from which principles developed over time might be extracted, and which provided information as to how to best formulate future changes. This needed to be done in a principled way: it was not possible or desirable merely to collate information haphazardly. A principle, a rule, or an institution should be selected and traced, either through the direct systematisation of recorded facts, or through logical inferences when the recorded facts were inadequate. Vinogradoff cited Theodor Mommsen (1817-1903), Rudolf von Jhering (1818-1892), and Joseph Kohler (1849-1919) as examples of the method⁴⁷ and it appears to be a summary of what he learned studying in Germany (in 1875-6). He also put it to use: for example, in synthesising a broad range of sources in describing the general concept of villainage in the 1880s,⁴⁸ and the manor in the early 1900s.⁴⁹

However, Vinogradoff intended to differ from his predecessors. The English approach Maine developed lacked the specificity and attention to detail epitomised by the German historical school:

⁴⁵ Doris M Stenton, *English Justice Between the Norman Conquest and the Great Charter* (American Philosophical Society 1964) 16.

⁴⁶ Roscoe Pound, 'Review: Vinogradoff, *Outlines of Historical Jurisprudence*, vol 1' (1921-1922) 35 *Harvard Law Review* 774. This claim would be more true of Maitland. For Pound's (sometimes inaccurate) criticisms of historical jurisprudence and his attempt to develop a new 'sociological jurisprudence', see David M Rabban, 'From Historical to Sociological Jurisprudence' in *idem*, *Law's History* (CUP 2013) 423.

⁴⁷ Vinogradoff, 'Jurisprudence, Comparative' (n 6) 586.

⁴⁸ Vinogradoff, *Villainage* (n 1). Vinogradoff translated his own Russian work, originally his Moscow doctoral thesis in 1884.

⁴⁹ Vinogradoff, *Growth* (n 2).

When one passes from a survey of English historiography to German historiography, one is at once struck by a difference both in methods and purpose... The place of a general narrative is taken by research work, the place of broad problems by special topics.⁵⁰

But the German school also had a one-sided approach: its investigations tended to focus on political institutions, general culture, and external growth, ignoring agricultural (economic) facts, class, and legal organisation.⁵¹ It could be deeply nationalistic, dismissive of other cultures and the knowledge to be gained from their study, and hence was not open to insights from the comparative method.⁵² Influential as it was, Vinogradoff thought the German approach was rapidly ‘antiquated’ because of its narrowness, unable to approach issues comparatively or to account for conscious growth.⁵³ Maine⁵⁴ and Jhering⁵⁵ respectively had sought to address these issues, but the German historical method alone was insufficient.

It has been said Vinogradoff widened Maitland’s horizons, and Maitland helped Vinogradoff to interpret English minds.⁵⁶ Maitland claimed to defer to Vinogradoff on social and economic questions, in part because he thought them outside the proper remit of legal, as opposed to social, history.⁵⁷ But Vinogradoff disagreed: to separate legal history from other aspects of social life was to miss the point. Maitland knew this:

⁵⁰ Paul Vinogradoff, *The Journal of the Ministry of Education* (Russian, December 1883), reproduced in Alexander Meyendorff (trs), ‘Sir Paul Vinogradoff: A Bibliographical Appreciation’ (1926) 5 Slavonic Review 157, 164.

⁵¹ Vinogradoff, *Villainage* (n 1) 25.

⁵² Vinogradoff, ‘Maine’ (n 41) 181.

⁵³ Paul Vinogradoff, *Outlines of Historical Jurisprudence*, vol 1 (Oxford 1920-1922) 135.

⁵⁴ Henry Maine, ‘The Effects of Observation of India on Modern European Thought’ in idem, *Village Communities in the East and West* (1871; 3rd enlarged edition, Henry Holt and Co 1889) 23.

⁵⁵ Rudolf von Jhering, *The Struggle for Law* (John Lalor (trs), Callaghan & Co 1915).

⁵⁶ Ada E Levett and George O’Brien, ‘Obituary’ (1926) 36(142) *The Economic Journal* 310, 311. Including helping Vinogradoff present his work in English: Vinogradoff, *Villainage* (n 1) x.

⁵⁷ Letter from Frederic W Maitland to Reginald L Poole (15 July 1895) in Fisher and Maitland (n 32) 86. One scholar who did seem to agree with Vinogradoff’s approach was James Barr Ames, who similarly sought to test analysis of rules against historical facts, but Vinogradoff’s direct influence on American scholarship seems to have been forestalled by Pound’s denunciation: Robert Gordon, ‘Historicism in Legal Scholarship’ (1981) reprinted in idem, *Taming the Past* (CUP 2017) 183,

You ask me about the Preface [to *Villainage in England*]... I think it will attract readers because of its very strangeness; but you will let me say that it will seem strange to English readers, this attempt to connect the development of historical study with the course of politics; and it leads you into what will be thought paradoxes.⁵⁸

Vinogradoff thought it was impossible fully to understand the medieval peasantry by looking only at class, social divisions, or legal and administrative definitions. As Maitland came to emphasise late in life, people naturally arrange into groups for economic and political co-operation, and in medieval England these groups were arranged according to the division and hierarchical organisation of labour. It followed that politics, law, and agriculture must all interlink.⁵⁹ This led to tangible results in Vinogradoff's *Villainage in England*, where he began to show how custom shaped the lives of medieval villeins excluded from the common law.⁶⁰

Vinogradoff criticised the work of a number of earlier legal writers who had assumed otherwise. John Selden (1584-1654) and Thomas Madox (1666-1727) had concentrated on particulars at the expense of the bigger picture; Edward Coke (1552-1634) had brought a lawyerly rationality to history in his work, but did not engage properly with historical facts, which he perverted to fit his scheme; and William Blackstone (1723-1780) made political arguments instead of writing history.⁶¹ Some other earlier (Whig) historians John Allen (1771-1843), Francis Palgrave (1824-1897), and Henry Hallam (1777-1859) were better, but Vinogradoff said none of them perfected the use of history in their law. After the French Revolution, many historians began to

207, citing James Barr Ames, 'Two Theories of Consideration' and 'The Doctrine of Price v. Neal', in idem, *Lectures on Legal History* (HUP 1913) esp. 284.

⁵⁸ Letter from Frederic W Maitland to Paul Vinogradoff (1889), in Fisher and Maitland (n 32) 49; Burrow, 'Village Community' (n 40) 257.

⁵⁹ Vinogradoff, *Villainage* (n 1) 223. For the role of this idea in historical jurisprudence generally, see Peter Stein, 'The Tasks of Historical Jurisprudence' in Neil MacCormick and Peter Birks (eds), *The Legal Mind* (Clarendon Press 1986), who traces it from Montesquieu via Adam Smith.

⁶⁰ Vinogradoff, *Villainage* (n 1).

⁶¹ Charles Elton, 'Villainage in England' (1892) 8 LQR 117, 118.

think more carefully about nationality, and use new primary materials: Kemble used Saxon charters to study private law; Konrad Maurer (1823-1902) and Stubbs ‘engaged in careful and particular inquiry into facts’, and all of them established a (non-exclusively) Germanic basis for English history. In the generation before Vinogradoff, Nasse (1829-1890), Georg von Maurer (1790-1872) and Maine had also expanded into economic study and comparative methods.⁶²

Vinogradoff sought to utilise the best parts of Maine’s work, extracting factual material and teasing out controversies to develop new ideas or clarify old debates. However, Vinogradoff was the only one who tried to systematically relate Maine’s theoretical ideas to progress and change concepts,⁶³ with Raymond Cocks describing Vinogradoff’s reward for loyalty to Maine as ‘intellectual isolation’.⁶⁴ Further, his attempt to develop a more precise methodology was not always successful. There had been some interest in the English publication of Vinogradoff’s *Villainage in England*, as those who had read the Russian version attested that it defended the Germanist position. However, when the book arrived in 1892, it did not shift the balance of the village community debate: William Ashley thought it ‘very interesting and learned’ but not decisive, despite Vinogradoff’s excellent understanding of medieval English law.⁶⁵ Firstly, Vinogradoff rested too much on his claims about personal freedom: it was uncontroversial that there had been free tenants who became unfree, alongside slaves who became more free in becoming unfree labourers – the latter went from chattels to merely directed labourers, an improvement. Secondly, Ashley objected to the use of local variation and divergence to argue that when reality differed from legal theory it was necessarily due to survivals from earlier communal or egalitarian

⁶² Vinogradoff, *Villainage* (n 1) 35-37.

⁶³ Raymond Cocks, ‘Maine, Progress and Theory’ in Alan Diamond (ed), *The Victorian Achievement of Sir Henry Maine* (CUP 2006) 75.

⁶⁴ Raymond Cocks, *Sir Henry Maine* (CUP 1988) 187.

⁶⁵ William J Ashley, ‘The History of English Serfdom’ (1893) 3 *The Economic Review* 153, 156-7.

conditions. Vinogradoff was too eager to explain anomalies with such ‘survivals’.⁶⁶ For example, his idea that ancient demesne tenants had special protection compared to non-royal tenants because of a survival of pre-Conquest conditions could alternatively be explained by reference to the fact that the king’s villeins could not practically be deprived of access to the royal courts, since their lord’s court was the royal court anyway – this would have necessitated different treatment.⁶⁷ This is a valid objection to Vinogradoff’s work. Much of his history is excellent and clearly demonstrates the sources used to reach his conclusions, but he often turned to link evidence to ideas of original Teutonic freedom without clear reason to do so: Kovalevsky said Vinogradoff was just as eager to attribute anything archaic to the Old English period as Seebohm was to the Roman.⁶⁸

Vinogradoff was also determined to see similarities between the Russian village community or *mir* and the English medieval community. Comparison with Russia was a new feature in English scholarship, although a number of Russian scholars were already concerned with England.⁶⁹ Maine had not written directly about it, but was aware of Russian village community studies and their political context, occasionally referring to them.⁷⁰ Maine believed that older Russian provinces had, since ‘time immemorial’, distributed land almost exclusively among kinship groups in self-governing village communities - like Indian village communities, if not even more archaic.⁷¹ But he was concerned that Russian writers were mistakenly inclined to describe the ‘natural

⁶⁶ *ibid* 158-60.

⁶⁷ *Ibid* 162. This will be discussed further in Chapter 3.

⁶⁸ Maxime Kovalevsky, ‘Early English Land Tenures’ (1888) 4 LQR 266, 271.

⁶⁹ See Eugene A Kosminsky, ‘Russian Work on English Economic History’ (1928) 1(2) Econ Hist Rev 208; Peter Gattrell, ‘Historians and Peasants: Studies of Medieval English Society in a Russian Context’ in Trevor Aston (ed), *Landlords, Peasants and Politics in Medieval England* (CUP 1987).

⁷⁰ Henry Maine, ‘European House Communities’ in *idem*, *Dissertations on Early Law and Custom* (John Murray 1883) 265.

⁷¹ *ibid* 240.

communism' of the village community as a precursor to modern developments.⁷² It was not egalitarianism, but low population density which had allowed Russia to preserve its traditional practices, as shown by comparison with India. As Russian kinship groups grew larger, redistribution of plots in land became less common, and permanent property more so.⁷³

However, Vinogradoff believed there was more to the connection. He saw traces of an ancient communism in the form of land re-allotment on English manors on the same model as contemporary Russian villages. Ashley criticised him for his extrapolation, and accused him of importing an ancient primitive communism from Russia – even in Russia those theories were increasingly doubted.⁷⁴ In retrospect, Vinogradoff was accused of exaggerating commonalities, including importing the idea of a duality in society - the village community on the land, and the political state - from Russian scholar Konstantin Aksakov.⁷⁵ This modelled state power as coercive, external, whilst the power of the community was self-government. Aksakov claimed the duality was created when 'Norman' chiefs took over the Russian people, with the Tsar's power descending from these 'Normans', existing only to create enough order to protect the people, who continued with their lives and self-government under it. This clearly resonated with Vinogradoff's claims regarding the village community in England, even though Vinogradoff said he found Askakov unpractical and unrealistic. The same dualism of central power and self-government was a part of his claims that the communal organisation of the peasantry was older than the manorial order in England.⁷⁶ Like Maine and Seeböhm, Vinogradoff sometimes committed the perennial sin of the comparative method in making unwarranted inferences from material from other places.

⁷² Henry Maine, 'Kinship as the Basis of Society' in idem, *Lectures on the Early History of Institutions* (1875; 7th edn, John Murray 1897) 83.

⁷³ Henry Maine, 'Ancient Divisions of the Family' in ibid 189.

⁷⁴ Ashley, 'Serfdom' (n 65) 169-171.

⁷⁵ Parker, *Delusions* (n 21) 43-50.

⁷⁶ ibid; Vinogradoff, *Villainage* (n 1) v-vi; 43; 223; 397; 408.

On the one hand, Vinogradoff was particularly well placed to step outside of national political commitments as an exile and a polyglot, and his wide knowledge of the 'human sciences' is evidenced by notebooks full of material on psychology, philosophy, politics, and economics, in a variety of languages. On the other, his breadth of scope meant he was unwilling to sacrifice any detail for the sake of simplicity – what might now be referred to as 'external legal history'⁷⁷ - and he understood that his style of historical investigation might not be as useful for lawyers' practical purposes than Maitland's more doctrinal approach. Vinogradoff's approach nonetheless combined some of the best features of Maine, Seebohm, and Maitland's attitudes: his engagement with economics took him beyond Maitland's scope, but his determination to consider evidence thoroughly meant that he was more grounded than Maine or Seebohm.

2) *Maitland's Internal Legal History*

Maitland was a former barrister and approached historical material with a 'lawyerly' perspective. One aspect of this was that his general approach might now be described as 'internal' rather than 'external' legal history.⁷⁸ Milsom described Maitland as having generally avoided study of the learned laws and ordinary people,⁷⁹ and thought this related to Maitland's unwillingness to allow that the practical (non-doctrinal) features of land tenure - like personal relationships between lord and tenant - were important in the development of property law: this distracted from his study

⁷⁷ Robert W Gordon, 'J Willard Hurst and the Common Law Tradition in American Legal Historiography' (1975) reprinted in idem, *Taming* (n 57) 19; Russell Sandberg, 'The Time for Legal History: Some Reflections on Maitland and Milsom Fifty Years On' (2018) 180 *Law & Justice* 21.

⁷⁸ Sandberg, *ibid* 25.

⁷⁹ Gwen Seabourne makes a similar observation regarding Maitland's lack of interest in medieval women: *Women in the Medieval Common Law c. 1200-1500* (Routledge 2021) 3-5.

of how the common law defined abstract rights in land.⁸⁰ He was not interested in economics, for instance, and thought medieval peasant landholdings were inalienable, despite evidence of selling and leasing,⁸¹ which he confined to ancient demesne manors.⁸² Hyams has described Maitland having a ‘hostility to market economics’ in general,⁸³ and ideas about limited trade in eleventh-century peasant land⁸⁴ may have come from the Whiggish perception that trade was a feature only of ‘advanced’ societies.⁸⁵ But this was not a specifically Whiggish flaw: Ashley argued a lack of economic thinking was also a problem in Fustel de Coulanges’ Romanist work.⁸⁶ Maitland considered this directly,⁸⁷ but was unwilling to change his approach.

Instead, internal legal history meant focusing on the history of key modern legal doctrines,⁸⁸ with a strong preference for doctrinal coherence and textual consistency. Maitland was deeply wary of speculation and the uncritical use of the comparative method. However, he acknowledged the usefulness of comparison, and Seebohm’s ‘retrogressive’ method, when used ‘circumspect[ly]’.⁸⁹ Where there were gaps in documentary evidence, Maitland sought to fill them with ideas borrowed only from better documented periods in the later history of the same place,

⁸⁰ Stroud Francis Charles Milsom, ‘Pollock and Maitland’: a Lawyer’s Retrospect’ in John Hudson (ed), *Proceedings of the British Academy*, vol 89(1) (OUP 1996) 246.

⁸¹ Deidre N McCloskey, ‘The Persistence of English Common Fields’ in William N Parker and Eric L Jones (eds), *European Peasants and Their Markets* (Princeton University Press 1975) 97.

⁸² Frederick Pollock and Frederic W Maitland, *The History of English Law Before the Time of Edward I*, vol 1 (2nd edn, CUP 1905) 415.

⁸³ Getzler (n 22) 242-8.

⁸⁴ Maitland, *DBB* (n 40).

⁸⁵ Michael M Postan, *The Medieval Economy and Society* (Weidenfeld & Nicolson 1972) 206.

⁸⁶ William Ashley, ‘The English Manor’ in Fustel de Coulanges, *The Origins of Property in Land* (Margaret Ashley (trs), Sonnenschein 1891) 22.

⁸⁷ Vice versa, economic problems could not be solved without dealing with legal ones: Maitland, ‘Materials’ (n 16) 34; 51.

⁸⁸ Holdsworth and Pares (n 34) 534.

⁸⁹ Maitland, ‘Materials’ (n 16) 4; 20.

avoiding assumptions and inferences from other contexts.⁹⁰ He was conscientious about the risk of anachronism – his recurring criticism of Maine was he had carried developed legal notions back into a time when ideas were vague.⁹¹ It was essential to have historical awareness of changing ideas, and to reconstruct past mindsets, ‘tracing the subtle methods in which legal notions expand, contract, take in new content, or... sometimes... become hide-bound, wither and die’.⁹² The similarity to Vinogradoff’s description of ideas’ lifecycle, including the use of organic metaphor, is noteworthy.⁹³ The historical schools had encouraged conservatism and treatment of legal rules as the unassailable product of social evolution, immune to criticism and assessments of their ongoing practicality.⁹⁴ Other contemporary writers focusing on legal doctrine (‘dogma’) like Oliver Wendell Holmes Jr (1841-1935) and James Barr Ames (1846-1910) were similarly realising that they could not use historical sources uncritically and simply take Coke or Blackstone at their word.⁹⁵

In place of the methods Maitland found unsatisfactory, he proposed a limited, cautious, comparison using only reliable and contextually appropriate evidence, and a focus on legal doctrine instead of attempting to account for myriad external factors. Maine and others’ search for a ‘fated scheme of successive stages’ in society, economics, history, or law was bound to be fruitless whether on the Scottish Enlightenment stadial or evolutionary models.⁹⁶ Maitland did not offer an explicit alternative, but his ideas implicitly rested on a model of organic growth, without determinism. Legal thinking, paradoxically, enabled flexibility by keeping rules in place whilst

⁹⁰ Paul Hyams, ‘Maitland and the Rest of Us’ in Hudson (ed), *British Academy* (n 80) 215.

⁹¹ Frederic W Maitland, ‘Tenures in Rousillon and Namur’ (1892), in *Collected Papers*, vol 2 (n 16) 255; idem, ‘The Survival of Archaic Communities’ in *Collected Papers*, vol 2 (n 16) 363.

⁹² Maitland, ‘Materials’ (n 16) 8.

⁹³ Vinogradoff, *Outlines*, vol 1 (n 53) 160.

⁹⁴ Frederic W Maitland, ‘The Law of Real Property’ (1879) in *Collected Papers*, vol 1 (n 16) 194-5. This was particularly obvious in Savigny’s approach.

⁹⁵ Maitland, ‘Materials’ (n 16) 8; see generally Rabban, *Law’s History* (n 46).

⁹⁶ Pollock and Maitland, vol 2 (n 82) 255.

allowing change in their meaning and use: it was possible to have both continuity and change without a sequence of stages.⁹⁷ History was instead a series of long continuous elements, with occasional continuity breaks where ideas changed, and/or where selective imitation between systems enabled faster adaptation.⁹⁸

B. REFRAMING THE VILLAGE COMMUNITY

Despite his doctrinal focus, Maitland's work was at least sometimes implicitly political and always nationalistic.⁹⁹ Where Maurer and Maine used the Teutonic village community to make claims about individualism, communalism, and 'progress', Maitland described a process of increasingly specific definition of legal concepts.¹⁰⁰

Maitland's work – especially his late work - represented a considerable break with the tone of both Whig and Germanist nineteenth-century history. Maine and Seeböhm had allowed scope to consider both Roman and Germanic elements, but Maitland was less politically invested and considered the evidence outside the lens of contemporary political debates. He attacked the idea of the Whiggish Teutonic free and communal village as the embodiment of primitive liberty and representative government, rejecting both the Romanist/Germanist dichotomy and the search for early communalism. He instead focused on law and rule by administration as a source of English exceptionalism.¹⁰¹ Maitland's idea of a free village was a village recognised as a unit for external

⁹⁷ Alan Macfarlane, *F W Maitland and the Making of the Modern World* (Palgrave 2002) 28-9.

⁹⁸ Getzler (n 22) 243; Maitland, *DBB* (n 40) 345. For the philosophical significance of this see generally Macfarlane (n 97).

⁹⁹ Getzler (n 22) 245; Burrow, 'Village Community' (n 40) 257, 276 describes Maitland as broadly apolitical except in relation to Gierke, where he was revealed as a socialist pluralist.

¹⁰⁰ Maitland, 'Survival' (n 91) 365.

¹⁰¹ Getzler (n 22) 248; Pollock and Maitland, vol 2 (n 82) 1; Frederic W Maitland, 'The Crown as Corporation' in *Collected Papers*, vol 3 (n 16) 260-70.

purposes (for governance, taxation, militaristic purposes, or otherwise), but not the romantic Germanist self-governing unit. The concept of self-governance was thus separated from questions of freedom and property rights. Here he disagreed in emphasis, and to some extent on legal detail, with Vinogradoff, who thought the village community was a communal institution committed to the sharing of resources. To Maitland it was and always had been ‘acutely individualistic’.¹⁰²

Towards the end of his life Maitland was particularly interested in the ideas of Otto von Gierke (1841-1921), who examined the possibility of and role for free associations in medieval society. The nuances of Maitland’s thinking underwent a significant change c. 1897.¹⁰³ His earlier writing objected to Maine’s attempt to bestow corporate legal personality on the village community on the basis of a Savigny-esque Roman law ‘fiction theory’ of legal personality.¹⁰⁴ His later work agreed with his earlier conclusion - the village community was not a corporation - but on a new basis: the village community was not developed enough for corporateness, whilst the medieval borough was. Maitland’s changed opinion involved a commitment to the view that corporation was the product of advanced social development and complexity: even if group personality was real and organic, the village community lacked legal personality because its functions were insufficiently complex.

He was, therefore, a unique Germanist in that his earlier work was imbued with Savigny’s Roman law fiction theory of corporate personality, and in his rejection of the Teutonic free village community. Maitland’s scepticism did not mean that he did not believe in village communities per se: the village community under the manor was a real and interesting phenomenon. It was the

¹⁰² Maitland, *DBB* (n 40) 348.

¹⁰³ Getzler (n 22) 245; e.g. Frederic W Maitland, *Township and Borough* (CUP 1898) 94-5; Otto von Gierke, *Political Theories of the Middle Ages* (Frederic W Maitland (trs), CUP 1900). See generally James Kirby, ‘History, Law and Freedom’ (2019) 16(1) *Modern Intellectual History* 127.

¹⁰⁴ Maitland, ‘Survival’ (n 91) 313.

unknowable iteration of the community which supposedly pre-dated the manor and had both nascent democratic tendencies and communal property ownership - for which there was a significant lack of evidence - to which he objected.

1) *Group Personality*

Maitland was determined to demonstrate that the village community was not a corporation or legal person. The village community did not use Roman law concepts, nor was it a property-owning 'mark' community - but there was Domesday Book evidence of free villages.¹⁰⁵ Free villages existed, perhaps even before manors did, but they did not own land.

Clearly, English village communities did not have the formal privileges of their continental counterparts.¹⁰⁶ That the word '*dominium*' could mean both governing power and ownership, and that these ideas were not clearly distinguished in early English law could also cause confusion and give rise to the impression of corporate ownership.¹⁰⁷ However, it seemed to nineteenth-century lawyers and historians that without some legal personality, the community could not hold land, possess legal rights, or enforce them. When Maine argued that property was held by communities before individuals, it followed the village community was some kind of corporation or juridical person. Maine argued that in 'primitive' and Roman law, the family was a corporation wherein a patriarch held property – supposedly in a representative, rather than a proprietary, capacity.¹⁰⁸ An heir to a testamentary succession was, he said, a corporation sole in Roman law, because they stepped into the legal capacities of the person they inherited from. Community wrongs were a

¹⁰⁵ Maitland, *DBB* (n 40) 362.

¹⁰⁶ Discussed more recently by Rodney Hilton, *Bond Men Made Free* (Routledge 2003) 74.

¹⁰⁷ Maitland, *DBB* (n 40) 398.

¹⁰⁸ Henry Maine, *Ancient Law* (1864; 2nd edn, John Murray 1873) xxxii; xlii.

corporate act in his account, too.¹⁰⁹ Maine made some reference to France, where unfree communities were, he said, voluntary associations favoured by lords because they provided more certainty and regularity of suit and service. The quid pro quo was that if a villein died, the lord did not exercise their right to resume the land. This made sense, Maine said, because these voluntary groups were not family groups or a village community, but based on house communities of descendants from a common ancestor – effectively a corporation incapable of dying, so that the land of a household was incapable of escheating.¹¹⁰

Maine's abuses of Roman law aside, the historical and anthropological evidence did not support his claim that the medieval village community was a land-owning corporation. Maitland found the idea that property was owned by corporations or fictitious legal persons before it was owned by individuals nonsensical.¹¹¹ When he abandoned 'fiction theory', he added that corporations existed at a later stage of the organic development of legal thinking, and the village community was insufficiently complex to be corporate – a change in emphasis but not in conclusion.¹¹²

Maine was not alone in his thinking about legal personality. The German scholar August Meitzen (1822-1910) compared the village community to the joint stock enterprise with limited aims and liabilities, which left villagers otherwise free to act independently. The shared aim (to successfully sustain individuals with agriculture whilst meeting external obligations) manifested in this case as total communal management of social and economic affairs. However, Vinogradoff had already rejected Meitzen's explanation: individual shares in the fields determined 'profit' in

¹⁰⁹ *ibid* 122.

¹¹⁰ Henry Maine, 'New Materials for the Early History of Institutions' in *idem*, *Institutions* (n 72) 6-7.

¹¹¹ Maitland, *DBB* (n 40) 340.

¹¹² Maitland, 'Survival' (n 91) 363.

terms of crops harvested, and the duties a landholder was subject to, rather than creating a formal joint entity. Meitzen had laid too much stress on artificial elements and ignored organic growth, minimising the village community's influence.¹¹³ Others applied Roman ownership concepts to try and explain the exclusion of non-community persons, but the '*universitas*' required a complete unification of interests and rights, which was not the case in medieval villages.¹¹⁴ In any case, the '*universitas*' was an inappropriate concept, Vinogradoff argued, because medieval documents showed individual rights constantly being asserted. It was not clear that the rights individuals had by virtue of their holdings were even kept conceptually distinct from the rights of the whole village, in the way, for example, that a modern company director's personal rights and duties are distinct from those of a company.¹¹⁵ This inability to find a suitable corporate concept was part of what led Romanists to conclude that community members acted only as individuals, and all communal elements were the product of seigneurial pressure because the unfree community under a lord could not be property-owning.

Germanists tended to a middle ground: the community was vague and organic, allowing for both community rights and individual interests, but without a doctrinally clear legal position. Ultimately, Maitland allowed this was probably accurate for the medieval period, where property rights were often not well defined - but it was not satisfactory for historians looking back at it to be equally unclear, and it was necessary to at least try and explain the phenomenon.¹¹⁶ Both he and Vinogradoff attempted to do so. They agreed medieval people were not in the habit of speculating

¹¹³ Vinogradoff, *Villainage* (n 1) note to 151. For a modern discussion of the joint stock enterprise or '*societas publicanorum*' in Roman law, see Ulrike Malmendier, 'Law and Finance "At the Origin"' (2009) 47(4) *Journal of Economic Literature* 1076; a recent response doubts Malmendier: Geoffrey Poitas and Frederick Willeboordse, 'The Societas Publicanorum and Corporate Personality in Roman Private Law' (2019) *Business History* *Business History*, DOI: 10.1080/00076791.2019.1656719.

¹¹⁴ A Roman law '*res universitatis*' was property which was held by a group and not an individual, but from which outsiders were excluded.

¹¹⁵ Vinogradoff, *Growth* (n 2) 324; Maitland, 'Survival' (n 91) 362-3.

¹¹⁶ Maitland, *Township and Borough* (n 103) 31-2.

about legal abstractions,¹¹⁷ and whilst it had been assumed that ancient ideas were clear cut and the passing of time made ideas more precise and complex, this was big assumption - why should inconsistency and indefiniteness be modern ideas? Instead, both recognised that early institutions could not be reduced to a single formula.¹¹⁸

a) Maitland and Gierke

Maitland ultimately rejected legal personality for the village community based on Gierke's definitions of corporations and co-ownership.¹¹⁹ Whilst Maitland was never inclined to grant legal personality to the village community, the use of Gierke to do so in *Township and Borough* represented a development in his views. He came to believe that corporations were not fictitious but *real* legal persons, with an independent existence intrinsic to their organic life.¹²⁰ Vinogradoff also favoured a 'real personality' theory of corporation, whereby juridical persons had independent existence and did not die with its members, such that the law had to decide how to treat this independently constituted entity. It could treat them as fictional, or as a legal expression of a social reality: Roman and modern English law favoured the former. The latter meant treating them like natural persons and ascribing to them brains, motives, institutions, agents, ability to hold property, perform acts, and exercise rights.¹²¹ Gierke had thought a corporation was a community with such collective personality, but the impact of his thinking had been limited because of the focus on legal status, Roman law influence, and ideas about the formation of sovereign states. Maitland popularised the

¹¹⁷ Vinogradoff, *Growth* (n 2) 324-6.

¹¹⁸ William Geldart, 'Review: Vinogradoff, *The Growth of the Manor*' (1906) 16(2) *The Economic Review* 244, 245.

¹¹⁹ Burrow, 'Village Community' (n 40) 282 discusses this point.

¹²⁰ Paul Vinogradoff, 'Juridical Persons' (1923) reprinted in *Collected Papers*, vol 1 (n 14) 337.

¹²¹ *ibid* 328, 329-336.

idea that a group mind could emerge through actors merging their behaviour for common purposes.¹²²

Maitland was willing to recognise there were groups and associations in medieval society to an unparalleled extent,¹²³ but he thought only some of them were legally defined.¹²⁴ He believed the medieval borough attained corporate personality in the later Middle Ages, whilst the township/village did not. The borough's personality arose spontaneously from urban life, because when thirteenth- and fourteenth-century towns grew larger and more complex the activities they undertook - like collecting revenues, entering contracts, leasing land - were ways of acting as a legal person.¹²⁵ The second edition of Pollock and Maitland particularly emphasised market tolls as a key factor in boroughs' legal personality.¹²⁶ This was a vindication of Gierke's theory: it showed the borough had latent group personality before fiction theory was adopted in English law in the late-fourteenth and fifteenth centuries.¹²⁷ But those functions were, Maitland thought, uncommon in village life, so the township never developed legal personality – although he thought it might have done so were it not for the controlling influence of lordship.

However, some explanation is called for by the range of local records describing interests in land as communal. For example, in 1327 in Hollywell, Hampshire, breaking a by-law and

¹²² Susan Reynolds, *Kingdoms and Communities in Western Europe 900-1300* (1984; 2nd edn, Clarendon Press 1997) xxix; Joshua Getzler, 'Plural Ownership, Funds, and the Aggregation of Wills' (2008) 10(1) *Theoretical Inquiries in Law* 241, 243.

¹²³ Maitland is generally considered a founder of political pluralism: David Runciman, *Pluralism and the Personality of the State* (CUP 1997).

¹²⁴ Getzler (n 22) 246; Maitland, *DBB* (n 40); Pollock and Maitland, vol 2 (n 82) 527-688.

¹²⁵ Maitland, *Township and Borough* (n 103) 80, 84-5.

¹²⁶ Pollock and Maitland, vol 1 (n 82) 683-7.

¹²⁷ Maitland, *Township and Borough* (n 103) 17, 19-20; Pollock and Maitland, vol 1 (n 82) 687; Kirby (n 103) 141. David Seipp, 'Formalism and Realism in Fifteenth-Century English Law' in Paul Brand and Joshua Getzler (eds), *Judges and Judging* (CUP 2012) discusses both Maitland's views and fifteenth-century cases on both sides of this ongoing debate.

entering the common meadow to the ‘common damage’.¹²⁸ The trespass is described as affecting the community as, collectively, owners of the whole meadow - however that was conceptualised by the participants. Villagers even occasionally had a sufficiently ‘corporate’ identity to make use of a common seal, although there are only three known examples: at Wellow, Nottinghamshire, in 1250, where villagers bound themselves and their heirs to provide a chaplain and maintain a chapel;¹²⁹ in Bromham, Wiltshire in 1295, where customary tenants were fined for creating a common seal by their lord the Abbot of Battle;¹³⁰ and at Kingsthorpe.¹³¹ These examples are interesting, and the Bromham case suggests the infrequent use of common seals may relate to lordly disapproval, rather than lack of community. However, a seal does not exclusively determine corporate character, then or now.¹³² Seals may have just been a convenient tool in particular instances, and there is far too little evidence to come to any broader conclusions about them.

Maitland proposed that individual co-ownership was a better fit for the written evidence of community actions. Whilst a village community constituted a group which held land and received grants of land, including in exchanges with lords, it was not a legal person.¹³³ There were common actions and rights by virtue of agreement, but any shared interests were dissolvable by consent. The ‘hypothetical village moot’¹³⁴ had some governing or policing powers but did not own land. If the houses and arable strips were held individually, and had annexed pasture rights enforceable by each individual, this left no space and no need for a communal village entity, nor

¹²⁸ Warren Ault, *Open Field Farming in Medieval England* (Allen & Unwin 1972).

¹²⁹ Helen Cam, *Law Finders and Law Makers in Medieval England* (Merlin 1962) 77; Charles W Foster (ed) *Antiquissimum Registrum of the Cathedral Church of Lincoln* (1935) 29(3) Lincoln Record Society 311.

¹³⁰ George C Homans, *English Villagers of the Thirteenth Century* (HUP 1941) 332, citing and transcribing PRO SC 2 Port 208 m 15 m 3.

¹³¹ John H Glover, *Kingsthorpiana* (Elliot Stock 1883) 1.

¹³² Reynolds, *Kingdoms* (n 122) 63.

¹³³ Frederic W Maitland, *Select Pleas in Manorial and other Seignorial Courts* (1888) SS vol 2, p 163.

¹³⁴ Maitland did not believe this institution existed, see further below.

for legal personality of the village itself.¹³⁵ References to ‘x’ number of men holding ‘y’ number of acres and having ‘z’ number of teams were likely convenient ways to describe what were actually holdings in severalty, although Maitland did not definitively rule out the possibility that it referred to holding in joint ownership. Pasture, in particular, was sometimes explicitly held in common for the villeins of one lord¹³⁶ - but what this meant was that each landholder had an individual right to use that common.

The essential problem here, for Maitland, was that scholars were ‘apt [to] give too sharp an edge to the legal terms of the middle ages, to treat them as fixed, whereas they were vague and fluid’.¹³⁷ The progress of law was not ‘status to contract’, but development from the ‘vague to the definite’.¹³⁸ Maine and others had wrongly attributed legal theories to historical persons who had none, and who were willing to accept any practical solution.¹³⁹ Maitland had comprehensively demonstrated the limitations of the Romanist/Germanist dichotomy. Previous scholarship too readily assumed a stark choice between a world of ‘great property’, servility, and Roman villas, and the corporate land ownership of the free village community. It was inappropriate to turn history upside down and attribute ideas to historical actors they could not have had. Medieval people were not making fine distinctions between co-owning and corporation, corporations as entities and the people that made them up (*universitas* and *singuli*). It did not occur to them that when they used their land that they had a *jus in re aliena* instead of *dominium*. They did not distinguish property and governmental power.¹⁴⁰

¹³⁵ Maitland, *DBB* (n 40) 411.

¹³⁶ In Colenness, Suffolk, pasture was held in common to all the men of the hundred: Vol 2, f 339V in Ann Williams and Geoffrey H Martin (trs), *Domesday Book* (Penguin 2003) 1226.

¹³⁷ Frederic W Maitland, ‘Tenures in Rousillon and Namur’ (1892), reprinted in *Collected Papers*, vol 2 (n 16) 255.

¹³⁸ Maitland, ‘Survival’ (n 91) 363

¹³⁹ Maitland, ‘Rousillon’ (n 137) 264.

¹⁴⁰ Maitland, ‘Survival’ (n 91) 362-3.

b) Vinogradoff and Communal Sentiment

The American law professor Albert Kocourek (1875-1952) described Maitland and Gierke's views that a corporation was real 'extreme' and located Vinogradoff between this extreme and the other.¹⁴¹ Vinogradoff was a Germanist, but sought to use ideas from both sides of the village community debate.¹⁴² His two large manorial studies began with critical and evaluative literature reviews, an approach which was optional if not novel, aiming to explain how the different specialist studies related and supported or contradicted each other, and his work demonstrates a sensitivity to both the economic and legal elements of the village community.¹⁴³ Vinogradoff's understanding of the community's legal personality was also Gierkean: people naturally co-operated and that the conditions of this co-operation sometimes had to be settled by law.¹⁴⁴ Corporate groups had a dual aspect: the business purposes for which such organisations were formed, and the legal consequences attached to being an organisation of that type. More formal versions of legal personality, like a (chartered) corporation, originated in agreement and required the reasonable consent of the parties involved in order to form and dissolve, with various technical variations between legal systems as to other features. However, it was difficult to reconcile rigid legal rules with the collective mentalities lying behind such organisations: courts had to deal with them flexibly.¹⁴⁵ Beyond the partnership and corporation, there were other associations: Maine was right in the sense that a family was created organically and constituted a 'super individual

¹⁴¹ Albert Kocourek, 'Review: Collected Papers of Sir Paul Vinogradoff' (1929) 38 Yale L J 833, 835.

¹⁴² Elton (n 61) 119.

¹⁴³ Vinogradoff, *Villainage* (n 1) 4; Vinogradoff, *Growth* (n 2) vii.

¹⁴⁴ Vinogradoff, 'Juridical Persons' (n 120) 328.

¹⁴⁵ *ibid* 331-4.

corporate unit' irrespective of any legal recognition.¹⁴⁶ Pollock and Maitland also discussed the legal status of the '*sippe*' or '*maegth*': the extended family or kindred,¹⁴⁷ although Vinogradoff accused Maitland of attempting to categorise it according to exaggeratedly sharp juridical definitions and constructions which did not consider the importance of context.¹⁴⁸ Local bodies, towns, and village communities were also organic, like families, created by 'neighbourly intercourse' and local conditions, not direct command. Both family customary arrangements and those of such local units were likely to find their way into law. Religious communities and trade unions were further examples.¹⁴⁹

The legally vague Germanic community concept recognised that villagers' actions were fundamentally affected by communal concerns, and that a lack of formal incorporation did not prevent effective communal action with legal implications.¹⁵⁰ Individualism in villagers' actions was not excluded as a matter of law, but it was not the preferred course of action within the community, and this significantly affected their legal and economic choices. As Maitland had described, there were groups which looked like corporations in medieval England: ownership of land by cities and burgesses looked corporate – i.e. it looked like ownership by a group with legal personality, as did many ecclesiastical institutions'.¹⁵¹ For example, the burgesses of Oxford possessed a meadow in common, with group rights and duties, and (probably) a common chest. However, Vinogradoff argued that whilst the boundaries between the rights of individuals and

¹⁴⁶ Maine, *Ancient Law* (n 109) xlii.

¹⁴⁷ Pollock and Maitland, vol 2 (n 82) 243.

¹⁴⁸ Vinogradoff, *Growth* (n 2) 139.

¹⁴⁹ Vinogradoff, 'Juridical Persons' (n 120) 334.

¹⁵⁰ Vinogradoff's view as to a lack of formal corporation not preventing communal action is echoed more recently in Christopher Dyer, 'The English Medieval Village Community and its Decline' (1994) 33(4) *Journal of British Studies* 407, 410. See also generally Reynolds, *Kingdoms* (n 122).

¹⁵¹ Paul Vinogradoff, *English Society in the Eleventh Century* (Clarendon Press 1908) 258.

those of the community were uncertain and ‘wavering’, there was real tenure in common, not the co-ownership Maitland claimed.¹⁵² Not only was the term ‘*communis*’ used, but the community had an independent aim and continuity of existence.¹⁵³ Maitland had shown the village community was not quite as complex, and Vinogradoff agreed that villagers were unlikely to have a clear conception of corporate ownership - but being ‘rudimentary’ did not make the institutions insignificant,¹⁵⁴ emphasising that:

the proprietary and economic arrangements of the township are peculiar, and cannot be explained either on the well-known lines of private ownership... nor on those of seignorial sway, nor on the basis of strict communalism, treating individuals as subservient items, nor as a consequence of a system of kinship. It is an arrangement which has some traits in common with every one of those we have mentioned, but remains distinct...¹⁵⁵

Although theories of corporate rights and personality had not yet developed, and it was impossible to draw clear distinctions between the corporate body and its members’ property and attributes, a co-operative union existed. The village community had some corporate features: it was capable of holding property, acquiring and alienating it, taking measures for ensuring compliance with common aims and protecting common interests.¹⁵⁶ It resembled a community of shareholders, with rights and duties connected with shares which were not random but units in organic relation to the whole. It was not formed by definite agreement, or as a manifestation of the will of members: communities grew naturally and had an independent existence. It was also a body which excluded strangers by strict formalities, and which could not be dissolved or left. Some decisions and actions were collective, but there was also a wide margin for individual action and other forms of association.¹⁵⁷ Maitland’s rejection of corporate personality for the village community had more

¹⁵² *ibid* 258; Maitland, *Township and Borough* (n 103) 12. See also Burrow, ‘Village Community’ (n 40) 282.

¹⁵³ Vinogradoff, *English Society* (n 151) 258.

¹⁵⁴ *ibid* 398.

¹⁵⁵ Vinogradoff, *Growth* (n 2) 150.

¹⁵⁶ *ibid* 322-3.

¹⁵⁷ *ibid* 139-150.

to do with his views on communal sentiment and individualism than its lack of resemblance to a Gierkean natural person.

C. COMMUNALISM AND INDIVIDUALISM

Having rejected the Teutonic land-owning community, many questions remained for Maitland and those that followed. The first was the extent to which the community was led by communal sentiment, rather than individualism. How much self-governance might here have been? When did this manifest? How? Both Maitland and Vinogradoff combined Roman and German elements, but reached different conclusions. Maitland thought that a village moot which prescribed a course of agriculture did not exercise land ownership, but had governmental power akin to a modern town council - but even this was not a necessary feature of common field farming. What communalism was visible came later, Maitland argued, and was a result of seigneurial demands for labour, rent, and other extractions.¹⁵⁸

Maitland held the township was no less individualistic than any other element of medieval society. Like Romanists, he saw the manor as continental, but traced it to ninth- and tenth-century Gallic land management. English church administrators observed the usefulness of the institution and imported it, enabling gifts of land which left the labouring population undisturbed and cultivating under church control. It was then only a matter of time until laypeople began to use manors too: they were as useful for gaining protection from invaders as for pious donations.¹⁵⁹ The village community with open fields was Germanic, as Meitzen had shown¹⁶⁰ - although not all

¹⁵⁸ Maitland, 'Survival' (n 91) 363.

¹⁵⁹ Maitland, *DBB* (n 40) 376.

¹⁶⁰ *ibid* 267.

English villages fit this model: Domesday Book showed both nucleated open field villages and smaller, less unified villages. Maitland argued there was no evidence of village communities, or their institutions, pre-dating manors, and they only coalesced if and when there was sufficient external pressure (and organisation) to drive them to work together.¹⁶¹ The non-nucleated villages were held together only by these external policing and taxation requirements. There was also evidence of individualism in property holding even before the Norman Conquest, as well as some clear evidence of explicit co-operation between landholders in respect of arable land and of sharing land for grazing: for example, in Goldington, Bedfordshire, the villagers were recorded as holding land ‘in common’ in Domesday Book.¹⁶² But the property rights therein were individualistic.¹⁶³

1) *Vinogradoff's Germanic community*

In contrast to Maitland, Vinogradoff remained committed to an ancient Germanic village community with strong communal sentiment, even after Maine's property-owning element was removed. He attempted to explain how self-governance might have been an ancient tradition, and argued that although the Roman villa and the village community evolved from different sources, it was their combination which produced the medieval manor.¹⁶⁴ This led William Paley Baildon (1859-1924) to complain that Vinogradoff did not seem to be able to make up his mind about the mixture of Roman and Germanic influence,¹⁶⁵ but it would be more accurate to say that he recognised evolving influences over time. Vinogradoff described a village community not only pre-Norman but pre-Roman, having endured Roman occupation in Germany, France, and

¹⁶¹ *ibid* 39.

¹⁶² Maitland, *DBB* (n 40) 143; Vol 1, f 213V in *Domesday Book* (n 141).

¹⁶³ Maitland, *DBB* (n 40) 348.

¹⁶⁴ Vinogradoff, *English Society* (n 151) 478.

¹⁶⁵ William Paley Baildon, ‘Vinogradoff on the Manor’ (1905) 21 *LQR* 294.

England and re-emerged, not unchanged, but broadly unscathed below or within the Roman administrative units and alongside direct bureaucratic management of land.¹⁶⁶ They were subsumed into the recognised '*pagi*'¹⁶⁷ units, or held under an extra-municipal private '*sallus*', and yet remained functionally self-governing, unmolested because of the Roman policy not to habitually impose their own social arrangements or institutions insofar as local customs only claimed local validity and did not conflict with Roman law principles. The village or Latinised '*vicus*' was not recognised in Roman law, which prioritised urban administrative units, but existed as a sub-unit under the '*pagus*' and was essential in supporting it by resolving neighbourhood issues, and settling hereditary custom claims. The '*pagi*' were themselves capable of holding property, erecting and repairing buildings, electing magistrates, maintaining roads and rights of way, regulating commons rights, and the settling and preservation of boundaries.¹⁶⁸ Much later, Postan reached the same conclusion: the Romans had not attempted to displace local tribal government or 'ancient tribal customs in all matters legal and social and agrarian', but had imposed Roman administrative structures on top.¹⁶⁹ This meant it was not difficult, when the Romans withdrew, for peasants to revert to older practices.¹⁷⁰

Like many Whig historians, Vinogradoff thought that Saxons and Normans were both essentially Teutonic races, so the Norman Conquest caused no great break in continuity. It was only the Romans, with their alien governance and agriculture, who had a temporarily disruptive

¹⁶⁶ Vinogradoff, *Growth* (n 2) 51.

¹⁶⁷ '*Pagus*' later became '*pays*', county: for instance '*pagus*' as a land distinct both geographical and administrative was used to describe the south eastern shires of England such as Kent, Sussex, and Essex: Paul Vinogradoff, 'Foundations of Society' in John Bagnell Bury (ed), *Cambridge Medieval History*, vol 2 (CUP 1913) 639.

¹⁶⁸ Vinogradoff, *Growth* (n 2) 45-9, 82.

¹⁶⁹ Postan, *Medieval Economy* (n 85) 4. This is the same point as Vinogradoff, *Growth* (n 2) 47: 'the Romans... recognised the land districts of the Celts and the peculiarities of their grouping on the land'.

¹⁷⁰ Vinogradoff, *Growth* (n 2) 48. A version of this argument has been made more recently by Chris Wickham in the form of a 'complete material collapse': *Framing the Early Middle Ages* (OUP 2005) 47.

impact.¹⁷¹ Old English practice included the continued occupation of surviving Roman great estates, but village communities on such would be no different to native settlements (i.e. they would be Germanic) – an admittedly odd combination of factors.¹⁷² This led to two ‘imperfectly co-ordinated’ systems. For Vinogradoff, the village community transmitted ancient principles of communal action and communal responsibility, and continued to exist alongside the common law, with its system of personal rights and relations.¹⁷³ The latter, including ‘feudal’ tenure, was predominant on the surface of the historical evidence. It was individualistic, based on contract, and governed the top of the social hierarchy. Under it, older than it, was the territorial system descended from tribal society based on townships with collective responsibilities.¹⁷⁴

Vinogradoff argued community had power because individual members rationally accepted constraints on their individualism in order to achieve certain goals, like crop rotation and soil productivity.¹⁷⁵ This sort of group will depend on a level of societal complexity and specific functions not present in the village community as Maitland understood it. Maitland argued that, apart from limited agrarian management, villagers were not otherwise a closely connected group, nor was the community a very active institution - why else would there be so little response to individualistic actions, like holdings being fenced or people removing stray animals? Although each individual landholder could assert their right to pasture, a newcomer might be rejected on the basis of an objection from a single villager.¹⁷⁶ Acquiring land by inheritance or purchase made you a community member, but the converse, being part of the community, did not entitle you to land:

¹⁷¹ Vinogradoff, *Villainage* (n 1) 13.

¹⁷² Geldart (n 118) 247.

¹⁷³ Vinogradoff, *Growth* (n 2) 365.

¹⁷⁴ Parker (n 21) 48-9; Vinogradoff, *English Society* (n 151) 471-73; 475-77.

¹⁷⁵ *ibid* 270.

¹⁷⁶ Maitland's evidence for this was the *Lex Salica* and not any English evidence: Maitland, *DBB* (n 40) 409.

for example ‘undersettles’ were subtenants who hired houses but held no land of the lord, so they had no common rights unless they acquired them in addition.¹⁷⁷ There were also cottars, bordars, and ‘*famuli*’ labourers, none of whom held arable. Maitland found no common law on these issues, but village by-laws, which will be discussed in more detail in later chapters, were a communal response to these problems and others, and involved a certain amount of punishment or disciplinary sanction in response to individualistic actions which harmed the community. Further, there are specific examples which indicate Maitland under-emphasised the connection between land and community. At Wakefield in 1275 the jury presented that a customary tenant (‘*nativus*’) was able to hold land, but had none: this suggests that being part of that particular community and not holding land was something to be amended, perhaps depending on personal status.¹⁷⁸ Other examples of a widow willing to marry any man who would submit himself to the community of the vill in 1283,¹⁷⁹ and presentments that a tenant could not maintain their holding and must be removed,¹⁸⁰ suggest that these communities and their holdings were more closely intertwined than Maitland allowed.

2) *The Importance of Communal Agriculture*

Once common field husbandry was established by some original allotment of land, it could, Maitland said, maintain itself without either the presence of corporation which owned the land instead of individuals, or a self-governing community.¹⁸¹ Community decision making was

¹⁷⁷ Maitland, ‘Survival’ (n 91) 374; idem and William Paley Baildon (eds), *The Court Baron* (1891) SS vol 4, p 146.

¹⁷⁸ William Paley Baildon, *Court Rolls of the Manor of Wakefield*, vol 1 1274-1297 (1901) 29 Yorkshire Archaeological Society 130.

¹⁷⁹ Poos and Bonfield, *Select Cases in Manorial Courts, 1250-1550* (1998) SS vol 114, p 115.

¹⁸⁰ Maitland and Paley Baildon (n 177) 124.

¹⁸¹ Maitland, ‘Survival’ (n 91) 361.

not legally significant: it ‘only’ regulated arable land, woods, and waste¹⁸² – although Vinogradoff admonished that this supposedly ‘small’ role impacted all the everyday transactions of ordinary people.¹⁸³ When Maitland read *Growth of the Manor*, he commented to H A L Fisher that ‘of course I see that he has knocked many holes in my armour but most of them I had expected for a little time past.’ It is unfortunate that Maitland had by that time largely abandoned working on that time period and further publications on the subject could not adapt to these ‘holes’.¹⁸⁴ Maitland had argued that there was no need for standing legal institutions to assart land, alter pasture rights, or build a mill or church.¹⁸⁵ When there was need for co-operation, it could be explained on the principles of neighbourliness and the automatism resulting from agriculture ‘[which] is fixed and will not be often or easily altered’. For example, in Seebohm’s Hitchin, the field system had supposedly followed the same rotation since ‘time immemorial’ – little active management was needed to repeat the same actions each year.¹⁸⁶ If crop rotations were indeed immemorially fixed, there was little need for discussion, and where new land was reclaimed from waste, lots could be cast to determine holdings without the need for arbitration or regulation. It has been similarly argued in modern economics scholarship that ‘even a moderate apathy towards social conflict could informally approximate the effects of conscious community regulation of economic activity’,¹⁸⁷ minimising the perceived need for community regulation.

The village council, Maitland argued, had been invented by ‘modern imaginations’, where the role of the rights and duties attached to land, the rapid transformation of new arrangements

¹⁸² Maitland, *DBB* (n 40) 187.

¹⁸³ Vinogradoff, *Growth* (n 2) 188.

¹⁸⁴ Cecil H S Fifoot (ed), *The Letters of Frederic William Maitland*, vol 1, (1965) 1 Selden Society Supplemental 338.

¹⁸⁵ Maitland, *DBB* (n 40) 411.

¹⁸⁶ Frederic Seebohm, *The English Village Community* (Longmans, Green 1913) 11.

¹⁸⁷ Hoffmann, ‘Medieval Origins of the Common Fields’ in Parker and Jones (eds) (n 81) 31.

into what was considered ‘immemorial’ custom, ‘the practice of taking turn and turn about’, and of casting lots, could ‘do much’ to explain agricultural management without it. On rare occasions when there was some unusual issue for the villagers resolve, which Maitland suggested might be every five years or so, a ‘resolution of the villagers which is or calls itself’ unanimous would be called forth – but there was still no need for ‘permanent or legal’ institutions.¹⁸⁸

Maitland also saw no inherent need for local legal actions, because failure to follow agricultural rules had direct personal consequences: the risk to your own land was incentive enough. It is easy to think of examples: if one farmer tried to plough before all the others, they would struggle to access their strips, or find space to turn the plough. The individual right not to have another trespass on land would suffice without the need for elaborate by-laws and institutions, Maitland thought. Trespass – i.e. entering another’s land without permission, or even encroaching thereon - was indeed a frequent possibility in a system whereby cultivation required access over others’ land and permitting access over your own. Maitland’s point was at least in part that these were individual wrongs and individual rights, not communal ones, and hence did not need their own special regime for group action or by-laws.¹⁸⁹ However, referring only to the common law actions leaves the unfree tenants who made up the majority of cultivators unexamined. Local custom also regulated trespass without respect to personal status, and these rules routinely appear in writing when by-laws were recorded. For example, turning a plough on land sown with crops is restricted ‘as before’ - implying an older rule only recently written down - in West Drayton, Somerset.¹⁹⁰ Each community must have had mechanisms for dealing with the perennial risk of boundary encroachment and trespass. Where this mechanism was the manorial

¹⁸⁸ Maitland, *DBB* (n 40) 187.

¹⁸⁹ Maitland, ‘Survival’ (n 91) 369.

¹⁹⁰ Ault, *Farming* (n 128) 23.

court it can be evidenced in the written records, and this type of issue appears across a wide enough geographical area to suggest that it was both a common problem and a common forum: at Barkby, Leicestershire, in 1296; at Great Horwood, Norfolk, in 1306; and at Houghton, Huntingdonshire, in 1308,¹⁹¹ for example.

Furthermore, Vinogradoff argued that the community was not doomed to blindly follow tradition as Seebohm claimed, and had the capacity to innovate and make rational economic decisions.¹⁹² Tenants could leave the village, generate income from sub-letting or offering hired labour, and sometimes enclose land for separate cultivation. Later manorial court rolls showed the likely reaction to this was an income generating fine, not prevention.¹⁹³ Because local custom was based on the broad agreement of the community as a whole, if enough members stopped believing in the value of customary rules, communal sentiment and community regulations would weaken. Conversely, the endurance of communal agriculture indicates that many communities did, for a long time, feel that common field agriculture was the best option.

Maitland, however, was unaware of or discounted evidence of peasants engaged in self-motivated innovation and decision making. For example, it is now known that thirteenth-century peasants switched from oxen to horses sooner than lords and demesne farmers did, and used them to carry goods to market.¹⁹⁴ Further, external pressure was neither a necessary nor a sufficient condition for village nucleation: cultivators themselves, it seems, could see the advantages of common field farming.¹⁹⁵ And community sentiment, although more strongly evidenced in

¹⁹¹ *ibid* 52-3; Ault, *Court Rolls of the Abbey of Ramsey and the Manor of Clare* (YUP 1928) 245.

¹⁹² Vinogradoff, 'A History of Local Government' in *Collected Papers*, vol 1 (n 14) 303-7.

¹⁹³ Vinogradoff, *English Society* (n 151) 476.

¹⁹⁴ Christopher Dyer, 'The Past, the Present and the Future in Medieval Rural History' (1990) 1 *Rural History* 37, 45; citing John Langdon, *Horses, Oxen and Technological Innovation* (CUP 1986).

¹⁹⁵ Rosamond Faith, *The English Peasantry and the Growth of Lordship* (Leicester University Press 1997) 150.

nucleated common field villages, was not exclusively there: for instance, communities spread over multiple villages often shared commons.¹⁹⁶ Maitland conceded that at least some of the features of medieval agriculture were compatible with villages without lords controlling them,¹⁹⁷ but doubted that such villages proved the existence of an early free village community or the sort of communal sentiment Vinogradoff saw, even if their burdens were relatively light. For example, the yearly ‘*donum*’ and ‘*auxilium*’ taxes¹⁹⁸ were payable by the village as a whole. The villagers then had a practical need to divide that burden amongst themselves, probably based on the number of animals each participant owned – this incentivised, even demanded, group action.¹⁹⁹ Tallage,²⁰⁰ policing requirements, church dues, and some military services were all similar burdens levied on townships, not manors,²⁰¹ and because they were more prominent in older documents, it suggested the practice had existed from an early date.²⁰² However, Maitland thought this showed not ancient communalism, but evidence that communal action was ‘called forth’ by seigniorial pressure for tributes. It followed that the earliest village communities were not egalitarian, but individualistic, coalescing under external pressure.²⁰³

Vinogradoff, by contrast, described a village community expressly designed to emphasise the inferior and derivative nature of individual rights. For instance, the custom of opening up

¹⁹⁶ Reynolds, *Kingdoms* (n 122) xxxviii. See examples in Chapter 1 above.

¹⁹⁷ Maitland, *DBB* (n 40) 181.

¹⁹⁸ For these purposes they might also be called ‘tallage’ although that word has a wider ambit.

¹⁹⁹ Vinogradoff, *Villainage* (n 1) 293 citing William Henry Hart (ed), *Historia et cartularium monasterii Sancti Petri Gloucestriae*, vol 3 (Rolls Series 1863-1867) 50; 180; 208.

²⁰⁰ Manorial tallage may be distinguished from royal tallage, and it is in the former sense the term is used here: Robert S Hoyt, *The Royal Demesne in English Constitutional History 1066-1272* (Cornell University Press 1950) 111.

²⁰¹ Vinogradoff, *Growth* (n 2) 196.

²⁰² Maitland, *DBB* (n 40) 184.

²⁰³ Maitland thought these pressures were fiscal and feudal, but other external pressures recognised in subsequent work - like population and land scarcity - had impact on individualism and land management, see generally Alan Macfarlane, *The Origins of English Individualism* (Blackwell 1978) and Chapter 4 below.

fields to common pasturing after the harvest was, to him, an example of the superiority (at least in sentiment) of the community as a whole.²⁰⁴ The essential need for regulation in common field agriculture seemed clearer to him than to Maitland,²⁰⁵ but Vinogradoff thought this was more than just economic necessity: he believed it was evidence of a commitment to equality in principle. This led to an extended debate with Seebohm about its practical manifestations.

Seebohm tried to show consecutive allotment of strips to those involved in a plough team as it moved around an open field, not for equality but in order to solve a practical problem:²⁰⁶ the team required to pull a heavy plough through clay soil required co-operation because most individuals could not afford a whole plough team, and that resulted in a need to allocate the outputs from the co-operative endeavour of ploughing with a team.²⁰⁷ Even composite teams provided by one wealthy landholder might have produced intermixed strips if that team ploughed the same open field at the same time as others.²⁰⁸ There was evidence for this practice in Welsh tribal communities, but not in England – Seebohm’s application to English field systems was only possible through the use of the comparative method.²⁰⁹ There was, however, also contradictory comparative evidence: the presence of scattered strips even where smaller ploughs and plough teams were used, for instance.²¹⁰ And markets for oxen rental, for which there was some evidence, also begged the question: if oxen could be rented, it was possible to use that market to avoid the inconvenience of scattered strips, and use animals at the most convenient times to create

²⁰⁴ Vinogradoff, *Villainage* (n 1) 230.

²⁰⁵ Ault, *Farming* (n 128) 15.

²⁰⁶ Seebohm, *Village Community* (n 186) 113.

²⁰⁷ This approach has been adopted by others: Ault, *Farming* (n 128) 20; and Postan, *Medieval Economy* (n 85) 54.

²⁰⁸ Charles S Orwin and Christabel S L Orwin, *The Open Fields* (1938; 2nd edn, Clarendon Press 1954) 8.

²⁰⁹ Seebohm, *Village Community* (n 186) 120; Maitland, *DBB* (n 40) 404.

²¹⁰ Vinogradoff, *Villainage* (n 1) 254.

consolidated blocks – but nonetheless there were scattered strips, so there must have been some other reason.

Seebohm had also tried to explain the continued use of strips. Lords would have favoured regular inheritance customs like primogeniture, which helped maintain regular and easily managed services from each holding. Holding size and uniformity were therefore, he said, the direct result of the lords' interest,²¹¹ and without that pressure the land would have been increasingly subdivided amongst heirs.²¹² Maitland was doubtful about the premise that partible inheritance prevailed amongst non-nobles: he suggested holding in 'parage' without physically undivided land shared amongst co-heirs as an alternative.²¹³ However, there was a lack of evidence of this custom amongst peasants, and Maitland's examples were in their own way comparative as they were drawn from the highest social class.²¹⁴ But primogeniture only emerged as the general inheritance custom in the thirteenth century, and if impartible inheritance did not prevail until then, the maintenance of holdings in larger pieces must have been due to some other factor, like conscious choice.²¹⁵

If common field agriculture resulted from political or social commitments to equality as Vinogradoff claimed, the shifting ownership and reallocation of arable seen in Russian village communities would have been a good way to show it. Maine had used some comparative evidence from Russia, where separate proprietary claims were allowed to develop in between periodic redistributions of land,²¹⁶ and India, where the language used to talk about landholdings fluctuated

²¹¹ Seebohm, *Village Community* (n 186) 77.

²¹² *ibid* 177.

²¹³ Maitland, *DBB* (n 40) 182. Maine had also discussed this: *Ancient Law* (n 109) 221.

²¹⁴ Rosamond Faith, 'Peasant Families and Inheritance Customs in Medieval England' (1966) 141(2) *The Agricultural History Review* 77, 79.

²¹⁵ Charles Elton, 'Review of Maitland (ed) *Bracton's Note Book*' (1889) 4(13) *EHR* 154, 161; Faith, 'Families' (n 214) 79.

²¹⁶ Maine, *Ancient Law* (n 109) 260.

between hereditary kinship and contractual voluntary associations,²¹⁷ to argue that the medieval concept of property in land had a twofold origin. Both German and Russian village communities engaged in the periodic redistribution of land via lot or rotation, and the arable responded to population changes by being divided into as many strips as there were community members without set holding sizes.²¹⁸ Vinogradoff and, later, Postan compared the Russian model with the English medieval village community.²¹⁹ However, it is doubtful that the concept was appropriate for England.²²⁰ Seebohm was an early critic: English village communities distributed land based on fixed holding sizes, not based on population needs.²²¹ More recently it has been argued that Russian periodic redistribution dated from the eighteenth century and was a response to heavy taxes and rents, imposed on the village by lord and state, and so not an appropriate comparison to the English medieval village if the latter was truly self-governing.²²²

English village communities themselves rarely exhibited features suggesting any kind of shifting ownership, with the possible exception of meadow land. Meadows were scarce and strictly regulated,²²³ which, Maitland said,²²⁴ explained why shares in them were often annually distributed on a lot or rotation basis.²²⁵ In any case, lots in meadows created individual claims, and ownership of that land was not described as communal. Sometimes arable was distributed on rotation the same way as meadow land, primarily in the fields relating to urban settlements. This atypical land

²¹⁷ Henry Maine, *Village Communities in the East and West* (1871; 3rd enlarged edn, Henry Holt and Co 1889) 117.

²¹⁸ Vinogradoff, *Villainage* (n 1) 236-7, 401-3; Vinogradoff, *Growth* (n 2) 18; 179, 207.

²¹⁹ Christopher N L Brooke and Michael M Postan (eds), *Carte Nativorum* (1960) 20 Northamptonshire Record Society xxxiv.

²²⁰ Hilton, *The English Peasantry in the Later Middle Ages* (Clarendon Press 1975) 6.

²²¹ Seebohm, *Village Community* (n 186) 383.

²²² McCloskey, 'Persistence' (n 81) 98.

²²³ Vinogradoff, *Growth* (n 2) 173.

²²⁴ Maitland, *DBB* (n 40) 406.

²²⁵ Vinogradoff, *Villainage* (n 1) 260. This is now seen as an insurance mechanism against variable crop yields: McCloskey, 'Persistence' (n 81) 97.

was considered the common property of the town community with rights derived from ancient custom, and the use of arable strips suggested to Vinogradoff that the urban version had developed from former rural village practice. Maitland however, argued that the scarcity rationale for meadows would apply as well to arable as any other non-urban land and was not a survival of primitive communalism.²²⁶

What evidence there was for periodic reallocation of arable in England was limited to areas of less intensive cultivation, where periodic allotment was less likely to be controversial or disruptive.²²⁷ There was a clear example of reallocation from Dunstable priory, but this was a consensual and one-off response to an unusual period of conflict and uncertainty and not evidence for a Russian-style system.²²⁸ There are also examples of wholesale reallocation from Winslow in 1362,²²⁹ at fourteenth-century Cuxham;²³⁰ one reference in Peterborough;²³¹ and two twelfth-century examples from Segenhoe, Bedfordshire, and Dry Drayton, Cambridgeshire²³² - but these are the exceptions which prove the rule. In England, population growth was managed by various means, including use of paid labourers, and migration for marriage and otherwise, but not usually by reallocation of arable land.

Vinogradoff's strength of conviction as to the egalitarianism of the village community faded in his later work: it is not clear whether this was due to research findings or his work

²²⁶ Vinogradoff, *Growth* (n 2) 174-5.

²²⁷ Maitland, *DBB* (n 40) 406.

²²⁸ Vinogradoff, *Villainage* (n 1) 233-235; Vinogradoff, *Growth* (n 2) 178.

²²⁹ Ada Levett, 'The Courts and Court Rolls of St Albans Abbey' (1924) 7 *Transactions of the Royal Historical Society* 52, 59.

²³⁰ Paul D A Harvey, *A Medieval Oxfordshire Village* (Oxford Record Society 1965) 29.

²³¹ Faith, *Peasantry* (n 195) 69.

²³² Harold Fox, 'Approaches to the Adoption of the Midland System' in Trevor Rowley (ed), *The Origins of Open Field Agriculture* (Croom Helm 1981) 95.

reflecting his disappointment after 1917 - hopes for reform in Russia based on the past development on other nations had led him to English medieval history, but it became clear that Russia was not going to become a constitutional monarchy.²³³ Even Vinogradoff's version of the village community was more focused on practical agriculture and subsistence than in precise equality and re-allotment of land.²³⁴ Egalitarian sentiment was limited to a roughly equal initial distribution of land, according to particular features of the terrain, and to a legality principle whereby everyone had to follow the village by-laws.²³⁵ He also argued that individualistic behaviour was not necessarily an existential threat: it was concerned with the allotment of landholding, but not, as a rule, with the relationship between land and population. For example, Vinogradoff described the pushing out of over-populated family members into bordar or croft houses as a sacrifice to economic efficiency.²³⁶ It was true that an individual could concentrate holdings, and lose them,²³⁷ and not all peasants were equally wealthy: the richer members of the community tended to dominate juries, for example.²³⁸ Seebohm noticed that some tenants tended to hold most of the land in a village were the same people who served as later jurors,²³⁹ and later demographic studies and manorial rolls confirmed village juries were often dominated by the wealthiest locals, who were also the most active in local land markets.²⁴⁰ The jury role enabled local elites to manipulate courts in their own interests, for instance when declaring facts or making presentments. Nonetheless, these decision makers were often unfree peasants, and almost always

²³³ Noted by Kosminsky, 'Russian Work' (n 69) 215.

²³⁴ Vinogradoff, *Growth* (n 2) 326.

²³⁵ *ibid* 237.

²³⁶ *ibid* 313; Vinogradoff, *English Society* (n 151) 459. 'Bordars' and 'cottars' or 'cottiers' were villeins holding only small portions of land around their houses, and usually nothing in the village fields.

²³⁷ Vinogradoff, *English Society* (n 151) 217.

²³⁸ Hoffmann 'Medieval Origins' (n 187) 62.

²³⁹ Seebohm, *Village Community* (n 186) 21.

²⁴⁰ For example, Phillip Schofield, 'Dearth, Debt and the Local Land Market in a Late Thirteenth Century Village Community' (1997) 45(1) *Agricultural History Review* 111.

members of the village community and not actors imposing pressure from outside. To allow a legal role for the village community was not necessarily to say that villages were entirely democratic and egalitarian institutions – even though that had been the claim of some mark theorists.

Markets, did, however, have the effect of dissolving communal sentiment: Seebohm showed increased commerce enabled tenants to pay cash rents instead of labour services, giving them more practical freedom,²⁴¹ and the increased availability of markets may have helped cause the kind of priority shift that would encourage individualism by providing an alternative way to deal with risk. Individuals could focus on producing a surplus to be sold to fund the purchase of anything not grown themselves,²⁴² and productivity could be maximised with crop specialisation and economies of scale, without the different risks entailed by relying on neighbours. That this is what did in fact happen is supported by evidence that areas with access to larger markets enclosed land faster and abandoned their open fields more readily than villages further from commercial centres,²⁴³ for example Kent was in a ‘privileged position’ for trade routes.²⁴⁴

D. CONCLUSION

Maitland and Vinogradoff, especially in dialogue with each other, set the understanding of the village community and medieval custom on a new footing. Whilst they emphasised different social aspects of the village community, they agreed on most of the legal detail, sweeping away the older debates about corporateness and the original freedom of the Teutonic village community.

²⁴¹ Frederic Seebohm, *The Era of the Protestant Revolution* (Estes and Lauriat 1874) 20.

²⁴² Hoffmann ‘Medieval Origins’ (n 187) 51.

²⁴³ Areas more sensitive to weather were also slower to enclose, as their risk variables were higher and, presumably, the argument for spreading risk was more persuasive. McCloskey, ‘Persistence’ (n 81) 118.

²⁴⁴ Vinogradoff, *Growth* (n 2) 317.

The village community was no land-owning corporation in the modern sense, but it did have a role in creating and maintaining customary law relating to land and other aspects of day-to-day life throughout the medieval period. Free villages had existed before the Norman Conquest, but at least some aspects of medieval custom related to seigneurial pressure and lordship. Whilst villagers need not have had a fully developed sense of the conceptual difference between communal and several ownership, Vinogradoff and Maitland agreed that what was actually evidenced in village communities was joint governance. Vinogradoff, however, gave much greater emphasis to a communal concern for equality fundamentally affecting the actions of villagers.

Whole vistas of enquiry were thus prepared by this groundwork: the extreme richness of English medieval documentary evidence could now be probed with careful analytical tools to reveal how customary law functioned in medieval society, what sorts of rules there were, how they were created, maintained, and enforced, and when. The English manor, village community, and their populations could be much more thoroughly understood, in a more nuanced way, by appreciating that legal concepts later made definite were hazy, and the development and roots of those ideas could therefore be searched for and traced. Year Books and manorial rolls alike could be examined to reveal the interrelationship between local custom and the developing common law. It was clear that the village community could not bear the weight of the claims made for it by Maine and earlier writers. Maitland's scepticism and common law focus did a great deal to demolish false claims relating to kinship, medieval communalism, hides, and manors. Vinogradoff hoped that this was not the end of the matter, and that 'people with a hopeful turn of mind may venture on reconstruction'.²⁴⁵

²⁴⁵ Vinogradoff, *Growth* (n 2) vi.

However, with precision and scholarship came a decreased capacity to use the village community in political debates. The new scientific methods in historical research made it harder to make sweeping generalisations and absolute claims:²⁴⁶ the village community became less useful in polemics about freedom, democracy, or communism at large. And a new set of political problems arose to occupy European political discourse which meant understanding village communities was less pressing: British politicians in particular were no longer focused on managing colonies and an empire, and instead worried about the implications of the collapse of imperial powers.²⁴⁷ Where Maine had been able to popularise the study of the village community because it was so directly relevant to vital political concerns, it was now consigned to, at best, quiet scholarly investigation. But even there it would take decades for studies of medieval law and institutions to regain momentum in legal historical scholarship, and when they did so it was in a very different form.

²⁴⁶ Maitland, 'Materials' (n 16) 23.

²⁴⁷ Dewey (n 43) 295; 304.

CHAPTER 3

EARLY STUDIES OF MEDIEVAL LOCAL CUSTOM

This chapter focuses on Maitland and Vinogradoff's work on the village community as to courts, law, and legal regulation. What claims could stand up to scrutiny, based on what was known at the end of the nineteenth century?¹ A more precise, legal, and technical set of enquiries than those of earlier scholars was called for, asking what proof there was for or against the presence of a village community court and/or legal rules, what their role was in the broader legal landscape, where this evidence was to be found, and how reliable or revealing it was.

Maitland did not believe the village community was a sufficiently sophisticated institution to have its own law or legal institutions - if it had been, he might have ascribed group personality to it as he did with the borough. His stated purpose was not just to disprove false claims about the village community, but to disprove the idea of a self-governing village community altogether.² This is surprising in some ways: Maitland's denial of communal sentiment in the village community was based on the available evidence, but was so enthusiastic it strikes the reader as not entirely objective – whilst Dewey claims this places Maitland in his time and context, it is noteworthy that legal historical writing has been broadly content to remain there.³ Communal sentiment, Maitland said, was not a legal relationship, and he thought it was rightfully neglected by the king's courts, because (or because of which) it was 'rather of social and economic than of legal importance.'⁴

¹ This date qualification is important, as Chapter 4 will demonstrate: in the twentieth century new methodologies developed in the social sciences, with new approaches to evidence, and more evidence generally available.

² Frederic W Maitland, 'The Village Community' in idem, *Domesday Book and Beyond* (CUP 1897) ('DBB').

³ Clive Dewey, 'Images of the Village Community' (1972) 6(3) *Modern Asian Studies* 291, 327.

⁴ Frederick Pollock and Frederic W Maitland, *The History of English Law Before the Time of Edward I*, vol 2 (2nd edn, CUP 1905) 379.

However, Maitland was also inconsistent in his statements about local custom. At one time, he described the jurisdiction of the manorial courts as the ‘lifeblood of the agrarian and economic system’, a ‘true jurisdiction’ administering the custom of the manor. But he did not investigate further or evidence this: it was simply that ‘no decent lord’ abused manorial courts.⁵ This chapter will consider how Maitland’s lack of further study or elaboration here, combined with his focus on common law doctrine, influenced a narrowing of the focus of legal historical study,⁶ one aspect of which was an unhelpful neglect of customary law and local custom studies.

Vinogradoff argued that Maitland’s analysis proceeded from four incorrect assumptions: that village organisation was mainly the product of (1) seigneurial and (2) crown pressure, such that the economic ties of common field agriculture had no great or direct importance on the development of village organisation; (3) that the common law and royal courts looked mainly to individual relations, so the juridical value of communal ideas and institutions was negligible; and (4) what co-operation was evidenced in relation to shared resource management was easily accounted for on the basis of constant and mechanical actions, not deliberate self-government.⁷

Lordship and fiscal controls are most visible in common law sources, and required little by way of communal organisation as the lord’s officers, accounting procedures, and common law rights largely determined their structure. The other two topics above provided more scope for self-governance. The adjudication of intra-community disputes in accordance with local custom was a task which required the identification, if not the creation and modification, of local rules by

⁵ Frederic W Maitland, *Select Pleas in Manorial and other Seignorial Courts* (1888) SS vol 2, p lx.

⁶ Raymond Cocks, *Sir Henry Maine* (CUP 1988) 187-8.

⁷ Paul Vinogradoff, *The Growth of the Manor* (1905; 2nd edn, George Allen & Company Ltd 1911) 326, n 39; Pollock and Maitland, vol 1 (n 4) 677; Maitland, *DBB* (n 2) 142-149; 346-350. These topics not only influenced Maitland and Vinogradoff’s understanding, but continued to provide the different research questions pursued by the twentieth-century works discussed in Chapter 4 below, and provide a framework for medieval local custom and institutions built on and modified in Chapters 5 and 6.

community participants in an area broadly unregulated by either the common law or lords. There was also some interaction with the common law and recognition therefrom.⁸ Similarly, management of shared resources was often by definition outside the scope of lordly interests: commons were often shared across manorial boundaries – for instance in villis of multiple lordship. Whilst there were a number of community functions imposed externally, particularly taxation and military obligations, many areas were left to community management.

Maitland's account of how, which relies on the unconscious continuation of past practice and recourse to external institutions, is not satisfactory, as Section A will discuss. Much of Maitland's argument turned on the lack of legal institutions in the vill, both because they were not evidenced, and because they were not required. This was perhaps the last vestige of the older village community debate in which many had assumed the existence of pre-Norman folk moots of free Germanic settlers as a part of their narrative of English individualism and democracy. Like most of the claims made for the village community, Maitland was determined to prove this incorrect.

Section B will consider Vinogradoff's more detailed attempt to explain how these governance issues were resolved in local custom, and his alternative proposal that not only was village self-governance necessitated by the fact that many functions were carried out and unregulated by any other organ, but that this was amply evidenced in documentary sources which Maitland made little use of. Vinogradoff was particularly cautious about subsuming the vill into the manor, and urged examination (insofar as was possible) of the complexities of historical life behind artificially coherent legal doctrine. Surviving written sources, often those relating to ecclesiastical estates and almost always created for seigneurial purposes, overemphasised some aspects of medieval society and obscured others. Manors were more visible than any other local institutions, but Vinogradoff

⁸ See Chapter 5.

was able to supplement and challenge some of Maitland's views using local records.⁹ This enabled a shift in perspective and an examination of the community more directly which some twentieth-century writers further developed: Warren Ault was able to claim in 1972 that 'formerly scholars made the manor the sole object of their study, unable or disinclined to penetrate to the vill that lay beneath, though it was both older and longer lived'.¹⁰

Vinogradoff defined 'self-government' not as complete personal independence from demands of all types, but as the power to direct efforts and seek profits by the labourer's own energy and insight, rather than by management from above.¹¹ Vinogradoff believed in relation to issues (1) and (2) above that, whilst the village community was affected by feudal pressures and ideas, it was not a product of them. The scarcity of agrarian labour, the existence and endurance of custom, the varieties of organisation, and the growth of an unfree (but unenslaved) class could not be explained solely on the basis of seigneurial pressure.¹² The basis of the legal rights, dues, and organisation of the township was the economic system and the open fields, and they could not be understood separately.

There were a range of institutions, methods and piecemeal solutions for regulating the village community. Most of these were 'bottom up' answers to practical questions, or local solutions commandeered by lords and kings to facilitate their own extraction of resources. The community was not directed from above, but from within. The idea that villagers were only loosely connected by virtue of their subjection to a lord was to ignore the evidence of all the activities they

⁹ This is of course not to say that Maitland did not also use local records, most notably in Maitland, *Select Pleas* (n 5), but he focused on common law sources generally.

¹⁰ Warren Ault, *Open Field Farming in Medieval England* (Allen & Unwin 1972) 18.

¹¹ Vinogradoff, *Growth* (n 7) 74.

¹² This was the Romanist position as well as Maitland's: Frederick Seebohm, *The English Village Community* (1883; 4th edn, Longmans, Green 1890) 266; 291; 334; 269.

were engaged in, especially in relation to shared resources and agriculture.¹³ Custom was also an essential element of agricultural behaviours which Maitland attributed to routine and ‘automatism’ – an account which, at most, explained the persistence of custom without explaining its creation. The substance of local customs varied, but they often had common themes and content: certain features were required for the sustainable sharing of commons, and even more for three-field farming. Since the land arrangements were the same, similar by-laws would have been required with or without a manor, in a village free or unfree.¹⁴ And because the same factors were at work in different places, Vinogradoff thought it permissible to (cautiously) generalise from the explanation of a custom in one place to other instances of the same custom, as long as there was no evidence to the contrary and the explanation could be tested against examples.¹⁵

A. LORDLY DEMANDS FOR RENTS AND SERVICES

Maitland’s description of the village community deliberately reduced any scope for self-government.¹⁶ In progress from ‘the vague to the definite’,¹⁷ the village community was vague, lacking in institutions and procedures,¹⁸ neither self-governing nor legally significant.¹⁹ He believed that factors (1) and (2) above - seigneurial justice and the organisation of society according to ‘feudal’ principles - created local legal institutions.²⁰ A vill often coincided with a manor, and it was

¹³ Vinogradoff, *Growth* (n 7) 86.

¹⁴ *ibid* 187.

¹⁵ Paul Vinogradoff, *Villainage in England* (Clarendon Press 1892) 138-9.

¹⁶ Frederic W Maitland, ‘The Survival of Archaic Communities’ (1893) 9 LQR 211, reprinted in Herbert A L Fisher (ed), *Collected Papers of Frederic William Maitland, Downing Professor of the Laws of England*, vol 2 (CUP 1911) 363; *idem*, ‘Review of *The Tribal System in Wales*’ in *ibid*, vol 3, 1.

¹⁷ Maitland, ‘Archaic Communities’ (n 16), and a similar sentiment in Maitland, *DBB* (n 2) 31.

¹⁸ Maitland, *DBB* (n 2) 187.

¹⁹ Frederic W Maitland, ‘The Surnames of English Villages’ (1889), reprinted in *Collected Papers*, vol 1 (n 16) 84.

²⁰ Maitland, *DBB* (n 2) 268.

the manor which had a court. This court had limited power over freeholders with recourse to royal courts, but ‘mighty’ powers over villeins - regarded by the common law as subject only to the will of their lord.²¹ Local customs, he said, originated from seigneurial pressure and were maintained in seigneurial institutions.²² Even the policing role attributed directly to the vill was not sufficient to change this: medieval law was centred on property rights, and it was not consistent with legal principle to try to define the vill as a public unit and the manor as a private law unit.²³ Somewhat paradoxically, because external fiscal pressure was applied to the manor and not the vill, the latter was concealed from the view of the royal courts: in consequence royal law became inaccessible to those invisible vills and their inhabitants.²⁴

First, Maitland sought to show that there was no evidence for a village court which predated manorial courts, in order to demonstrate that local legal institutions were the product of lordship. There was limited evidence from Domesday Book and other early sources. For example, in the former, free men were fined in West Derby Hundred for failing to attend the pre-Norman shiremoot (*‘sciremot’*) or hundred (*‘hundredo’*), or a plea when the reeve ordered it. The text mentions a third *‘placitum’*, contrasted with these.²⁵ Nearly a hundred years later the *Leges Henrici Primi*, a collection of laws from the early twelfth century of unknown origin, mentioned the *‘balimotum’* but did not help establish its origin or nature.²⁶ Vinogradoff thought it doubtful that these local

²¹ Maitland, ‘Surnames’ (n 19) 85.

²² Maitland, ‘Survival’ (n 16) 340-1.

²³ Maitland, ‘Surnames’ (n 19) 86.

²⁴ Maitland, *DBB* (n 2) 480.

²⁵ Vol 1, f269V, in Anne Williams and Geoffrey H Martin, *Domesday Book* (Penguin 2003) 738.

²⁶ Leslie John Downer (ed) *Leges Henrici Primi* (Clarendon Press 1972) 3.

‘*halimotes*’ were an invention of the Norman landlords: they mixed free and servile tenants, covered all kinds of local business, and were common in the eleventh century.²⁷

However, Maitland argued, the word ‘hallmoot’ was a post-Conquest term not evidenced in pre-Conquest documents, and the institution was not widely popular until the thirteenth century, having been created by ecclesiastical landlords.²⁸ Further, the word indicated the lord’s hall, and although most Domesday Book manors were described with halls, that building might only be a place for tax collection: not all halls were hallmoots.²⁹ The smallest manors of eight or ten households were ‘not likely to be a highly organised entity’ and had little need for courts, especially given a likely diversity of legal classes and rights.³⁰ The idea that differing legal rights and status necessitated different institutions, however, is anachronistic and based on the later division of manorial courts into courts leet and baron: as Vinogradoff noted, earlier local courts happily mixed persons of differing legal status.³¹

The isolated example of a Cheshire manor described in Domesday Book with ‘pleas in the lord’s hall’ was, for Maitland, the exception which proved the eleventh-century rule.³² However, there are other examples of pleas held in manors, as opposed to shire or hundred moots: at Taunton, Somerset, the bishop’s pleas were to be held three times a year;³³ at Fardel, Devonshire,

²⁷ Vinogradoff, *Growth* (n 7) 194. Stenton later revived the argument that ‘*halimotum*’, derived from Old English ‘*heall gemot*’, indicated pre-Conquest origins: Frank Merry Stenton, *Anglo-Saxon England* (1943; 3rd edn, Clarendon Press 2001) 502.

²⁸ Maitland, *Select Pleas* (n 5) lxxvii. More recently, John Hudson agreed regarding lack of written evidence before the Conquest, but noted nonetheless that agricultural assemblies must have existed in some form: *The Oxford History of the Laws of England: 871-1216* (OUP 2012) 62.

²⁹ Maitland, *Select Pleas* (n 5) 143.

³⁰ *ibid* 44.

³¹ P D A Harvey notes that although there was a conceptual distinction between courts leet and baron, the terminology was not clear until the fifteenth century, and thirteenth- and fourteenth-century records usually mix the business of the two: *Manorial Records* (2nd edn, British Records Association 1999) 44-7.

³² Maitland, *Select Pleas* (n 5) 122. See also Hudson, *OHLE* (n 28) 288.

³³ Vol 1, f 87V, in *Domesday Book* (n 25) 234.

the manor owed ‘the customary dues of the pleas’;³⁴ and at Pershore, Worcestershire, manorial income included the profits of ‘the pleas of the free men’³⁵ – the Cheshire case may have been in the minority, but was not unique. Nonetheless, Maitland claimed that manorial courts were rare in eleventh-century England, notwithstanding that Domesday suggested that ‘already before the Conquest England was full of manors’.³⁶

Maitland believed that pre-Conquest kings made mistakes in granting away jurisdiction, empowering local lords and manorial courts in a ‘stupendous failure’.³⁷ He thought the impact of this was realised over time: at first, the small change of court president from king’s reeve to the lord or their steward – the only sign of the lords’ power growing from the right to profits of jurisdiction to actual jurisdiction. Later, as the manor courts developed a more wide-ranging and active interest in land transfers and other matters, their scope grew.³⁸ This claim has long been noted as one of Maitland’s weakest: the powers supposedly granted away were not powers the Old English kings possessed. This was an assumption based on comparison with continental regimes operating within an inherited Roman governmental framework, without the interruption of Saxon invasions and several hundred years’ interlude. The ‘central’ machinery of the pre-Conquest administration actually grew more effective over time, as demonstrated by the fact that those who had previously relied on unwritten custom increasingly sought more formal, centrally recognised, reassurance as to their rights.³⁹ This does not, therefore, support Maitland’s claims.

³⁴ Vol 1, f 105V in *ibid* 296.

³⁵ Vol 1, f 175 in *ibid* 484.

³⁶ Maitland, *DBB* (n 2). This theme has been developed by Rosamond Faith, who argues that manorialisation was primarily a twelfth- and thirteenth-century phenomenon: *The English Peasantry and the Growth of Lordship* (Leicester University Press 1997).

³⁷ Maitland, *DBB* (n 2) 102.

³⁸ *ibid* 378.

³⁹ Helen Maud Cam, *Law Finders and Law Makers in Medieval England* (Merlin 1962) 23–30, and see generally Susan Reynolds, *Kingdoms and Communities in Western Europe 900–1300* (1984; 2nd edn, Clarendon Press 1997).

Whilst Maitland did convincingly show that there was limited written evidence for pre-Conquest courts more local than the hundred, this did not preclude later local self-governance via the forum of the manorial court. Stubbs, for instance, claimed the Normans centralised existing institutions,⁴⁰ with local self-government easily visible under manorial governance. It was argued that manorial lords appropriated control of village assemblies (but in so doing were compelled to accept limits on their control of freeholders).⁴¹ Vinogradoff thought this practical: adopting the institutions and traditions of the community maintained order with less effort than outright oppression, and with the unintended consequence that a ‘sphere of semi-servile customs formed under cover of the manorial lordships’.⁴² The presence of these customs was in turn used by some historians as evidence of the original freedom of the village community.⁴³ Soon after, Cam and Stenton would both argue (without the mark community connotations from the earlier historiography) that early seigneurial courts made use of both Old English and Norman custom to build a working system of customary law which was then used by royal courts and jurists like the writer of *Bracton*. But Maitland doubted an unfree population would have had the power to maintain their preferred customs, especially if those customs sacrificed lords’ interests in maximising production, even if lords did make use of pre-existing institutions.⁴⁴ This begs questions about the nature and enforcement of local custom and by-laws.

⁴⁰ William Stubbs, *The Constitutional History of England in its Origin and Development* (6th edn, Clarendon Press 1903-1906); for discussion see Vinogradoff, *Villainage* (n 15) 23.

⁴¹ Maitland, ‘Survival’ (n 16) 340.

⁴² Paul Vinogradoff, *English Society in the Eleventh Century* (Clarendon Press 1908) 215. George Homans also adopted the view that lords made use of pre-existing collaborative institutions: Homans, *English Villagers of the Thirteenth Century* (HUP 1941) 325, as has Christopher Dyer: ‘The English Medieval Village Community and its Decline’ (1994) 33(4) *Journal of British Studies* 407, 413.

⁴³ See, e.g., Cam, *Law Finders* (n 39) 48.

⁴⁴ Maitland, *DBB* (n 2) 395.

1) *By-laws, Lords, and Free tenants*

Seebohm thought villeins made individualistic arrangements by contract or otherwise when cultivating for themselves, but not community-wide regulation, which was predicated on lordly authority and limited to the lord's demesne.⁴⁵ However, when the creation of by-laws is described in written documents, authority is stated as deriving from variations of the entire 'community of the vill'; the 'neighbours of the vill'; or even 'all tenants free and otherwise' – not the lord.⁴⁶ Maitland had distinguished the (elite) group of tenants of the vill from the village community,⁴⁷ but since they appear in similar contexts, and sometimes together, this distinction is not firmly evidenced.⁴⁸ One set of manorial by-laws poses a particularly notable contrast between the orders of the lord and the pronouncement of the community. At Newton Longville (Buckinghamshire) the 1345 by-laws were split into one section wherein 'all natives' and 'the tenants' generally were ordered, and another wherein 'it is granted by the lord and also by the free and the villeins'. The former section concerned works owed to the lord and trespass on the lord's fields, the latter the 'ordinances of autumn' or village by-laws regulating villagers' conduct and the election of wardens.⁴⁹ A less explicit but similar example contrasting lord and community can be seen at Cuxham in November 1295: a villein tenant was accused of receiving outsiders, contrary to the lord's prohibition, and of digging in the common pasture, contrary to the rights of the township.⁵⁰ By-laws were not generally a lordly creation, or an exclusively lord-focused set of rules.

⁴⁵ Seebohm, *Village Community* (n 12) 49.

⁴⁶ Ault, *Open Field Farming* (n 10) 58.

⁴⁷ Pollock and Maitland, vol 1 (n 4) 615.

⁴⁸ Vinogradoff, *Growth* (n 7) 187.

⁴⁹ Ault, *Open Field Farming* (n 10) 101.

⁵⁰ The juxtaposition of the two sets of rights is noted by Ralph Evans, 'Whose was the Manorial Court?' in idem (ed), *Lordship and Learning* (Woodbridge 2004) 162.

If manorial courts evolved as a way to exert lordly power and manage lordly and royal demands, as Maitland claimed, it was also strange that free tenants were also involved with and subject to by-laws: they lacked the tenurial relationship which would explain lordly control and regulation of their actions.⁵¹ Their ability to access the common law courts may have given them a number of advantages, but did not exempt them from manorial court jurisdiction if they wanted to, for example, enforce local debts or contracts, or from commons regulations if they grew crops in the open fields.⁵² In return for surrendering some freedom to direct their own agricultural activities, free tenants gained a number of advantages: collective agriculture could make cultivation worthwhile even during war or high taxation, and they gained predictability, a convenient forum for business in the manorial court, rents limited by custom, and a role in village self-government.⁵³

If free tenants held land in the common fields, they shared in collective agriculture. Vinogradoff conceptualised intermixture as either designed to satisfy equal claims (to land) - a 'community in ownership'; or to ensure the equal imposition of duties (rents) - a 'community in assessment'. If the latter, it would evidence a community formed by the application of downward pressure - usually in the form of demands for rents and labour, with or without a role for direct coercive violence, as Maitland described. It was true that villeins tended to perform the same sorts of services, and hold the same sized holdings (or portions thereof) within any one village: customals referred to all villeins holding one virgate owing the same services, for instance. On the other hand, free tenants had more variable rents for the same sized plots, and might pay in money, labour, or goods. The fact that they did not have to manage their land directly for the benefit of the lord must have had a role in encouraging this diversity, but that did not explain why the duties

⁵¹ Vinogradoff, *Growth* (n 7) 195.

⁵² Evans (n 50) 161.

⁵³ Vinogradoff, *Growth* (n 7) 79.

owed by free tenants (rents) were so much less uniform than their claims (plot sizes). Vinogradoff concluded that the size of plot was determined with communal interests in mind, whilst the duties owed were separately determined by the lord's (individualistic) interest – a combination of motives acting on the same piece of property.⁵⁴

Even in cases of free tenants applying to royal courts, it was not questioned that they were bound to follow local by-laws generally, even if the specific outcome of the case went against a particular disputed rule.⁵⁵ For example, in Ravensthorpe in 1223, two free tenants complained at common law that thirty-seven other villagers had pastured their animals on their crops. The villagers responded that they were entitled to depasture the land because it should have been fallow that year in accordance with village custom: the free tenants, who did not deny the custom, had planted wrongly. The villagers were fined: Maitland thought this showed that free tenants were not bound by custom to allow pasture on their land, either because the substance of the custom was bad, or the mode of enforcement was.⁵⁶

Another late thirteenth-century case (published in the first edition of Pollock and Maitland but perhaps tellingly removed from the second), suggests mode of enforcement was at issue. In Carlton in Lindrick, Nottinghamshire⁵⁷ six tenants and the lord were accused by the village parson of depasturing his corn, mowing his rye crop, and pasturing their animals on his oats. The lord, Richard de Furneis, said the parson had sowed his land without his knowledge, and the tenants claimed the land as common pasture. The jury found the land was the common of the 'whole

⁵⁴ Vinogradoff, *Villainage* (n 15) 341-7.

⁵⁵ *ibid* 188.

⁵⁶ Maitland, *Bracton's Note Book* (Clay & Sons 1887) 511, pl 1662; note 8.

⁵⁷ Frederick Pollock and Frederic W Maitland, *The History of English Law Before the Time of Edward I*, vol 1 (CUP 1895) 623. Now: *Richard de Furneis of Carlton et al* (1292) CRR 131, SS vol 57, p 84.

community of the said vill' and 'from of old the custom... was and still is that the lord of the vill and the parson and every free man' could plough and sow that land in January. However, it was against custom to use compost without licence from the community, as the parson and his predecessor had done, with the consequence that the community was allowed to depasture the offending land at any time. But the royal court disapproved of their wasteful destruction of crops: 'a deed which is obviously harmful and unsupportable by any by-law (*birlawe*)'. The lord and villagers were ordered to pay damages equivalent to the value of the crop destroyed.

Maitland thought this showed 'against the freeholder [by-laws] are weak', because the custom was insufficient grounds for destroying the parson's crops.⁵⁸ But the case could equally be taken to establish a kind of prescriptive right for the parson from his long use, whilst demonstrating that common law courts were willing and able to consider the details of local by-laws. The fine at Ravensthorpe does suggest the villagers did something wrong, but in light of Carlton, it seems the wrong was the manner of enforcement and ensuing property damage, not the attempt to impose village customs on free tenants.⁵⁹ This did not 'militate against the validity of reasonable by-laws enforced at the proper time and in a proper manner'.⁶⁰ Given other cases where royal courts upheld and enforced local custom, it seems likely that the issue in these two was the waste of good crops, not the inherent attempt to restrict the rights of a free tenant.

It was not just free tenants, but also the lords who could find themselves on the wrong side of local custom. In one particularly striking example from the Ely Cartulary which seemed to show the lord's interest subordinated to community rules, the bishop rented out rights of common

⁵⁸ *ibid* 656.

⁵⁹ Vinogradoff, 'Some Considerations on the Methods of Ascertaining Legal Customs' in Herbert A L Fisher (ed), *The Collected Papers of Sir Paul Vinogradoff*, vol 2 (Clarendon Press 1928) 408.

⁶⁰ Vinogradoff, *Growth* (n 7) 188.

to outsiders and was obliged to pay a part (1/7) of that sum to the (free) tenantry in Willingham.⁶¹ Some common law cases provide further evidence of lords bound by manorial custom. Requiring compliance with local custom and by-laws could lead to common law litigation, too. For example, in a 1285 replevin case it was said that no lord could sell or give their right of free bull or boar to any tenant of a village, nor to anyone else, unless the community assented (*la comunalte de la vile ne sa sente*) because the matter affected the whole community.⁶² In a 1311 Year Book case, Chief Justice Bereford said he had seen that a lord could be restricted as to how he used his own land: the Prior of the Hospitalers in Warwick could not depasture his own meadow ‘any more than the most complete stranger’.⁶³

B. JURIDICAL VALUE OF LOCAL REGULATIONS AND INSTITUTIONS

Manorial records and common law cases provide evidence of community self-government, although in limited quantities, and, in the words of Warren Ault, ‘if we turn over enough rolls and are on the alert we catch a glimpse here and there of the community of the vill acting on its own initiative and in its own interests.’⁶⁴ However, by-laws were only sometimes, often incidentally, documented in manorial records: there were no independent village rolls.⁶⁵ Sometimes by-laws were associated with instances of apparently extra-manorial organisation, managed by special meetings of householders – the key example known in the nineteenth century was Aston and

⁶¹ Vinogradoff, *Villainage* (n 15) 272; see also Nellie Neilson and Adolphus Ballard (eds), *A Terrier of Fleet, Lincolnshire* (OUP 1920) 4 Publications for the British Academy xlii, both discussing the early twelfth-century Ely Cartulary: MSS Claudius xi, folio iii A.

⁶² *Prior of Launde v Ralph Basset* (1285) 112 SS, p 205.

⁶³ *Abbot of Abingdon v Bysshop* (1311) YB 4 Edw 2, SS vol 42, p 103, at 109.

⁶⁴ Ault, *Open Field Farming* (n 10) 65.

⁶⁵ Vinogradoff, *Growth* (n 7) 187.

Cote.⁶⁶ And, although many manorial records survive, they were not designed for direct description of local self-government.⁶⁷ Nonetheless, they evidence plenty of intra-community and non-seigneurial business, like agreements between individuals. The manorial courts were a place for both economic and judicial affairs, and infringements of agricultural regulations were dealt with there as well as the more obvious seigneurial and crown fiscal functions. Customs are indirectly evidenced by continued practice and the formula of words used, or sometimes recorded in full when by-laws were recorded in manorial rolls, or a dispute as to custom led to a general statement.⁶⁸

It did not follow from non-corporate status that the community as a whole did not engage in legal action. The hundred and other local institutions made use of the vill, not the manor, for administrative purposes: the vill was the unit onto which dues owed to the church and policing duties were imposed⁶⁹ - a particularly potent fact in regard to the many vills which contained more than one manor. This could result in one vill having multiple churches reflecting multiple lordship, or a community obviously separate and distinct from the manorial regime. That the township was responsible for these specific duties may have helped ensure the vitality and continuity of the community's traditions, assisted by a general sense of solidarity or conscious resolve to act together.⁷⁰ Whether this sort of behaviour entailed juridical personality mattered to nineteenth- and early twentieth-century writers, as it seemed to them a prerequisite for legal capacity – i.e. the enforceable ability to hold, transfer, and modify legal rights and obligations. A legal person was a

⁶⁶ *ibid* 189. See further below on Maitland's use of Aston.

⁶⁷ On the origin of written local court records, see Razi and Smith, 'The Origins of the English Manorial Court Rolls as a Written Record: A Puzzle' in *idem* (eds), *Medieval Society and the Manor Court* (OUP 1996).

⁶⁸ Warren Ault was one of the only scholars to have ever focused on collecting by-laws: Ault, *Open Field Farming* (n 10).

⁶⁹ Vinogradoff, *Villainage* (n 15) 395; Vinogradoff, *Growth* (n 7) 196; Vinogradoff, *English Society* (n 42) 198; Maitland, *DBB* (n 2) 34.

⁷⁰ Vinogradoff, *English Society* (n 42) 216.

significant entity in the legal system, with corresponding social and economic implications. In many ways, this would counterbalance the individual rightlessness of the villein: deprived of access to the common law as an individual, but enabled to make use of common law as a part of the larger village community.

Maitland agreed that the community was capable of bringing legal action, but argued it rarely needed to. Vinogradoff found this inadequate: each community had a variety of customary rights and interests and took action to defend them in manorial courts.⁷¹ Frequently, a community was said to be injured by the action of some individual or another community, even if vindicating that right required action by some member(s) as individuals to establish a precedent for the rest.⁷² For at least some tenants on ancient demesne manors, collective action was initiated with relative ease via the *monstraverunt* writ, which could be used to challenge increased customs and services in the royal courts.⁷³ Elsewhere, there was a common law rule that tenants had to plead in severalty,⁷⁴ but actions to enforce local customs were certainly not confined to tenants of ancient demesne manors. For example, the court rolls of Brightwaltham (Berkshire) c.1294 showed that the ‘commonality of the villeins’ entered into an agreement with their lord as to the use of some commons: the village surrendered its common rights in a wood (‘Hemele’), and in return the lord allowed them common rights in relation to ‘Estfield’, another wood (‘Trendale’), and pannage in Hemele.⁷⁵ This was one of several ways in which the community behaved as a legal actor.

⁷¹ Pollock and Maitland, vol 1 (n 4) 322.

⁷² Vinogradoff, *Growth* (n 7) 323.

⁷³ Whilst this writ was not technically available to all ancient demesne tenants, only villein sokemen, this was often ignored in practice, see Rodney Hilton, ‘Peasant Movements in England before 1381’ (1949) 2(2) *Econ Hist Rev* 117; Vinogradoff, *Villainage* (n 130) Part 1, Ch 3.

⁷⁴ Vinogradoff, *Villainage* (n 15) 101.

⁷⁵ *ibid* 358; Maitland, *Select Pleas* (n 5) 172.

1) *Direct Self-Governance and Farming*

The best example of villages exercising self-government was when communities leased their manor as a whole. Leasing (or ‘farming’) disposed of the need for seigneurial manorial officials – to the potential advantage of both village and lord, and may have improved social conditions.⁷⁶ The lord gained certainty and a fixed income for minimal monitoring effort, and villagers gained incentive to produce a surplus they could keep. Vinogradoff thought a community managing its economic and jurisdictional affairs this way was unlikely to have been so common or so successful if they did not already have some communal organisation.⁷⁷ The possibility of whole manors being let to farm assumed the vill was capable of dealing with disputes and management functions otherwise undertaken by the lord’s officials.⁷⁸

That the description of a borough in Pollock and Maitland⁷⁹ is essentially the same as that of a vill at farm demonstrates how thin the conceptual boundary was between the two, and begs the question of why Maitland then drew a stark line between ‘corporate’ borough and ‘unincorporated’ vill. He believed a farmed manor was not communally managed: villeins elected a representative and paid rents and other dues to them like a lord’s steward, with no additional decision making.⁸⁰ This was a strained interpretation of the evidence. Even on un-farmed manors, many functions exercised in manorial courts did not directly concern the lord at all, nor involve any profit for them. This was demonstrated, for instance, when at the St Albans manor of

⁷⁶ Vinogradoff, *Villainage* (n 15) 360.

⁷⁷ Vinogradoff, *Growth* (n 7) 320-2.

⁷⁸ This point has also been made by Postan, *The Medieval Economy and Society* (Weidenfeld & Nicolson 1972) 132; idem, ‘Glastonbury Estates in the Twelfth Century’ (1953) 5(3) *The Economic History Review*, 5(3) 358, 364 with reference to the leasing of demesne land at Grittleton by the Abbot of Glastonbury from 1189; and by Sherri Olson, *A Chronicle of All that Happens* (Pontifical Institute of Mediaeval Studies 1996) 169.

⁷⁹ Pollock and Maitland, vol 1 (n 4) 690.

⁸⁰ *ibid* 661.

Kingsbury villagers held two subsequent courts uninterrupted, notwithstanding the temporary absence of any manorial officials.⁸¹ When the manor of Hemingford, Huntingdonshire, was leased to the tenants for a lump sum from 1265, some profits were reserved to the lord (Ramsey Abbey). One of these was ‘causes which cannot be settled without us or our bailiff, of which issues they shall have half’. There is some evidence of what this encompassed: William Belond, an unfree tenant, was ‘in rebellion against his neighbours’ and refused to submit to their judgment, to the ‘injury of the community’.⁸² It seems the dispute only reached the manorial court because the community had difficulty enforcing successfully in this case (implying they usually managed without it). Similarly, at Elton (also farmed from Ramsey) when villein farmers allowed tenants to leave, the abbot complained in the manor court that this was not one of their delegated powers.⁸³ Otherwise, the business in farmed manors seems to have carried on in much the same way as when directly managed.

There are plenty of examples of farming.⁸⁴ Earlier instances showed some peasants farming demesne in the eleventh century at Milbrook and Alverstoke (Hampshire);⁸⁵ Ore (Kent);⁸⁶ Willesdon (Middlesex);⁸⁷ and East Clandon (Surrey)⁸⁸ - all held of different lords. Although it has been argued these are not unequivocal cases of a manor leased to the whole body of the villeins,

⁸¹ Ada Levett, ‘Studies in the Manorial Organisation of St Albans Abbey’ in Helen Maud Cam et al (eds), *Studies in Manorial History* (Clarendon Press 1938) 112.

⁸² Ault, *Open Field Farming* (n 10) 70.

⁸³ Homans, *English Villagers* (n 42) 331-2. It is notable from a continuity perspective that the court roll for Elton did not change in format or otherwise during the period it was at farm.

⁸⁴ Vinogradoff, *English Society* (n 42) 396. This was also noted with examples by Seebohm, *Village Community* (n 12) 70; and Maitland, *DBB* (n 2) 85; 183.

⁸⁵ Vol 1, f 41V in *Domesday Book* (n 25) 100.

⁸⁶ Vol 1, f 10V in *ibid* 24.

⁸⁷ Vol 1, f 127V in *ibid* 360.

⁸⁸ Vol 1, f 34 in *ibid* 79.

as opposed to a subset thereof,⁸⁹ this does not change the fact that lords were leasing whole manors to unfree tenants. This continued through the twelfth century, and although in the thirteenth many lords renewed direct interest in demesne management,⁹⁰ there are examples from across the period.⁹¹

According to Madox,⁹² royal villis often farmed themselves to Exchequer – for example, the earliest Pipe Roll of Henry I included Tew (Oxfordshire), farmed to ‘the king’s men of Tew’ in 1130/1; Corsham (Wiltshire) where ‘the men of Corsham render account of the farm of that manor which they have in custody’; and Hareham (Wiltshire) where ‘the men of Hareham render account of the farm of that manor’.⁹³ In Kingsthorpe (Northamptonshire) the entire royal manor was leased to the tenants as early as the reign of King John, and they proceeded to regularly hold a court; farm the hundred of Spelhoe; select bailiffs; and create by-laws without even mentioning a lord in their records (although the court roll does not begin until 1350).⁹⁴ The town mills were also farmed, and the community made an agreement in relation to enclosure⁹⁵ – in this instance, at least, the locals were very active in pursuing and maintaining their interests.

⁸⁹ Robert S Hoyt, *The Royal Demesne in English Constitutional History 1066-1272* (Cornell University Press 1950) 65; Bernhard Zeller et al, *Neighbours and Strangers* (Manchester University Press 2020) 94.

⁹⁰ See generally John Sabapathy, *Officers and Accountability in Medieval England 1170-1300* (OUP 2014).

⁹¹ Maitland, *Select Pleas* (n 5) 132. Homans listed thirteen thirteenth-century examples: *English Villagers* (n 42) 330.

⁹² See generally Thomas Madox, *Firma burgi* (Bowyer 1726).

⁹³ Hoyt (n 89) 66; Judith A Green, *The Great Roll of the Pipe for the Thirty First Year of the Reign of King Henry I, Michaelmas 1130* (Pipe Roll Society 2012) 5; 19.

⁹⁴ Ault, *Open Field Farming* (n 10) 72-3; Louis F Salzman (ed) ‘Spelhoe hundred’, in *A History of the County of Northampton: Volume 4* (London, 1937) 63, <https://www.british-history.ac.uk/vch/northants/vol4/pp63-64>. Accessed 7 January 2021; a Northamptonshire Pipe Roll shows it farmed in 1242, along with six other manors: Henry Lewin Cannon, *The Great Roll Of The Pipe For The Twenty-Sixth Year Of The Reign Of King Henry The Third AD 1241-1242* (OUP 1918) 319; John H Glover *Kingsthorpiana* (Elliot Stock 1883) 49.

⁹⁵ Glover (n 94) 3, 26, 36, 54-7.

There are also a range of twelfth- and thirteenth-century examples of farming to non-royal vills across different lordships and geographical areas.⁹⁶ Seebohm described an unusual Boldon Book example in the twelfth-century of villeins farming their services collectively from the monastery, but the text indicates a normal farming of the tenements plus some residual services of mowing and carting.⁹⁷ Better examples include Sowerby, held at rent from the Templars as early as 1185; Hallow and Tiberton, farmed by villeins from the Priory of Worcester by 1250; Bensington, let to farm by Richard of Cornwall to twenty-seven men of the vill by 1257; and Ramsey Abbey's manor of Elton, already mentioned, leased to villeins by 1312.⁹⁸ St Albans Abbey leased demesne in pieces from at least as early as 1349,⁹⁹ and the entire demesne of Great Horwood was leased to the tenants from 1320, subject to reservations to the lord in relation to certain profits.¹⁰⁰ Some cases have been studied in detail: Stoneleigh was a prime example of a self-governing community 'closely and powerfully organised', giving court judgments, working as officials, witnessing bailiffs' summonses, and permitting alienation of land and admittance of strangers.¹⁰¹ In 1295 in the farmed ancient demesne manor of King's Ripton, land sales were stated as requiring the licence of the court, rather than the more conventional licence of the lord, which depended on a verdict given by the community of suitors or the jurors.¹⁰² The frequency and variety of demesne leasing supports the conclusion that many villein communities were sufficiently

⁹⁶ The following examples are collected and cited in full in Cam, *Law Finders* (n 39) 78 and, in respect of the thirteenth century only, in Homans, *English Villagers* (n 42) 330.

⁹⁷ 'Villani de South Bedic tenant villam suam ad firmam, et reddunt 5l, et inveniunt clx homines ad metendum in autumpno, et xxxvj quadrigas ad quadrigandum bladum apud Hoctonam': William Greenwell (ed), *Boldon Buke* (Surtees Society 1825) 6; Seebohm, *Village Community* (n 12) 70 has a slightly different transcription.

⁹⁸ n 83.

⁹⁹ Levett, 'The Courts and Court Rolls of St Albans Abbey' in *Studies in Manorial History* (n 81) 59.

¹⁰⁰ Ault, *Open Field Farming* (n 10) 68.

¹⁰¹ Vinogradoff, *Villainage* (n 15) 382, citing The Stoneleigh Register folio 75. This has since been published as Rodney Hilton (ed), *The Stoneleigh Leger Book* (1960) 24 Dugdale Society.

¹⁰² Vinogradoff, *Villainage* (n 15) 383; Maitland, *Select Pleas* (n 5) 122.

well organised to manage their own affairs, and in many cases lords were content to let them do so.

2) *Jurisdiction*

Even if there was self-organisation, Maitland doubted its constitutional adequacy or democracy: village communities were unlikely to have vote counting or formalised majority decision making,¹⁰³ and adjudication of disputes required certain procedural features he believed absent. Even if there were a village legal institution, Maitland had several reasons why a ‘moot’ managing local by-laws was comparable to shareholder meeting and not a court. One was lack of coercive power – as he defined it.¹⁰⁴ Maitland made a distinction between communities with power to impose penalties for breaches of customary rules, and the coercive power of the royal courts ‘issuing execution for penalties’ such as seizing goods.¹⁰⁵ He appears not to have considered other forms of coercion, such as *infamia*, exclusion and outlawry, or the withdrawal of legal protections, as sufficient coercive power for local rules.¹⁰⁶

Maitland was also troubled by the lack written records of community decision making: any ‘village meetings’ dealing with business outside the competence of a seigneurial court ‘were not sessions of a tribunal; they kept no rolls; the law knew them not’.¹⁰⁷ From the thirteenth century

¹⁰³ Vinogradoff, *Villainage* (n 15) 408.

¹⁰⁴ Maitland, *DBB* (n 2) 405-8. Maitland’s questionable assumption that coercive power is a requisite element of law derives largely from John Austin’s concept of law, and is discussed further in Chapter 5.

¹⁰⁵ Maitland, ‘Survival’ (n 16) 374.

¹⁰⁶ For *infamia* in medieval England, including secular contexts, see Richard Helmholz, ‘Crime, Compurgation and the Courts of the Medieval Church’ (1983) 1(1) *LHR* 1, esp. 21.

¹⁰⁷ Maitland, *DBB* (n 2) 413.

onwards, court proceedings were recorded in a variety of forums, even in small manorial courts.¹⁰⁸ Good reasons might be given why non-manorial village assemblies left hardly a mark on cartularies, annals, court records, and common law Year Books, but Maitland saw this as an attempt to shift the burden of proof and draw inferences from silence. However, he did not elaborate on why a lack of written records was relevant to institutional qualification as a court. It seems he had in mind a lack of concepts like binding precedent – in which case the common law courts were also potentially disqualified until the early Tudor period.¹⁰⁹ It also seems to relate to integration into the broader common law: if an institution were not rare, the common law would have an explicit place for it, Maitland argued, and being a court of record was implicitly part of that cohesion.¹¹⁰

The problem was not just lack of written evidence: Maitland also believed village communities had little theoretical or practical need for local dooms or by-laws, and disputes could be taken to the smallest, most local court originally available: the hundred.¹¹¹ There seemed to be no evidence of a smaller court before the Norman Conquest, but a village community which had no jurisdictional power would have to rely on outsiders not invested in the community for judgments.¹¹² Since customs varied according to local conditions, uniform custom across a hundred was unlikely, and since likely the only suitors informed as to local fact and customs were

¹⁰⁸ See Paul Brand, *Earliest English Law Reports*, vol 1 (1995) SS vol 111, p xix-clxii for an outline of the earliest common law reports now known. As well as common bench cases, thirteenth-century eyre sessions were also recorded: see idem, 'The Beginnings of English Law Reporting' in Chantal Stebbings (ed) *Law Reporting in Britain* (Bloomsbury 2003); county courts had rolls from the beginning of the thirteenth century and perhaps earlier: Robert C Palmer, *The County Courts of Medieval England* (Princeton University Press 1982) 153-9; manorial court records in a very simple accounting form survive from as early as 1208-9 and more fulsomely from the late 1230s-40s: Harvey, 'Court Records' in *Manorial Records* (n 31).

¹⁰⁹ John Baker, *An Introduction to English Legal History* (5th edn, OUP 2019) 207-12. See also Ian Williams, 'Early Modern Judges and the Practice of Precedent' in Joshua Getzler and Paul Brand (eds), *Judges and Judging* (CUP 2012).

¹¹⁰ Maitland, 'Survival' (n 16) 354. The extent to which common law did have a place for local custom is discussed in Chapter 5.

¹¹¹ Maitland, *DBB* (n 2) 45.

¹¹² Maitland, 'Surnames' (n 19) 87.

from the village in question, there seems little advantage over simply resolving issues at home. Even if the hundred was the only forum, Vinogradoff argued that there were too many minutiae of daily life to manage per village for a hundred court to cope with all of it (unless, perhaps, it was a very small hundred).¹¹³

Maitland was not blind to these issues, and once suggested a solution: if the hundred was the smallest pre-Conquest court, perhaps that was because originally the vill and hundred were identical. A range of evidence comparing later village names with Domesday Book seemed to show the pre-Conquest hundred encompassed two or more of what would later be vills and independent agrarian units.¹¹⁴ This avoided the evidence and jurisdictional issues, and it could have originally been used to manage agrarian communities, later evolving into an administrative and jurisdictional, rather than economic, unit.¹¹⁵ The hundred/vill described looks like a revived ‘mark community’. However, Maitland argued, there was a difference in scope. He was not arguing that later hundreds in mid- and northern England were ever agrarian communities, as Kemble had. Instead, they formed later, borrowing the hundred concept from the south after it had evolved into a jurisdictional division containing several townships/agrarian communities.¹¹⁶

Maitland seems to have abandoned this thought in later work, although it may lurk implicitly in ‘Sake and Soke’ in *DBB*,¹¹⁷ where the discussion of a thief caught on the land of the Prior of Canterbury is interesting on this point. Procedure required the thief be taken to the private

¹¹³ Vinogradoff, *Growth* (n 7) 196. Including fencing, road management, hedge management, drainage, repairs, as well as the more obvious agricultural issues like sowing, ploughing, and rights of common.

¹¹⁴ Maitland, ‘Surnames’ (n 19) 88-93.

¹¹⁵ *ibid* 94-5.

¹¹⁶ *ibid* 95 n 1.

¹¹⁷ Maitland, *DBB* (n 2) 110. The Maitland, ‘Surnames’ (n 19) article seems a distinctly under-cited piece of his work: even Vinogradoff appears to have ignored it.

hundred court¹¹⁸ of the Abbot of Battle at Wye. If the thief was not one of the Prior of Canterbury's tenants, they were judged by the hundred. If they were a Canterbury tenant, Canterbury tenants formed their own sub-court, going to one side to consider. Only if that smaller tribunal could not agree was the case considered by the full hundred.¹¹⁹ Maitland imagined whenever a crime crossed territories, a mixed court of men from the two might meet at the boundary to discuss crime and punishment.¹²⁰ This would have been particularly useful in cases where a boundary prevented hue and cry pursuit, as for instance at Wakefield in 1275, when a culprit escaped by crossing fees.¹²¹ Maitland did not, however, consider that these examples indicate a strong sense of local identity as a village, separate to the hundred: even whilst attending that larger court for convenience or necessity, villagers clearly could and did still conduct their own business in respect of their own community. This undermines his claims that there was no need for a smaller jurisdiction.

3) *Local Custom as Law*

As well as evidential doubts, Maitland had theoretical objections to describing local custom as law. He criticised Austinian sovereign command theory, which defined law as sovereign backed sanctions, arguing it involved an inappropriate transplant of (Imperial/Justinianic) Roman law hierarchical ideas.¹²² However, the sense that Maitland's definition of what constituted 'law' was

¹¹⁸ For discussion of hundred courts and private hundreds see generally Helen Maud Cam, *Liberties & Communities in Medieval England* (Merlin 1963).

¹¹⁹ Maitland, *DBB* (n 2) 128, citing Samuel Robert Scargill-Bird (ed), *Custumals of Battle Abbey in the Reigns of Edward I and Edward II* (Camden Society 1887) 136.

¹²⁰ Maitland, *DBB* (n 2) 339.

¹²¹ William Paley Baildon, *Court Rolls of the Manor of Wakefield*, vol 1: 1274-1297 (1901) 29 Yorkshire Archaeological Society 113.

¹²² John Austin, *The Province of Jurisprudence Determined* (Wilfrid E Rumble (ed), Cambridge University Press 1995); Maitland, 'Historical Sketch of Liberty and Equality' reproduced in *Collected Papers* vol 1 (n 16) 1, 83; idem, *Roman Canon Law in the Church of England: Six Essays* (Methuen 1898); idem, *English Law and the Renaissance* (CUP 1901) 14.

still quite positivistic¹²³ is confirmed by his explicit description of medieval law, where ‘law’ was linked exclusively to common law courts, with little time for less centralised rulemaking.¹²⁴ He assumed a stance that required legal pronouncements from an authoritative ‘sovereign’ power. Even the later manorial court was not a true legal institution to Maitland: whilst tenure in villeinage was protected there, ‘manorial custom very rarely, if ever, dignifies itself with the name of law’.¹²⁵ Protection arose from ‘positive morality’ rather than by ‘law properly so called’ – a starkly Austinian statement.¹²⁶ Where a lord followed custom, it was not because they were *legally* bound to follow those rules of ‘positive morality’. Whether this was a matter of ‘provident self-interest, a desire for a quiet life, humane fellow-feeling’ or ‘a respect for custom as a custom’ he left open, although he noted thirteenth-century royal justices tended to the latter.¹²⁷

This reflects Maitland’s commitment to a conceptual gap between custom and law; however, if the lords felt themselves bound to follow these rules, and acted that way, to say that they were not in fact bound to follow them because of the common law principles is to obscure the real force of manorial custom. The lord was clearly part of and not above the village community insofar as there were customary rules governing behaviour created by the community (including unfree tenants) applicable to them. They had at least some commitment to following those rules - or we would not hear about them in seigneurial documents and common law cases, and there were procedures and institutions for enforcement. Maitland’s criteria for law, like those

¹²³ Maitland might now be called a ‘soft legal positivist’: he thought positive law should be followed, but when it conflicted with other duties (ethics) latter prevailed: Maitland, ‘Liberty and Equality’ (n 122) 26.

¹²⁴ Pollock and Maitland, vol 1 (n 4) xxxv; This has been noted in another context in Stephen D White, ‘Maitland on Family and Kinship’ (1996) 89 Proceedings of the British Academy 91, 94.

¹²⁵ Pollock and Maitland, vol 1 (n 4) 381.

¹²⁶ Hudson, ‘Introduction: Customs, Laws, and the Interpretation of Medieval Law’ in Per Anderson and Mia Münster-Swendson (eds) *Custom* (2009 Proceedings of the Fifth Carlsberg Academy Conference on Medieval Legal History 2008) 11 notes that whilst Maitland was apparently against Austinian positivism, he never developed this in relation to custom.

¹²⁷ Pollock and Maitland, vol 1 (n 4) 383-98.

of both earlier and later positivists, did not serve well when confronted with custom instead of modern legislation.¹²⁸ The custom which regulated local rights and obligations ought to be regarded just as much as law and just as important in understanding manors and village communities as the common law Maitland focused on, because in feudal society ‘convention and custom [were] the ruling principles of the law’.¹²⁹ Although they had no binding power at common law (consistent with Maitland’s description of custom as ‘positive morality’) customs had moral authority and were usually followed.¹³⁰

Further, the manorial institution was usually described as a court, it had jurors, and its records described its practices as law. Maitland recognised this by the admission that:

we are bound to add that it is protected by a morality which keeps a court, which uses legal forms, which is conceived as law, or as something akin to law... [and] let him admit that [manorial custom] is positive morality conceived as law and little is left to quarrel over save words.’¹³¹

This definitional quibble also has particular significance in light of Maitland’s late work on trust and corporation, where he urged that many groups were ‘right-and-duty bearing units’ whether the state recognised them or not,¹³² and that there is often ‘morally most personality where legally there is none’.¹³³ The latter observation suggests the ‘positive morality’ of the village community and manorial court ought to have wide significance for understanding English law and how it managed unincorporated groups. But Maitland never revisited his village community scholarship

¹²⁸ This theme is developed further below, and in Chapter 5.

¹²⁹ Paul Vinogradoff, ‘Preface’ in idem (ed), *Studies in the Hundred Rolls* (1914) 6 Oxford Studies in Social and Legal History.

¹³⁰ Vinogradoff, *Villainage* (n 15) 174.

¹³¹ Maitland, *Select Pleas* (n 5) 163.

¹³² Maitland, ‘Moral Personality and Legal Personality’ (1903) reprinted in *Collected Papers*, vol 3 (n 16) 314.

¹³³ Maitland, ‘Trust and Corporation’ (1904) reprinted in *Collected Papers*, vol 3 (n 16) 383.

before his death in 1906, and *Township and Borough* indicated he was not primarily interested in doing so.¹³⁴

To Vinogradoff, however, law was primarily a product of custom, and whilst external influences from other cultures (like Rome) had to be acknowledged and explored, legal history was primarily an investigation of the social life of an ‘indigenous’ community.¹³⁵ Nineteenth-century descriptions of custom had been the battleground of the rationalistic codifiers and the champions of tradition,¹³⁶ but by the early twentieth century, debate had shifted.¹³⁷ The new focus was the relationship between legal rules and institutions, social conditions,¹³⁸ and law in social context.¹³⁹ The earliest laws were now to be sought in non-litigious custom,¹⁴⁰ for instance in Old English law,¹⁴¹ using a wide range of historical and geographical sources.¹⁴²

Vinogradoff’s express definition of law differed from Maitland’s. Rather than focus on coercion and formal features, Vinogradoff defined law as ‘a set of rules imposed and enforced by a society with regard to the attribution and exercise of power over persons and things’,¹⁴³ not bound to legal maxims or treatises, or even to legal logic.¹⁴⁴ Like Maine, Vinogradoff was wary of

¹³⁴ As was discussed in Chapter 2.

¹³⁵ Ada Levett and George O’Brien, ‘Obituary’ (1926) 36(142) *The Economic Journal* 310, 314.

¹³⁶ E.g., by Bentham and Savigny respectively: Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789; OUP 1996); Friedrich K von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (Abraham Hayward (trs), Littlewood 1831).

¹³⁷ Vinogradoff, ‘Legal Customs’ (n 59) 402.

¹³⁸ Vinogradoff, ‘The Problem of Customary Law’ (1926) reprinted in *Collected Papers*, vol 2 (n 59) 410.

¹³⁹ Vinogradoff, ‘Customary Law’ posthumously published in Charles G Crump and Ernest F Jacob (eds), *The Legacy of the Middle Ages* (Clarendon Press 1926) 287, 288.

¹⁴⁰ Vinogradoff, ‘Problem of Customary Law’ (n 138) 422.

¹⁴¹ Vinogradoff, *English Society* (n 42) 3.

¹⁴² Vinogradoff, ‘Problem of Customary Law’ (n 138) 411.

¹⁴³ Vinogradoff, *Common Sense in Law* (1914; 3rd revd edn OUP 1959) 59.

¹⁴⁴ Levett and O’Brien (n 135) 313-6.

oversimplification in the construction of logically coherent theories: modern legal systems utilised Maine's fictions, equity, and legislation to close the inevitable gap that opened when social norms changed more swiftly than the law,¹⁴⁵ and those same gaps revealed the legal and social realities of their time.¹⁴⁶ Legal doctrine, meanwhile, formed an artificial 'crust' over social facts – it grouped them together and made claims for them, but those claims were extrapolated and not always consistent with every example. Legal rules were also both 'both an influence and a consequence' which inevitably gave 'a very definite even if a somewhat distorted shape to the social processes which come within its sphere of action': in generalising to form a legal rule, some social facts were inevitably over-simplified or left out of the picture.

Lawyers were by training inclined to look for clear and logical doctrine, but Vinogradoff urged that this was not a suitable way to think about history.¹⁴⁷ The places where legal ideas broke down because of the 'confusing variety of life' were the most frustrating to the lawyer who favoured the 'internal' study of legal doctrine, but the most interesting to the legal historian. The 'legal intellect', including past lawyers, sought to analyse complex cases into their constitutive elements and bring those elements under principles, but when this resulted in 'contradictions and confused notions' it showed the 'historical stratification of ideas and facts', which 'cannot be abolished however much lawyers crave for unity and logic.' Different thinking about law had predominated at different times, engaging with a host of social and circumstantial factors. Studying

¹⁴⁵ Henry Maine, *Ancient Law* (1861; 5th edn, John Murray 1873) xvii. This also resembles Brian Simpson's more recent model of English common law as a customary law system: Brian Simpson, 'The Common Law and Legal Theory' in William Twining (ed), *Legal Theory and Common Law* (Blackwell 1986).

¹⁴⁶ Vinogradoff, *Villainage* (n 15) 212. This is comparative jurisprudence in one sense – see Vinogradoff's 'Jurisprudence, Comparative' in *Encyclopædia Britannica*, vol 15 (11th edn, CUP 1911) and discussion in Chapter 2.

¹⁴⁷ Also Maitland's sentiment: *Why the History of English Law is not Written* (CUP 1888), reprinted in *Collected Papers*, vol 1 (n 16), esp. 491-2.

law in historical context demonstrated the logical gaps and flaws ('seams and scars') in doctrine rather than rationalising them away.¹⁴⁸

C. VINOGRADOFF AND LOCAL CUSTOM

In his enthusiasm to disprove the existence of the pre-Conquest corporate village community, Maitland swept aside an interesting and important part of medieval law.¹⁴⁹ Vinogradoff described a rich self-government manifesting in local production and maintenance of customary rules which, although not precisely the same from village to village,¹⁵⁰ followed a general pattern and structure backed by community affirmation and sanctions. Although day-to-day decisions made by local officials had a significant practical influence on the formation and alteration of custom, community members were responsible for their creation and maintenance (whether by explicit decisions in the nature of legislation, or customary practice), upholding their authority, and sometimes recording them in manorial court records.¹⁵¹

1) *Vinogradoff's Account of Custom*

Before turning to Vinogradoff's study of custom in the village community, it is useful to consider his broader description of medieval legal custom. The treatises *Glanvill* and *Bracton* both

¹⁴⁸ Vinogradoff, *Villainage* (n 15) 127. It is interesting that the question of whether legal principles do fail to deal with complex factual situations would later become a core debate, for example in Ronald Dworkin, *Law's Empire* (HUP 1986).

¹⁴⁹ Milsom accused Maitland of letting his antipathy to 'legal legends' which resulted in historical mistakes and anachronism lead him, in turn, astray in relation to both history without the type of legal evidence he was most comfortable with and ideas about communalism: "'Pollock and Maitland': a Lawyer's Retrospect' in John Hudson (ed), *Proceedings of the British Academy*, vol 89(1) (OUP 1996) 245.

¹⁵⁰ Some variation resulted from differing geography, whilst other variations, for example as to inheritance, are less easily explained. It remains true that customary rules across different lordships and counties were often very similar.

¹⁵¹ Vinogradoff, *Growth* (n 7) 188-9.

described the common law as customary.¹⁵² In *Bracton*, this meant recognising the variety of local customs, for instance the Cornish children of parents of mixed status, or Herefordshire villeins not summoned in criminal charges. Such customs could contradict the common law, or cover ground outside it,¹⁵³ and seemed to develop from attempts to solve problems in line with theoretical and moral ideas about justice and expediency, not technical considerations. Force of habit then promoted continuity, even without official formulation, with the practical consequence that customary law was resistant to change.¹⁵⁴

This did not prevent modification, however: customs could adapt and grow, and receive outside ideas. But because custom represented tradition and growth, it was a contradiction in terms for anyone to create it expressly by a single act of legislation, even a sovereign.¹⁵⁵ This had the effect of limiting both royal power and the scope of the common law in the thirteenth and fourteenth centuries. Even then, there were workarounds: the king could alter custom with Parliamentary co-operation,¹⁵⁶ and recording custom in writing could be used as an opportunity to make deliberate changes. In particular, when a customary rule arose in a court case, legal procedure and discussion translated it into a technical formula, just as had once happened with the customary law of Rome - but this did not change the fact the rules originated in the habits and ideas of a particular class or group of people. Even formalised, written, custom maintained a connection with social usage: for example the legal rights and duties in family law and marriage; agrarian customs; and commercial rules. This demonstrated that custom, as a source of law, came from

¹⁵² Vinogradoff, 'Problem of Customary Law' (n 138) 414.

¹⁵³ Vinogradoff, *Villainage* (n 15) 138-9.

¹⁵⁴ Vinogradoff, 'Problem of Customary Law' (n 138) 421.

¹⁵⁵ John Baker, 'Prescriptive Customs in English Law 1300-1800' in Harry Dondorp, Eltjo J H Schrage, and David J Ibbetson (eds), *Limitation and Prescription* (Duncker & Humblot 2019) esp. 148. Vinogradoff made no use of modern distinction between prescription by grant and custom by long use, generally discussing only the latter.

¹⁵⁶ Vinogradoff, 'Constitutional History and the Year Books' reprinted in *Collected Papers*, vol 1 (n 59) 202-3.

below - not from a sovereign, but from communities reflecting their social conditions and moral opinions.¹⁵⁷ In this sense, custom was a form of legislation based on collective will – in Roman terms, '*lex*', promulgated by multiple acts of practice instead of single decree.

Further, Vinogradoff asked, if custom was a 'source' of law: did that mean custom was a way of evidencing legal rules, or a source of authority creating them?¹⁵⁸ Ascertaining the supposedly customary common law sources was not easy. For instance, *Glanvill* connected twelfth- and thirteenth-century English law with Norman customs. Clearly, both English and French royal courts had to engage with many entrenched customs, although the English royal courts' authority benefitted from early centralisation. There was thirteenth-century French evidence of judges considering the substance of local usage, but the French courts soon left this to juries acting like special witnesses.¹⁵⁹ In England, juries were also used to recognise local custom, particularly in Kent.¹⁶⁰ But Vinogradoff thought that although Norman practice might have affected the English jury, it was a pre-Conquest institution related to Scandinavian customs.¹⁶¹ A practical consequence was that the English jury, unlike the French, was investigative. The English common law judge had some regulatory jurisdiction as to unreasonable customs and acts committed under them, but the jury was both the repository and judge of custom.¹⁶²

¹⁵⁷ Vinogradoff, 'Problem of Customary Law' (n 138) 415-20.

¹⁵⁸ *ibid* 411.

¹⁵⁹ Vinogradoff, 'Legal Customs' (n 59) 402-4.

¹⁶⁰ Other examples included the customs of Somerset, Surrey, and Cumberland: 'Vinogradoff, 'Legal Customs' (n 59) 406-7.

¹⁶¹ Vinogradoff, *English Society* (n 42) 7.

¹⁶² Vinogradoff, 'Legal Customs' (n 59) 406-8; *Bracton's Note Book* (n 56) 1662. The origins of the jury have been much debated, especially in relation to the 'Brunner debate'. See Mike Macnair, 'Vicinage and the Antecedents of the Jury' (1999) 17(3) LHR 537, and John Beckerman, 'Procedural Innovation and Institutional Change in Medieval English Manorial Courts' (1992) 10 LHR 197 regarding manorial courts. The point here is not directly about jury origins, but about how they used custom.

Custom therefore affected judicial decision-making, and the law juries pronounced was influenced by non-litigious custom and local usage.¹⁶³ All judicial decision making takes place against a background of social custom, usage, professional and public opinion,¹⁶⁴ but medieval judges were more able to engage with this context than modern judges because precedent was not binding.¹⁶⁵ If a common law court was confronted with conflicting appeals to the custom of the manor and the common law, the judge looked for evidence of immemorial usage. If this was provided, the royal courts ‘allowed a great latitude for the peculiarities of customary law’.¹⁶⁶ There were some practical limits, such as the need for proof from within living memory, but this was an evidence issue and not substantive principle.¹⁶⁷

Access to and control of waste land provided a good example of the relation of common law and local custom. Waste land was often closely regulated within village communities from an early date because of its value as pasture.¹⁶⁸ Control and the ability to convert this land to arable was particularly controversial: if it was true that ‘*nulle terre sans seigneur*’ the primary claim to unoccupied land would always be the lord’s. However, in her study of fenland commoning, Vinogradoff’s student Nellie Neilson showed that this was not straightforward in practice, as waste was often commoned by multiple vills, supposedly by lordly mutual consent or tolerance. But this same land was often subject to disputes between lords (often in conjunction with their tenants) –

¹⁶³ Vinogradoff, ‘Legal Customs’ (n 59) 408.

¹⁶⁴ Vinogradoff, ‘Problem of Customary Law’ (n 138) 412-3. A similar argument was made more recently by Robert Gordon, ‘Historicism in Legal Scholarship’ (1981), reprinted in idem, *Taming the Past* (CUP 2017).

¹⁶⁵ Vinogradoff, ‘Problem of Customary Law’ (n 138) 414.

¹⁶⁶ Vinogradoff, *Villainage* (n 15) 99.

¹⁶⁷ Vinogradoff, *Villainage* (n 15) 111; citing (1321) YB 15 Edw II f455 (Seipp 1321.101), where the case turned on whether ancient demesne was defined by the previous seisin of Edward the Confessor or the seisin on the day of the Conquest.

¹⁶⁸ Richard C Hoffmann, ‘Medieval Origins of the Common Fields’ in William N Parker and Eric L Jones (eds), *European Peasants and Their Markets* (Princeton University Press 1975) 58.

hardly evidence of a tolerant atmosphere.¹⁶⁹ These disputes often ended in partition of the land, and the village community(s) then had an important role in determining boundaries by perambulation and regulating use of that land.¹⁷⁰

Within a single lordship, lord and community could strike a balance as to waste, for instance, allowing continued use in return for cash payments, but the community, and especially the villeins, had no common law rights if the lord was not amenable. This was especially problematic because commoning rights over the waste were usually attached to the arable land of a village not by the common law, but by manorial custom. Before the Statute of Merton (1235), as a practical matter, free tenants could object at common law if lords contradicted the custom of the manor. Commons regulation in manorial custom did not distinguish between free and unfree, but as only free tenants had royal court access, the incidental effect was that apportionment customs which had not evolved to protect a minimum right, or the interests of the free tenants in particular, came to be used that way.¹⁷¹ Agrarian riots were the ultimate recourse for the unfree without that privileged access.¹⁷² The Statute of Merton created a solution reducing conflict, which involved the incorporation of customary practices into the common law. Lords' right to reclaim land from waste was defined and limited to the residue after the minimum necessary for tenant commoning was set aside,¹⁷³ where the amount of the latter was based on customary law.¹⁷⁴

¹⁶⁹ Neilson, *Fleet* (n 61) l.

¹⁷⁰ *ibid* li.

¹⁷¹ Vinogradoff, *Growth* (n 7) 171-2; 271.

¹⁷² *ibid* 312.

¹⁷³ Statute of Merton (1235), ch 4; the same power was guaranteed against neighbours by Statute of Westminster II (1285), ch 46.

¹⁷⁴ Vinogradoff, *Growth* (n 7) 171-3.

Custom provided for a multitude of other claims behind unified and indivisible common law rights, particularly in relation to land.¹⁷⁵ Apportionment customs are one good example: they originated in the community, were appropriated by the common law, and both remained connected with community practice and changed in the process. The ability to adapt via a ‘substratum’ of autonomous legal custom meant it was possible to have a large and powerful royal administration governing at a general level, and regional self-determination. Large geographical areas like counties could have their own custom – as Kent did from the eleventh century, but by the fourteenth century, regional, borough, and manorial customs all functioned autonomously under the ultimate and distant formal supervision of the royal courts.¹⁷⁶ Evidence of local custom was recorded in the manorial documents which supplemented and verified the legal documents of the king’s courts, and Vinogradoff argued that manorial court rolls could be used as a ‘stepping-stone’ between general theories and statements of principle in the common law and local practical arrangements. Whilst the writ and pleading requirements in the royal courts limited the scope to describe local variation, royal and seigneurial extents and inquisitions were not constrained by the same rules and showed local practice. These, alongside treatises on farming and instructions to officials, showed economic realities and could be compared with the descriptions of legal rights in the common law sources in order to develop a more complete picture of medieval law. Vinogradoff’s study of villeinage in England¹⁷⁷ was a detailed case study seeking to do exactly this.

2) *Custom and Villeinage*

¹⁷⁵ Vinogradoff, *Villainage* (n 15) 248.

¹⁷⁶ Vinogradoff, ‘Problem of Customary Law’ (n 138) 422; Vinogradoff, *English Society* (n 42) 91-4.

¹⁷⁷ Not just in *Villainage* (n 15) but also the later texts: *Growth* (n 7) and *English Society* (n 42). His work in this area remains valuable and useful to modern scholars: it was used throughout the modern account of the topic in Hyams, *Kings, Lords and Peasants in Medieval England* (Clarendon Press 1980) (‘KLP’) viii.

The common law concept of villeinage was not fully developed until the mid-thirteenth century,¹⁷⁸ and evidence suggested earlier villeins were in a better condition than later ones, as hardening common law doctrine restricted freedoms. In the thirteenth century, the law of villeinage was not entirely settled – for example *Glanvill* and *Bracton* had contradictory statements on manumission,¹⁷⁹ and ‘the passage from obligatory labour to proprietary rights [was] effected... by the gradual accumulation of facts which are not strictly legal and at the same time tend to become legal’.¹⁸⁰ Common law case law developed legal doctrine with specific legal disabilities out of varied thirteenth-century legal and political facts, and what resulted had features in common with a variety of older concepts:

...Legal theory and political disabilities would fain make it all but slavery; the manorial system ensures it something of the character of the Roman *colonatus*; there is a stock of freedom in it which speaks of Saxon condition.¹⁸¹

The process gave rise to risks of both artificial simplification, and confusing variety: the different classes of personally free and unfree tenants were hard to separate, and this was the first time they had been the focus of legal distinctions.¹⁸² Doing so in practice and theory fused together some classes and hardened the division between personal freedom and unfreedom.¹⁸³ Personal status was on a spectrum of freedom to unfreedom, and any stark divides that came to exist were a product of common law rules, not their cause.¹⁸⁴ Vinogradoff argued that even once the common law proposed precise definitions, the fundamental principles of villeinage exhibited ‘notable

¹⁷⁸ This may partly explain manorial court written record proliferation at the same date, as manorial lords more carefully documented who was unfree and what they owed: Lawrence Poos and Lloyd Bonfield (eds), *Select Cases in Manorial Courts, 1250-1550* (1998) SS vol 114, p xxi.

¹⁷⁹ Vinogradoff, *Villainage* (n 15) 88.

¹⁸⁰ *ibid* 214.

¹⁸¹ *ibid* 138. Hyams also notes this conflation, in the form of the occasional equation of the villein with the Roman ‘*servus*’ in order to facilitate borrowing Roman law concepts for the developing common law: *KLP* (n 177) xix.

¹⁸² Vinogradoff, *Villainage* (n 15) 83.

¹⁸³ Hyams, *KLP* (n 177) xxii; 1.

¹⁸⁴ Vinogradoff, *Villainage* (n 15) 82-3.

discrepancies and vacillations... the result of conflict between logical requirements and fluctuating facts.¹⁸⁵ For instance, some of *Bracton's* statements about villeins were never in practice true. There were instead real differences of rank and class amongst the unfree, and customary distinctions as to manorial duties and privileges.

The difficulties with 'villeinage by prescription' demonstrated just how inevitable confusion was once these differences were overlooked, by both later historians and contemporary lawyers. *Bracton* and *Britton* contained conflicting statements on whether it was possible to become a villein by prescription,¹⁸⁶ and it seemed the territorial aspect of unfreedom had given rise to a confusion when modes of proving this were tangled with personal status.¹⁸⁷ *Bracton* said thirteenth-century villeinage was a tenure, not a status, and free tenants could hold unfree land without a change of personal status - but it was possible to lapse after five generations. *Britton's* view was similar, but held no lapse was possible, and during Edward I's reign, *Bracton's* general theory came to be doubted. The result was that '...both [*Bracton* and *Britton's*] views, though absolutely opposed to each other, are in a sense equally true: the one giving the logical development of a fundamental rule of the law, the other testifying to the facts.'¹⁸⁸ De facto changes in legal status were possible, even if not recognised de jure. Holding unfree land and living in the same material position as personally unfree neighbours made it difficult to maintain personal freedom (or evidence it). Similarly, later historians thought the terms 'villein regardant' and 'villein in gross' related to differences of status: the former a debased free person attached to land, but disabled only in relation to their lord. However, Vinogradoff showed that this distinction was a later imposition arising from Littleton's interpretation of medieval law. The two terms developed in the fourteenth

¹⁸⁵ *ibid* 64.

¹⁸⁶ Pollock and Maitland, vol 1 (n 4) 408; Hyams, *KLP* (n 177) 116.

¹⁸⁷ Vinogradoff, *Villainage* (n 15) 48.

¹⁸⁸ *ibid* 64.

century as different ways to plead, and they said nothing about the personal status of the individual.¹⁸⁹ Confusion had arisen when the two were conflated by later lawyers.

One of the key impacts of the settling of the common law of villeinage was that, by combining unfree persons under one umbrella term, the important theoretical difference between personal unfreedom and tenurial status was often obscured in practice – this both weakened the villeins' rights, and increased the role of order and legality in the lord-villein relationship.

a) Personal Status

Maine argued that medieval villeins were much misunderstood until the comparative method compared them with 'backward' societies.¹⁹⁰ Villeins owed a variety of dues and services, could not leave the manor without permission, required consent to alienate land, and all of their moveables belonged to the lord (at least in legal theory). However, none of those disadvantages proved absolutely that a person was of servile status, and all could be otherwise explained.

The common law position described in *Dialogus de Scaccario*¹⁹¹, *Glanvill*¹⁹², *Bracton*¹⁹³, *Fleta*¹⁹⁴, and *Britton*¹⁹⁵, stated that a person of unfree status, a villein, could be transferred, sold, or otherwise

¹⁸⁹ *ibid* 48-56.

¹⁹⁰ Henry Maine, *Dissertations on Early Law and Custom* (John Murray 1883) 305.

¹⁹¹ Richard Fitz Nigel et al, *Dialogus de Scaccario*, vol 2 (Oxford Medieval Texts 2007) 10.

¹⁹² Derek Hall and Michael T. Clanchy (eds), *The Treatise on the Laws and Customs of the Realm of England, Commonly Called Glanvill* (Clarendon Press 1993) 5.

¹⁹³ George E. Woodbine and Samuel E. Thorne (eds), *Bracton on the Laws and Customs of England*, vol 2 (SS and HUP 1968) 4.

¹⁹⁴ Henry G. Richardson and George O. Sayles (eds), *Fleta*, vol 2 (1953) 72 SS, p 13-15.

¹⁹⁵ Francis M. Nichols (ed), *Britton*, vol 1 (Clarendon Press 1865) 194.

alienated by their lord like a chattel¹⁹⁶ - although, as they were attached to land, they could not be devised by will.¹⁹⁷ The villein's person was not generally protected, but the extreme actions of maiming and killing were prohibited.¹⁹⁸ Evidence of villeins being bought and sold independently of their tenements is rare, however, one example from the London Eyre of 1244 did clearly state that earls, barons, and free tenants could lawfully sell their serfs (*rustici*) like oxen or cows.¹⁹⁹ Other references to giving or selling the unfree include Walter at Holme Lacy, Herefordshire, giving a villein to a church,²⁰⁰ or in Buckinghamshire in 1230-1, when seven villeins and services were given to the Abbey of Great Missenden.²⁰¹ Much more often, villeins were indirectly sold with the land they inhabited.²⁰²

Villeins were procedurally disabled by their tie to land and lord: they did not have an action against their lord at common law. The general difficulty villeins encountered was this procedural disability, not personal debasement, and the lord's power was primarily derived from it. The villein had no power to call the lord to account in royal courts, even where morality and custom might have recognised a right.²⁰³ At common law, the lord would state the person was their villein, over whom they had rights and no need to justify their actions - this '*exceptio villenagii*' is visible in the earliest extant common law Plea Roll.²⁰⁴ Common law courts expressly declared it was not their

¹⁹⁶ Vinogradoff, *Villainage* (n 15) 44.

¹⁹⁷ *ibid* 132; *Britton*, vol 1 (n 195) xxxii; 5; 197. Hyams, *KLP* (n 177) 25, 13 notes that there is only one (questionable) known example of a villein devised by will.

¹⁹⁸ Vinogradoff, *Villainage* (n 15) 47.

¹⁹⁹ Hyams, *KLP* (n 177) 5.

²⁰⁰ William H Hart (ed), *Historia et cartularium monasterii Sancti Petri Gloucestriae*, vol 1 (Longman 1863-7) 85.

²⁰¹ *Bracton's Note Book* (n 56) case 524.

²⁰² Hyams, *KLP* (n 177) 2. This is not particularly debasing - a modern landlord can also sell a piece of land with a sitting tenant (without claiming that they own the sitting tenant): Faith, *The English Peasantry* (n 36) 175.

²⁰³ Vinogradoff, *Villainage* (n 15) 134.

²⁰⁴ Francis Palgrave (ed) *Rotuli Curiae Regis*, vol 1 (Record Commission 1835) 84, 6 Richard I; Vinogradoff, *Villainage* (n 15) 46.

business to interfere between lord and customary tenant.²⁰⁵ If the land was unfree, rather than the person, common law was similarly hands-off: a lord could remove a tenant from their unfree holding at will, and the king's courts would not hear cases on this or on the topic of villein services: '*dominus Rex non vult se de eis intromittere*' (the lord king is not willing to admit [cases] in relation to this).²⁰⁶ However, at least according to *Bracton*, villeins were free and capable in legal cases against everyone except their lords.²⁰⁷ Third parties were not to complain that their opponent in court was a villein if they were not seised of them, and a villein did not need their lord to join their action to make it legally valid. This is strange, at first glance, as a villein could not have legal title to anything, and could buy nothing except with their lord's money. However, unless and until the lord chose to take possession, the villein was in practice able to act freely.²⁰⁸ The key exception was that a villein could not bring an action to recover possession of tenements held in villeinage, as they never possessed them - but this did not prevent them having the assize of novel disseisin in respect of any free tenements they held,²⁰⁹ nor from bringing actions about unfree land in manorial courts. The extent to which even this limitation was actually applied in common law court practice has been doubted, at least before relevant part of *Bracton* was written in the 1230s.²¹⁰ If theory and practice were at variance, it would be another example of the practical limitations of the legal theory of villeinage.

In short, villeinage was largely free of the substantive personal disabilities which characterised slavery: there were no markets where lords bought and sold villeins. Villeins were

²⁰⁵ *Bracton's Note Book* (n 56) viii, 251. Royal demesne was an exceptional example.

²⁰⁶ Vinogradoff, *Villainage* (n 15) 45; *Bracton's Note Book* (n 56) pl 1237.

²⁰⁷ Hyams, *KLP* (n 177) 88.

²⁰⁸ *ibid* 17.

²⁰⁹ Vinogradoff, *Villainage* (n 15) 68-69.

²¹⁰ Hyams, *KLP* (n 177) 99.

more similar to Roman '*coloni*' than '*servi*' - although unlike *coloni*, villeins were tied to land generally and not to any specific plot: the lord nominally had the power to require different kinds of work, move them between locations, and consequently cause them to be governed by different sets of local customs.²¹¹ How far this was true in practice is also questionable: thirteenth-century tenants in Newton Longville successfully argued that a tenant could not be compelled, nor could his land be confiscated for refusing, to move to another manor in order to serve the lord as an official there, on the basis of manorial custom.²¹²

Whilst parts of the medieval common law and legal theory equated the villein with the Roman chattel slave, manorial rolls and local custom created many limitations on lordly power over villeins.²¹³ Like the variations and socio-economic inequalities amongst the unfree, recognition of these was lost when useful but broad definitions like 'chattel slavery' and 'customary serfdom' were used in common law writing. The vital connection between villeins and the land was underlined in *Bracton*²¹⁴ and elsewhere²¹⁵ in relation to preserving a villein's 'waynage' – the plough and plough team – as the means by which they performed agricultural labour. Whether or not this only applied to villeins on ancient demesne,²¹⁶ it is indicative of the vital importance of labour on land that *Bracton* equates deprivation of waynage with '*intollerabilis injuria*', more commonly interpreted to mean a serious injury to the body. Farmers²¹⁷ were also prohibited from 'wasting' villeins by subjecting them to burdens so onerous that they fled, depleting the value of

²¹¹ Vinogradoff, *Villainage* (n 15) 57.

²¹² 4 November (1293): Poos and Bonfield (n 178) 48.

²¹³ Vinogradoff, *Villainage* (n 15) 43.

²¹⁴ *Bracton*, vol 2 (n 193) 34.

²¹⁵ Magna Carta (1215), ch 20 talks about 'saving his waynage'.

²¹⁶ Vinogradoff thought reference to ancient demesne was a bad gloss: Vinogradoff, *Villainage* (n 15) 75; Hyams, *KLP* (n 177) 143.

²¹⁷ 'Farmer' in the sense of one who rented a manor and acted as manager, paying a fixed rent upwards and extracting the usual services and rents from the tenants.

land.²¹⁸ And a villein's unfreedom was so tied to the land that when they crossed the manorial boundary common law treated them as free unless and until their servile status was proved.²¹⁹

There was also some difficulty in working out the personal status of villeins' children. *Glanvill's* rule was based on Roman law:²²⁰ a child's status followed its parents'. However, with the medieval English church emphasising the importance of a solemnized Christian marriage, the Roman rule became inappropriate.²²¹ By the time of *Bracton*, villein status followed the child's father as long as their parents were married,²²² although this common law rule was not followed on every manor. *Bracton's* use of Roman law terminology (copied from *Aspilog*)²²³ was therefore unsuited to the English context, even if it might have been carried into practice by some lords,²²⁴ and influenced other legal writers. *Bracton* and other early common lawyers were trying to describe something new, and legal definitions were an influence on the developing common law as much as a product of it. The status of villeins was primarily developed by economic and political forces, but the study of Roman precedents was an important influence, and the infusion of Roman ideas about slavery did affect the legal rules on villeinage, perhaps making them harsher than they would have otherwise been.²²⁵ Any disconnect with English practice was not simply attributable to mindless copying of Roman rules: the social context at least partly justified it, and this was another

²¹⁸ Hyams, *KLP* (n 177) 28.

²¹⁹ Vinogradoff, *Villainage* (n 15) 85.

²²⁰ *Glanvill* (n 192) 58.

²²¹ Vinogradoff, *Villainage* (n 15) 59; Hyams, *KLP* (n 177) 176.

²²² *Bracton*, vol 2 (n 193) 31.

²²³ Vinogradoff, *Villainage* (n 15) 47.

²²⁴ Charles Elton, 'Villainage in England' (1892) 8 LQR 117, 120.

²²⁵ Vinogradoff, *Roman Law in Medieval Europe* (1909) 100-101.

instance of the need to recognise the ‘seams and scars’ in legal doctrine which revealed important truths about the history of law.²²⁶

b) Tenorial Status

Since most villein land was in the hand of people of equally unfree personal status until after the Black Death, the distinction between tenorial and personal villeinage often remained unclear, and perhaps largely irrelevant in practice. However, if free tenants acquired unfree land, it became important to lords that legal theory distinguish the two, to prevent the land becoming free by association.²²⁷ Thirteenth-century common law initially made use of two contradictory tests to determine the servility of land as distinct from the servility of the person.²²⁸ One test was based on the *certainty* of the amount of service owed, and another based on the *type* of service: uncertain obligations indicated greater subjection to the will of a lord and so a lack of freedom, but some services were seen as demeaning in themselves and incompatible with free holding.

Bracton said the key factor was certainty: the common law definition of a villein was a worker who did not know what kind of work they would be performing day to day, although a person owing villein services need not necessarily be a villein.²²⁹ However, in practice, custom might (and usually did) settle most villeins’ duties into a predictable pattern. Even if this certainty was not binding as a matter of common law, it meant that the common law courts needed to look to something other than unpredictability. The other test, therefore, asked what kind of services

²²⁶ Vinogradoff, admonished Rogers for claiming that *Bracton*’s definitions were legal pedantry: *Villainage* (n 15) 44-8; e.g. Thorold Rogers, *Six Centuries of Work & Wages* (1884: 8th edn, Sonnenschein and Co 1906) 44.

²²⁷ Hyams, *KLP* (n 177) 89.

²²⁸ Vinogradoff, *Villainage* (n 15) 128.

²²⁹ *Bracton*, vol 2 (n 193) 89.

were rendered, looking for traits associated with servility, such as merchet - a fine paid when a daughter, or occasionally a son, was married, fines for selling cattle, being bound to serve as reeve, tallaging at will, and particular inheritance customs. This latter reflected the fact that succession by Borough English was widespread amongst the unfree – but the custom alone did not indicate unfreedom. The obligation to serve as reeve was similarly indecisive: it indicated personal subjection, not tenurial status, as did inability to leave the manor without permission, the payment of chevage, and restrictions on buying free land.²³⁰ The jury in one common law case in 1228 outright queried whether it was possible that a holding subject to tallage and merchet could be free – a good indication the answer was not obvious.²³¹

In any case, lords seemed more interested in the non-legal distinction between those owing rent and those owing service (informally related to freedom and unfreedom respectively). For example, the Glastonbury Abbey survey of 1189²³² made no reference to certainty and precarity, instead focusing on rent and service, like later manorial documents. The economic reality was that land which was not made to co-operate and provide for the manor, even if subject to heavy rent, was free: the holder could conduct husbandry more independently and any restrictions for the benefit of the lord came from agreement. This directly related to the uncertainty test: land subordinated to the manor was uncertain and unfree - it was there to serve on demand, but money payments were fixed, contractual, and negotiated.²³³

As with personal status, lordly power over the unfree could be restricted outside common law contexts, such as in the manorial courts applying local custom. Even if those institutions were

²³⁰ Vinogradoff, *Villainage* (n 15) 157.

²³¹ *Prior of Ripley v Thomas Fitz-Adam: Bracton's Note Book* (n 56) case 281.

²³² Later discussed at length in Postan, 'Glastonbury Estates' (n 78) 358.

²³³ Vinogradoff, *Villainage* (n 15) 165-171.

nominally subject to the will of the lord as a common law principle, custom consistently modified the simplicity and rigidity of common law rules.²³⁴ ‘Peasants unprotected at law were under the rule of orderly custom’, limiting the ‘capricious interference [of unchecked lordly power] which would have wantonly destroyed order and rule in village life’. Local custom fixed the value of most villein payments and duties, for instance. And whilst lords had the economic and military power to ignore custom if they wished, there would be consequences: lordly violence especially could lead to unrest and desertion, undermining their position.²³⁵ A key area where this was visible in practice was agricultural custom.

D. SHARED RESOURCE MANAGEMENT

For Maitland, one reason local customary law institutions were not needed was because local agricultural custom was maintained by ‘reality’ and ‘automatism’ with a ‘constant and mechanical repartition of duties’ between holders of certain plots of land: a court would have little business. Whatever linked economic interests villagers had, he saw little impact on legal and administrative arrangements.²³⁶

This is insufficient to explain the evidence.²³⁷ Automatism might account for the endurance of customs and practices, but could not explain their introduction,²³⁸ nor changes to them.²³⁹ Customs must originate somewhere, and minimum arrangements and divisions must have been decided, at

²³⁴ *ibid* 148-150.

²³⁵ *ibid* 172-6.

²³⁶ Pollock and Maitland, vol 1 (n 4) 677; Maitland, *DBB* (n 2) 187-8; Vinogradoff, *Growth* (n 7) 347.

²³⁷ Vinogradoff, *Growth* (n 7) 372.

²³⁸ Pollock and Maitland, vol 1 (n 4) 642.

²³⁹ Vinogradoff, *Growth* (n 7) 236.

the very least, in order to reflect local socio-economic conditions and maintain order. This was particularly true in relation to shared resource management. It was not enough to say that communal fields, woods, and waste could be managed ‘automatically’ – men, not things, took care of plans, disputes, and enforcement.²⁴⁰ ‘A whole series of operations’ required rules and directions, and/or monitoring officials, for instance to apportion rights of common, decide how many animals, and of what kind, each landholder was allowed to pasture.²⁴¹ The community decided if the customary rotation of crops should be altered, or if land should be reclaimed from waste (all in light of the unpredictable English climate).²⁴² There would inevitably have been situations caused by climate, famine, or war where there was a serious enough threat to the community as a whole that group action was necessary. Further, in cases of wrongs, some sort of decision making was essential, for example, if one person put animals in to pasture whilst others were still growing crops. Maitland’s individualistic solution, to exclude that person henceforth, might prevent repeat transgression, but would be little consolation to neighbours with livelihoods already damaged: they needed compensation as well as prevention. There are numerous examples of landholders being fined in manorial courts for exactly this: for example at Sevenhampton, Wiltshire, in 1276, a man was fined for the oft-prohibited act of letting his pigs into the grain in autumn.²⁴³

Even activities which involved individualistic behaviour, like contract-making, were regulated by the village community: for example, co-operation in ploughing non-demesne land. Local contracts were not usually written, but nonetheless on occasion appear in court records when enforcement was sought. In one case in Wakefield, Yorkshire, in 1286, Richard de Tuthill complained that he and Roger de Bosco had made an agreement to plough their land jointly, but

²⁴⁰ *ibid* 186.

²⁴¹ Vinogradoff, *Villainage* (n 15) 261.

²⁴² *ibid* 273.

²⁴³ Ault, *Open Field Farming* (n 10) 49.

Roger had ‘cast him off’, leaving his land unploughed. Roger was fined, and Richard was awarded damages. Similar ploughing agreements can be seen in Hampshire in 1327;²⁴⁴ Yorkshire in 1286; and in Alton, Hampshire in 1338.²⁴⁵ These agreements were evidently of some practical importance: the Hundred Rolls of 1275 include an objection from a tenant that the misbehaviour of the bailiff in the Isle of Axholme, Lincolnshire had sullied his reputation such that he could not find a partner to plough with.²⁴⁶

Whatever repetition and memory could be relied on to simplify activities, day-to-day life in a medieval village required conscious action - and Vinogradoff suspected this would have gone without saying if the ‘high authority’ of Maitland had not declared local regulatory activities as lacking value or legal force and importance.²⁴⁷

1) *Vills of Multiple Lordship and Commons Sharing*

It was not the case, at Maitland once believed,²⁴⁸ that each vill was coincident with one manor, with the exception of more densely populated eastern counties. Although the single mention of a vill in Domesday Book suggested this,²⁴⁹ it was common to find mention of multiple lords and manors per vill in other sources. The phenomenon was too frequent to be dismissed, as ‘not interfer[ing] with the general fact that the typical manor was a manorial lord’s estate, with a[n

²⁴⁴ Both of the above examples: Ault, *Open Field Farming* (n 10) 21.

²⁴⁵ Homans, *English Villagers* (n 42) 78.

²⁴⁶ Ibid 78-9; *Rotuli Hundredorum*, vol 1 (Record Commission 1812) 341.

²⁴⁷ Vinogradoff, *Villainage* (n 15) 186; citing Pollock and Maitland, vol 1 (n 4) 609.

²⁴⁸ Maitland, *Select Pleas* (n 5) xl; Maitland, ‘Survival’ (n 16) 341. After Tait’s review, which argued that ‘manor’ in Domesday Book was a technical term for a house against which geld was charged, such that the vill was the unit of taxation, Maitland wrote that his belief was ‘shaken’: James Tait, ‘Review: F W Maitland, *Domesday Book and Beyond*’ (1897) 12(48) EHR 768; Cecil Fifoot (ed), *The Letters of Frederic William Maitland*, vol 1 (Selden Society 1965) 165.

²⁴⁹ Maitland, *DBB* (n 2) 46.

unfree] village or township upon it' as Seebohm claimed.²⁵⁰ Multiple manors within one vill seemed to Maitland to mean that either a non-manorial assembly had to be found, despite lack of documentary evidence, or that for six or seven hundred years common field husbandry was carried on without a tribunal or assembly to regulate and control it.²⁵¹ In France, Marc Bloch went as far as to say that the existence of multiple manors in one vill was 'in itself sufficient refutation of the idea that the rural community could ever have been completely absorbed by the seigneurie.'²⁵²

Frank Stenton was also clear:

No authority of seigneurial origin controlled the whole economic life of villages under divided lordship. And unless we are prepared to assume that medieval agriculture followed an absolutely rigid sequence of operations, that the same processes were begun each year at the same times without regard to the fluctuations of weather... we must invoke a village meeting to regulate the management of the village open fields... The strips of which those fields were composed were tilled according to one routine, though they might be held by many men of many lords, and no single lord had by himself the power of deciding in his court what that routine should be.²⁵³

Vills with multiple lordship were potentially important evidence for village self-government: common field farming regulations were essential regardless of the lordship pattern,²⁵⁴ and as Maitland said, the village and not the manor was the economic unit. In thirteenth-century Cambridgeshire, for example, he described vills functioning as an agrarian (economic) whole even where property rights were shared amongst different lords: at Duxford, the villagers maintained regular sized holdings, even though the vill consisted of different manors and lords, and 'the village seems to say that it must be one, though the lords would make it many.'²⁵⁵ If a lord was not resident, or if lordship was divided, this was even more true, with the homage or village community

²⁵⁰ Seebohm, *Village Community* (n 12) 83.

²⁵¹ Maitland, 'Survival' (n 16) 367.

²⁵² Marc Bloch, *French Rural History* (Janet Sondheimer (trs), University of California Press 1966) 168.

²⁵³ Frank M Stenton, *Documents Illustrative of the Social and Economic History of the Danelaw* (1920) British Academy Records of the Social and Economic History of England and Wales, lxi.

²⁵⁴ Ault, *Open Field Farming* (n 10) 19; similarly Stenton, 'Danelaw' (n 253) xlv.

²⁵⁵ Maitland, *DBB* (n 2) 173-6.

taking the main role in agricultural regulation.²⁵⁶ There could be multiple manorial courts where local business was transacted,²⁵⁷ and it was theoretically feasible that the court of the ‘most important’ manor in a vill controlled agriculture²⁵⁸ - but this claim lacks evidence to support it. Without one overarching manor, community responsibility might be more obvious, because even with different lords or manors, villagers had shared local interests and disputes relating to husbandry, boundaries, debts, agreements, inheritance, and perhaps more.

Only if a dispute actually concerned a particular lord would all the villagers meeting in one court pose a question of proper jurisdiction. Otherwise, it would have been more efficient and practical to have one court in the vill to decide internal questions in vills with multiple manors. For example, if a lord had ten tenants across six vills, they would be unlikely to hold a separate court in each. In Walsoken, Norfolk, amongst three manors and three lords, the Abbot of Ramsey did hold a separate court for his tenants,²⁵⁹ but like many things about Ramsey this seems to have been unusual. Even there, the view of frankpledge was held jointly and overseen by one steward for each interested lord. In another example from the split vill of Chalgrove, which was divided into two manors held by William de Barentyn and Margaret (the daughter of the Earl of Warwick) respectively, one court seems to have served all tenants, because suit of court was expressed as due to one court of Chalgrove, not multiple courts.²⁶⁰ Practice may have varied, but at least some of the time the village structure asserts itself through the veil of lordship rights.

²⁵⁶ Ibid 128.

²⁵⁷ Vinogradoff, *Growth* (n 7) 305.

²⁵⁸ Tom Williamson, *Shaping Medieval Landscapes* (Windgather 2003) 7.

²⁵⁹ Warren Ault, *Court Rolls of the Abbey of Ramsey and the Manor of Clare* (YUP 1928) 173.

²⁶⁰ Warren Ault, *Private Jurisdiction in England* (YUP 1923) 234.

Neighbouring manors also sometimes shared commons. Where there was plenty of supply of land, regulation of commons was looser and more superficial, and was mainly about keeping access to the commons restricted to locals and essential maintenance of ditches, canals, and dikes. As demand rose, access to wood, moor, and pasture commons had eventually to be restricted ('stinted') in order to prevent destruction or abuse – the latter could arise as a consequence of individual rational calculation that the commons were not sustainable, leading to pre-emptive value stripping: what Hardin would later call the 'tragedy of the commons'.²⁶¹ Commons came to be included in the defined territory of a specific community, with the right to use them 'appendant' to their holdings, probably apportioned in accordance with earlier informal practice as with waste under the Statute of Merton. As these rights became more formalised and defined, communities made more formal their customary sharing agreements. The legal distinctions in relation to commons proceeded from the vague to the clearly defined and limited, as Maitland said.²⁶²

Recourse to a higher seigneurial court was possible where manors had common lords, but if not, informal meetings or use of the public courts like the shire and hundred were the only common law options when agreements required witnesses or customs enforcement - as records of disputes about intercommoning show. And yet, the problems with always having to resort to the hundred court have already been discussed. If common field farming (including commons grazing) entailed by-laws, then multiple vills on one commons must have entailed by-laws which were binding on more than one vill, and perhaps a multi-vill and extra-manorial body to administer

²⁶¹ Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243. Hardin was not the first to talk about this, but has become the canonical example despite Hardin's avowed eugenicism. The tragedy mechanism was known at least 300 years ago: Nathaniel Wolloch, 'Before the Tragedy of the Commons' (2018) 19 Theoretical Inquiries in Law 409; Stuart Banner, 'The Banality of the Commons' (2018) 19 Theoretical Inquiries in Law 395.

²⁶² Vinogradoff, *Growth* (n 7) 167-8.

them, unless this area coincided with a hundred, which had its own court. In later periods, there is written evidence of joint tenant meetings.²⁶³

Villages with multiple lordship also inherently provided more scope for self-government: if more than one lord was involved, government by single command was impossible,²⁶⁴ especially since it might not even be clear who had jurisdiction. A similar situation could arise if there were free tenants in the vill who answered to no lord with a manor there.²⁶⁵ For example, in the Hundred Rolls for 1255, the villagers at Oving, Buckinghamshire, were able to identify the lord of the vill, but there were four other tenants holding small portions of the vill, and they could not identify their relation to the village except to say who held the view of frankpledge.²⁶⁶ It is likely these arrangements existed more often than written records show, because vills themselves had no institutions which kept written records.²⁶⁷ Neilson found that, although most of the written material belongs to the period when lords had assumed direct control of manorial land, the vill still had a role to play in regulating intercommoning, and agreements to do so seemed to originate from before the manors were created.²⁶⁸ In these agreements, the commons were referred to by reference to vill, not manor, and intercommoning vills in different lordships, only sometimes also connected by the hundred, could share obligations to maintain boundaries, roads, and dikes.²⁶⁹

Questions of shared resource management were not just a problem in vills of multiple lordship, although they may have been more visible there. These examples helped expose those

²⁶³ *ibid* 305.

²⁶⁴ Reginald Lennard, *Rural England 1086-1135* (Clarendon Press 1959) 61. Lennard was another of Vinogradoff's students.

²⁶⁵ Maitland, *DBB* (n 2) 171.

²⁶⁶ *Cam, Law Finders* (n 39) 76.

²⁶⁷ Vinogradoff, *Growth* (n 7) 306.

²⁶⁸ Neilson, *Fleet* (n 61) vii; li.

²⁶⁹ *Ibid* l.

areas which were mostly likely to be subject to village self-government, even in simpler vills. Many shared commons,²⁷⁰ for example around Peterborough and Ely on the fens; large sheep commons on the eastern border of Essex; and large woodlands in Western counties close to Wales and the south.²⁷¹ ‘Gruntifen’ was shared by Ely and a further six vills, all commoning, cutting, digging, burning, and using the space as meadow; and ‘Heyfen’, belonging to the manor of Wisbech, was commoned by five vills as well as the town.²⁷² Three vills were sharing commons in Henfield, Lancaster, and even whole hundreds and the constituent vills shared large tracts like Kentis Moor, or Coleness in Suffolk.²⁷³ Even in vills with only one manor, some functions were by their nature communal and must have been exercised by the villagers.²⁷⁴

Maitland was not convinced, and argued that husbandry was carried on without standing institutions until the establishment of manorial courts.²⁷⁵ He used a case study of the unusual seventeenth-century village community of Aston to illustrate this. In 1657, Aston and Cote had a regulating body of sixteen unelected tenants with the roles attached to their tenements and taken in turn. Some were ‘lords tenants’, others ‘hundred tenants’, depending on which of several manors in the village they held from. Arable was intermixed, rights of common were annexed to tenements, and lots were drawn for portions of meadow each year. Allotments were supervised by a group called the ‘sixteens’, who also disposed according to their discretion of extra parcels of land (‘hams’ and ‘leyes’), made orders ‘beneficial’ for the inhabitants, met three times a year, and

²⁷⁰ Joan Thirsk, ‘The Common Fields’ (1964) 29 *Past and Present* 3, 4.

²⁷¹ Vinogradoff, *Growth* (n 7) 167.

²⁷² Neilson, *Fleet* (n 61) xli; xxvi.

²⁷³ Thirsk (n 270) 4.

²⁷⁴ For a more recent discussion see Postan, *Economy and Society* (n 78) 130.

²⁷⁵ The objection to Maitland here is not the timing question, but the implication that villagers were not engaged in self-government in respect of these questins.

could summon special meetings to resolve grievances. They could amerce community members for breaches of their orders.²⁷⁶

But they did not, Maitland said, aspire to act as a court of law, nor was it clear what authority they claimed over inhabitants who were not holding the specific land under their management. They had no records, and although they had ‘some little power’ of imposing pecuniary penalties for breach of customary rules, that type of power could also be exercised by bodies like clubs – it was not, for Maitland, the power of a court, which could execute penalties, seize goods and exercise (direct, physical) coercive power.²⁷⁷ There was ‘little reason for calling this community a governing community, rather it is a proprietary community’. This showed, he said, that it was possible for a village community to exist and go on existing without a court.²⁷⁸

Whilst Maitland was usually careful to avoid anachronism and careless use of evidence from different time periods, it is hard to see how the procedure of a seventeenth-century vill, existing within an established state and a very different socio-political landscape, was an appropriate case study for the medieval village – even if the agriculture was similar. Maitland’s use of Aston is even more puzzling in respect of his description of its origins. If Aston had developed its unusual arrangements when one large manor was divided, that might explain it: one agricultural community with different lords would have no single manorial court, and some organisation would have been needed to regulate agriculture, define pasture rights, and resolve disputes. But Aston was probably of fairly modern origin, created when different lords assarted land and either created or permitted the existence of the intermanorial arrangement.²⁷⁹ It was not an ancient ‘survival’.

²⁷⁶ Maitland, ‘Survival’ (n 16) 342-6.

²⁷⁷ *ibid* 352-3. Maitland’s limited definition of what constituted coercive power has been discussed above.

²⁷⁸ *ibid* 346-53.

²⁷⁹ *ibid* 352.

There are two other, fifteenth century, examples which Maitland seems not to have been aware of (although Vinogradoff used them). The 'Harlestone indenture' dates from 1410, and demonstrates the capabilities of the village community acting independently where a portion of land was granted 'to the community of the vill' to widen village roads. An agreement to enlarge the vill's recently created third field was made with the lords, six named men, and the whole vill. The most interesting Harlestone feature resembles Maitland's Aston and Cote: a committee of nine men of the vill was chosen to settle disputes arising out of the agreement; superintend the crop cultivation; inspect and supervise roads and cart-tracks; and note any defects in the fields. All of the committee members were villagers, with seven of them intended to protect the lords' interests, and two acting in the name of the villagers. Their tenure was for life, and vacancies were to be filled by men chosen by the lord and township – it is unclear whether this was in a meeting of the vill, but if it was in a manor court it is difficult to see which one of the lords' it would have been. A similar structure seems to have been used at a Fountains Abbey manor of Marton-in-Dishforth, Yorkshire, where three men represented the free tenants; three represented the lord, Richard Scrope; and three represented Fountains Abbey. These tenants were responsible 'with the assent of these men and of all' for 'casting' (laying out) three fields in the late fourteenth or early fifteenth century.²⁸⁰ These are unusual examples, but like Aston they evidence the possibility of non-manorial courts or gatherings in vills (in these cases, precipitated by multiple lordship), which clearly persisted from the fifteenth to seventeenth centuries, even if not earlier. In any case, these look like legal institutions: the difficulty in calling them such is self-imposed by Maitland's own definition of coercion – and a very specific type of coercion - as essential for legal control.

²⁸⁰ Homans, *English Villagers* (n 42) 56.

E. CONCLUSION

Maitland's attempt to disprove the existence of local legal institutions, whether in the evidence or in theoretical terms, was one of the least considered and most underdeveloped aspects of his work. He was aware of this,²⁸¹ but, as with many of his ideas, he did not live long enough to revisit the materials even had he wanted to. New questions would also arise in relation to medieval economics, the emergence and role of lordship, and the community as an object of demographic study, all of which could directly or indirectly further village community studies. Whilst, in particular, the Selden Society and some of Vinogradoff's students carried on these investigations into the twentieth century, the furore surrounding the village community in contemporary political debates was decisively extinguished by the First World War. Despite the fact that Vinogradoff lived until 1925, scholarly focus had moved on even before his death. This left many interesting and important questions about medieval customary law unexplored.

Maitland and Vinogradoff had showed that study of the village community, the manor, local custom and the common law governing villeins were necessary elements in a full understanding of medieval law and society. They demonstrated that nineteenth-century conceptions of these institutions had many flaws and unfounded assumptions, and cleared the ground for more precise future study. They also effectively set out a research agenda by focusing on the evidence in manorial and common law court records and asking what features could help explain what they saw.

²⁸¹ Letter from F W Maitland to Reginald L Poole, 26 August 1900: 'Of all that I have written that makes me most uncomfortable. I try to cheer myself by saying that I have given others a lot to contradict.' *Letters of F W Maitland*, vol 1 (n 248) 217.

CHAPTER 4

THE VILLAGE COMMUNITY IN THE TWENTIETH CENTURY

Christopher Dyer has described how twentieth-century historical research ignored the village community or gave it 'such small emphasis as to imply that it was of little importance, [so] it is still necessary to provide evidence for the existence of the community and its organisation'.¹ The focus of contemporary politics moved elsewhere, and greater historical precision in any case limited the scope for using history to make grand political claims. The custom of the village community remained largely untapped and little further developed.

This chapter considers relevant developments in method, economic history, and specialised studies making use of the village community in the twentieth century in order to give a sense of its role over a hundred years of scholarship. It focuses on the village community as a *legal* concept. At the same time, extra-legal observations of the village community and the tenor of medieval local life will impact our understanding of law and regulation. For instance, common law court records and treatises give an impression of a local society consisting largely of unfree persons with little economic or social autonomy, under a great deal of lordly oppression. This colours our understanding of local rules – were they really rules, or more like guidelines which all-powerful lords could choose to follow or not? But local records show more nuance in the form of complex, rational, local economies of peasant cultivators, who had access to markets, and social relations spanning a spectrum of free to unfree without a stark divide - this too should affect our understanding of medieval law.

¹ Christopher Dyer, 'The English Medieval Village community and its decline' 1994) 33(4) *Journal of British Studies* 407.

Twentieth-century studies attempted to address the constraints imposed by written evidence: rejecting old preoccupations; asking more questions; and developing new approaches to old ones. However, broad themes remain in the form of the relation between lords and subjects or crown and subjects, the relation between the common law and local custom, communal ideas, and institutions;² and explaining co-operation in relation to shared resource management and agriculture.

A. COMPARATIVE METHODS

Twentieth-century reflections on the fate of historical jurisprudence describe a reaction against generalisations lacking empirical grounding, including village community studies generally. Despite Vinogradoff's improvements on Maine's method and the many insights gained into English legal history from this work, there was no natural heir to the school.³ The line of descent fragmented. From Marc Bloch's description of the field early in the century, to Richard Cosgrove writing at the end,⁴ the intellectual trend was away from universals and towards detailed historical investigation. The cost of this precision, however, was a general loss of the theoretical grounding that had been at the forefront of earlier work. Nonetheless, there are obvious similarities between Vinogradoff's approach and Bloch's more enthusiastically received historical writing, and with comparative work in economic history.

² This factor is reserved for Chapters 5 and 6.

³ See further Brian Simpson, 'The Corpus Chair of Jurisprudence' in idem, *Reflections on the 'The Concept of Law'* (OUP 2011).

⁴ Richard Cosgrove, *Scholars of the Law* (New York University Press 1996).

1) *Marc Bloch (1886-1944)*

In the foreword to *The Historian's Craft*, Marc Bloch is described as putting into practice the sort of history others had only talked about for fifty years. Bloch approved of Seebohm,⁵ Maitland, and Vinogradoff,⁶ and shared the nationalism of many early scholars: the 'Annales school' founded with Lucien Febvre (1878-1956) explicitly sought to distance French historical writing from Germanic style, especially from 1930-1944.⁷ However, it may be that Bloch's strong aversion, even hostility, to German nationalism, culture, and scholarship led him to downplay the impact of the German historical tradition on his thinking.⁸

Like Vinogradoff, Bloch viewed comparative history not as a separate kind of historical writing, but a technique to change historical method – no topic could be understood in isolation, and economics, beliefs, and customs were all relevant.⁹ He thought Coulanges' analytical approach mistaken, and was impressed by Seebohm's retrogressive method, which searched backwards from the best understood sources to the obscure.¹⁰ Comparison could uncover parallels and differences, find sources, and ask how they were to be used.¹¹ Also in alignment with Vinogradoff was Bloch's

⁵ On whom he relied somewhat critically in relation to field systems: Marc Bloch, *French Rural History* (Janet Sondheimer (trs) 1966) xxvii, noting that Seebohm had been misled by Fustel de Coulanges. See Frederic Seebohm, 'French Peasant Proprietorship' (1891) 1(1) *Economic Journal* 59.

⁶ Especially on English lordship: James Ambrose Raftis, 'Marc Bloch' (1962) 24 *Med Stud* 349, 352.

⁷ On the general climate as well as Bloch's approach, see Carole Fink, *Marc Bloch* (CUP 1989), esp. 27-35.

⁸ Stephan R Epstein, 'Marc Bloch: the Identity of a Historian' (1993) 19 *Journal of Medieval History* 273, 278-9.

⁹ Raftis, 'Marc Bloch' (n 6) 350. It is no coincidence that both scholars were invited to lecture at the Institut pour l'Etude Comparative des Civilisations, where in 1929 Bloch delivered the lectures which became 'French Rural History'.

¹⁰ Marc Bloch, *The Historian's Craft* (Peter Putnam (trs), MUP 1954) 45-6.

¹¹ Bloch, *Historian's Craft* (n 10) 86-110; Raftis, 'Marc Bloch' (n 6) 351; Joseph R Strayer, 'Foreword' in *The Historian's Craft* (n 10) iv.

description of law as a formal covering over realities too diverse to be a single subject of study,¹² and his description of European tribal institutions surviving and adapting under Roman rule.¹³ Bloch's comparative history showed the phenomenon of serfdom was so widespread, in so many contexts, that general description was impossible. Instead, he urged the use of detailed local studies to compare individuals and groups,¹⁴ but only after determining the right questions in the context of the broader subject across place and time – a global framework gave meaning to local data.¹⁵ This led him to emphasise that agrarian and economic studies (especially comparative and Europe-wide) were necessary to understand his specialist area of French rural history.¹⁶ Vinogradoff's English villeinage and manorial studies had a similar rationale.

However, early twentieth-century historians increasingly recognised that historians bring their own context and assumptions to the questions asked and answers found. History, therefore, had no place in modern politics, because using it this way ignored the politics of historical actors themselves. Nineteenth-century seekers of universal laws were 'mesmerised' by physical scientific methods, and mistaken, Bloch said. Maitland was right that simplicity in history was impossible: 'we must avoid making our picture too tidy... older societies could accommodate a large measure of confusion and overlapping in their property arrangements... on the ground and in the way they were defined in law.'¹⁷ Formulating universal laws meant either simplistic rational models which excluded too many 'mere events', or scepticism about documentary evidence and disillusionment

¹² Bloch, *Historian's Craft* (n 10) 148-9; Raftis, 'Marc Bloch' (n 6) 356.

¹³ Bloch, *French Rural History* (n 5) 75; idem, *Historian's Craft* (n 10) 171.

¹⁴ Bloch, *Historian's Craft* (n 10) 155.

¹⁵ Raftis, 'Marc Bloch' (n 6) 354-7.

¹⁶ 'Preface' to Bloch, *French Rural History* (n 5) xviii.

¹⁷ Bloch, *Historian's Craft* (n 10) 65-9. See further Edward H Carr, *What is History?* (Penguin 1964); Quentin Skinner, 'Meaning and Understanding in the History of Ideas' in idem, *Visions of Politics* (CUP 2002).

with historical knowledge and progress.¹⁸ For example, a restricted definition of feudalism focused on military tenures narrowed the view, where Bloch preferred to look more broadly at government and political power, and social features.¹⁹ This included the concept of community: whilst there was no written evidence of ‘community’ in pre-thirteenth century French documents, lack of witnesses alone was no proof. Written records were generally seigneurial, not communal, and for centuries, Bloch argued, communal life was carried on *de facto*, without formal legal personality – so in France, legal records were the wrong place to look.²⁰

Like Vinogradoff, Bloch believed the absence of universal laws in history did not preclude all generalisation, but ‘scientifically valid’ history was subject to different impediments than the physical sciences.²¹ It was possible to describe a preliminary ‘evolution’ of society in ‘generations’, and to develop a rational analysis of social change based on the ‘dominant note’ of a period, even if that ‘note’ was irregular.²² It had to be borne in mind that change could be both conscious and unconscious, and that institutions evolved.²³ Nor should historians shy away from multiple causation: that a village could contain multiple seigneuries was ‘in itself sufficient refutation of the idea that the rural community could ever have been completely absorbed by the seigneurie’ – thinking with obvious parallels to Maitland and Vinogradoff’s discussion of vills of multiple lordship in England.²⁴

¹⁸ Bloch, *Historian’s Craft* (n 10) 14.

¹⁹ Michael M Postan, *The Medieval Economy and Society* (Weidenfeld & Nicolson 1972) 90.

²⁰ Bloch, *French Rural History* (n 5) 167-8.

²¹ *ibid* 62; Fink (n 7) 35-37.

²² Bloch, *Historian’s Craft* (n 10) 185-7.

²³ Strayer (n 11) v.

²⁴ Bloch, *French Rural History* (n 5) 168; *idem*, *Historian’s Craft* (n 10) 193.

Bloch's work has been described as a 'three pronged attack' on contemporary historical method: first, identifying the limitations of using fixed categories to demarcate historical concepts where historical actors were unlikely to have used them; secondly, relying on assumption and narrative instead of documents and artefacts; and thirdly, highlighting that evidence itself had limitations that could sometimes not be overcome – for instance the biases of an author or the limitations of a particular perspective. In doing so, he sought to avoid positivistic and teleological tendencies equating history with its conclusions: the notion of 'progress' was unhelpful and inaccurate.²⁵ Whilst Bloch's work has consistently been recognised as ground-breaking in French history and social history in general,²⁶ it did not reinvigorate village community studies or comparative history in England, despite many similarities. An English reaction against romantic Teutonic ideas had set in, which Raftis accused of producing two generations of accurate but conformist English historical writing. Court rolls were not well studied, for instance, because mainstream scholarship prioritised political history to the detriment of social and economic studies. It was not until the 1960s that a wide variety of voices would be heard on the subject again: even in the 1930s, Bloch observed a lack of comparative study in England after Maitland and Vinogradoff. But in manorial studies the comparative method is essential: when Ada Levett described St Albans as an unorthodox landlord, Bloch responded they all were - there was no orthodoxy to depart from.²⁷ Without a clear method and use of comparison, progress in understanding the manor and local custom stalled. Although Bloch saw Michael Postan and Eileen Power as ongoing users of the comparative method, they too failed to inspire a break with

²⁵ Marc Bloch, 'A Contribution Towards a Comparative History of European Societies' (1928) in idem, *Land and Work in Medieval Europe* (John E Anderson (trs), Routledge 1967) 46-7; Raftis, 'Marc Bloch' (n 6) 356.

²⁶ See generally Fink (n 7).

²⁷ Raftis, 'Marc Bloch' (n 6) 353-9. Most manorial studies seem to present the manor in question as 'unorthodox' in some way.

conformity, whether in their own territory of economic history, or in general English historical writing.²⁸

2) *Eileen Power (1889-1940)*

Eileen Power went from one of the best-known medievalists of her time to near-invisibility, and her comparative economic history which engaged sociology and anthropology was discontinued.²⁹ She was determined that social sciences needed to learn to respect each other, as only dialogue would establish the methodology for a ‘science of humankind’.³⁰ Power was never an evolutionist, and was not interested in stadial theories. Instead, she focused on comparing the development of different societies in time and place. This was not intended to form the basis for universal theories, but was designed to produce generalisations – the difference being the lack of claims to universal or inevitable application.³¹ Her approach had much in common with both Vinogradoff and Bloch.³²

Power studied in France alongside Bloch, Charles-Victor Langlois (1863-1929), and Charles Seignobos (1854-1942) in the years preceding World War One. The identity crisis in French historical writing as to German influence, which clearly affected Bloch, seems not to have troubled Power at the time.³³ Instead, it was the literary writing style of Langlois which she

²⁸ *ibid* 362.

²⁹ For a detailed biography, see Maxine Berg, *A Woman in History* (CUP 1996). Power has had some recent attention in Francesca Wade’s excellent *Square Haunting* (Faber & Faber 2020).

³⁰ See generally Eileen Power, ‘On Medieval History as Social History’ (1934) 1(1) *Economica* 13.

³¹ Berg (n 29) 165.

³² I am not aware of any evidence Power and Vinogradoff knew each other, but they certainly had mutual friends in Helen Cam and Ada Levett, moving in similar circles in the 1920s.

³³ Berg (n 29) 59. Power was a couple of years behind Bloch and they shared Langlois as a supervisor. The latter also directed Levett a few years earlier.

internalised from her spell in France. Power used literary vignettes to illustrate empirical research, going beyond direct evidence to imagine the lives of individuals.³⁴ In contrast to the historians dedicated to ‘scientific’ history and exposing the flaws of their narrative historian predecessors, Power embraced some creativity – she thought it essential for turning research into historical writing. Her aim in doing so was to combine the abstract with observation and comparison.³⁵

Power set out a clear methodology in her inaugural lecture at the LSE in 1933. Historians needed a ‘theoretical equipment’ fitted to their subject – a proper historical method was obviously needed for research and data-gathering, but something more was also required: a method of analysis and synthesis. In particular, an economic historian needed an appropriately economic theory, not a legal, institutional, or political one. Approaches including Vinogradoff’s ‘brilliant’ legal historical manorial studies were valuable, but they were not economic history.³⁶ Power chose not to pursue manorial studies or legal or constitutional topics, unlike her contemporaries and friends Ada Levett and Helen Cam.³⁷ However, this limited her scope and sometimes meant over-reliance on other sources:³⁸ for example, her discussion of the peasantry via the vignette of ‘Bodo’ the European peasant relied on medieval French sources and made no use of manorial records.³⁹ And Power was not outside the influence of earlier village community scholarship: like Maine, she understood India as a static, ahistorical society resembling Europe in the Middle Ages, and drew on it to illustrate the latter.⁴⁰ It was China, however, which captured her imagination in the way India had fascinated nineteenth-century writers. Its international connectedness inspired her

³⁴ Berg (n 29) 112-3; 131-3; Eileen Power, *Medieval People* (Methuen 1924).

³⁵ *ibid* 165.

³⁶ *ibid* 17-18.

³⁷ For these writers see Chapters 5 and 6.

³⁸ Berg (n 29) 110-8.

³⁹ *ibid* 131.

⁴⁰ *ibid* 97.

medieval studies and combined with Power's feminist politics to inspire her methodology. She sought an approach which included the women and ordinary people many historians ignored - not nationalistic history, but an international view based on a community of humankind.

Max Weber (1864-1920) and Werner Sombart (1863-1941) had already developed an alternative method for economic history based on ideal types, which had the advantages that it defined and delimited abstraction, and illuminated the distinctive features of each individual type. But the problem with using types was they were apt to confound theory with concrete realities. For example, Sombart's idea that an economic system corresponded with an economic epoch in history involved an unexplained sideways logical step. He used theory not to interpret history but to manipulate the facts, and insofar as an ideal type ceases to be ideal, the method ceases to be scientific.⁴¹ This was the same problem Vinogradoff encountered in his attempt to use types.⁴²

Power's method, like Vinogradoff's, involved combining historical data and theory. Historical research asked questions of sources, looked for connected elements in a society or economy, and compared them in different surroundings or times to identify habitual or 'repeatable' social phenomena. This was to be collated with sociologists' field work, and deductive theories, in order to build a comprehensive picture including universal laws of social behaviour. Abstract economic theory required this contextual grounding to apply and verify hypotheses – as a science concerned with people and social constructs, economics would never be able to reach the level of abstraction in a deductive science like mathematics, nor should it try. In this, Power was aligned with Bloch: 'no one in his senses' ever said social laws would be as logically satisfactory as those of mathematics or physics - both the material and the investigators had disadvantages by

⁴¹ Werner Sombart, *Der moderne Kapitalismus*, 3 vols (Duncker und Humblot, 1902-27); Power, 'Medieval History' (n 30) 19-20. Sombart is not now considered a core social theorist, which is perhaps fortunate in light of his antisemitism and Nazism.

⁴² See Lorren Eldridge, 'Gone and Forgotten: Vinogradoff's Historical Jurisprudence' (2021) 41 *Legal Studies* 194.

comparison. Whilst the formalist and deductive reaction against over-ambitious nineteenth-century history was understandable, it went too far. Universal abstract relations, even if rough approximations, were both possible and useful. Insofar as this resembled Marx's method, Power did not object: Marx had a good combination of induction and deduction - it was his conclusions and materialist baggage which were problematic. Marx had taken a sociological theory and combined it with 'deductive analysis' – historical facts, in order to state general laws correlating social phenomena. Whilst Power did not agree with his interpretation of the facts themselves, the method itself was a sound one, and recognised that history required some guiding theory or model. Marx was also fundamentally committed to the premise (also adopted in functional anthropology) that 'all important institutions and activities can be explained in terms of other social activities... all phenomena are social phenomena'.⁴³

The Middle Ages were, Power said, far enough from the present that contrasts and similarities were clear, and it encompassed a long time period suited to the 'intelligent' use of comparative method examining social change. Medieval historians could also teach other historians to be more alive to the theoretical aspects of their work: they investigated social evolution, culture contacts, and apparent breaches of continuity – the same things that interested sociologists.⁴⁴ Like Vinogradoff, Power believed medieval history was an especially valuable testing ground for this comparative and comprehensive method, and for illuminating modern problems in Russia and Asia. In her League of Nations campaigning, she argued medieval ideas could help twentieth-century politics redirect focus from sovereign state to multiple sovereignty. The political notions of the Middle Ages, even if imperfectly implemented, revealed a lot about the political institutions necessary for people to live in society. Medieval communities showed how small local

⁴³ Power, 'Medieval History' (n 30) 15-6; 21-2.

⁴⁴ *ibid* 22-23.

and functional associations could exist alongside a larger state or governing entity (like the Holy Roman Empire).⁴⁵ This balance of local institutions and a larger state or empire met social needs, and could provide a model for modern thinking.⁴⁶ For all that Power shunned manorial studies, Maitland's ideas about community and corporation had a substantial impact on her, and her ideas prefigured Susan Reynolds' later work. In a context where the debates which had originally stirred the village community debate had faded, Power argued that medieval ideas about community still had much to offer.

3) *Michael Postan (1899-1981)*

Sir Michael 'Munia' Moïsey Postan had a similar background to Vinogradoff: he was educated in Russia and left for political reasons, becoming a British citizen in 1926.⁴⁷ He was Eileen Power's research assistant (later, husband) and a leading economic historian. He was interested in method, pedagogy, and the economy of the Middle Ages, but explicitly not legal history per se. Like Vinogradoff and Bloch, he thought the analytical rigidity of legal concepts tended to distort reality: the 'penalty of being sufficiently concrete to be real is the impossibility of being sufficiently abstract to be exact.'⁴⁸ Postan did, however, make extensive use of legal historical sources.⁴⁹

⁴⁵ Berg (n 29) 165; 201-4.

⁴⁶ Eileen Power, 'A Plea for the Middle Ages' (1922) 5 *Economica* 173, 174-6.

⁴⁷ Edward Miller, 'Postan, Sir Michael Moïsey (1899–1981), Economic Historian' (2004) *Oxford Dictionary of National Biography*; Accessed 6 Oct. 2020. <https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-31563>.

⁴⁸ Michael M Postan, 'The Historical Method in Social Science' (1938) reprinted in idem, *Fact and Relevance* (CUP 1971) 22, 30-2.

⁴⁹ For the impact of Postan's economic history, see e.g. Schofield, 'Population, Resources and the Medieval English Peasantry' in idem, *Peasants and Historians* (CUP 2016).

Postan defended the usefulness of a ‘scientific’ or ‘rational’ method in history through to the 1980s, when the approach had become unfashionable.⁵⁰ The comparative method was essential, but like most theory in history had been forced to become a set of implicit questions in reaction to over-ambitious Victorian work.⁵¹ Eighteenth- and nineteenth-century social, legal, and constitutional history tried to derive useful lessons in politics and philosophy from history. Then historical jurisprudence sought universal laws in history, generating debates about historical relativity and anti-philosophical scepticism. It took several generations to realise the search was futile, because although historians and theorists ‘travel on the same road’ they ‘use different vehicles’ and ‘reach different destinations’. The influence of Postan’s correspondent, Edward Carr (1892-1982) is obvious here: Carr was harsh on nineteenth-century historians’ supposedly factual ‘nonsense’ - an excuse, he said, not to think for themselves under the influence of German protest against moralistic history.⁵²

However, like Power, Postan argued that the prematurity of Victorian attempts did not mean all social science was impossible, or that their imperfect answers did not contribute.⁵³ Victorian law reformers, anti-reformers, legal historians, constitutional historians, and social historians all sought contemporary relevance, and their interdisciplinary approaches usefully introduced new ideas. History combined with theoretical argument was especially useful – much more so than the attempts to use history as substitute for theory Carr criticised. Historians doing so ought to be more aware than most, thanks to the Victorian legacy, of the need to always to stay

⁵⁰ Michael M Postan, ‘Reason in Social Study’ (1948) reprinted in *Fact and Relevance* (n 48).

⁵¹ Michael M Postan, ‘History and the Social Sciences’ (1936) reprinted in *Fact and Relevance* (n 48) esp 20; Postan, ‘Fact and Relevance in Historical Study’ (1968) reprinted in *Fact and Relevance* (n 48) 63.

⁵² Carr (n 17) 4-5.

⁵³ Postan, ‘History’ (n 51) 18-19.

grounded in the complex and the concrete: facts would never yield simple generalisations but offered multiple solutions.⁵⁴

However, twentieth-century historians came to dislike any generalisations, even specifically historical ones. They focused on verifying and correcting, narrowing historical inquiry to minutiae and repudiating all theory.⁵⁵ But any attempt to write medieval history with vision unencumbered by theory, whilst it helped to avoid anachronisms (a particularly common problem in legally trained historians, he said), also meant a lack of proper theoretical engagement with economics, sociology, and demography.⁵⁶ Historians who claimed to ‘just’ study facts without a philosophical framework were unselfconscious about epistemology, not free of it. A ‘garb of fictitious concreteness’ concealed underlying implications, even from the author,⁵⁷ when they implicitly accepted philosophical realism (the idea that human knowledge corresponds to the world objectively and can reproduce it faithfully).⁵⁸ The influence of Power’s thinking on the same lines is obvious here, although Postan had more time to mature his ideas.

One aspect of Postan’s method which was more developed than Power’s was the critical use of sources, which again shows similarities with Bloch’s work. Postan argued that earlier scholars and even some twentieth-century studies insufficiently considered this. For example, medieval extents and surveys were inadequate indicators of population or actual occupation of land because they did not record ‘undersettles’ or sub-leasing arrangements. In some places, there may have been none, but it was at least necessary to cross-check other sources. These documents

⁵⁴ Postan, ‘Fact and Relevance’ (n 51) 48-56, 61-63.

⁵⁵ Postan, ‘History’ (n 51) 16.

⁵⁶ Michael M Postan, ‘Some Agrarian Evidence of Declining Population in the Later Middle Ages’ in idem, *Essays on Medieval Agriculture* (CUP 1972) 208.

⁵⁷ Postan, ‘History’ (n 51) 20.

⁵⁸ Postan, ‘Fact and Relevance’ (n 51) 48.

should not be used alone to make claims about household landholdings, as Kosminsky had⁵⁹ - more generally, it was wrong to assume the history of a document was identical with the history of its subject.⁶⁰ As Bloch said, local studies were crucial: for instance, what looked like unusual practice in 'less manorialised' areas might reflect more accurate records rather than structural differences. Much of what historians saw as social transformation might be optical illusions caused by changing sources and record keeping practices – there was no way of knowing until multiple sources were consulted.⁶¹

Economic theory avoided many evidential challenges by relying on deduction and abstraction, but this came at a price. It tried to 'solve the largest possible problems from the least possible knowledge', such that its conclusions were not necessarily related to experience at all, and were not - perhaps could not - be tested against reality. The appropriate remedy was to combine theory with empirical data and history.⁶² Power despaired of integrating history and economics because of this obsession with abstraction, but Postan suggested a way they could profitably interact.⁶³ Empirical studies could enhance deductive conclusions, not necessarily by testing them, but by supplementing scientific thought on the aspects of social life they abstracted from.⁶⁴ This, again, echoes Vinogradoff's approach without being explicitly derived from it.⁶⁵

⁵⁹ Postan, 'The Charters of the Villeins' in *Medieval Agriculture* (n 56) 144.

⁶⁰ *ibid* 112.

⁶¹ *ibid* 145. Postan limited impact here is evidenced by the continued appearance, even in recent work, of stark statements comparing eastern and western land layouts: Philipp R Schofield, *Peasant and Community in Medieval England, 1200-1500* (Palgrave-Macmillan 2003) 20; 67.

⁶² Postan, 'Historical Method' (n 48) 24-7.

⁶³ Berg (n 29) 164.

⁶⁴ Postan, 'Historical Method' (n 48) 27.

⁶⁵ Eldridge, 'Vinogradoff's Historical Jurisprudence' (n 42).

Because every historical fact is itself a kind of abstraction, something is always out of focus, and over time familiar history takes on new aspects. For instance, Maitland and Vinogradoff may not have known of the existence of some court rolls, charters, or bailiffs accounts studied in the twentieth century, and they may not have even wanted to know about all the demographic data in them, or their use in studying capital formation, or soil and climate.⁶⁶ The Victorian belief that trade and markets were only features of relatively 'advanced' societies also prevented them from seeing industrial specialisation, or the frequent of sales of agricultural surplus.⁶⁷

Vice versa, there were 'ex-facts' relevant to problems which used to be interesting.⁶⁸ For instance, there was an assumption that change best revealed historical process, and that it came in continuous sequences. Evolutionary growth was consistently present in social history: German and Scottish stadial theory, Tylor and Spencer's social evolution, classical histories of legal institutions in Savigny through to Maine, Maitland, Vinogradoff, and most strongly in the dialectical philosophy of history - an attitude to social and historical phenomena which sought to explain them by their relative positions in time. The latter was frequently described as evolutionary, but was an older idea, both more comprehensive (in that it took entire societies as its object), and more unilinear (in that it did not allow for reverse progress).⁶⁹ History, however, need not necessarily be preoccupied with change. Whilst change illuminated the nature of social problems, reversals also had to be examined, as did the adaptation of ideas and institutions to shifting historical environments.⁷⁰

⁶⁶ Postan, 'Fact and Relevance' (n 51) 51-3.

⁶⁷ Postan, *Medieval Economy* (n 19) 206; Postan, 'Charters' (n 59) 117.

⁶⁸ Postan, 'Fact and Relevance' (n 51) 54.

⁶⁹ Postan, 'Function and Dialectic in Economic History' (1962) reprinted in *Fact and Relevance* (n 48) 36-8.

⁷⁰ *ibid* 40-4.

In particular, the idea of a sequence of stages and evolutionary theory had outlived the theory of progress that birthed it by a half-century. The persistent bias towards ‘progress’ enabled historians to (wrongly) assume historical gaps could be filled by interpolation from an evolutionary framework: population was assumed to always increase, capital to always grow, markets to always become more complex, without proper evidence.⁷¹ The German historical school had also bequeathed a nationalistic bias towards particular sources, teaching English disciples to trace their history to German ancestors. The use of ‘native’ English legal records for scholarship emerged during the nineteenth century, but in the twentieth the role of Roman economic and social influences was more readily recognised. Like Vinogradoff and Bloch, Postan argued the Romans did not even seek to displace local tribal government, which continued to conform to ‘ancient tribal customs in all matters legal and social and agrarian’, with Roman structures imposed on top.⁷² When documents became available evidencing eighth- and ninth-century estates, there was no need to rely on dramatic and rapid change and bold politically-driven arguments. The dates of Germanic influence were revised, placing it earlier and embedded in the Roman imperial practice of resettling tribal warriors. This also changed the perceived date at which ‘feudalism’ began, as it no longer entailed a departure from an original free Teutonic democracy.⁷³ Along with this willingness to recognise complexity came the recognition that property and economics ideas did not develop in a linear fashion, and that neither private property nor inequality were absent from the early Middle Ages. Black Death studies based on Victorian historiography and assumptions about the ways servility limited economic choices for peasants, a natural economy lacking markets and trade because it was not sufficiently ‘progressive’, and the inevitability of linear growth in

⁷¹ Postan wrote in 1962: *ibid* 39-40.

⁷² Postan, *Medieval Economy* (n 19) 2-4. This is the same point as Vinogradoff made in *The Growth of the Manor* (2nd edn, 1911) 47: ‘the Romans... recognised the land districts of the Celts and the peculiarities of their grouping on the land’.

⁷³ Postan, *Medieval Economy* (n 19) 83-9.

pursuit of that 'progress' were proved inaccurate.⁷⁴ This in turn undermined the idea of distinct differences between stages.

However, like many other twentieth-century historians, Postan was not particularly interested in discussing the Roman or Germanic origin of serfdom, or legal history, unless it helped explain what economic and social life were actually like.⁷⁵ For instance, the thirteenth-century tightening and definition of legal restrictions on villeins seemed to reflect the opposite of economic reality, which was that villeins had increasingly lighter burdens.⁷⁶ Postan observed:

in the old and unregenerate days of medieval historiography it was generally believed that it was during the twelfth century that the manorial system finally took shape and villeinage became universal. Even an historian so firmly anchored in documentary evidence as Vinogradoff spoke at times of the twelfth century as the period which added the final instalment to the process whereby freemen and sokemen were reduced to serfdom.

This may have happened in medieval legal theory, as lawyers defined a consistent concept of villeinage, and records with legal purposes might have reflected this, but the free population was in practice expanding.

Emphasis on legal status was another legacy of the German historical school, which had focused on it at the expense of examining economic differences, especially since the background and training of nineteenth-century authors tended to be in law and politics, not economics.⁷⁷ However, whilst it was true that some practical differences followed from legal differences, like access to courts, a person's role in local government, and their liability to fines for merchet, the

⁷⁴ A falling economic curve from the mid-fourteenth to late fifteenth century fit the evidence better: Postan, 'Some Agrarian Evidence of Declining Population in the Later Middle Ages' in *Medieval Agriculture* (n 56) 195-6.

⁷⁵ Postan, 'Function and Dialectic' (n 69) 44.

⁷⁶ Postan, *Medieval Economy* (n 19) 166-8.

⁷⁷ *ibid* 135.

economic differences were more significant and largely independent of legal status.⁷⁸ For instance, peasants themselves did not regard status differences as highly as the amount of land cultivated: otherwise why did villagers who could clearly afford to pay for manumission choose not to? The fact that free men were willing to marry villein women to gain possession of their land, even though that might prejudice their personal status, was further evidence.⁷⁹ Another example of the distortions caused by focusing on legal rules was the fact that it was a legal commonplace that villeins could not use charters to transfer land, or possess seals, but the *Carte Nativorum* collected examples proving otherwise in practice.⁸⁰ Whilst villein charters might not have been worth producing in common law courts, they still provided a record which could be produced in informal disputes before neighbours or village arbitrators.⁸¹ Examining only the common law sources occluded this.

This contrast between legal and economic history fit general tendencies: economic historians to assume a gradual dissolution of manorial structure over the same two or three centuries as legal historians assume manorialisation was firming up via development of clearer legal doctrines. Labour services were being extended up until the time of the Hundred Rolls, and then contracted – but nineteenth-century historians did not notice demesne farming and labour services receding in twelfth-century surveys, possibly because the sources known to them made this less obvious. The relevant facts concerning a decline of labour services, then a manorial reaction and increase, had long been known and were often described in local studies: for example by Maitland, Neilson, Kosminsky, Petrushevsky, and Vinogradoff.⁸² Other sources which came to

⁷⁸ Postan, 'Legal Status and Economic Conditions in Medieval Villages' in *Medieval Agriculture* (n 56) 281-5.

⁷⁹ Postan, *Medieval Economy* (n 19) 160-1. This will be discussed further in Chapter 5 below.

⁸⁰ See generally Postan, 'Charters' (n 59).

⁸¹ *ibid* 124.

⁸² Postan, 'The Chronology of Labour Services' in *Medieval Agriculture* (n 56) 89-102.

light in the twentieth century made this clearer, but the persistent Victorian belief in a lack of money economy precluded their investigating the sources they did have with these kinds of questions.

Whilst Postan's work has much to offer on method, it appears to have had little impact on the study of medieval legal history, notwithstanding that he was working within an existing tradition. In 1996, Richard Cosgrove observed that the study of jurisprudence and legal history had matured in the final quarter of the twentieth century after decades of 'untheoretical' study.⁸³ Cosgrove traces the same trajectory as Postan: a growth of a late nineteenth-century analytical trend, followed by criticism and reaction.⁸⁴ The lasting legacy of the Victorian legal history agenda has been the opposite of what was intended: rather than ushering in a new era of legal theory and legal history, their over-enthusiasm for generalisation prompted a conservative and anti-theoretical reaction which has only recently begun to be re-evaluated. Historical jurisprudence in the twenty-first century is, I have argued elsewhere, edging towards an explicit methodology which takes theoretical frameworks developed as abstract philosophies and tests them in the context of history, adapting them or affirming them as appropriate.⁸⁵

B. SEIGNEURIAL AND CROWN PRESSURE

Leading twentieth-century historical writing which did examine village communities was undertaken by the demographically-focused 'Toronto school', and in Rodney Hilton and his students' Marxist studies. These schools developed methods for examining historical records and

⁸³ Cosgrove (n 4) 1-2.

⁸⁴ *ibid* 4-11.

⁸⁵ For a more detailed consideration of the recent resurgence of historical jurisprudence, see Eldridge, 'Vinogradoff's Historical Jurisprudence' (n 42) and citations therein.

village communities, but were often locked in conflict as to whether lordship ought to be a focus (in Marxist accounts, as a source of struggle) or not (giving way to community and family, in the Toronto studies). Seigneurial pressure on village communities could take various forms, including demands for rent, labour, and other services, sometimes backed by implicit or explicit threats of outright violence. Crown pressure, similarly, centred on demands for tax payments in money or goods, and for military and local policing services, and could be exacted through lords with franchises or local royal officials like sheriffs. Whilst these themes are interesting and important, they have limited direct bearing on legal questions, beyond establishing or undermining the independence of local community decision-making. What is relevant is that they kept the study of the village community and of local court records alive in the twentieth century, even when legal historians were not often using them.

The “Toronto school”⁸⁶ of medieval studies focused on detailed court roll study in order to establish, in particular, demographic claims about the medieval peasantry. The school emerged from the work of George Casper Homans (1910-1989),⁸⁷ followed by Father James Ambrose Raftis (1922-2008) and others since. The focus on family, its relationship with land, and the social structures within peasant society has done much to revive an interest both in court rolls as an object of study and in peasant communities. The school has also been heavily criticised for, inter alia, its methodology in seeking to establish demographic data from historical records;⁸⁸ its focus on family ties to the exclusion of other social institutions, especially lordship;⁸⁹ use of narrowly

⁸⁶ The name was not coined by the participants, but by critic Zvi Razi: ‘The Toronto School’s Reconstitution of Medieval Peasant Society’ (1979) 85 P&P 141.

⁸⁷ Homans’ work, whilst it inspired Raftis, was more invested in the community concept itself, and is used as a source of legal material in Chapters 5 and 6: George C Homans, *English Villagers of the Thirteenth Century* (HUP 1941).

⁸⁸ See n 86 above, and Zvi Razi, ‘Family, Life and Village Community in Later Medieval England’ (1981) 93 P&P 3; idem, *Life, Marriage, and Death in a Medieval Parish* (Cambridge 1980).

⁸⁹ Richard M Smith, “Modernization” and the Corporate Medieval Village Community in England’ in Alan R H Baker and Derek Gregory (eds), *Explorations in Historical Geography* (CUP 1984) 155-6.

restricted geographical areas;⁹⁰ and making assumptions about sentiments and mentalities in the peasant family which may contradict the evidence.⁹¹

Criticisms notwithstanding, Homans significantly developed court roll studies,⁹² both methodologically and in encouraging them, and the Toronto school has produced a number of detailed and useful editions (whatever purpose one seeks to use them for) since Raftis' Ramsey study,⁹³ growing the selection in the 1950-60s.⁹⁴ Homans had used a 'structural functional' anthropological framework and saw peasant sentiment as embedded deeply in customary law. Raftis recreated and extended this methodology, and the school placed great emphasis on the harmonious and organic qualities of the village community, in contrast with the class conflict highlighted in Marxist accounts. However, whilst Raftis' early work was directed towards the village community, from the 1980s onwards his and his students' work tended to use court rolls to investigate other topics like urban communities and peasant capital.⁹⁵

Kate Parkin has argued that Toronto researchers realised that earlier historians, particularly legal historians, had (wrongly) tried to reach the medieval peasant via the common law. The latter had focused on the formal aspects of lord and peasant legal relationships and hierarchical distinctions, but those categories were in practice blurred. Similarly, a manorial focus which looked

⁹⁰ *ibid.*

⁹¹ Schofield, *Peasants and Historians* (n 49) 208-9. See also Macfarlane below.

⁹² Homans, *Villagers* (n 87).

⁹³ James Ambrose Raftis, *The Estates of Ramsey Abbey* (Toronto 1957).

⁹⁴ Including James Ambrose Raftis, *Warboys* (Pontifical Institute of Mediaeval Studies 1974); Edwin B DeWindt, *Land and People in Holywell-cum-Needingworth* (Pontifical Institute of Mediaeval Studies 1972); *idem* (ed and trs), *The Court Rolls of Ramsey, Hepmangrove, and Bury, 1268-1600* (Pontifical Institute of Mediaeval Studies 1990); *idem* and Anne R DeWindt (eds), *Royal Justice and the Medieval English Countryside* (Pontifical Institute of Mediaeval Studies 1981); Sherri Olson, *A Chronicle Of All That Happens* (Pontifical Institute of Mediaeval Studies 1996).

⁹⁵ See Edwin B DeWindt, 'Introduction' in *idem* (ed), *The Salt of Common Life* (Pontifical Institute of Medieval Studies 1996) xiv for a summary.

primarily or exclusively to economy and institutions was criticised. Instead, the Toronto researchers cast a wider net, to examine broader social life within the village - although the village was an institution too, with different structures. This involved the unspoken assumption that the common law rules were too rigid to rely on alone as evidence for the variety of activities medieval people actually engaged in: exactly the problem identified by Vinogradoff, Bloch, and Postan.⁹⁶

However, there has been notably little interaction between the Toronto school and traditional legal historiography, which retains many nineteenth-century predilections. Sherri Olson, in a critical review of Razi and Smith's *Medieval Society and the Manor Court*, noted that legal historians' court roll studies (deliberately and consciously) retain the methodology and approach of Maitland, refusing to engage with more 'progressive' themes like the consideration of small peasant farmers.⁹⁷ This is not surprising, as Zvi Razi was a constant critic of the Toronto school: as well as the objection to the demographic analyses already mentioned, he argued that lords and peasants were in constant tension because of their opposing interests – a broadly Marxist approach.⁹⁸ Olson describes an 'ideological determinism' which inhibits the exchange of ideas by ignoring North American scholarship, and almost all women writing on the subject, to assume un-evidenced simple class differentiation and class struggle. Paul Hyams' contribution to the collection was exceptional in this sense, urging a wider range of methodologies, thinking about peasant mentalities, and the contextualisation of village law in broader legal and cultural contexts – but this suggestion was not followed by the other contributors.

⁹⁶ Kate Parkin, 'Courts and the Community' (PhD Thesis, University of Leicester 1998) 14-6

⁹⁷ Sherri Olson, 'Review: Zvi Razi and Richard Smith, *Medieval Society and the Manor Court*' (1999) 74(3) *Speculum* 818, 820.

⁹⁸ Razi, 'Toronto School' (n 86) esp 153-155.

The Toronto school, in contrast to nineteenth-century village community studies, was not particularly interested in lordship. Instead, they considered peasants themselves as capable of both moulding their own society via their social structures, and in turn being moulded by them. Whilst this inevitably takes an under-inclusive approach and leaves out a significant part of the picture, the notion is a valuable one and encourages a more rounded view of the medieval peasantry. For legal history, the villagers' ability to shape and be shaped by their institutions is particularly relevant, as these are often legal institutions. Anne DeWindt made the point concisely when she noted that horizontal (i.e. neighbourly) relationships provided scope for a greater variety of economic decisions: an individual had many more neighbours than they did lords. Horizontal-focused records, like local court rolls, often show a lively, flexible economy with varied opportunities - in contrast to vertical-focused ones which lift an individual out of their web of social and economic relationships and obscure the variety of actions they could and did take.⁹⁹ Schofield has described the same contrasting approaches as a distinction between the institutional view of law as a discrete sub-system, which is beyond the everyday and artificially isolated from it, and law as a process arising from the everyday and responding to particular circumstances.¹⁰⁰ The Toronto studies should encourage legal historians to consider not just how the law (certainly in the sense of customary law, but perhaps also the common law) was shaped from above, by the king, common law and lordship, but also how it was impacted from below, by peasant actions and mentalities.

At around the same time, Rodney Hilton (1916-2002) wrote explicitly Marxist history of peasant communities which was (in some ways) the flipside of Toronto school coin - emphasising

⁹⁹ Anne Reiber DeWindt, 'The Town of Ramsey' in *The Salt of Common Life* (n 95) 63-65.

¹⁰⁰ Philipp R Schofield, 'Peasants and the Manor Court: Gossip and Litigation in a Suffolk Village at the Close of the Thirteenth Century' (1998) 159 P&P 3, 6.

peasant mentalities, but defined by resistance to lordship.¹⁰¹ Hilton and his students showed, for instance, how peasants might group together to act in common law courts to protect their interests.¹⁰² More broadly, the class consciousness Hilton described could crystallise when central authorities demanded tax payments.¹⁰³ But, for Hilton, it was resistance to such demands which created a sense of community, not working together or communal sentiment. Even some of the Toronto researchers saw customary rules reflecting power relations within a community at a particular time and not meaningful communal practices.¹⁰⁴

Hilton saw the common law as a legal machinery for the free, excluding the unfree and abandoning them to the jurisdiction of manorial courts.¹⁰⁵ The common law of villeinage was, for him, part of the general process of landlords resuming direct cultivation of demesnes and taking control away from the labouring class. This, as has been noted, neglects the substantial benefits customary tenants received from their ability to use manorial courts to structure their personal and business interests.¹⁰⁶ But notwithstanding the one-sidedness of this view, the notion of both local custom and common law as a tool for the peasantry to use to oppose those of higher status is one worth preserving - alongside other considerations.

¹⁰¹ For summaries, see Schofield, *Peasants and Historians* (n 49) 108, 210; idem, *Peasant and Community* (n 61) 96.

¹⁰² Rosamond Faith, 'The "Great Rumour" of 1377 and Peasant Ideology', in Rodney H Hilton and Trevor H Aston (eds) *The English Rising of 1381* (CUP 1984).

¹⁰³ Rodney Hilton, *A Medieval Society* (Weidenfeld & Nicolson 1966) 152. This resembles similar ideas in Helen Cam's (un-Marxist) legal historical work, which emphasises the '*communitas villae*' in external accounting: 'The Community of the Vill' in Veronica Ruffer and A J Taylor (eds) *Medieval Studies Presented to Rose Graham* (OUP 1950) 1. Cam's work is discussed in more detail Chapters 5 and 6.

¹⁰⁴ DeWindt, *Holywell-cum-Needlingworth* (n 94); Anne DeWindt, 'Peasant Power Structures in Fourteenth-Century King's Ripton' (1976) 38 *Mediaeval Studies* 236; James Ambrose Raftis, 'The Concentration of Responsibility in Five Villages' (1966) 28 *Medieval Studies* 92; Edward Britton, *The Community of the Vill* (Macmillan 1977) 59. For further discussion see Lawrence Poos and Lloyd Bonfield (eds) *Select Cases in Manorial Courts, 1250-1550* (1998) SS vol 114, p xxv.

¹⁰⁵ Rodney H Hilton, *The Decline of Serfdom in Medieval England* (1969; 2nd edn, Macmillan 1983) 18.

¹⁰⁶ Smith, 'Modernization' (n 89) 173.

Hilton's ideas resemble Maitland's and earlier Romanists': it was oppressive demands which gave rise to community, as people banded together to respond to those demands. This is no coincidence: Hilton's context was a reaction against individualist ideas which, as will be discussed in the next section, were themselves a reaction against nineteenth-century theories of communalism. His account attempted to reorientate the community in a wider social and economic context, rather than viewing them as isolated individuals.¹⁰⁷

C. SHARED RESOURCE MANAGEMENT

An individualist focus was, akin to much twentieth-century history, a reaction against the over-ambitious attempts to use community in Victorian work like Maine's. Christopher Dyer has traced the impact of a line of revisionist works beginning with Maitland, followed by Alan Macfarlane's (1941-) market individualism, then Bruce Campbell's (1949-) focus on landlords, all of which have used economic descriptions to shift scholarly focus away from the community.¹⁰⁸ A final topic for this chapter is how the information available regarding medieval agriculture and economics has developed since the heyday of village community studies, and how it has been used. Whilst this is a substantial subject on its own, this section will attempt to highlight areas where these changes most impact understanding of the legal aspects of the village community.

1) *Individualism and Collectivism*

¹⁰⁷ Smith, 'Modernization' (n 89) 159.

¹⁰⁸ Christopher Dyer, 'Power and Conflict' in Della Hooke (ed), *Medieval Villages* (OUP 1985) 5 Oxford University Committee for Archaeology 27.

Twentieth-century anthropological studies of societies which seem to resemble those of medieval England have offered a wealth of suggestive comparative information.¹⁰⁹ These studies have done much to disprove the assumption pre-industrial and peasant societies were rigid, formalist, and irrational in their approach to law, and to show the blurring of boundaries between formal and informal norms even within systems with regular systems of courts and law enforcement.¹¹⁰ What nineteenth-century scholars would have called ‘primitive’ and irrational has been shown to work well enough in practice.¹¹¹

The anthropologist Alan Macfarlane is particularly notable for his early work on individualism and his use of village community studies. He objected in the 1970s that writing about medieval England misused the term ‘peasant’ because medieval England was too individualistic to be a peasant society. Macfarlane’s arguments, which were at least in part a reaction against the family-focused studies of the sort produced by the Toronto school, held that England departed from the ‘peasant’ paradigm because the economy was not based on community and family: English medieval peasants had quick turnover of land ownership and offices which was inconsistent with this. Eastern Europe had true peasantry: the community was not an association holding common property, as members of the family had no economic share in land, but their membership of the group resulted in the social right to be supported and the obligation to contribute.¹¹²

¹⁰⁹ See, e.g. Max Gluckman, *The Ideas in Barotse Jurisprudence* (1965; 2nd edn, MUP 1972); Ernest Gellner, *Saints of the Atlas* (University of Chicago Press 1969).

¹¹⁰ Susan Reynolds, *Kingdoms and Communities in Western Europe 900-1300* (1984; 2nd edn, Clarendon Press 1997) 13-4.

¹¹¹ Some scholars have taken a similar approach to ‘irrational’ procedures in medieval English law: *ibid* 37; see the chapters by Stephen D White and Jane Martindale in Pauline Stafford, Janet L Nelson, and Jane Martindale (eds), *Law, Laity and Solidarities* (MUP 2001).

¹¹² Alan Macfarlane, *The Origins of English Individualism* (Blackwell 1978) 18.

However, Macfarlane's early work has not generally had a significant influence on historians' use of the term, and there is much to criticise in his claims.¹¹³ Although he sought to depart from the nineteenth-century paradigms, his thinking was still firmly within that tradition, and especially so when he explicitly uses Maitland's and Maine's concepts.¹¹⁴ Richard Smith argued that in using Maitland uncritically, without examining the extent to which he was himself a product of his time,¹¹⁵ Macfarlane erred. He was also accused of making the familiar logical error of assuming that because the law and litigation evidences individualistic behaviour, the economy and larger 'superstructure' were also individualistic. This might have been true, but it was not logically necessary and needs to be proved empirically.¹¹⁶ One response to MacFarlane's individualism has been to argue that his conception of positive law stresses conflict and renders law static, immune to economic or demographic influences and, in its most extreme version, presents villagers living by rules determined by others which they were incapable of changing. But local custom could and did evolve in response to different influences, external and internal.¹¹⁷ Specifically, since Macfarlane seems to assume that common law and customary law are the same, he ignores the potential for more complex rights than common law shows.¹¹⁸ Whilst Macfarlane's arguments did much to disprove the idea of medieval family restraints on land ownership, they did not prove anything further about how people lived in medieval England by establishing that they departed

¹¹³ Schofield, *Peasants and Historians* (n 49) 23.

¹¹⁴ Smith, 'Modernization' (n 89) 160. See, e.g., Macfarlane, *Individualism* (n 112) 186.

¹¹⁵ Maitland's insistence on individualism was too vehement to have been entirely intellectual, as discussed in Chapter 2.

¹¹⁶ Smith, 'Modernization' (n 89) 160-1.

¹¹⁷ Lawrence R Poos and Lloyd Bonfield, 'Law and Individualism in Medieval England' (1986) 11 *Social History* 287, 289; in Poos and Bonfield (eds), *Select Cases* (n 104) xxxii they do exactly this.

¹¹⁸ Poos and Bonfield, 'Law and Individualism' *ibid* 297. The details of the legal records concerning village communities will be discussed further in Chapters 5 and 6.

from his Eastern European peasant paradigm. Further, his own reading of Maitland is now less acutely individualistic and more nuanced.¹¹⁹

Macfarlane also has a definitional objection to the term ‘community’, as a territorial group of people with a common mode of living, striving for common objectives.¹²⁰ He describes ‘community’ as an important myth in highly mobile industrial societies, representing a supposedly stable and tightly knit group from the past. It was developed in the context of nineteenth-century industrialisation as a symbol of nostalgic closeness, quality of life, and values, then cemented by twentieth-century anthropology, social history, and economic history - all of which seemed to evidence these lost communities. Whilst sociology and anthropology make use of the concept of community to demarcate a meaningful area of study, Macfarlane argues that community studies, however useful they might have once been, are nowadays both impossible and undesirable for several reasons - many of which echo earlier concerns.¹²¹ Firstly, the definition itself: different community studies might stress a sentiment of belonging or mentality, or geography – the contrast between the two can be shown by, for instance, comparing the Toronto school with something like Postan’s economic history. Secondly, it is an error to treat a locality as a microcosm of a nation, as Bloch had emphasised. Thirdly, as Power and Postan repeatedly noted, communities are not and should not be treated as geographically and socially isolated. Whilst historical records create the illusion of demarcation, especially legal records confined to one jurisdiction, these records neglect the role of individual mobility and political integration. In any case, legal records use fictions so often that their relation to reality is questionable, and they omit swathes of detail

¹¹⁹ Alan Macfarlane, *FW Maitland and the Making of the Modern World* (Palgrave 2002). See also David Runciman and Magnus Ryan (eds), *State, Trust and Corporation* (CUP 2012).

¹²⁰ In the context of the county, this term has been used without a precise investigation of its: Christine Carpenter, ‘Gentry and Community in Medieval England’ (1994) 33(4) *Journal of British Studies* 340 examines the methodological problems with this.

¹²¹ Alan Macfarlane, ‘History, Anthropology and the Study of Communities’ (1977) 2(5) *Social History* 631, 631-5.

important to the modern observer.¹²² Finally, the perennial problem of the absence of a temporal dimension and a discussion of change has been a problem with functionalist responses to nineteenth-century evolutionary theories using community concepts. Macfarlane's work often suggests problematic dichotomies: setting capitalism against communalism, or legal right against mentality and sentiment. It sits squarely in the twentieth-century pattern: reaction upon reaction, with each school of thought responding at the different end of the spectrum to the one that came before - from generalisation to specificity, from self-direction to oppression and constraint, and from communalism to individualism.¹²³

Macfarlane himself notes the use in sociology of network analysis, or the idea of an 'action-set' – a set of people mobilised in a situation but without a permanent group identity, but his objections to artificial conceptual boundaries in community studies is so great that he thinks they should not be pursued using any concept.¹²⁴ Susan Reynolds (1929-), who shares some of Macfarlane's scepticism about the term 'community',¹²⁵ also considers both these ideas. She finds network analysis more helpful than Macfarlane does in emphasising the interconnectedness of different medieval groups, but also feels it undervalues the role of hierarchy and coercion.¹²⁶ However, she profitably proposes a more constructive use of something akin to an 'action-set', emphasising the flexibility of group membership and interrelation of institutions more subtle than all-or-nothing individualism or communalism. Her starting point is the simple premise that people living in physical proximity tend to form a social group with their own rules and customs, which

¹²² *ibid* 646.

¹²³ Smith has made a similar point: 'Modernization' (n 89) 161.

¹²⁴ Macfarlane, 'Communities' (n 121) 636-7.

¹²⁵ Reynolds, *Kingdoms* (n 110) xii, 2-3.

¹²⁶ *ibid* lxx.

differ from those in other places insofar as the circumstances in which they live do.¹²⁷ Macfarlane's contrast between individual and collective reflects nineteenth-century assumptions, not medieval ideas.¹²⁸

Reynolds' perspective is also at least a partial response to the objection that the word 'community' itself has a tendency to assume the existence of bonds and ties which may not have actually existed amongst participants. The mythical assumptions Macfarlane objects to, which posit a supportive, pre-commercialised entity in the Middle Ages, were prevalent in the 1960s and 1970s. However, Reynolds urges that studying community requires acknowledgement of differences in legal and economic status, motives, and the ability to participate in multiple different communities and social spheres in different guises. The focus on landlords and the growth of government unnecessarily equated the defining of boundaries and jurisdictions with defining communities themselves, as well as neglecting the role lordship and government could play in providing a framework for collective activity.¹²⁹ But to Reynolds, like Gierke, 'community' means a group which defines itself by engagement in collective activities. Reynolds argues these were characteristically determined by less formal regulations like shared values and norms, with many-sided, reciprocal, and direct relationships between participants.¹³⁰ The tendency to focus on vertical bonds like lordship and not to look to horizontal bonds or community is a product of historiographical traditions, not history.¹³¹ Medieval people of all status groups were capable of intelligent and thoughtful management of law and government, and the notion they were not is a survival of tenacious Enlightenment and nineteenth-century 'progress' ideas. Despite all evidence

¹²⁷ Susan Reynolds, *An Introduction to the History of English Medieval Towns* (Clarendon Press 1977) 67.

¹²⁸ Reynolds, 'The history of the idea of incorporation or legal personality: a case of fallacious teleology' reprinted in *Ideas and Solidarities* (Variorum 1995) 1; Reynolds, *Kingdoms* (n 110) xxxviii.

¹²⁹ Reynolds, *Kingdoms* (n 110) 109; 140.

¹³⁰ *ibid* 2.

¹³¹ Reynolds, *Kingdoms* (n 110) xiv-xv, 1.

to the contrary, scholarship often still follows Maine's line from 'barbaric' to 'progressive', awarding 'points' to societies more like ours, rather than recognising that things can be managed differently without teleological development.¹³² Bloch and Power would have agreed with Reynolds that assumptions and a paradigm for the whole of Western Europe based on a handful of early studies is the continued legacy of nineteenth-century English exceptionalist historiography. The strong tradition of lawyers' involvement in English medieval history, and their perception that the common law was peculiar, encourages this.¹³³ Richard Smith also advocated this kind of approach when he urged that Macfarlane's individualism can be described against a backdrop of collectivist institutions creating boundaries on individual behaviour without contradiction.¹³⁴ And, once again, the similarity between this approach and Vinogradoff's description of the village community is striking.

Reynolds believes that the study of medieval society has been consistently distorted by the application of anachronistic legal concepts, particularly in relation to the idea of 'corporation'. In a number of publications in the 1980s, Reynolds argued that no system of medieval law had any formal concept of legal personality before 1300.¹³⁵ The persistent anachronistic use of the concept by historians, including Maitland, derived partly from an incorrectly simplified view of the modern law of corporations, and partly from a determinedly teleological approach which sought hints of the later concept in earlier practice.¹³⁶ We have an understandable and inevitable propensity to interpret unexpected evidence using familiar categories, she said, even when inappropriate – as in the emphasis placed on the use of seals in medieval practice, or overly technical interpretations of

¹³² Stafford et al (n 111) 1-2.

¹³³ Reynolds, *Medieval Towns* (n 127) vii, 10-6; Reynolds, *Kingdoms* (n 110) 7-8.

¹³⁴ Smith, 'Modernization' (n 89) 177-8.

¹³⁵ Susan Reynolds, 'The Idea of Corporation in Western Christendom Before 1300' (1984) *Law and Social Change in British History* 27.

¹³⁶ Reynolds, *Kingdoms* (n 110) xiii. In particular regarding boroughs: *Medieval Towns* (n 127) 97.

words like '*communitas*' or '*universitas*'.¹³⁷ This was echoed by the late Michael Clanchy, an authority on medieval written culture: we cannot start from the belief that lay society and government in the twelfth and thirteenth centuries inherited a formalistic, rigid, or magical idea of law, or that medieval people were somehow 'primitive' and less intelligent and thoughtful than us.¹³⁸ Although twelfth-century philosophers and jurists were beginning to think about hard cases and their implications,¹³⁹ Reynolds argues that nothing stopped any group acting as a legal identity in medieval England as long as they were not subversive or rebellious – many lawsuits evidenced this, and that churches or towns were not thought of as 'more corporate' than other groups because of their more formalised character (including the use of charters and seals). Although Reynolds herself does not claim to be doing so, her account has much in common with Gierke and Maitlands' real personality theory of corporations: her primary objection is the imposition of anachronistic *formal* legal concepts, not the existence of groups engaged in collective action.

Like Vinogradoff, Reynolds thought medieval governments could make use of the strong tendency to associate, and that a centralising government and local association could co-exist. The twelfth-century law as practised was much more flexible than often portrayed, especially as it was often unwritten customary law able to make subtle distinctions in different factual scenarios, with older practices surviving alongside new.¹⁴⁰ Without a concept of binding precedent or writing to cement forms of words or expression, customary definitions and decisions could not become authoritative. Only with twelfth- and thirteenth-century centralisation of government was there a sufficient monopoly of law enforcement, and procedure for recording enacted law and legal

¹³⁷ Reynolds, 'Corporation' (n 135) 28-31; Reynolds, *Medieval Towns* (n 127) viii, 103-112.

¹³⁸ Michael T Clanchy, 'Medieval Mentalities and Primitive Legal Practice' in Stafford et al (n 111) 83. Clanchy disagreed with Reynolds' connection between literacy and intellectual development, however: 85.

¹³⁹ Reynolds, 'Fallacious teleology' (n 128) 8-9 considers development of the concept amongst, first, canon lawyers, then secular lawyers.

¹⁴⁰ Stafford et al (n 111) 5-10.

decisions, to start distinguishing law from social or moral rules.¹⁴¹ This entailed more formal punishments for crime, more structured legal assemblies and jurisdictions, and an increased legislative pace.

Thirteenth-century lawyers began to develop a theory that governmental functions in general could only be exercised by royal delegation. Definition emerged from this, at first inconsistently – for example, the Quo Warranto proceedings did not distinguish individual and church franchises, and the first English charters of incorporation appear to be a response to mortmain legislation.¹⁴² Only once this became standardised through repetition was there any kind of consistent concept of legal personality at common law.¹⁴³ The increase in medieval scholarly interest in the common law may have also threatened the evidential role and validity of collective judgments: reliance on collective memory and oral recollection was insufficiently certain or definite for those attempting to write authoritative statements of law, like Bracton. The result of this need for certainty may be seen, for example, in the development of tests of villeinage Vinogradoff examined.

Overall, the modern law on legal personality had been shaped less by advances in legal concepts or theories, and more by rules devised over time by lawyers and governments to meet practical needs. It was a feature of a professionalised legal system which diverged more from social norms than the looser customary practices that pre-dated it, and effectively constrained and limited group activity by setting boundaries to what unincorporated groups could do.¹⁴⁴ It was not the intellectual search for definition which led to a decreased role for custom, but the practical needs

¹⁴¹ Reynolds, *Kingdoms* (n 110) 14-6.

¹⁴² Reynolds, 'Corporation' (n 135) 30.

¹⁴³ *ibid* 32.

¹⁴⁴ Reynolds, 'Fallacious Teleology' (n 128) 11.

of church and king: custom undermined their attempts to reform, raise taxes, or protect their interests.¹⁴⁵ Local custom had served, at least in part, to prevent over-exploitation of local communities: for example, the *monstraverunt* writ enabled villein sokemen on ancient demesne manors to assert custom in resisting any attempt to increase their services.¹⁴⁶ The ability to limit outside interference which threatened the community was one of the core purposes of custom in a commons system,¹⁴⁷ and the medieval kings' need to reduce that power by focusing on, inter alia, formal legal personality instead of customary groupings indicates that it was succeeding in doing so.

All of this continues to reflect a Gierkean 'real personality' theory of corporations, continuing the work Maitland began in exploring the limitations of a 'fiction theory' of personality.¹⁴⁸ Seigneurial demands for tributes and concentrated settlements with open fields were evidenced, as were economic differences between individuals of the same legal status, the family and social structures identified by the Toronto school, and some of the features modern anthropologists saw in peasant societies - but the link between these features and the existence of community was not dependent or necessary.¹⁴⁹ We ought not to fall into the trap of the idea of a 'top-down diffusion of rationality' - similar to what has been called elsewhere the 'dumb peasant' argument,¹⁵⁰ by requiring external or state recognition and organisation of collectivities where groups were both capable of organising themselves and demonstrably did so.

¹⁴⁵ Reynolds, 'Corporation' (n 135) 39-46.

¹⁴⁶ Frederick Pollock and Frederic W Maitland, *The History of English Law Before the Time of Edward I*, vol 1 (2nd edn, CUP 1905) 410.

¹⁴⁷ See Elinor Ostrom, *Governing the Commons* (1990; 2nd edn CUP 2015), and below.

¹⁴⁸ Reynolds, 'Fallacious Teleology' (n 128) 20.

¹⁴⁹ Reynolds, *Kingdoms* (n 110) xxxvii-xxxviii, citing e.g. Chris Wickham, *Framing the Early Middle Ages* (OUP 2005).

¹⁵⁰ Carl Dahlman, *The Open Field System and Beyond* (CUP 1980) 38-42.

A recent publication, focused on 700-1000AD across Western Europe, well illustrates the ongoing impact of Reynolds' ideas. The first chapter of *Neighbours and Strangers* sets out a number of enquiries to be pursued in understanding the early medieval community. The authors 'have no sympathy with... teleological views that see the early medieval residential group as the prototype of the late medieval and early modern structured community' – a reflection of an inversion of ideas since Victorian attempts to use 'primitive' society to illustrate 'progressive'. Further, the authors argue that early medieval community studies have been constrained by 'national preoccupations' like the Norman Conquest, and by over-attention to (classical) legal history at the expense of observation of social practice in legal and other sources.¹⁵¹ There is much here that even Vinogradoff would agree with, but it broadly summarises a shift away from attempts to read backwards in time where evidence is not forthcoming, although for the early medieval period results often remain lacking due to evidence constraints.

If the historian asks not what defined group personality but what groups actually did in society, it was clear that they acted in what would later be called corporate legal capacities long before the formal concept entailing charters and sovereign recognition existed. Political ideas and assumptions were based on law and custom long before 1066, wherein order and hierarchy were prescribed, and the exercise of authority was both sanctified and proscribed.¹⁵² Once nineteenth-century preoccupations with equality and Germanic liberty were dismissed as fictional, it was possible to see divisions and disunity as perfectly compatible with general collective action and self-government.¹⁵³ One of the most obvious (but by no means exclusive) areas in which this is all evidenced is collective agriculture.

¹⁵¹ Bernhard Zeller et al, *Neighbours and Strangers* (MUP 2020) 1-3.

¹⁵² Reynolds, 'Medieval Urban History and the History of Political Thought' in *Ideas and Solidarities* (n 128) 3. Reynolds also noted there was more pre-twelfth century evidence than often supposed: *Kingdoms* (n 110) xlvi.

¹⁵³ Reynolds, *Kingdoms* (n 110) xl.

2) *Developments in Understanding Common and Open Field Farming*

It is now broadly recognised that village community legal arrangements were intimately linked with common field management and collective efforts to farm and graze large stretches of land, and that questions about law in the village community cannot be answered without engaging with the economic and social structures – as Vinogradoff argued. As John Beckerman put it:

The medieval English manor court was much more than a mere court of law. It was an organ of administration, not only of justice, but also of an economic routine centred on the manor and of a social order centred on the village. This legal-administrative dualism has long been a stumbling-block for historians, who traditionally have dissociated the various spheres of the court's influence.¹⁵⁴

Twentieth-century economic models of common field farming developed substantially, but this has thus far had minimal impact on legal history or medieval history generally.¹⁵⁵ An exception is in respect of the peasant land market, including the works of Postan,¹⁵⁶ Hyams,¹⁵⁷ and most recently Rosamond Faith's exploration of peasants' ability to determine their own fate both before and immediately after the Norman Conquest.¹⁵⁸ The characterisation of this market has been shaped by the authors' positions on the recurring theme of the presence or absence of capitalist mindsets, and whether that was a strengthening or dissolving force acting on societal bonds.¹⁵⁹

¹⁵⁴ John Beckerman, 'Customary Law in English Manorial Courts' (DPhil Thesis, University of London 1972) 273.

¹⁵⁵ See the discussion in Schofield, *Peasants and Historians* (n 49) 256; *Peasant and Community* (n 61) 118-133.

¹⁵⁶ Postan, 'Charters' (n 59) 107.

¹⁵⁷ Paul Hyams, 'The Origins of a Peasant Land Market in England' (1970) 23(1) *The Economic History Review* 18.

¹⁵⁸ Rosamond Faith, *English Peasantry and the Growth of Lordship* (Leicester University Press 1997); idem, *The Moral Economy of the Countryside* (CUP 2019); Debby Banham and Rosamond Faith, *Anglo-Saxon Farms and Farming* (OUP 2014).

¹⁵⁹ Schofield, *Peasant and Community* (n 61) 73.

There are several key areas of economics scholarship bearing on the village community and its legal aspects. Firstly, the dating of key periods of development has shifted substantially later than in Victorian scholarship. Secondly, early models proposed by Seebohm and Vinogradoff to explain the intermixture of strips in the open fields have been rejected. Thirdly, the open field system was not as economically inefficient as early scholars believed, due to the existence of markets for various goods and services, and a focus on minimising risk for the whole agrarian unit rather than maximising individual gains. This altogether presents a more complex picture of the rural economy, and with that complexity comes the recognition of a realm of peasant autonomy and their inevitable need for regulation, dispute resolution, and compensation for wrongs.

It is important to bear in mind when considering agriculture that, whilst it was an important and visible aspect of the village community, it was not a necessary or sufficient condition for it. Whilst more people appear to have lived in nucleated villages and places with tightly regulated agriculture in the twelfth and thirteenth centuries than earlier, it does not follow that there was no community or collective activity in the tenth and eleventh centuries. This could take the form of regulation of commons without open fields, or collective action in other forums like the parish.¹⁶⁰

a) Dating Agricultural Systems

The prevailing view was once that the village emerged in the fifth century, and the manor not until the ninth or later. Open fields were supposedly introduced by post-Roman Germanic invaders before the Norman Conquest. However, developments in twentieth-century place name studies, archaeobotany, and archaeology more generally have offered many new kinds of evidence

¹⁶⁰ Reynolds, *Kingdoms* (n 110) 107-11.

as to medieval life. It is now known, for instance, that Roman Britain left a developed and functioning system of agriculture.¹⁶¹

The most successful twentieth-century account of field systems is that of Charles and Christabel Orwin.¹⁶² It is now believed that the common field system of crop rotation and close regulation was not functioning in England until well into the Saxon period, and according to some not until after the Norman invasion.¹⁶³ Development was also uneven across different localities: for example, some thirteenth-century villages in Sussex developed a mature open field system at the same time as other Sussex and Kent villages were enclosing.¹⁶⁴

The increased use of open and common field farming in England in the late medieval period has been connected with plough changes, population growth, and certain types of grain, but causal connections between these factors remain unclear. For instance, larger ploughs required more livestock and potentially more families working together to afford them, which in turn encouraged settlement nucleation. But nucleation might also have been encouraged by population growth and land pressure, generating the need for co-operative agriculture, larger ploughs, and more livestock to work them. Population changes seem particularly influential, and both Macfarlane and Postan emphasised the extent to which marginal land was in cultivation by the end of the eleventh century, but declined in quality with economic consequences in the thirteenth. Postan argued that lesser quality soil was not generally in cultivation until the late twelfth or early

¹⁶¹ Christopher Dyer, 'The Past, the Present and the Future in Medieval Rural History' (1990) 1 *Rural History* 37.

¹⁶² Charles S Orwin and Christabel S Orwin, *The Open Fields* (1938; 2nd edn, Clarendon Press 1954). See also Jan Z Titow, *English Rural Society 1200–1350* (Allen and Unwin 1969).

¹⁶³ See generally Richard C Hoffmann, 'Medieval Origins of the Common Fields' in William N Parker and Eric L Jones (eds), *European Peasants and Their Markets* (Princeton University Press 1975) 35.

¹⁶⁴ Deirdre N McCloskey, 'The Persistence of English Common Fields' in Parker and Jones (n 163) 90.

thirteenth century,¹⁶⁵ and that late thirteenth-century population growth made margins tighter, whereas prior to that a small population would have meant more surplus for less intensive effort.¹⁶⁶

The connection between manorialisation and this mode of agriculture remains an active topic. Archaeological evidence indicates common field systems emerged first and most densely in Northern France, Flanders, and southwestern Germany - also areas with early manors – before spreading along the same geographical lines of adoption as the manorial system.¹⁶⁷ Local ‘lords’ may have had a role even before manors: military or family leaders would have found it easier to control and exploit a concentrated populace providing them with sustenance. These large ‘multiple estates’ are seen by some as the antecessors which broke up into smaller manors in the ninth to eleventh centuries.¹⁶⁸ Nonetheless, it is clear changes like this need not be lord driven, and that peasant cultivators were capable of arranging and changing field layouts and crops themselves.¹⁶⁹

Recent scholarship, which is not unanimous but is at least ‘much closer to consensus on the general processes’¹⁷⁰ holds there is archaeological evidence for open fields (but not necessarily common fields) in some parts of England by the end of the Saxon period, but so far there is little evidence for earlier open fields.¹⁷¹ By the thirteenth century, however, these field systems can confidently be seen across the midlands and much of the east of the country in written evidence.¹⁷²

¹⁶⁵ Postan, *Medieval Economy* (n 19) 17, 24-6.

¹⁶⁶ See generally Banham and Faith (n 158) esp. Chapter 12.

¹⁶⁷ Hoffmann (n 163) 27.

¹⁶⁸ Dyer, ‘Past, Present and Future’ (n 161) 37.

¹⁶⁹ David Hall, *The Open Fields of England* (OUP 2014) 193.

¹⁷⁰ Mark Bailey, *The English Manor c. 1200-1500* (MUP 2002) 11. See generally George C Homans, ‘The Explanation of English Regional Differences’ (1969) 42 *Past and Present* 30; Hoffmann (n 163); Hall (n 169).

¹⁷¹ Christopher Dyer and Philipp Schofield, ‘Recent work on the Agrarian History of Medieval Britain’ in Isabel Alfonso (ed), *The Rural History of Medieval European Societies* (Brepolis 2007) 21, 28; see generally on this topic Banham and Faith (n 158) esp. 295.

¹⁷² Tom Williamson, *Shaping Medieval Landscapes* (Windgather 2003) 89.

Strict Victorian definitions of ‘the common field system’ requiring uniform, wholly symmetrical systems covering village lands in their entirety, with all holders commoning on communally managed stubble, waste, meadow, and pasture in collective ownership, will find very few qualifying places in the early Middle Ages. This is not to say that some land was not communally managed as early as the Anglo-Saxon period: rather that, despite some communal management, the comprehensive system of management of the entire land of a village, with common pasture and crop rotation entirely under communal management known as ‘common field farming’, is not evidenced in eleventh-century archaeology or surviving documents.¹⁷³

Territorial communities nonetheless had a role to play in land management before the Norman Conquest, with evidence of large commons and intercommoning.¹⁷⁴ The use of strip fields also pre-dates full common field farming, as early as the seventh century on the continent and certainly pre-Norman Conquest in England.¹⁷⁵ Some areas, particularly East Anglia and Kent, later made use of commons and intermixed strips, but on looser and less strictly regulated models, even in later periods.¹⁷⁶ The three field, more tightly regulated system therefore represents a transition from less intensive methods, not a new introduction.¹⁷⁷

In the eleventh century, Domesday Book may be understood as describing holdings in loose arrangements, probably with ad hoc neighbourly agreements rather than communal

¹⁷³ Postan, *Medieval Economy* (n 19) 61-2.

¹⁷⁴ Banham and Faith (n 158) 170-80.

¹⁷⁵ *ibid* 269-78.

¹⁷⁶ Howard Levi Gray, *English Field Systems* (HUP 1915); Williamson (n 172) 9.

¹⁷⁷ Postan, *Medieval Economy* (n 19) 62; Banham and Faith (n 158) Chapter 13.

management in open fields, as Maitland said.¹⁷⁸ However, twelfth- and thirteenth-century population growth may have necessitated more careful control of land in order to support the populace and prevent overexploitation.¹⁷⁹ It is in this period that evidence of strict communal control of agriculture starts to appear in written sources (in any case written evidence is more limited before the thirteenth century), with full regulation of cropping developing slowly from such ad hoc arrangements between the cultivators of adjoining strips.

The earliest written example of common stubble pasturage in Normandy, for instance, comes from 1214. Arable expansion in England reduced pasture resources, and the earliest written evidence of village-wide crop management in England comes from 1156/7, with communal control of stubble pasture a thirteenth-century phenomenon. It seems there was little need for village institutions regulating agricultural practices earlier than the manorial courts, as some Victorian scholars argued.¹⁸⁰ Once they began to appear there is evidence of a swift increase in the extent and severity of communal restrictions on individual management of land. It may be that, because farmers had sacrificed their permanent rights to graze on (good quality) large areas of common in return for poor grazing on the fallow and stubble, it was imperative that the incentive for doing so (increased arable) was protected, hence increased regulation.¹⁸¹ The incentives for doing so have been a lively topic of investigation in twentieth-century economics scholarship.

b) Commons Regulation

¹⁷⁸ Frederic W Maitland, *Domesday Book and Beyond* (Cambridge 1897) 187-8.

¹⁷⁹ Postan, *Medieval Economy* (n 19); Macfarlane, *Individualism* (n 112) 4, 123-130.

¹⁸⁰ Joan Thirsk, 'The Common Fields' (1964) 29 *Past and Present* 3, 17.

¹⁸¹ Hall (n 169) 192.

Control of common pasture was the core role of communal regulation in medieval agriculture. There was an intimate connection between the limited supply of pasture and the land used for arable in common field systems: oxen needed pasture to eat, since there was a limited market for hay and fodder, and peasants needed oxen to plough and grow crops, as well as using their manure as fertiliser. The opening of fields for pasture was likely a simple economic necessity due to limited (but not non-existent) access to markets for fodder, and not a reflection of a deeper communal mentality.

It followed from the fact of common pasturing, however, that ‘if the right of pasture was to be enjoyed by all and shared equitably [because everyone needed to graze their animals] there would have to be communal control, field-wide if not village-wide.’¹⁸² This supposedly prevents the ‘tragedy of the commons’ described by Hardin in 1968. In a situation where farmers can place animals on pasture at their discretion, the benefit from placing more of one’s own animals will always outweigh the negative impact to oneself of overstocking, since that immediate negative impact is shared amongst all users, and the positive impact accrues to the farmer alone. The solution, according to Hardin, was to impose mutually agreed upon and enforced coercion on those who abused the commons.¹⁸³

Whilst Hardin’s arguments have been widely influential, they are not evidence based. They overlook that commoners were not generally careless as to use of their resources, and that they tend to develop a rich variety of institutions and community sanctions restraining and stinting use, preventing the ‘tragedy’ with little need for coercion.¹⁸⁴ Elinor Ostrom’s modern analysis of

¹⁸² Ault, *Open Field Farming in Medieval England* (Allen & Unwin 1972) 15.

¹⁸³ Garrett Hardin, ‘The Tragedy of the Commons’ (1968) 162 *Science* 1243-7.

¹⁸⁴ During enclosure, supporters of the commons argued that they were governed by established norms regulating use meaning that tragedy was not inevitable: Nathaniel Wolloch, ‘Before the Tragedy of the Commons’ (2018) 19 *Theoretical Inquiries in Law* 400.

enduring commons management identified empirical examples, and drew attention to the concrete forms of political activity and practices underpinning commons.¹⁸⁵ Dagan and Heller have also argued that law can provide the infrastructure for a liberal commons – i.e. a commons within which law facilitates co-operation whilst also ensuring that exit is possible, and supply anti-opportunistic devices to reassure commoners that they will not be abused when they cooperate. This is law not as a prominent means of coercion but as a set of background rules: not overtly manifest, but functioning as a safety net. Commoners will often not need to deploy law against each other because it is seen as unneighbourly, costly, and largely unnecessary. Instead, informal social interactions govern their relations, which according to Dagan and Heller, are law-like but not comprised of formal legal rules.¹⁸⁶ There are also the inherent goods that come from cooperation: people like working together. These economic and social values tend to reinforce each other, although they can also conflict.¹⁸⁷

All of this reflects the attitudes found in Vinogradoff and Reynolds, albeit phrased in very different technical language. These studies highlight the importance of the rules within communities which use commons, and the interrelationship between law and economics there. They can also provide theoretical frameworks to test against historical commons in pursuit of historical jurisprudence, as Postan suggested. Any truly comparative approach will need to consider these economic explanations in order to fully understand the history and concept of customary law.

¹⁸⁵ Ostrom (n 147).

¹⁸⁶ Hanoch Dagan and Michael Heller, 'The Liberal Commons' (2001) 110 Yale LJ 549, 578. As Chapter 5 will discuss, there are good reasons for allowing that these rules are not just law-like but customary laws.

¹⁸⁷ *ibid* 572.

c) Open Field Agriculture as Risk Mitigation

Modern economic scholarship rests on a different understanding of the motivations for using an open field system than the arguments considered in Chapters 1-3. The evidence is that, in an economy with limited access to markets and external pressure from landlords to pay dues, peasant landowners rationally chose to minimise risks rather than maximise efficiency in the form producing maximum volume. This presents peasants as rational, self-determined actors, and conflicts with the earlier model of ‘automatism’ as to custom, as well as with more recent scholarship focusing on oppression by lords. It also presents the intermixture of strips as having a different rationale (risk reduction) from commoning (maximising resource efficiency), consistent with the modern understanding that the common field system likely developed gradually rather than all at once.¹⁸⁸

A Victorian view continued into the twentieth century in Postan’s work was that scattering of strips in arable fields derived from agricultural cooperation, where there was an ethical requirement that every participant should have a share of good and bad land.¹⁸⁹ This reduced productivity gains (for example, from economics of scale and simpler logistics), and this was a key factor in the Victorian view that common field agriculture could not possibly have been economically efficient, and that its use must have been driven by non-rational factors like community sentiment.

However, it is questionable how great a sacrifice this entailed. It has long been argued that the physical inconvenience of strip scattering was a key factor in reducing productivity and

¹⁸⁸ For further discussion see e.g. Faith, *English Peasantry* (n 158) esp. 146, 219-37.

¹⁸⁹ Postan added that the requirement might also be logical: *Medieval Economy* (n 19) 54.

inconveniencing holders: it was difficult for any single cultivator to look after their own land, having to move constantly from one place to another and being dependent on their neighbours for good results - and large ploughs are not easily moved from place to place. But this has been overstated: the number of strips set out as separate plots was likely often lower than the number in written records, because, for instance, they might lay very close together separated by only one small strip, and so effectively form one large plot.¹⁹⁰ As far as inconvenience in ploughing is concerned, if a days' ploughing consisted of one strip of approximately one acre, there would be no inconvenience in moving between strips: animals would return to the village each night and begin the next strip the following day.

Some inefficiency was generated by neighbourhood effects: bad neighbours whose actions affected neighbouring plots by seeding weeds, for example.¹⁹¹ Village by-laws were often focused on mitigating this. For instance, the long boundaries of the strips were not always measured exactly¹⁹² and it is unsurprising to find that disputes among neighbours were frequent¹⁹³ - but there was practice for dealing with such disputes. It has been estimated that, overall, common field farming reduced agricultural productivity by approximately ten percent: as the Victorian scholars said, it is difficult to imagine farmers living on very small margins would sacrifice so much – unless there was some 'compensating advantage', sentimental or otherwise.¹⁹⁴

¹⁹⁰ Both Seebohm and Vinogradoff noticed this: *Villainage in England* (Clarendon Press 1892) 246; Frederic Seebohm, 'Villeinage in England' (1892) 7(27) EHR 444, 464.

¹⁹¹ McCloskey, 'Persistence' (n 164) 76.

¹⁹² Vinogradoff, *Villainage* (n 190) 232; idem, *Growth* (n 72) 176.

¹⁹³ Seebohm described the system as 'contrived as though purposely to make agriculture as awkward and uneconomical as possible': *The English Village Community* (1883; 4th edn, Longmans, Green 1890) 16.

¹⁹⁴ McCloskey, 'Persistence' (n 164) 88

Postan described the tendency to attribute the persistence of common field farming solely to custom or habit as ‘crude’. Another factor was lack of ability to invest, or lack of investment in innovation rather than quantity of labour or livestock.¹⁹⁵ More importantly, a key concept in modern explanations of common field farming is the desire to insure against agricultural risks.¹⁹⁶ Vinogradoff was well aware of this idea, notwithstanding his emphasis on communal sentiment. In any field there were sections of better quality, with richer soil, or being better drainage, for example, and intermixture spread benefits as well as risks like stony soil or poor drainage. This explanation was ‘wide enough to meet the requirements of cases placed in entirely different local surroundings and historical connexions’. It needed to be, because ‘the tendency towards an equalising of the shares of the tenantry is equally noticeable in England and in Russia, in the far west and in the far east of Europe’.¹⁹⁷ Each peasant landholder had a diversified ‘portfolio’ of strips which varied in quality but amounted to a roughly equivalent asset to peasants of similar wealth. The volume of crop output would be smaller than from consolidated holdings, which would benefit from economies of scale, but was more stable and less exposed to the risk of complete crop failure. Other factors eventually reduced the need for risk mitigation within the field system: seventeenth-century disease resistant crops, for example, the use of water meadows to control drainage, and the development of more reliable fodder crops. All eventually reduced the variability of agriculture output, and so reduced incentives for intermixture.¹⁹⁸

The overwhelming conclusion from twentieth-century research on farming is that the use of commoning and intermixture of assets was not purely traditional or automated: the availability

¹⁹⁵ *Medieval Economy* (n 19) 47-56. Possibly this was another reflection of risk-averse attitudes: new methods might fail, but old methods were known variables.

¹⁹⁶ McCloskey, ‘English Open Fields as Behavior Towards Risk’ (1976) 1(2) *Research in Economic History* 124; idem, ‘Persistence’ (n 164); idem, ‘The Prudent Peasant’ (1991) *J of Econ Hist* 343.

¹⁹⁷ Vinogradoff, *Villainage* (n 190) 236.

¹⁹⁸ McCloskey, ‘Persistence’ (n 164) 114-8.

of other options indicates it was a conscious choice. It has also clearly demonstrated what Maitland denied, that a range of rational choices and decision making were involved in the creation and management of this system of agriculture. This directly connects to the importance of regulations in village by-laws and the rules enforced in manorial courts.

D. CONCLUSION

Before proceeding, a tentative attempt to define the ‘village community’ as an object of study in the twenty-first century will be made – clearly, it does not carry the same implicit understandings as it did in the nineteenth, or even in much of the twentieth century. The twentieth- and early twenty-first century studies summarised in this chapter demonstrate several things pertinent to the study of local custom in medieval law. Firstly, the value of the comparative method is still clear, and essential when dealing with a concept susceptible to so many local variations as custom. This method has come a long way from Maine’s enthusiastic generalisations, and its explicit and careful use is required in order to avoid falling into well-worn traps. Second, historical work has remained attuned to the respective roles of individual and communal action, and of the importance of the relation of landlord and tenant, even as it has moved away from a village community focus. These insights can and should be profitably re-integrated into the legal historical picture. Rather than placing a boundary around a geographical area and calling it a community, we should be examining the structures of power, identities, interdependence and other condition which conditioned the collective responses of localities.¹⁹⁹ In particular, there remains a great deal of scope to engage with village communities as ‘unincorporated’ groups with legal importance, as even Maitland was well aware. Finally, it is now well established that economics and legal regulation were inextricably intertwined in local society in medieval England, and yet the insights of economic

¹⁹⁹ Reynolds, *Kingdoms* (n 110) 378-9.

historians and theorists have not yet been made use of in understanding the legal aspects of medieval agriculture.

The ‘village community’, was a Europe-wide phenomenon, and the term has been used to refer to a geographical, social, economic, or legal phenomenon – and most often indicates a combination of those elements. Collective activity in relation to agriculture is clearly evidenced in many places by the thirteenth century, as written records proliferated at that time. Village communities involved a relation between lordship and tenantry which might be positive or negative but was clearly hierarchical and structured by custom. The term is very often also used to include the management of commons and local field systems, with the former more clearly evidenced by the thirteenth century. Addressing these issues in more detail requires a great deal of academic work, but the final two chapters of this thesis attempt to demonstrate some of the possibilities in doing so by focusing on what continues to be the key element constituting this group as a ‘community’ and not merely a geographical settlement: the ability and desire to engage in self-government at local level. This was most clearly demonstrated, as far as written records show, in respect of legal jurisdiction and local courts.²⁰⁰

²⁰⁰ Reynolds, *Medieval Towns* (n 127) 119.

CHAPTER 5

CUSTOMARY LAW IN LEGAL HISTORY

This chapter will explore the extent to which customary law had a recognised place within the early common law, and interacted with it. The rules developed by royal courts primarily governed the lives of the powerful, especially focusing on military tenures, and rarely provided rules applicable to day-to-day peasant life. Instead, each local court had varied rules applying in that specific village, manor, parish, or county, with patterns and consistent approaches often shared across these contexts. A number of publications since the 1980s have explored the relationship between medieval local custom and the common law from the latter's perspective, adopting a legal positivistic approach to what constituted 'law' and legal rules by focusing on material derived from sovereign authority. Some of these questions have also been addressed by historians not specialising in law, as Chapter 4 demonstrated. When used together, these works constitute a valuable picture of the local community in medieval English law, its role as a legal institution, and the nature and content of the customary law created within it.

Self-government and law creation by the village community with both local and wider effect substantially qualified the supposed status of the unfree as non-existent for common law purposes. As already noted, *Glanvill*¹ and *Bracton*² said villeins had no legal status in respect of their lords, could be bought and sold, had no rights of any sort, could not inherit, and could not challenge their lord in common law courts.³ This concealed the reality that villein lives were not governed exclusively by lordly whim, and that royal courts did not generally interfere with manorial

¹ Derek Hall and Michael T Clanchy (eds), *The Treatise on the Laws and Customs of the Realm of England, Commonly Called Glanvill* (Clarendon Press 1993).

² Henry de Bracton, George E Woodbine, and Samuel E Thorne, *Bracton on the Laws and Customs of England*, vol 2 (SS and HUP 1968) 4.

³ Paul Hyams, *Kings, Lords and Peasants in Medieval England* (Clarendon Press 1980) ("KLP") 49.

or local custom. Maitland described the village community as not a 'lofty' body which could declare the law of a tribe or nation,⁴ but the authorities on local custom - in the sense of both substantive laws and procedural rules. And even were Milsom correct that rules concerning unfree land had 'no major effect on the intellectual development of the common law', they were vitally important in their own way.⁵

Direct use of manorial records for legal history has remained rare,⁶ and they tend to be used as evidence for jurisdictional and structural questions rather than for the substance of legal rules and 'customary law' in manorial courts.⁷ For instance, extensive court roll studies in the 1960s to 1980s focused on social science, not legal history.⁸ One of the problems with this is that relying primarily on common law treatises like *Glanvill* and *Bracton* presents a skewed version of the peasantry which underestimates their capacity for rational and independent thought by emphasising their servility and vertical relationships, at the expense of considering their horizontal relations with each other in local courts. Both this chapter and Chapter 6 will therefore make use of three specific manorial court rolls as case studies, as well as secondary materials and collections of excerpts.⁹ They are, in brief: Ingoldmells, Lincolnshire, a large non-ecclesiastical manor with no demesne and rolls beginning 1291;¹⁰ Walsham-le-Willows, Suffolk, a combined roll of two small

⁴ Frederic W Maitland, *Domesday Book and Beyond* (CUP 1897) ("DBB") 408.

⁵ Milsom was dismissive of the importance of copyhold: Stroud Francis Charles Milsom, *Historical Foundations of the Common Law* (1969; 2nd edn, Butterworths 1981) 163.

⁶ Lawrence Poos and Lloyd Bonfield (eds), *Select Cases in Manorial Courts, 1250-1550* (1998) SS vol 114 being an exceptional instance.

⁷ *ibid* xx. The forthcoming Selden Society volume Phillip Schofield and Christopher Briggs (eds), *Select Cases in Manorial Courts c1250-c1350: Debt, Detinue, and Covenant* will hopefully add to the field substantially.

⁸ Chris Briggs, 'Manor Court Procedures, Debt Litigation Levels, and Rural Credit Provision in England c 1290-1380' (2006) 24 LHR 519, as well as Chapter 4 above, discuss this.

⁹ Citation of medieval court cases using modern conventions is problematic, especially in manorial court records, as there may not be two parties to a case in the modern sense. Instead, the convention of citing the date of the roll and a secondary source (where there is a published version of the roll) or a direct citation of the primary record will be generally followed.

¹⁰ William Oswald Massingberd, *Court Rolls of the Manor of Ingoldmells in the County of Lincoln* (Spottiswoode & Co 1902).

manors held by minor gentry beginning in 1303;¹¹ and the court book of Winslow, Buckinghamshire, a large manor containing four vills and held of a large ecclesiastical landlord, with records beginning in 1327.¹² These manors cover a disparate geographical area (respectively; north east, south east, midlands), different types of landlords, differing sizes, and have reasonably early rolls. Two of them also have a strong pedigree in legal history: Maitland lived just long enough to be interested in the Ingoldmells rolls,¹³ and Winslow has been well studied as a part of the St Albans estates.¹⁴

The remainder of this thesis will also focus on the period c. 1200-1348. This is not to suggest practices did not exist outside this timeframe – however, before the thirteenth century there are few written records, and after 1348 the Black Death changed the economic and demographic situation. It is also arguable that certain conditions need to pre-exist in order to distinguish even customary law from non-legal social norms, including the monopolisation of law enforcement and the use of writing as legal evidence.¹⁵ The period selected shows the village community as a functioning legal institution, when it was developing record keeping and precedent, and interacting with the early common law. It was an institution in transition from an oral culture to a predominantly written one, from less formally defined to more rigidly categorised legal statuses and institutions. It is a valuable object of study both in relation to the developing common law, and in showing the ways different communities at different times use and understand ‘law’. In particular, at this moment of transformation, Reynolds argues we need to study how communities’ responsibilities and solidarities changed; autonomy was increased,

¹¹ Roy Lock and Mark Bailey (eds), *The Court Rolls of Walsham Le Willows, 1303-1350* (Boydell & Brewer 1998).

¹² David Noy, *Winslow Manor Court Books Part I 1327-1377* (2011) 35 Buckinghamshire Record Society Publications.

¹³ Maitland, ‘Lincolnshire Court Rolls and Yorkshire Inquisitions’ (1903) EHR, reprinted in Herbert A L Fisher (ed), *The Collected Papers of Frederic William Maitland*, vol 3 (CUP 1911) 440.

¹⁴ Particularly by Ada Levett, see idem et al, *Studies in Manorial History* (Clarendon Press 1938).

¹⁵ Susan Reynolds, *Kingdoms and Communities in Western Europe 900-1300* (1984; 2nd edn Clarendon Press 1997) 16.

reduced, or circumscribed by formal rules; and the ways new conditions provoked new conflicts, solidarities, and methods of internal government. Whilst law does not constitute communities, it reflects a great deal about them.¹⁶

A. CUSTOMARY LAW AS 'LAW'

The main legal institution used to administer the medieval manor was the manorial court presided over by the lord or their steward.¹⁷ This was by definition not usually a village court, as villages and manors rarely coincided exactly.¹⁸ In light of archaeological evidence on field systems, it is also doubtful that a formal village court existed before the manor: the common field system and its strict regulations likely only fully developed around the same time as manorial written records proliferated.¹⁹ It may be both communities and lords developed a need for a court at roughly the same time, although for different purposes: this helps explain the variety of matters arising. Nonetheless, assemblies of some sort must have been involved in earlier agriculture concerning crop and livestock arrangements, laying out settlements, and particularly in the regulation of waste land - perhaps as ad hoc meetings without 'judicial' functions in resolving disputes.²⁰

¹⁶ Reynolds, *Kingdoms* (n 15) xli; 12.

¹⁷ For the private jurisdiction debate as to when and where such courts originated, see Maitland, *DBB* (n 4) 307; Henry Adams, 'The Anglo-Saxon Courts of Law', (1905) *Essays in Anglo-Saxon Law* 1; Warren O Ault, *Private Jurisdiction in England* (YUP 1923). As Jan Titow noted, the date of the emergence of the 'manor' as a phenomenon depends on whether it is considered as a legal or an economic institution: *English Rural Society 1200–1350* (Allen and Unwin 1969) 17.

¹⁸ As discussed in Chapter 2.

¹⁹ Richard C Hoffmann, 'Medieval Origins of the Common Fields' in William N Parker and Eric L Jones (eds), *European Peasants and their Markets* (PUP 1975) provides a useful summary; see also Tom Williamson, *Shaping Medieval Landscapes* (Windgather 2003) 89 that this was a long-stop date, and open field farming may have emerged earlier.

²⁰ John Hudson, *The Oxford History of the Laws of England*, vol 2 (OUP 2012) 62.

Milsom cautioned against presuming that rules in customary courts were not 'law' just because the king's courts took little notice. For instance, once a tenant was accepted by homage at a lord's court, their title was practically very difficult to challenge there.²¹ The idea that medieval customary law was itself a legal system was proffered twenty years ago by Poos and Bonfield,²² and attempts have since been made to apply theoretical models of 'law' – a challenging task, as the meaning of 'law' is an age-old debate. When Bonfield tested three proposed criteria for 'law' against local custom, he found it lacking.²³ However, both his approach and conclusions were challenged,²⁴ and he clarified that he was only highlighting the role of other factors in the application of customary law *as well as* (not instead of) substantive principles.²⁵ Poos and Bonfield also together argue that manorial courts applied custom to resolve disputes of both fact (e.g. concerning inheritance, or land alienation) and law (e.g., questions of what the custom was concerning villein inheritance or alienation generally). The reasoning process was often not recorded, so the jury or homage may have been doing any number of things: whether they were affirming a custom, disregarding one, creating a new one, or deciding a case independently of any system of precedent is only sometimes explicit - making for the most interesting cases.²⁶

Even if local custom is considered solely from the perspective of the thirteenth- and fourteenth-century common law, it was significant in the legal landscape. The common law could

²¹ Milsom, *Foundations* (n 5) 21-22; 127-134.

²² Poos and Bonfield (n 6) xxxii.

²³ Lloyd Bonfield, 'The Nature of Customary Law in the Manor Courts of Medieval England' (1989) 31(3) *Comparative Studies in Society and History* 514.

²⁴ John S Beckerman, 'Toward a Theory of Medieval Manorial Adjudication' (1995) 13 *LHR* 1; Paul Hyams, 'What Did Edwardian Villagers Understand by "Law"?' in Zvi Razi and Richard Smith (eds), *Medieval Society and the Manor Court* (OUP 1996) Appendix 2.1.

²⁵ Lloyd Bonfield, 'What did English Villagers Mean by "Customary Law"' in Razi and Smith (n 24) 10.

²⁶ Poos and Bonfield (n 6) xxxiii; xxiv note the infrequency of such records may also reflect the infrequency of complicated cases arising.

mean one of several things by ‘custom’: whilst it consistently indicates some regularity of behaviour, it can refer to a (1) a formal source of law; (2) an assembly of customary rules relating to a particular socio-political group (a ‘*patria*’ or ‘*pays*’, for instance); (3) a specific rule of law; (4) some seigneurial rights; (5) types of dues owed to ecclesiastical institutions or authorities; or (6) monastic customs applying within those communities.²⁷ This is further complicated by the fact that, in relation to court proceedings, ‘custom’ (*consuetudo*) might also have another definition, referring to the rules of procedure,²⁸ and that the early English sources make little distinction between the use of the words ‘*consuetudo*’ and ‘*lex*’, which was a key distinction in Roman law. For example the *Leges Henrici Primi* uses ‘*legem*’ and ‘*secundum legem*’; the *Dialogue of the Exchequer* uses ‘*leges*’, ‘*consuetudines*’, and ‘*iura*’; *Bracton* distinguishes custom from law once, but not throughout, and is liable to use ‘*leges et consuetudines*’ as a phrase.²⁹ It has been suggested that the use of the word ‘law’ (*lex*, *legem*, etc) might have implied a claim to parity of authority with the major systems of written law, whilst ‘custom’ recognises that the consent of the system’s users is the foundation of the authority.³⁰ Bractonian ‘custom’, then, could, like *Glanvill*’s, include the law of the royal courts, divergent rules recognised by the royal courts, and the rules of local jurisdictions both divergent and supplementary. The common law itself was described as a customary system in the sense of representing the customs of the realm in general,³¹ but more specific local customs were also recognised by the common law. A custom in this sense was therefore a specific local law applying to a defined locality or administrative unit which displaced or supplemented the default common

²⁷ John G H Hudson, ‘Introduction: Customs, Laws, and the Interpretation of Medieval Law’ in Per Anderson and Mia Münster-Swendson (eds) *Custom: the Development and Use of a Legal Concept in the Middle Ages* (2009 Proceedings of the Fifth Carlsberg Academy Conference on Medieval Legal History 2008) 2.

²⁸ Poos and Bonfield (n 6) 3.

²⁹ *ibid* 4 and citations therein.

³⁰ Paul Brand, ‘Law and Custom in the English Thirteenth Century Common Law’ in Anderson and Münster-Swendson (eds) (n 27) 31.

³¹ Hence the titles of the treatises of both *Glanvill* and *Bracton*.

law on a certain topic.³² *Britton* says that customs which are ‘*usages use z'en le countee autres qe commune ley*’, customs used in the county differing from the common law, were allowable, but that those which were ‘*contrariaunt a la commune ley*’, repugnant to the common law, were not unless they had been confirmed already by ‘our predecessors’.³³

The royal courts developed a set of criteria to recognise the validity of local custom in the early fourteenth century, so that when common law judges were confronted with questions of custom, they knew how to resolve them. These criteria were not the same as those used by village communities themselves, but constituted a ‘minimal recognition’ by the common law of the right of local groups to devise their own institutions.³⁴ Only tenants holding free land had access to actions in royal courts (including local outposts like county courts) when their property rights were threatened. This meant those holding unfree land, regardless of whether they themselves were personally free or unfree, could act only in manorial courts in relation to that property.

When the common law recognised local custom, it could and did recognise and uphold rules created and maintained by the unfree. It has long been argued that exclusion of the unfree from the common law courts was a by-product of reforms, rather than an intended outcome,³⁵ but the role reserved for local custom is significant. The integration into the broader legal system firstly raises definitional questions: Milsom, following Maitland, described custom as not clearly differentiated as ‘law’, as opposed to other administrative functions - but nonetheless a considerable volume of custom was binding in nature.³⁶ Customary systems may not meet modern

³² John W Salmond, *Essays in Jurisprudence and Legal History* (Stevens & Haynes, 1891) 93.

³³ Francis Morgan Nichols (ed) *Britton*, vol 1 (Clarendon Press 1865) 84.

³⁴ For the importance of this recognition in commons systems generally, see Elinor Ostrom, *Governing the Commons* (1990; 2nd edn, CUP 2015) 90.

³⁵ Milsom, *Foundations* (n 5); idem, *The Legal Framework of English Feudalism* (CUP 1976).

³⁶ Milsom, *Foundations* (n 5) 1-11.

positivist criteria³⁷ or resemble the traditional Austinian ‘sovereign command’ model of law.³⁸ However, by contrast with studies which focus on the disabilities of the villein at common law and emphasise legal servility and economic limitations, they show a less oppressive side to medieval village life by looking to relations outside a vertical hierarchical system.³⁹

It is clear that, at common law, custom was a recognised concept used to establish legal title to a right based on reasonableness, application to a defined locality, and ‘immemorial’ usage.⁴⁰ *Bracton* said that a custom was observed as law in places where it has been approved by usage (*consuetudo vero quando que pro lege observatur in partibus ubi fuerit more utentium approbata, et vicem legis obtinet*).⁴¹ In the context of local courts, there were such customs which provided for things which ‘they do not have by law’ (*habent enim Anglici plura ex consuetudine quæ non habent ex lege*).⁴² In later law, custom was also contrasted with ‘prescription’. Prescriptive rights complied with the common law, but were acquired irregularly, through immemorial usage: for example, franchisal jurisdiction could not be claimed via custom, only prescription.⁴³ *Britton* used the word ‘custom’ in this sense: ‘customs as by prescription of time have been differently used’ - although he denied the possibility that a valid custom could be contrary to the general law.⁴⁴ However, customary rights could and often did conflict with common law principle.

³⁷ Approached most famously in Herbert L A Hart, *The Concept of Law* (3rd edn, OUP 2015).

³⁸ John Austin, *The Province of Jurisprudence Determined* (1832; CUP 1995).

³⁹ Hyams, *KLP* (n 3). Hyams concludes the villein was often not too disadvantaged, but this did not detract from lordly use of violence, or the stigma of unfreedom. A more community-centric perspective from the same author is in Hyams, ‘Edwardian Villagers’ (n 24).

⁴⁰ John Baker, ‘Prescriptive Customs in English Law 1300-1800’ in Harry Dondorp, Eltjo J H Schrage, and David J Ibbetson (eds) *Limitation and Prescription* (Duncker & Humblot 2019) 147; 167.

⁴¹ *Bracton*, vol 2 (n 2) 22.

⁴² *ibid* 19. The local jurisdictions mentioned are counties, cities, boroughs and vills.

⁴³ Baker, ‘Prescriptive Customs’ (n 40) 148; 156.

⁴⁴ Francis Morgan Nichols (ed), *Britton*, vol 1 (Clarendon Press 1865) 1.

The common law did not create local custom, and whether or not it had explicitly recognised a custom did not affect local validity or enforcement. Raftis developed this idea even further and claimed that the common law was irrelevant to villeins because their law was custom.⁴⁵ Hyams, citing the possibility of violence from lords unchecked by the common law, disagrees.⁴⁶ However, it is clear that the extent to which lords could wield arbitrary violence was checked in its severity by both common law and customary rules and economic restrictions.

Questions then arise as to the nature and purpose of the common law's deployment of local rules. Rosamond Faith recently suggested that where individuals had access to royal courts as free persons, they were unlikely to seek collective action. Once this was withdrawn through the process of twelfth- and thirteenth-century legal developments, collective action was both enabled by lordly demands and necessary to provide sufficient negotiating power in tenurial relationships.⁴⁷ Susan Reynolds, on the other hand, has argued that common law changes simply reflected increasingly specific recognition and regulation of collectivities which had long existed.⁴⁸ When the common law tests for custom sought identifying features like geographical restriction and long endurance, or whether the custom contradicted 'common right' or the common good (as discerned by judges), they were effectively policing the outer boundaries of the concept of custom, without particular concern for internal content. The potential significance of these ideas in understanding the concept of custom as a legal idea is obvious, even if they complicate discussion by emphasising vagueness and uncertainty. The question to be explored here is how the common law position on custom operated and developed. This entails asking what, exactly, the early common law recognised as custom, and how it used it.

⁴⁵ James A Raftis, *Tenure and Mobility* (Pontifical Institute of Mediaeval Studies, Studies and Texts Number 8, 1964) 60-1.

⁴⁶ Hyams, *KLP* (n 3) 50.

⁴⁷ Rosamond Faith, *The Moral Economy of the Countryside* (CUP 2019) 201-5.

⁴⁸ See generally Reynolds, *Kingdoms* (n 15).

This relates in part to the institutional development of English law as set out by Milsom.⁴⁹ Eleventh-century law and institutions applied many unchanging customary obligations and made few overt decisions because custom generally determined what ought to be done. This early law had little role for contracts, and instead looked to enduring tenurial relationships – just as Maine once argued.⁵⁰ It was possible to make deliberately arrangements for the future, but although custom and *de facto* pressure to maintain the status quo was persuasive, the past did not bind future decisions and could not invalidate them. Divergence from past practice entailed a modification or refinement of custom only. But it was easy to see how decisions could in practice become binding. Economic needs created pressure both to find good rules and maintain flexibility, but had less direct impact on decision making when more complex and extended tenurial hierarchies developed and during periods when landlords stepped back from managing their demesnes directly. This divorced most of the structure from direct economic concerns, and reduced the need for flexibility. Instead, general and more abstract rules developed as jurisdiction migrated from local courts to distant royal ones.⁵¹

The element perhaps under-emphasised in Milsom's account is the increased role of writing in legal procedure during the same period. That same abstraction of rights was facilitated by the ability to make permanent records and precisely define concepts, rights, and the moment of legal change.⁵² But written law is far less flexible than unwritten law and custom. To reflect this, local courts applied customs free of the more uniform common law requirements – at least at first.

⁴⁹ Milsom, *Foundations* (n 5) 1-2. See generally Paul Brand, 'The Origins of English Land Law: Milsom and After' in idem, *The Making of the Common Law* (Hambledon Press 1992).

⁵⁰ ibid 12. The resemblance of this model to twentieth-century tribal proprietary rights amongst, e.g. the Barotse is noteworthy: *Barotse Jurisprudence* (1965; 2nd edn, MUP 1972), esp. Chapter 5.

⁵¹ Milsom, *Foundations* (n 5) 12.

⁵² Michael Clanchy, *From Memory to Written Record* (Wiley-Blackwell 2013); Reynolds, *Kingdoms* (n 15) 17.

Some of these rules would later become part of copyhold tenure, whilst others would become part of property law in general, in either case losing their flexibility over time.

1) *Lordship and Local Courts*

The level of practical freedom enabled by local custom depended to some extent on the inclinations of each individual lord. However, it did not follow that unfree tenants were subject to arbitrary justice, nor that manorial custom always reflected lords' interests at the expense of tenants'. If that were the case, manorial custom and local customary law would only change in response to economics – a class struggle rather than a legal system, and an approach linked to the lord-focused studies discussed in Chapter 4.⁵³ Whilst this may be partly true, particularly in relation to claims for 'customs' like rent and services, it does not fit with evidence relating to rights which less directly concerned lords, like those governing inheritance, dower, and agricultural regulation. A focus on lordly oppression also diminishes the usefulness of manorial records, particularly court rolls, by arguing they do not accurately reflect lords' influence. Poos and Bonfield, for instance, found little evidence of lordly intervention in property and family disputes in a wide survey. To the extent there were interventions, lords questioned jury verdicts or directed routine institutions in situations where their interests were directly at stake. If lords were pressuring unfree tenants generally, they must have done so 'off the record'.⁵⁴ But this seems unlikely: regular interference by lords in the outcomes of manorial court cases would have required a level of energy and resource they neither had nor could spare,⁵⁵ and it would have been impractical and economically

⁵³ Rodney Hilton, *The English Peasantry in the Later Middle Ages* (Clarendon Press 1975); John S Beckerman 'Customary Law in English Manorial Courts' (DPhil Thesis, University of London 1972) 272 gives examples of stewards intervening in disagreements.

⁵⁴ Poos and Bonfield (n 6) xii; xxxiv; cvi.

⁵⁵ On the limitations of even the crown's ability to administer manors see Robert S Hoyt, *The Royal Demesne in English Constitutional History 1066-1272* (Cornell University Press 1950), and generally John Sabapathy, *Officers and Accountability in Medieval England 1170-1300* (OUP 2014).

inefficient to maintain. Utilising peasants' own actions and reaping the rewards in the form of profits from court fines and agricultural output would have been simpler and easier.⁵⁶ The use of legal procedures and locally determined custom rather than violent coercion was probably not a choice based on egalitarianism, as Vinogradoff might have argued, or political agendas, but a practical consideration.⁵⁷

There appears to have been a general commitment to a legality principle throughout medieval English society, at all levels of hierarchy – in Faith's terms, a shared 'moral economy'.⁵⁸ Whatever arbitrary personal sway there was, administration, justice, and policing were consistently managed via the courts and not by routine violent coercion.⁵⁹ For instance, a lord might bring an action against his men if they did him wrong, but was told not to exact retribution outside the law.⁶⁰ This legalistic mindset can be seen in the early twelfth-century *Leges Henrici Primi*, which states that 'nothing shall be expected or taken by anyone except by the application of law and reason, in accordance with the law of the land, justice, and the honest judgement of the court'.⁶¹ This was not expressly limited to particular courts: the *Leges* notes that customs vary according to place, time, and persons involved. And yet, 'all cases shall have suitable methods of legal procedure provided appropriately'.⁶² Homans believed custom represented the 'course of a long-continued

⁵⁶ Susan Reynolds, *An Introduction to the History of English Medieval Towns* (Clarendon Press 1977) 138; Chris Wickham, *Framing the Early Middle Ages* (OUP 2005) 264; Poos and Bonfield (n 6) xiii. See further below that, for instance, lords were interested in ensuring that there were by-laws in their manors governing behaviour, but not necessarily in their content.

⁵⁷ Paul Vinogradoff, *English Society in the Eleventh Century* (Clarendon Press 1908) 215. George Homans also believed lords utilised pre-existing collaborative institutions: *English Villagers of the Thirteenth Century* (HUP 1941) 325, and more recently Christopher Dyer, 'The English Medieval Village Community and its Decline' 1994) 33(4) *Journal of British Studies* 407, 413.

⁵⁸ Faith, *Moral Economy* (n 47) 19. This is of course not to deny the presence of much more violence than in modern society.

⁵⁹ Reynolds, *Kingdoms* (n 15) 38.

⁶⁰ Leslie John Downer (ed), *Leges Henrici Primi* (Clarendon Press 1972) c 86, 1. For discussion of the value of this source, see e.g. John Hudson, *The Formation of the English Common Law* (1996; 2nd edn Routledge 2018) 212-3; Nicholas Karn, 'Rethinking the *Leges Henrici Primi*' in Stefan Jurasinski, Lisi Oliver and Andrew Rabin (eds), *English Law Before Magna Carta* (Brill 2010).

⁶¹ *Leges Henrici Primi* (n 60) c 8, 1b.

⁶² *ibid* c 9, 3.

process of interaction among many factors' including individuals' wishes and needs, community, and collective projects like agriculture.⁶³ Customary rules, then, were likely to represent practical solutions to problems encountered, and to reflect collective priorities. Notwithstanding that there is always a gap between law in theory and law in action, manorial courts and local custom did more than just reflect the needs and interests of lords.

2) *Juries in Manorial Courts*

Although lords or their stewards 'held' manorial courts, kept order, and profited from fines, the court suitors delivered judgements, and created and maintained local rules through collective memory and decisions. Juries were an essential institutional feature for managing both lordly and communal interests: they brought cases (by 'presentment') and judged the outcomes of disputes. Lords were generally constrained by the customs pertaining to that manor to respect these outcomes.⁶⁴ It has been questioned how far this was true in practice,⁶⁵ but free and unfree suitors and jurors clearly played a substantial role in giving authoritative judgments in local courts even if their power was not absolute. Felix Liebermann believed it 'of the highest consequence for English freedom at large... [that the villein was] not ruled by an arbitrary despotism, but by an old customary law... adjudged by his own neighbours.'⁶⁶

It appears from the earliest written records that decisions were made by the community as a whole as the suitors who attended the manorial court. Levett was able to provide early examples

⁶³ Homans (n 57) 404.

⁶⁴ Maitland, *DBB* (n 4) 328; idem, *Select Pleas in Manorial and other Seignorial Courts* (1888) SS vol 2, p lx.

⁶⁵ Bonfield, 'Nature of Customary Law' (n 23) 518.

⁶⁶ Felix Liebermann, 'Review: F W Maitland, *The Court Baron*' (1894) 9(34) *EHR* 361, 361.

from St Albans of pronouncements from the whole ‘community’ or whole ‘vill’.⁶⁷ Sometimes, utilisation of the whole homage as decision-maker may have been a practical choice in light of a small manorial population. In the Suffolk manor of High Hall, for instance, the jury appears to have consisted of ‘all of the lord’s villeins’, since one entry uses this phrase with ‘the abovesaid jurors’.⁶⁸ Since the entire villein landholder population consisted of less than twenty tenants, there might have been little point in whittling them down to a standard jury of twelve. However, with thirteenth-century population growth and the use of juries becoming more common, the role for the entire body of suitors declined.⁶⁹ At St Albans, for instance, the ‘whole homage’ appears less often in the records from Edward I’s reign onwards, replaced by a regular body of jurors whose evidence was supplemented by written court rolls (the earliest example at St Albans is from 1236).⁷⁰

Whether the whole homage presented, or a presentment jury was used, they were tasked with policing local custom and bringing wrongdoing to the court’s attention. For instance, they often reported a tenant had died with particular land, so that their heir could claim it.⁷¹ They also routinely presented trespasses, failures to perform services, ‘waste’ (dilapidation or dereliction) of land or buildings, marriages and ‘fornication’, and the purchase of free land by villeins. Much, but not all, of the business reported can be seen in the list of ‘articles of presentment’ included in thirteenth-century court management manuals – however, the questions there represented primarily seigneurial interests and not the community business also conducted in manorial courts.⁷² Separate juries were used for ‘inquisitions’ or ‘inquests’ which decided disputes. Not all cases

⁶⁷ Levett et al, *Manorial History* (n 14) 147.

⁶⁸ 21 October (1327): *Walsham* (n 11) 105.

⁶⁹ Beckerman, ‘Customary Law’ (n 53) 31.

⁷⁰ Ada Levett, ‘The Courts and Court Rolls of St Albans Abbey’ (1924) 7 *Transactions of the Royal Historical Society* 52, 70.

⁷¹ Poos and Bonfield (n 6) xxxvi lists a number of examples.

⁷² Frederic William Maitland and William Paley Baildon (eds), *The Court Baron* (1891) SS vol 4, p 102; John S Beckerman, ‘Procedural Innovation and Institutional Change in Medieval English Manorial Courts’ (1992) 10 *LHR* 197, 235.

required this: in many instances the rolls record only the presentment jury reporting a wrongdoing followed by the person being punished. In something like a complaint of trespass or a plea for the possession of land, however, a decision on the competing arguments of two parties had to be reached. The use of juries rather than the whole homage also had the practical effect of reducing the number of cases decided by wager of law, and presentment juries enabled a potentially larger volume of business to reach the court (and be recorded on court rolls).⁷³

Procedural rules as to juries seem not to have been fixed. The court at the St Albans manor of Winslow routinely made use of a presentment jury of twelve, sometimes fifteen, chosen from the four vills constituting the manor. It was also possible to use the ‘whole homage’, even after the use of juries became routine: at Winslow, a dispute about a custom would be settled by consultation with ‘the whole homage’. At least for the period covered by the Winslow court book, this was not consonant with the jury: a case in November 1332 was considered by ‘the jurors mentioned above *and* the whole homage’ (emphasis added) – a statement entirely superfluous were the two bodies the same.⁷⁴ This does not seem to have been a feature unique to St Albans. At Hatfield Chase in 1336 the ‘more powerful and stronger of the entire lordship of the four vills’ pronounced custom.⁷⁵ Poos and Bonfield cite this and a case of 1319 to argue that the villeinage as a whole was more likely to be called upon when a challenge to custom appeared to infringe on seigneurial interests, had wide ranging implications, or alleged customs which the steward or lord challenged.⁷⁶

⁷³ Poos and Bonfield (n 6) xxiii; Beckerman, ‘Procedural Innovation’ (n 72) 197.

⁷⁴ 7 November (1332): *Winslow* (n 12) 37.

⁷⁵ 16 October (1336): Poos and Bonfield (n 6) lx, 148-9.

⁷⁶ Worlingworth, Suffolk, 7 July (1319): Poos and Bonfield (n 6) lxi, 120; Reynolds, *Kingdoms* (n 15) xlix makes a similar point about larger groups.

Decision-making by suitors or jury clearly allowed a great deal of local power, even sometimes in cases involving persons of superior legal status, to the lowest socio-economic group of free peasants and the unfree. The primarily unfree tenant composition of homages and juries must have been at least in part for lack of other options: free tenants might only be obliged to attend the 'great' courts twice yearly, where the view of frankpledge was held, but unfree tenants usually had to attend the lord's court on a three-weekly basis⁷⁷ (although how often they were absent is evidenced by the many essoins in manor rolls). The later separation of free and unfree into their respective courts baron and leet has some antecedents, but free tenants could constitute the homage and serve on juries either separately or alongside the unfree. For instance, in Cranfield, Bedfordshire in 1312 the jury was customary tenants only,⁷⁸ and at Great Horwood in 1322 a presentment was by 'all the customers' (*omnes custumarii*)⁷⁹ - but a year later an inquest was made by both free and customary tenants.⁸⁰ The rolls of Ingoldmells contain at least three examples of explicitly mixed free and unfree juries.⁸¹

How jurors were selected is not consistently described. Jurors for the Suffolk manor of Walsham were selected in advance – by methods unknown - and sworn in at court before the one wherein they served.⁸² The *Leges Henrici Primi* states that in some places half of the jurors were chosen by each party,⁸³ and there is some evidence of this in manorial practice, with jurors

⁷⁷ Beckerman, 'Customary Law' (n 53) 8.

⁷⁸ Poos and Bonfield (n 6) 130.

⁷⁹ 5 October (1322): Poos and Bonfield (n 6) 10.

⁸⁰ Poos and Bonfield (n 6) 52.

⁸¹ 6 March (1303): *Ingoldmells* (n 10) 23; 27 July (1330) (jury of half villeins and half free): *ibid* 107; 5 November (1341) (six known unfree tenants): *ibid* 111.

⁸² 11 December (1329): *Walsham* (n 11) 9, 132; 3 July (1342): *ibid* 260.

⁸³ *Leges Henrici Primi* (n 60) c 31, 8.

sometimes chosen 'by the consent of the parties'.⁸⁴ At Walsham in 1339, two parties agreed to 'stand, and be bound, by the finding of ten men of the homage, duly elected and sworn, under penalty of ½ mark, payable to the lord'.⁸⁵ The conventional jury at Walsham was twelve or fourteen, and this was the only example in this roll of the parties to a dispute deciding on their own procedure: whether this means that it was not normally recorded or was not normally the procedure is unclear.

The concern with choosing jurors was likely in order to avoid bias. At the Wakefield manor of Rastrick, in 1274, allegations against the foresters were dismissed by a large jury of villagers as 'presented against them through the hate of their enemies' - later named and fined for false claims.⁸⁶ One of the *Court Baron* manuals includes a case where a man argues he cannot ask for the judgment of the 'good folk of the vill' because they have 'set their hearts' against him, to which the steward replies that no juror would risk their soul over hatred of the accused man - but in any case jurors could be challenged for bias.⁸⁷ The objection to being judged by a biased individual could apparently apply to where the whole homage was the judge, not just to juries: in Great Horwood in 1331, the whole homage except for two named men were 'challenged by the parties' in a case concerning disputed possession and inheritance.⁸⁸

The decisions of local juries could also be challenged. Whilst appeals will be discussed in the next section, some court rolls display a concept of 'intervening'. The first instance of this in

⁸⁴ Poos and Bonfield (n 6) 'chosen by consent of the parties' 2; 19; 'assent of either party' 61; 'assent of the parties' 65; 'assent... being sworn, tried and chosen' 71; 83; 132; 134.

⁸⁵ 27 January (1339): *Walsham* (n 11) 231.

⁸⁶ William Paley Baildon, *Court Rolls of the Manor of Wakefield*, vol 1: 1274-1297 (1901) 29 Yorkshire Archaeological Society 95.

⁸⁷ Maitland and Paley Baildon (n 72) 63.

⁸⁸ Poos and Bonfield (n 6) 6.

the Walsham roll is in October 1316, where a fine was paid for ‘intervening’ in a trespass plea.⁸⁹ Other instances are scattered through the Walsham roll: in January 1317, for intervening with the jury;⁹⁰ at High Hall in 1319, for ‘intervening’ against another tenant in various complaints;⁹¹ and in the sample place in 1321 for intervening ‘through the inquest in a plea of trespass’, with damages awarded to the person the inquest concerned.⁹² Similar wording was used later in the same year⁹³ and later.⁹⁴ A case from 1324 may shed some light on the meaning: in a dispute over sowing, the defendant was amerced for ‘intervening’ against the plaintiff in her plea of covenant, whilst she was amerced for a false claim in debt.⁹⁵ Intervening therefore seems to suggest some sort of jury interference. Explicit interference was reported in 1341, when a juror was fined for consulting with ‘men who were not sworn’.⁹⁶ Something very similar happened on the manor of Upwood in 1297, when a juror was fined for talking to his neighbours after he was sworn (*‘quia loquebatur cum vicinis post quam fuit iuratus’*).⁹⁷ Walsham jurors and officials, both of whom swore oaths, could also be punished for bearing false witness (*‘afferend’ fals’*), which was considered a ‘contempt of the steward of the lord’s court’,⁹⁸ and the neighbouring High Hall bailiff was amerced for a false testimony in 1335 when he wrongly reported that a person was present in court.⁹⁹ Refusing to testify was also a contempt – although when the miller at Walsham refused to inform on those

⁸⁹ *Walsham* (n 11) 35.

⁹⁰ *ibid* 48.

⁹¹ *ibid* 81.

⁹² *ibid* 90.

⁹³ 26 December (1321): *ibid* 92.

⁹⁴ 14 June (1329): *ibid* 126; 24 October (1348): *ibid* 315.

⁹⁵ *ibid* 95.

⁹⁶ *ibid* 255.

⁹⁷ Sherri Olson, *A Chronicle of All that Happens* (Pontifical Institute of Mediaeval Studies 1996) 127.

⁹⁸ See e.g. 8 October (1328): *ibid* 115. In that case the fine was ‘condoned because poor’; 13 January (1334): *ibid* 169, also condoned.

⁹⁹ *ibid* 183.

not using the lord's mill in 1343 his fine was condoned.¹⁰⁰ There is a sense here of the rules governing how the jury was to proceed: they were not to be biased against the parties, and perhaps not even consult or be influenced by others.

It may have been that high-ranking lords were indifferent as to how procedures and decisions were made as long as they received the profits of justice, as Maitland once argued,¹⁰¹ but this does not explain why they did not adopt the simpler expedient of letting the steward decide all cases. To decide a dispute in accordance with local custom, local knowledge was required. This is evident from the *Court Baron* manual, where a steward relying on the 'good folk' of the vill to testify in a case was forced to hold an inquest when there was insufficient testimony.¹⁰² A steward also relied on those 'good folk' to value chattels.¹⁰³ Juries could establish disputed boundaries,¹⁰⁴ set payment dates for fines and debt repayments,¹⁰⁵ and balance competing interests in deciding case outcomes. In respect of the latter, an interesting case from Wakefield in 1274 involved a land dispute ending in a party being dispossessed. What, she asked, was to happen to the crops she had planted on that land? Would she receive compensation for her contribution in manuring the land with her animals?¹⁰⁶ The inquisition awarded her that crop, and the crop of the following year as compensation for the manure. Similar compensation can be seen in a Crowland Abbey case of

¹⁰⁰ *ibid* 265.

¹⁰¹ Maitland, *DBB* (n 4) 328. This argument might also be made in respect of by-laws created by villagers generating profits from fines for the lord.

¹⁰² Maitland and Paley Baildon (n 72) 51. Royal courts, even those held locally, applied royal law and had no need of local interpreters of custom: Paul Brand, "Multis Vigiliis Excogitatam et Inventam": Henry II and the Creation of the English Common Law' in *idem*, *The Making of the Common Law* (Hambledon Press 1992) 82.

¹⁰³ See e.g. a jury valuing chattels: Poos and Bonfield (n 6) 122; an inquest into tenement value: *ibid* 137; a survey of the lord's stock and trespasses: Maitland and Paley Baildon (n 72) 139.

¹⁰⁴ See Chapter 6 for examples.

¹⁰⁵ Sherri Olson, *A Mute Gospel* (Institute of Pontifical Studies 2009) 14.

¹⁰⁶ *Wakefield*, vol 1 1274-1297 (n 86) 84.

1323, when a disseisor got back $\frac{1}{2}$ of the land he had held and sown by way of expenses for that sowing.¹⁰⁷

Juries were administratively efficient and cheap – especially where a presentment jury identified relevant business so the lord did not have to.¹⁰⁸ There are other reasons why juries might have been an attractive option for lords: it might mean minimising their risk of having to choose between followers and alienate them – whilst this might be more readily applicable to higher ranking tenants, Briggs’ work on the need to attract business to manorial courts suggests it applies as well to lesser tenants.¹⁰⁹ Whatever the reasons for using juries, it was not only lords who profited from making use of local knowledge, but the common law as a whole.

B. DIALOGUE BETWEEN COMMON LAW AND CUSTOM

Ibbetson has argued that the possibility of customary rules diverging from the common law functioned as a ‘safety valve’, enabling the common law to recognise new local rules as necessary to reach a desirable outcome in a particular case.¹¹⁰ Local communities in turn needed minimal recognition of their customs by the common law in order to be confident in non-interference.¹¹¹ This two-way exchange would inevitably lead to some sharing of concepts, stimulated by conscious adoption of substance, procedural convenience, or unconscious replication. For example, in 1325 at the small manor of High Hall, the court roll wording in respect

¹⁰⁷ 11 April (1323): Poos and Bonfield (n 6) 10.

¹⁰⁸ Beckerman, ‘Procedural Innovation’ (n 72).

¹⁰⁹ Paul R Hyams, *Rancour & Reconciliation in Medieval England* (Cornell University Press 2003) 174; Briggs, ‘Manor Court Procedures’ (n 8) 524.

¹¹⁰ David Ibbetson, ‘Custom in Medieval Law’ in Amanda Perreau-Saussine and James B Murphy (eds), *The Nature of Customary Law* (CUP 2007) 174.

¹¹¹ For discussion concerning villagers’ expectations of independence here, see Hyams, ‘Edwardian Villagers’ (n 24) 73.

of guardianship changed: previously the custom had been expressed ‘in accordance with the custom of the manor’, but at that court it was ‘following the custom of England’.¹¹² The same court entry contains other anomalous wording, which suggests that some external influence like a new scribe or steward affected proceedings, and introduced some common law ideas – a good example of local custom replicating common law forms, if not their substance.

That customary law and the common law were distinct is sometimes explicitly stated in surviving records, both manorial land common law. For example, early fourteenth-century cases at the St Albans manor of Barnet said pleas were held ‘according to the custom of the manor’, and did not ‘belong to the common law’.¹¹³ The Barnet jury declared in 1306 that ‘the custom of the vill of Barnet and the hallmote there’ was something ‘they have and use according to the custom of their hallmote and not according to the common law’.¹¹⁴ A year later, it was reiterated that Barnet did not look to the common law, but held pleas according to the custom of the manor.¹¹⁵ On the common law side, a 1292 *nuper obit* claim in the common pleas involved the argument that a tenement was partible amongst male heirs. In order to succeed, the party had to prove there a ‘good reason’ – meaning in this context some proof of past practice - for the deviation from the common law default norm or ‘...the tenements are not transferred from the common law to a special [or customary] law’ as they sought to argue.¹¹⁶

The possibility of varying rules on the same topics was an obvious implication of having both an abstract and general common law and a detailed local customary law. This could manifest

¹¹² 22 May (1325): *Walsham* (n 11) 97.

¹¹³ Levett, ‘Rolls of St Albans’ (n 70) 72; idem, ‘The Courts of St Albans Abbey’ in *Studies in Manorial History* (n 14) 151 and citations therein.

¹¹⁴ *ibid*, and Poos and Bonfield (n 6) cix; 3.

¹¹⁵ Levett, ‘Courts of St Albans’ (n 113) 151.

¹¹⁶ *Mauteby v Mauteby* (1292) YB Hil 20 Edw I, RS p 320; p 328.

two ways: firstly, similar rules could apply in different situations governed by common law and customary law respectively, involving supplementation and not conflict. For example, at Cranfield, Bedfordshire, in 1312, the custom was that a woman with an illegitimate child could not inherit – this went beyond the general prohibition on illegitimate children themselves inheriting.¹¹⁷ Alternatively, a customary law rule could diverge or conflict with a common law rule on the same subject. This was managed by a careful awareness of boundaries and by a process of constant dialogue. It was more straightforward to establish a divergent custom than a contradictory one: if there was only a gap in the common law and not a conflicting norm, there was less conceptual difficulty in accepting the customary rule. But it was possible in theory, even if not every attempt succeeded, to have the common law courts apply a local custom instead of the common law rule. However, the method of proof required varied, and the process was uncertain whilst thirteenth- and fourteenth-century royal courts developed their approach to conflict of laws questions on an ad hoc basis.¹¹⁸

The common law position was that, in principle, custom was a ‘special law’ which took precedence.¹¹⁹ This required the preliminary step of identifying valid custom, for which thirteenth- and fourteenth-century common law developed criteria.¹²⁰ The mechanism for making a claim concerning custom was the usual common law writ, with examples taken from 1293 such as:

a woman demands her dower by... writ at common law, and yet according to the custom of the country she will recover for her dower a moiety of the tenements... where by the common law she would have only the third part... tenements in some countries (*payis*) which are holden by knight-service, the lord can avow the taking as good for cornage

¹¹⁷ Poos and Bonfield (n 6) 130.

¹¹⁸ Paul A Brand, ‘Local Custom in the Early Common Law’ in Pauline Stafford, Janet L Nelson, and Jane Martindale (eds), *Law, Laity and Solidarities* (MUP 2001) 153.

¹¹⁹ Salmond, *Essays* (n 32) 93.

¹²⁰ See further chapters by John Baker, ‘Prescriptive Customs’ and Paul Brand, ‘Limitation and Prescription in the Early English Common Law (to c.1307)’ both in Dondorp et al (n 40). What follows seeks to use similar materials in respect of local self-government.

according to the custom of the country (*usage del pays*); and yet the writ is at common law... in Gavelkind... one brother shall recover against the other by...[common law writs].¹²¹

The simplest of these was gavelkind, the custom of Kent, which was habitually recognised in the common law courts and often held up as the standard for a special local custom.¹²²

It was decided by the early fourteenth century that valid custom had three features: it was reasonable; arose from actual usage which could be proved with certainty, and not from grant or the mere possibility of usage not taken up; and it was claimed to have been practiced since ‘time immemorial’. The latter criteria referred to use since a fixed date in the past, eventually settled at 1189 to coincide with the availability period of the writ of right, but realistically based on the living memories of the jurors.¹²³

In the simplest overlap scenario, the common law and customary courts might reach similar conclusions in different ways. This can be seen in two contrasting examples concerning rights of way, one concerning a free person, the other concerning an unfree tenant. In Notleigh, Hampshire, in 1229, when a free tenant’s access to their twenty-two acres was denied, the royal court affirmed their entitlement to free access to cultivate their land. In Newington, Oxfordshire, in 1301, a customary tenant had the same problem: a neighbour blocked their right of way, and as they had no rights in respect of customary land in the common law courts, they complained in the manor court. The manorial jury also affirmed their right of access.¹²⁴ Although the cases are seventy years apart, by the turn of the fourteenth century both free and customary tenants were

¹²¹ *Adam v B* (1293) Trin 21 Edw 1, RS p 210; p 212 per Metingham J.

¹²² Nellie Neilson, ‘Custom and the Common Law in Kent’ (1924) 38 Harv Law Rev 482; Brand, ‘Local Custom’ (n 118) 157.

¹²³ Brand, ‘Limitation’ (n 120) 125; Baker, ‘Prescriptive Customs’ (n 40).

¹²⁴ Warren O Ault, *Open Field Farming in Medieval England* (Allen & Unwin 1972) 55.

able to assert a right of access with passage over others' land, with similar rights recognised in both royal and manorial courts.

A conflict of laws was also possible: for example, in the case at Barnet in 1306 discussed above. The local inheritance custom, contrary to the common law, was that land given to a younger son ought to revert to the brother closest in age, and not to the eldest brother or his children.¹²⁵ Another set of examples is provided by comparing a pre-1278 (anonymous) assize case with several local examples in the Winslow court books: in the common law case, an alienation of land on the express condition that trees were not cut down and rent was paid did not give the feoffor the right to re-enter when those conditions were broken, and it was found that he had disseised the feoffee even when the re-entry had been in accordance with the agreed terms: 'the common law cannot be waived by the mutual agreement of two individuals'.¹²⁶ Meanwhile, in the manorial court at Winslow (and many other manors), 'maintenance agreements' were not uncommon. These involved an alienation of land on the condition of payment of goods or rent, reserving the right to re-enter if the conditions were breached – for example in one 1344 instance re-entry was reserved if the agreed grain payments were not made.¹²⁷ Since the latter referred to land held in villeinage, there was no risk of anyone being technically disseised anyway: at common law it was in the seisin of the lord at all times. But it was not argued in any of the Winslow cases that the conditions in some way infringed the validity of the land transfer, even though the language of the land grants has a variation between the expressions 'enfeoffed' and 'put into possession' which might hint at the distinction.¹²⁸

¹²⁵ Poos and Bonfield (n 6) 2, 3.

¹²⁶ *Anon v Anon* (pre-1278) Seaton Assize 2, SS vol 123, p 488.

¹²⁷ *Winslow* (n 12) xix; 157.

¹²⁸ For example, 6 June (1329): *ibid* 13, where both terms are used in one entry.

Once identified as valid, the common law courts were willing and able to apply the substance of local custom to decide cases. A dispute in 1268 as to the descent of land was originally heard in the hundred court of Alton and was decided according to the custom of the hundred, not common law, when the forum was changed via royal writ.¹²⁹ In 1310, debate arose in a common law case over whether to test whether an heir was of age using the gavelkind customary test or the common law rules.¹³⁰ Chief Justice Bereford said: ‘if we were in the Eyre of Kent, it would behove us to allow the usages [of Kent]; and why should we not do that here?’.¹³¹ Whilst one Kentish case might be dismissed as an example of Kent’s unique customs, the existence of other cases applying local custom indicate the common law courts’ ability to apply the substance of local custom from across different groups in the realm.

C. JURISDICTION

The dialogue between courts was not only manifest in procedural or substantive borrowing; there was also movement between jurisdictions. The definition of these different jurisdictions emerged as law and legal structures were increasingly defined and professionalised, especially where some groups were explicitly granted privileges dividing them from others.¹³² For example, McIntosh’s study of Havering illustrates the development of local court practices regarding the special privileges of royal and ancient demesne communities. She found that as early thirteenth-century royal courts gradually excluded tenants of royal manors, formal claims

¹²⁹ *Malherbe v Cornish* (1268) 52 Hen III, SS vol 111, p 2.

¹³⁰ *Attecrouch v Frost* (1310) Trin 3 Edw II, SS vol 20, p 159-60.

¹³¹ *ibid* 161. In a similar case in 1323 it was argued that a plaintiff could not bring a common law writ to recover land then allege local custom as to age of alienation. The outcome is not recorded: *Anon v Anon* (1323) YB Trin 16 Edw 2 [2]; Seipp 1323.009.

¹³² Reynolds, *Kingdoms* (n 15) lviii.

developed in their manorial courts for lesser crown tenants.¹³³ At first, nearly all of these concerned customary tenure. In 1199 and 1210, when parties to (successful) royal court cases argued that customary land cases should not be heard in the king's courts,¹³⁴ they were told land on a royal manor was essentially free (because it was heritable and subject to royal writs). However, by 1233 there had been some eyre and assize disputes over jurisdiction (in 1228-1230),¹³⁵ but there were now few Havering cases in royal courts – the exception was collusive (unfree) land 'disputes' appearing as a method of transfer until c. 1254. Instead, courts in royal and ancient demesne manors developed a writ mirroring the royal action: the 'little writ of right close', which directed the bailiff to summon a jury to testify about facts and customs. The writ remained nominally subject to review by royal courts, which could revise outcomes and punish jurors for misconduct,¹³⁶ but these jury decisions could also be upheld in common law courts (even if their outcome contradicted common law rules) as long as they were procedurally correct and in accordance with the custom of the manor. This writ was used by communities to assert themselves against their lord, but its effectiveness is not entirely clear: in King's Ripton, the Abbot of Ramsey was impleaded by one of his tenants in 1294 and summoned to court multiple times.¹³⁷ That the Abbot did not respond suggests that a confident and powerful landlord might not take much notice of the writ.

Outside the special case of royal manors, jurisdiction over unfree tenants seemed inherent in lordship: the lord 'owned' unfree tenants at common law, regardless of any contingent franchisal

¹³³ Marjorie K McIntosh, *Autonomy and Community* (CUP 2002) 28.

¹³⁴ *ibid* and *Richard son of Richard de Walda v Gilbert de Stanford* (1199) CRR, vol 1, p 77; *Richard de Walda v Alice de Havering* (1210) CRR, vol 6, p 68.

¹³⁵ McIntosh (n 133) 30.

¹³⁶ *ibid* 31; Frederick Pollock and Frederic W Maitland, *The History of English Law Before the Time of Edward I* (1895; 2nd edn CUP 1905) 291; Frederic W Maitland (ed), *Bracton's Note Book*, vol 2 (Clay & Sons 1887) 641, no. 834.

¹³⁷ Paul Vinogradoff, *Villainage in England* (Clarendon Press 1892) 383, citing Maitland, *Select Pleas* (n 64) 112.

or delegated jurisdiction.¹³⁸ However and whenever precisely the manor court arose, it is clear from written records that both free and unfree peasants routinely utilised manorial courts from at least the thirteenth century. To take one good example, Schofield's study of the manorial court at Hinderclay, Suffolk, found that 66% of disputes between 1289 and 1304 involved either or both of two prominent villein landholders.¹³⁹ These two men routinely and zealously used this, and (to a lesser extent) other local courts, both to play out their long-running disputes and manage business.¹⁴⁰ The manor court was useful, effective, and low-cost institution for dealing with a range of matters.

Notwithstanding this, there are many examples of tenants seeking to transfer land outside the lords' court, causing the lord to assert their jurisdiction over land alienation. A Winslow case of June 1334 demonstrates the weight in-court transfers carried.¹⁴¹ The dispute turned on whether a piece of land given to four daughters had been held in common by them, or divided. The jurors favoured one party's arguments, but it did not matter: the current landholders had been admitted by the lord, and that secured their tenure. This fact alone was legally decisive, even though there were earlier and better claims. An unusually detailed land dispute in the 1328 Walsham roll gave rise to similar issues. A husband and wife claimed a cottage based on an out of court transfer wherein a former tenant had surrendered it to the use of the wife and her heirs. They argued that the current occupier, the heir of the former tenant, was trespassing. He argued that the transfer should not prejudice him because it was illegitimate. The inquest relied on a precedent from the time of the former steward: a tenant had then surrendered land into the hands of the clerk of the

¹³⁸ For debate about the early history of these courts, see Doris M Stenton, *English Justice Between the Norman Conquest and the Great Charter* (American Philosophical Society 1964) 80; for example, Oswaldslaw in Domesday Book: vol 1, folio 172V in Anne Williams and Geoffrey H Martin, *Domesday Book* (Penguin 2003) 475.

¹³⁹ Phillipp R Schofield, 'Peasants and the Manor Court' (1998) 159 *Past & Present* 3, 13.

¹⁴⁰ *ibid* 17.

¹⁴¹ *Winslow* (n 12) 43.

court (not a valid transfer), but died before the court hearing. The surrender had been declared null, and the tenement returned to the original tenant's heir.¹⁴² They compared that case with the present one, and concluded that since the current possessor's use of the land had been confirmed in court properly, the husband and wife could not recover based on the out of court transfer. The lord's and manor court's jurisdiction over land transfers was closely protected in order to ensure tenants' confidence in their titles.

However, in 1329, a tenant 'at Walsham church' surrendered a piece of land to the lord 'through the hands of the haywards'. When the transferee came to be admitted, it was allowed and the land was granted to him (to hold unfreely).¹⁴³ It may be that the difference was presence of an official as a representative of the lord in lieu of the proper in-court transfer. There are other instances at both Winslow and Walsham of property surrendered into the hands of the bailiff or beadle by people unable to attend the court. These could take the form of 'deathbed transfers': for instance, at Walsham in 1340, when a woman before her death 'surrendered all the tenement she held in bondage' in the presence of the hayward, six named people, 'and others'.¹⁴⁴ The validity of this transfer was unchallenged, as the heir died as well, and the next heir 'did not pursue' his claim. Another case the following year made reference to a wife 'examined by the lord' rather than the usual 'examined in open court', with the surrender 'through the hands of the bailiff', suggesting an out of court transfer later recorded on the roll.¹⁴⁵ Parkin has suggested¹⁴⁶ that Bonfield and Poos¹⁴⁷

¹⁴² 27 July (1328): *Walsham* (n 11) 113.

¹⁴³ 8 June (1329): *ibid* 124.

¹⁴⁴ 1 December (1340): *ibid* 246.

¹⁴⁵ 6 September (1341): *ibid* 250; there are other references to the hands of the bailiff in a surrender in September (1345): *ibid* 284 (High Hall); 24 October (1348): *ibid* 313.

¹⁴⁶ Kate Parkin, 'Courts and the Community' (PhD thesis, Leicester 1998) 169.

¹⁴⁷ Lloyd Bonfield and Lawrence R Poos, 'The Development of the Deathbed Transfers in Medieval English Manor Courts' in Razi and Smith (n 24) 117.

were incorrect in describing deathbed transfers as a special exception to the rule that land was to be surrendered in court, as she thinks the categories of allowable out of court transfers were wider. For instance, Ingoldmells examples of out of court transfers do not mention deathbeds or illness, only the presence of officials like the ‘grave’ (reeve) or bailiff, and other tenants - whether the whole homage of the vill,¹⁴⁸ ‘bond tenants’,¹⁴⁹ or named tenants.¹⁵⁰

It also did not necessarily follow from the lord’s jurisdiction that unfree tenants could only use their courts, nor that free tenants were restricted to doing so regarding local matters. Whilst the local manorial court was likely the most convenient forum, and the cheapest, there were a number of circumstances in which a different court was more attractive.¹⁵¹ An obvious example would be a dispute over a free tenement, which as a maxim involved the use of a royal writ and royal courts.¹⁵² But Briggs has challenged the idea that the unfree were constrained to use only their lords’ courts from an economic efficiency perspective. In order for rural economics to function smoothly, it was crucial to have a legal framework guaranteeing enforcement of agreements. This is true especially of commons, which require speedy and efficient dispute resolution mechanisms.¹⁵³ Expensive systems would be too great a drain on resources, and slow ones inadequate to solve problems in time on which harvests depended. However, the common law principle was that if parties held in different manors, a lord could not distrain the goods of the person outside their fee, severely curtailing their jurisdictional powers and ability to enforce judgments. A person doing business with any party outside their own manor or lordship would

¹⁴⁸ 13 March (1316): *Ingoldmells* (n 10) 53; similarly 25 August (1344): *ibid* 115; 8 February (1346): *ibid* 121; 5 July (1346): *ibid* 127.

¹⁴⁹ 15 May (1316): *ibid* 57.

¹⁵⁰ 30 July (1313): *ibid* 33; similarly 5 October (1345): *ibid* 116.

¹⁵¹ On ‘forum shopping’ between manor courts see Briggs, ‘Manor Court Procedures’ (n 8) 524.

¹⁵² See n 21 above.

¹⁵³ See generally Ostrom (n 34).

need recourse to an outside court, or their range of enforceable economic arrangements would be very limited.¹⁵⁴

Jurisdictional boundaries were not as hard-edged as common law principle indicated. By-laws,¹⁵⁵ such as those of Great Horwood in 1344 and Cockerham, Lancashire in 1326,¹⁵⁶ declare that tenants were not to implead each other elsewhere – this would have been unnecessary if they had no other options anyway. There is also plentiful evidence tenants fined for using outside courts - ‘forbidden jurisdictions’ - in contempt of the lord.¹⁵⁷ The most familiar examples are moral transgressions resulting in church fines, for which a villein was often further amerced for ‘losing the lord’s chattels’.¹⁵⁸ The Ingoldmells rolls provide numerous examples of this, beginning in 1303, when a woman complained a neighbour’s report to the church cost her 40s.¹⁵⁹ Instances of tenants fined for having been ‘chastised’ are similar.¹⁶⁰ In 1314, a tenant used trespass to complain that the defendant unjustly caused him to be fined by the parish chaplain (which the defendant denied).¹⁶¹ In 1325, an unfree tenant was ‘oppressed’ when subjected to an action about a road leading to church in a court Christian instead of the lord’s court.¹⁶² The chaplain himself was fined in 1328 for ‘vexing’ two tenants in a court Christian for a ‘matter not touching a testament or will’.¹⁶³

¹⁵⁴ Chris Briggs, ‘Seigniorial Control of Villagers’ Litigation Beyond the Manor in Later Medieval England’ (2008) 81(213) *Historical Research* 399, 401.

¹⁵⁵ ‘By-law’ is a term which appears in the fourteenth century, but earlier ‘ordinances’ or simple statements of custom performed the same function.

¹⁵⁶ Both discussed *ibid*.

¹⁵⁷ *ibid* 405.

¹⁵⁸ Richard H Helmholz, ‘Independence and Uniformity in England’s manorial courts’ in Lloyd Bonfield (ed) *Seigniorial Jurisdiction* (Duncker & Humblot 2000) 215, 232.

¹⁵⁹ 12 June (1303): *Ingoldmells* (n 10) 25. The jury agreed she was wronged, but awarded only 10s.

¹⁶⁰ 10 July (1303): *ibid* 27.

¹⁶¹ 29 April (1314): *ibid* 38.

¹⁶² 24 October (1325): *ibid* 91; see also 24 January (1347) for impleading in a court Christian: *ibid* 132.

¹⁶³ 14 March (1328): *ibid* 103.

Jurisdictional concerns went beyond church courts: in 1301, a villein at Hinderclay, Suffolk was amerced the large sum of £4 for impleading other villein tenants with royal trespass writs (although the fine also included payment for theft).¹⁶⁴ This case is particularly noticeable because the outcome was audited in the manorial court four years later, analogous with common law review for error. It seems the large fine reflected that a tenant seeking to go outside the jurisdiction was a threat to the integrity of the land transfers in that manorial court – it could not be permitted, even if the decision was long made.¹⁶⁵ Helmholz cites various examples of tenants being amerced for ‘vexing’ and ‘impleading’ in the king’s court when they ought to have used the manor: in Lincolnshire in 1307; Suffolk in 1322; and Sutton 1339.¹⁶⁶ An Ingoldmells tenant being fined in 1314 for suing another in ‘other courts’ when he could have sued in the court of the lord may be similar.¹⁶⁷

In protecting lordly jurisdiction, the king’s courts are treated no differently to any other court. In Walsham in 1328, Geoffrey of Burgate was fined for contempt: he had pleaded outside the lords’ court and in the hundred,¹⁶⁸ although this clear assertion of the lord’s jurisdictional authority is the first one recorded in a roll beginning in 1303.¹⁶⁹ Another Walsham tenant was amerced in the same year because he had ‘prejudiced the villeins of the lord’ by telling the neighbours’ bailiffs that they had caused damage in his meadow,¹⁷⁰ and one further, less explicit,

¹⁶⁴ Schofield, ‘Gossip’ (n 139) 22.

¹⁶⁵ *ibid* 37.

¹⁶⁶ All Helmholz, ‘Independence and Uniformity’ (n 158) 283.

¹⁶⁷ 29 April (1314): *Ingoldmells* (n 10) 37.

¹⁶⁸ 22 March (1328): *Walsham* (n 11) 107.

¹⁶⁹ Geoffrey was apparently unpersuaded: he did not answer the accusation, and over the next four years refused to do homage and fell behind on his rent payments, causing his pledges to be fined in his stead: *ibid* 109-147.

¹⁷⁰ 8 October (1328): *ibid* 116.

Walsham instance saw a tenant distrained for ‘maliciously’ accusing another and resulting in a payment to another lord.¹⁷¹ Perhaps, then, the Walsham lordship was protecting its interests more intensely in this period. An exception to the rule appears in 1333, when the fine owed by two Walsham tenants was reduced on the condition they ‘go on behalf of the reeve of the manor to the old Tower [at Bury St Edmunds] and the king’s court of justice, for the delivery of prisoners and the discharge of others,’¹⁷² the duty having no obvious connection to the fine (which related to a sheepfold). These were unfree tenants not just being allowed, but actively encouraged and incentivised, to act in an external royal court. The key difference, of course, is that in this case they were doing so on behalf of the reeve, and in an official capacity, not on their own.

The jurisdiction of particular courts seems to have been well understood by local communities: in 1341, a tenant at Redgrave, Suffolk, was amerced for taking a dispute to the hundred instead of the lord’s court, with a focus on having ‘vexed’ other tenants.¹⁷³ At Wakefield, Yorkshire, the capacity of the village to enforce its own rules was recognised by necessity, as there was only one exceptionally large manor court for a wide area. For instance, a complaint in 1297 over the seizure of a horse focused on whether the animal was trespassing - the fact the distrainers were village wardens acting to enforce the by-laws and not officials of the lord appears unproblematic. But another instance from the same court shows the limits of the villagers’ enforcement power: in 1316 a son refused to pay a fine incurred by his deceased father for trespassing with cattle. The fine had been pronounced by the ‘village court’, but due to the son’s lack of co-operation the issue was taken to the manor court for enforcement (and hence appears in the rolls).¹⁷⁴ Instances of ‘illicit litigation’ could arise in home manors where the presentment

¹⁷¹ 30 May (1328): *ibid* 111.

¹⁷² 18 October (1333): *ibid* 164.

¹⁷³ Helmholz, ‘Independence and Uniformity’ (n 158) 232.

¹⁷⁴ Both Ault, *Open Field Farming* (n 124) 66.

jury brought it to the court's attention, or where there was a civil lawsuit for damages in the home manor because the plaintiff complained they had been fined elsewhere. This resulted in a fine for the lord - a punishment inflicted because going elsewhere threatened the lord's power, but Briggs argues the fact that it was often noted by juries suggests that villagers were using the rule to protect their own interests, too.¹⁷⁵

This is a particularly pertinent point in relation to vills containing multiple manors, potentially offering more than one manorial court. If villagers had a choice, there would be an increased concern to have efficient and commercially attractive courts to attract business. Briggs found a contrast between lord friendly courts at, for example, the Merton manors of Thorncroft and Cuxham, and the court in a vill with multiple manors in Oakington. The Oakington court had more effective record keeping, stricter enforcement (evidenced by more amercements), and swifter resolution of disputes. This, combined with the fact that Oakington had increased business in debt litigation in the course of the fourteenth century, led Briggs to conclude that the Oakington court was consciously seeking to attract business, and that it was incentivised to do so because it was in a manorially fragmented vill. This was in contrast with the neighbouring manor of Horwood, which did not have the more efficient procedures, and lost debt litigation business during the same period.¹⁷⁶

The rolls of Walsham-le-Willows present an interesting case in this respect, as the roll contains the entries for two manors with different lords, but closely geographically related and with a number of shared tenants. In one example, the lord of High Hall had ordered enforcement against John Man, a villein of the lord of Walsham, in a plea concerning John Wodebite, a High

¹⁷⁵ Briggs, 'Seignorial Control' (n 154) 406.

¹⁷⁶ Briggs, 'Manor Court Procedures' (n 8) 525; 537; 556.

Hall villein.¹⁷⁷ However, at the next Walsham court, the same dispute was decided with the opposite party victorious.¹⁷⁸ There are also examples with less direct jurisdictional conflict: in Walsham in 1332 and 1338 there are mentions of land in ‘the manor’ of Alexander de Walsham, who was a member of the lordly family in High Hall.¹⁷⁹ It would seem that the High Hall court was the more appropriate forum for this, but no objection to the jurisdiction was recorded. The jurisdictions directly clashed in 1345, when a man who held customary land in Walsham came and distrained against various villeins in Walsham on behalf of the son of that same Alexander.¹⁸⁰ The distrainer was amerced in Walsham. None of these instances suggest that there was any particular jurisdictional outrage when business was conducted in the neighbouring manors: this is not surprising, since such an attitude would likely have prevented the existence of a shared court roll. It may have been that administrative convenience was more important than assertions of jurisdictional authority when the manor was so close by and so well known. Sometimes, however, it could be a problem: an entry from 1334 shows customary land confiscated because a tenant of Walsham manor had alienated it to a villein of High Hall.¹⁸¹ It may be that tenants exchanging customary land on the two manors went too far. However, from the marginal notes it seems the order was intended to be deleted, and each was to keep their land.¹⁸² Disentangling the relationships between different local manors is not an easy task, but the case studies referred to here all indicate that jurisdictional boundaries were harder in theory than in practice – not because lords or tenants were careless as to jurisdiction, but because economic and geographical factors often outweighed strict legal rights.

¹⁷⁷ 17 October (1336): *Walsham* (n 11) 202.

¹⁷⁸ 5 November (1336): *ibid.*

¹⁷⁹ 28 April (1332): *ibid* 149; 11 March (1338): *ibid* 221.

¹⁸⁰ 12 November (1345): *ibid* 287.

¹⁸¹ 29 April (1334): *ibid* 173.

¹⁸² See footnote to *ibid* 173.

D. DOCTRINE AND PRACTICE OF VILLEINAGE

Villeinage may be loosely defined as the rules and procedures by which the common law decided who was (1) personally and (2) tenurially free, and thereby entitled to protection of their rights in royal courts, and who was not.¹⁸³ Tenants holding free land had access to actions in royal courts in respect of that land,¹⁸⁴ whilst those holding unfree land did not, and this was theoretically unrelated to the personal status of the holder. The coherence or otherwise of the common law rules, and their efficacy in practice, has direct bearing on local self-government. In particular, the common law position on unfreedom as reflected in treatises and the Year Books obscure the level of day-to-day autonomy villeins had according to manorial and other local records. As discussed in Section A above, local courts did not need to make rules of general application for the whole realm, so they were able to respond quite differently. Practices in relation to villeinage provide an ideal case study demonstrating this, and highlighting the complex interrelation between the common law and local custom.

1) *Freedom and Unfreedom*

First, a note on terminology.¹⁸⁵ Common law sources did not typically distinguish between ‘*servus*’; ‘*villanus*’; and ‘*nativus*’, on the basis that all were unfree and no distinctions were necessary. ‘*Rusticus*’ also appears in some early sources: in Domesday Book it seems to mean much the same as ‘*villanus*’, i.e. a rural labourer, but that person might have been personally unfree, free, renting

¹⁸³ Hyams, *KLP* (n 3) xix.

¹⁸⁴ Including locally situated royal courts like the county.

¹⁸⁵ See also Vinogradoff on terminology in Chapter 2 for a wider range of terms.

or bound to the land.¹⁸⁶ In one twelfth-century jurisdictional dispute between the bishop of London and earl of Leicester, a man was ‘almost a rustic’ (*homini suo et fere rustico*), but this may have meant unfree or merely of low status.¹⁸⁷ In 1172, a protagonist was both a ‘*rusticus*’ and a man of the people (*plebejus*) in different versions of the record – this does not reveal much about his legal status.¹⁸⁸ The terminology of ‘villeinage’ (*in villanagio*) and ‘bondage’ (*in bondagio*) often appears interchangeably in written records. For example, in a Great Horwood dispute which began in 1317 and was resolved in 1331,¹⁸⁹ ‘*in villanagio*’ and ‘*in bondagio*’ were both used in reference to the same piece of land and dispute in the records for 1317 (*villanagio*); 1330 (*villanagio*); and 1331 (*bondagio*), then *villanagio*).

The more precise ‘villein sokeman’ is usually taken to mean a villein residing on an ancient demesne manor, but there is an argument that this term also denoted a personally free individual holding villein land.¹⁹⁰ The importance of royal demesne status emerged in the twelfth century: Hoyt emphasised that in the early common law its significance was limited, because concepts of private right and public authority were not yet clearly differentiated. The king received revenues from royal demesne land as its lord, but there was nothing special about it until these manors became a ‘testing ground’ for the rapidly developing royal administrative system in the twelfth century.¹⁹¹ This process led to the consolidation of royal demesne as distinct entity by the mid-thirteenth century. ‘Ancient demesne’ also came to be distinguished, with its unfree inhabitants

¹⁸⁶ Rosamond Faith, *The English Peasantry and the Growth of Lordship* (Leicester University Press 1997) 125.

¹⁸⁷ *Gilbert Foliot v Robert, Earl of Leicester* (date unknown) *Lawsuits from William I to Richard I*, SS vol 106(2), p 484.

¹⁸⁸ *ibid* 507; 509.

¹⁸⁹ 29 October (1317) to 16 August (1330), Poos and Bonfield (n 6) 3, 5.

¹⁹⁰ Faith, *English Peasantry* (n 186) 261.

¹⁹¹ Hoyt, *The Royal Demesne* (n 55) 107.

endowed with particular privileges in royal courts.¹⁹² The gradual exclusion of Havering actions from the royal courts mentioned in Section A above and evidences this process on one manor.¹⁹³

Outside royal and ancient demesne, the extent to which villeinage in practice resembled common law theory depended a great deal on lordly attitude. The abbey of St Albans, for example, was a lenient landlord, allowing villein land transfers and some freedom of movement. For instance, Robert Howeprest of Winslow paid a fine in 1329 so that he might ‘serve the lord where he wishes’, i.e. leave the manor, and so ‘he will conduct himself well towards the lord and his people in future’ he was granted immunity until his death, permission to come to the view of frankpledge but not do suit to the halimote, and exemption from chevage.¹⁹⁴ The last shows Robert was unfree, but he was clearly not very encumbered by it. On the same manor another villein had similar, although more limited, privileges granted in 1339 without even having to pay.¹⁹⁵ The conditions were that the tenant or the farmer of his holding was to attend the halimote and the view of frankpledge, would not commit waste or remove chattels, and would perform the services due. In return, the tenant could go elsewhere to be apprenticed. Another similar grant was made in 1342.¹⁹⁶ It appears that maintaining the capital value of the holding was more important than maintaining control over individual tenants at Winslow. However, in one of these grants, in 1346, the lord allowed the villein could go elsewhere as long as they paid chevage, but reserved that the tenant was not to become a free man in any community without paying the lord.¹⁹⁷ There was still value in retaining tenants in the long run.

¹⁹² *ibid* 136.

¹⁹³ See n 133.

¹⁹⁴ 6 June (1329): *Winslow* (n 12) 16.

¹⁹⁵ 15 December (1339): *ibid* 97.

¹⁹⁶ 4 June (1342): *ibid* 128.

¹⁹⁷ 29 May (1346): *ibid* 178.

One Walsham villein tenant seems to have had similar privileges: when he died in 1339, he was described as a villein holding customary land, so heriot was due, but it was also noted that he held 26 acres of free land, one rood of meadow, and one rood of woodland freely outside the manor. This is confirmed by the 1327 subsidy return,¹⁹⁸ which had him paying 3s tax in Finningham. The editor of the Walsham roll suggested that since this tenant held so much free land elsewhere, perhaps his description as a villein which in a marginal note was an error – in any case his illegitimate son was later confirmed as personally free.¹⁹⁹ A case from Ingoldmells looks similar: an Agnes atte Hafdyk who had permission to dwell on her son's land seems to have been given permission to leave on particular conditions: she needed four pledges, had to 'justify herself with all her goods and chattels against the lord and his bailiffs', and 'to do for him all she ought to do during the time she dwells there', reminding her that her privileges were always 'at the will of the lord'.²⁰⁰

Even within a single manor, it was not always clear who was personally free and unfree. The difficulties are nicely evidenced in a common law case of 1285, where the meaning of the phrase 'tenants of the village' gave rise to a problem: the defendants asked for judgment where a lord tried to claim on their behalf, because this term could mean any combination of personally free tenants, cottiers, or villeins.²⁰¹ The common law claim the lord made was only appropriate if he was bringing it on behalf of unfree tenants, because free tenants had their own action – the uncertain language risked invalidating the whole claim.²⁰²

¹⁹⁸ 12 March (1339): *Walsham* (n 11) 232, see also editor's note therein.

¹⁹⁹ 17 July (1339): *ibid* 236.

²⁰⁰ 24 January (1347): *Ingoldmells* (n 10) 134.

²⁰¹ *Rector of Pottersbury v Richard Fitzjohn* (1285) 85 Northamptonshire Eyre 5: SS vol 122, p 218.

²⁰² *ibid* esp 220.

This confusion often gave rise to claims in manorial courts concerning free or unfree status which were vital in determining the rights and duties attached to the person or land. At Walsham in August 1317, a tenant tried to assert he was free and holding free, not customary, land.²⁰³ The jury were to investigate before the next court, but in the meantime, he needed pledges that he would swear fealty, since he was accused of unfreedom. In 1318, another tenant's attempt to claim he held nothing unfreely from the lord was put to the jurors to certify at the next court.²⁰⁴ It was decided that he held unfree land with services, which he had purchased from another unfree tenant. Since he refused to hold any land unfreely, the land was taken back into the lord's hands.²⁰⁵ Similarly, land was confiscated from a villein tenant who failed to prove their freedom at High Hall in 1327.²⁰⁶

Whilst there is reference at Ingoldmells in 1316 to an unfree tenant purchasing free land from the lord,²⁰⁷ generally those who did so on that manor and elsewhere were suspect. They were liable to have the land confiscated,²⁰⁸ sometimes expressly because it was 'contrary to the custom of the manor without licence of the lord' for that person to hold that land.²⁰⁹ At Ingoldmells in 1313, an unfree tenant who purchased land 'contrary to the form of the statute' had the land confiscated, but it was re-leased to him by the lord, with the duty to perform suit of court newly

²⁰³ 9 August (1317): *Walsham* (n 11) 57.

²⁰⁴ 15 June (1318), *ibid* 72.

²⁰⁵ 6 September (1318): *ibid* 76.

²⁰⁶ 39 August (1327): *ibid* 101.

²⁰⁷ 9 August (1316): *Ingoldmells* (n 10) 66.

²⁰⁸ 16 November (1325), *ibid* 93.

²⁰⁹ 18 February (1314): *ibid* 36.

attached.²¹⁰ In other places, most notably Peterborough Abbey's manors, the confiscation of the charter and re-letting of the formerly free land to a villein as unfree tenure was common.²¹¹

The question of charters in regards to unfree land was a difficult one. Sometimes, tenants accused of holding unfreely were told to 'show the charter' by which they were 'enfeoffed'.²¹² In one Ingoldmells case, an unfree husband and wife found pledges for the 'safe custody' of six charters whilst they waited to show the lord.²¹³ Whilst the earlier Ingoldmells cases are uncertain about charters, the issue arose for explicit consideration in 1328, when two unfree tenants produced a written instrument (an indenture, no less²¹⁴) by which they had acquired free land for life.²¹⁵ The roll proceeds: 'because it is not known whether free land thus purchased by any bond tenant ought to be arrented to the lord, therefore concerning the arrenting nothing at present...'.²¹⁶ At the following court, the land was taken by the lord 'by reason of their naifty' and they paid the large fine of 40d to hold the land unfreely hence. At the same court, the free land purchased by other unfree tenants was straightforwardly confiscated and returned.²¹⁷ This seems to signal a general policy change on the manor, with many tenants cited at that court session. Not long after, the homage of Ingoldmells was fined for the first time on the record for failing to present a purchase of free land by an unfree tenant.²¹⁸ This is not dissimilar to a Great Horwood case from

²¹⁰ 25 April (1313): *ibid* 34.

²¹¹ See generally Christopher N L Brooke and Michael Moisse Postan (eds), *Carte Nativorum* (1960) 20 Northamptonshire Record Society. See also Poos and Bonfield (n 6) lxx; 61 for villein land held by charter being regranted in this way in Yorkshire in 1338.

²¹² 28 November (1319), *ibid* 73; 16 November (1325): *ibid* 95.

²¹³ 8 February (1326): *Ingoldmells* (n 10) 99.

²¹⁴ 14 March (1328): *ibid* 102.

²¹⁵ 17 February (1328): *ibid* 100.

²¹⁶ *ibid* 101.

²¹⁷ 14 March (1328): *ibid* 102.

²¹⁸ 11 January (1329): *ibid* 104.

the same period, in 1322, wherein the tenants tried to assert that they had alienated land from time out of mind without the lord's licence, but were told this was not allowed and the land in each case was taken.²¹⁹ As with the Ingoldmells example, it looks like a policy change on the part of the lordship to no longer allow something which threatened the lord's interest and which had hitherto been overlooked, if not explicitly sanctioned.

The impact of land having passed through unfree hands was also questionable. At Walsham in 1333, a jury decided that a tenant was holding unfreely 'by the rod', because at some time previous the land had been taken into the lord's hands and returned to be held at will.²²⁰ A similar scenario seems to be behind an alienation of land 'in fee' later the same year 'as it was held for all time before the land came into William's hands'. In the same court a tenement was to be held by an incoming heir unfreely because 'at some time, it was in the hands of John Lene villein, who held it by the rod', although before that time the land was 'free from all time'. The heir objected to this, arguing they ought to hold freely, 'as of old it was accustomed to be': the fact the land had been at some time in villein hands ought not to count against them.²²¹ He was successful, but the case shows that there was an idea that land held by a villein could become tainted by their personal unfreedom. Another similar case in 1334 involved land purchased from villeins who held it unfreely, where the land had formerly been free. The new tenant claimed to hold it freely and would not make suit of court or do 'anything else which should pertain to customary tenure'. He did not succeed, and accepted at the next court that he received the land 'by the rod',²²² as did

²¹⁹ Poos and Bonfield (n 6) lxxviii.

²²⁰ 3 February (1333): *Walsham* (n 11) 156.

²²¹ 18 October (1333): *ibid* 164.

²²² 13 January (1334): *ibid* 168.

another tenant who had made the same argument.²²³ Untangling unfree status and unfree tenure was not easy, even for well-informed local decision-makers.

However, whilst status was important in determining the rights and duties of both individuals and land, it is possible to overstate the practical distinctions between free and unfree tenants. Whilst the common law drew a sharp distinction, local custom was not limited in application to the unfree: the business of manorial courts concerned a geographic and economic community of neighbours.²²⁴ Vinogradoff showed ample documentary evidence that custom could and did bind free tenants. Instances can be found where local custom explicitly refers to the unfree alone: for example at Houghton, Huntingdonshire (a Ramsey manor) the by-laws referred to customary tenants only - but this is unusual.²²⁵ More often, by-laws were expressly made with the agreement of all tenants, free and unfree. For example, at Great Horwood, Buckinghamshire, in 1290, it was 'granted by the whole homage and by the freemen that all the statutes and ordinances of autumn... be observed';²²⁶ and in the same village in 1305, 'all the lord's tenants, the free men as well as the villeins' stated a by-law about horse tethering.²²⁷ Elsewhere, in Warboys, Huntingdonshire in 1346, 'the whole homage as well free as others' restricted the use of marsh reeds.²²⁸

²²³ *ibid* 169: the tenant was fined for ten years' cultivation without leave – the land was confiscated at the next court: 3 February (1334): *ibid* 171, and taken up by another unfree family member soon after: 29 April (1334): *ibid* 175.

²²⁴ Milsom, *Foundations* (n 5) 21.

²²⁵ Warren Ault, 'Village by-laws by Common Consent' (1954) 29(2) *Speculum* 378, 391.

²²⁶ Ault, *Open Field Farming* (n 124) 83.

²²⁷ *ibid* 86.

²²⁸ *ibid* 66.

There is some dispute as to whether to take this literally, or whether references to whole communities should be read as references to the local elite.²²⁹ However, firstly, the difference between a wealthy unfree tenant and a less wealthy one was not as large as, for example the gap between a baron and a small lay landholder. Even if some peasants were deciding rules for the rest, they were still peasants, and often unfree ones. Secondly, Reynolds argues that inequality might be distasteful to us, but did not preclude a principled approach to representation and responsibility in that community – class antagonism may be another example of anachronistic concepts too readily applied to medieval society.²³⁰ Thirdly, this does not change the fact that unfree tenants were involved in creating rules which bound the entire community, free and unfree.

The customs making no distinction between free and unfree were not just restrictive ones. In 1219, fifteen men of John de Bovill held a meadow in common, as had their predecessors, at rent from another lord. Thirteen of them were unfree villeins.²³¹ In a charter c. 1279, Thomas fitz Lambert of Multon granted pasture to his tenants; all men of the vill, free and 'bond'.²³² In an unusual example from Elsworth, Cambridgeshire - a Ramsey manor – a 1290 court roll shows people accused of failing to attend boon works in the manor court who were not even that lord's tenants.²³³ This might even go so far as to suggest that any tenants in the vill were part of the common field system and bound by the by-laws, regardless of lordship, and could be held accountable for breach - even in a court which they were not usually required to attend.

²²⁹ Christopher Dyer, 'Power and Conflict in the Medieval Village' in Della Hooke (ed), *Medieval Villages* (OUP 1985) 29; Ault, *Open Field Farming* (n 124) 58-9.

²³⁰ Reynolds, *Medieval Towns* (n 56) 138-9.

²³¹ *Men of John de Bovill* (1219) 8 CRR 8, discussed by Hyams, *KLP* (n 3) 147.

²³² Nellie Neilson and Adolphus Ballard (eds), *A Terrier of Fleet, Lincolnshire* (OUP 1920) 77.

²³³ Homans (n 57) 230.

Even where by-laws did not explicitly state whether the whole community included free tenants, they had the same economic incentives in relation to common field farming as the unfree: straying animals, availability of hired labour, and the other matters that by-laws regulated affected them just as much.²³⁴ On Durham estates, where committees ('plebiscites'²³⁵) were used to draft local by-laws, members included free tenants working under pain of a fine just like the unfree.²³⁶ Durham is an interesting case: the 'halmote' there was large, hence the sub-committees for by-law creation. That court attempted to regulate the activities of free tenants, even those who did not owe suit of court, via fines for the assize of ale and communal work obligations.²³⁷ Free tenants who challenged manorial authority were often economically and socially most similar to the unfree – and most at risk of slipping into unfreedom. Perhaps, then, wealthier free tenants more secure in their freedom – maybe because they could rely on written evidence – were less likely to object to manorial court jurisdiction, which in any case often offered convenience to balance its demands.

The maintenance of jurisdictional differences may explain why a distinction was maintained in some places as to the relative ability of free and unfree tenants to essoin²³⁸ from the manorial court. In a 1336 Walsham case, an attempt to essoin in a debt plea was denied because 'he holds customary land'.²³⁹ The same happened at other times,²⁴⁰ with one tenant unsuccessful in 1337 because 'he holds by the rod'.²⁴¹ However, this was inconsistently enforced: many suitors

²³⁴ Ault, *Open Field Farming* (n 124) 58.

²³⁵ This may be translated as a 'court leet', although it would be an early use of the concept, see further below: *Dictionary of Medieval Latin from British Sources* (Brepols 2018).

²³⁶ Ault, 'Common Consent' (n 225) 393.

²³⁷ Peter Larson, 'Village Voice or Village Oligarchy?' (2010) 28(3) LHR 675, 682.

²³⁸ Excuse oneself from attending.

²³⁹ 17 January (1336): *Walsham* (n 11) 193.

²⁴⁰ 17 May (1336): *ibid* 196; 2 July (1338): *ibid* 223.

²⁴¹ 7 May (1337): *Walsham* (n 11) 211.

at Walsham held customary land or land 'by the rod' but were not denied essoins. Ingoldmells was similar: it was sometimes held those holding unfree land could not essoin,²⁴² but enforcement was variable.

Further, some landlords do appear to have held a separate court for free tenants from an early date. Maitland identified St Albans, the Abbot of Ramsey's court at Broughton, and a handful of other places in the thirteenth-century.²⁴³ Another example of a 'free court' comes from the lands of the Prior of Durham, which had a central court for freeholders. However, the free tenants there also routinely attended and conducted business in the manorial court, and the editors of the Durham records were unable to discern a principled difference between the forums.²⁴⁴ This flexibility was also the case at St Albans, but Levett found no evidence for the separate court Maitland thought existed there.²⁴⁵ His evidence - Matthew Paris' description of a 1257 court at the Abbey concerning knight service - did not refer to a court for free tenants as such.²⁴⁶ Although the composition of that court was unusual, as it probably involved the Abbot's counsellors, villein tenants could and would be called there: there was no particular distinction between it and other local courts, and the same business would often alternate.²⁴⁷ The Broughton court at Ramsey was a clearer example of a separate court, described as for the 'greater' freehold tenants, those who held their own manors of Ramsey and their own more local courts. But even if Ramsey and

²⁴² 28 November (1291): *Ingoldmells* (n 10) 2.

²⁴³ Maitland, *Select Pleas* (n 64) xlv.

²⁴⁴ William H D Longstaffe and John Booth (eds), *Halmota Prioratus Dunelmensis* (1889) 82 Surtees Society xxi.

²⁴⁵ Levett, 'Rolls of St Albans' (n 70) 60.

²⁴⁶ Maitland, *Select Pleas* (n 64) xlv; Henry Richards Luard (ed) *Matthæi Parisiensis, monachi Sancti Albani, Chronica majora*, vol 6 (Longmans 1872) 438.

²⁴⁷ Levett, 'Rolls of St Albans' (n 70) 65.

Durham were holding separate courts for free tenants, they appear exceptional, perhaps because of their large size.²⁴⁸

2) *Commitment to Process*

However determinative the lord's will was at common law, they not only generally left the workings of custom to communities, but also complied with those customs, especially where demesne land was held as intermixed strips in common fields.²⁴⁹ For instance, the 'testimony of the hallmoot' was persuasive enough to remind Geoffrey de Ivoi to return land he had wrongfully taken to its rightful owners, the nuns at Godstow.²⁵⁰ It may have invoked community disapproval when a religious house was wronged, but it is also a case of a community telling a lord what to do with his land via the court. Sometimes communities even ordered a bailiff to take remedial action against a lord: demanding the filling of two nuisance causing pits;²⁵¹ attempting to summon the lord to court;²⁵² and ordering the clearing of obstructed²⁵³ and encroached on²⁵⁴ common ways and ditches.²⁵⁵

In Great Horwood in 1323, the lord tried to appoint woodwards, but the villagers objected, presenting evidence that they had always elected them. Woodward appointment was a

²⁴⁸ Maitland, *Select Pleas* (n 64) xlv.

²⁴⁹ Homans (n 57) 323. Dispersed demesne holdings were more common in the central region, whilst block demesne was more frequent elsewhere, but there is evidence of demesne intermixture across regions: David Hall, *The Open Fields of England* (OUP 2014) 95.

²⁵⁰ *Re Geoffrey de Ivoi* (date unknown, twelfth century) SS vol 106, p 291; Frank Merry Stenton, *The First Century of English Feudalism* (Clarendon Press 1961) 42.

²⁵¹ Broughton (Hunts), 17 November (1288): Ault, *Open Field Farming* (n 124) 157.

²⁵² Alrewas (Staffs), (1272): Ault, 'Common Consent' (n 225) 389.

²⁵³ Wistow (Hunts), (1294): *ibid*.

²⁵⁴ Broughton (Hunts), (1306): James A Raftis, *Tenure and Mobility* (Pontifical Institute of Mediaeval Studies 1964) 125.

²⁵⁵ Ramsey (Hunts), (1355): Ault, 'Common Consent' (n 225) 389.

longstanding issue: twenty years earlier there had been a dispute when the woodwards the villagers appointed tried to assert extra privileges and a jury of (free and unfree) villagers reminded them that consensual gifts given in the past could not be demanded as of right.²⁵⁶ Elsewhere, a Ramsey tenant argued he owed suit of court to Broughton only twice a year. His evidence was the backing of his community: the whole court of the township of Hurst, villeins and free men, had said so.²⁵⁷ More dramatically, there are examples where the ‘entire community’ appeared in court to object to some interpretation of custom. At Cakeham, Surrey in 1315, the tenants argued that they did not have to cart dung, and won the argument after an inquest of three hallmoots.²⁵⁸ Although this was not strictly a manorial issue – the decision-making body having been partly extra-manorial, the outcome was noted in the manorial custumal: a convenient way of formally recording it, to prevent misunderstandings, and to protect entitlements in the future.

Not every attempt communities made to assert custom was successful. At Worlingworth, Suffolk, in July 1319, a woman refused to pay merchet because she held land by hereditary succession, which she said exempted her. ‘All the tenants in villeinage’ said that by custom all men of the homage, whether their land was unfree or free, could marry without the lord’s licence, and women who held land by hereditary succession could, too. It seems the presiding official suspected something, as they ‘questioned whether [the villein tenants] wished to claim the said custom at their peril’, but the tenants insisted this was their custom from ‘time out of mind’. They were ordered evidence that the custom had been ‘allowed to them’ previously, but a search of the rolls did not provide that evidence. Undaunted, the tenants cleverly argued this was because the custom had never been challenged in court before, so it had never been noted.

²⁵⁶ Ault, *Open Field Farming* (n 124) 65.

²⁵⁷ Maitland, *Select Pleas* (n 64) 68.

²⁵⁸ Walter Divie Peckham, (ed), *Thirteen Custumals of the Sussex Manors of the Bishop of Chichester* (Sussex Record Society 1925) 12; see also Homans (n 57) 320.

This argument, that the rule existed but had never been challenged, is reminiscent of a Year Book case: Chief Justice Herle insisted a local inheritance custom be proved by evidence of practice in 1328,²⁵⁹ whether on the tenements in dispute or on others ‘of the same nature’. The claimants tried to argue there might not have been an opportunity to prove the custom for that tenement. Neither the manorial case nor the common law instance succeeded: in Worlingworth, the local court rolls not only failed to provide evidence but disproved the villeins’ claim by showing the opposite past practice. The villeins were collectively fined for making a false claim.²⁶⁰ Similarly, the villeins at Wistow and Little Raveley in 1297 could not prove that they were not obliged to carry the lord’s hay beyond the meadow, and were collectively fined for claiming so after being allowed to search the rolls.²⁶¹ The jurors also received a warning in Walsham in 1342 during an inheritance dispute where the heir claimed his entry fine had already been paid on the death of his father.²⁶² An inquest of twelve jurors at first said this was true, but were ‘questioned whether they wish this to be their final verdict, under penalty as appropriate’ and changed their minds. They consulted the court roll and found the heir’s mother had paid a fine for custody of the underage heir and tenement, but not for entry. The jurors were amerced for their false presentment. These examples all evidence a commitment to process and the use of the manorial court as an institution for settling disputes in the community, including those between lord and tenants.

These cases also reveal something of how customs were proved in a local court. The volume of support offered was important, analogous to a wager of law using more ‘hands’. In various instances, it was the pressure of the ‘whole homage’ and not just the jury which reinforced

²⁵⁹ *Ralph Colby v Henry Colby* (1328) YB 2 Edw III 5; Seipp 1328.051.

²⁶⁰ Poos and Bonfield (n 6) 120.

²⁶¹ Raftis, *Tenure and Mobility* (n 254) 106.

²⁶² 15 April (1342): *Walsham* (n 11) 259.

custom. The concept of ‘time immemorial’, so vital at common law,²⁶³ is sometimes mentioned, but has a looser definition than in common law courts. Court rolls were used from an early stage as both an aid to decision making and an administrative tool: for instance, at St Albans jury evidence was supplemented by court rolls from as early as 1236.²⁶⁴ Appeal to local court rolls becomes more common in the records in the course of the thirteenth century, not least because a greater volume of material accumulated.²⁶⁵ St Albans began using court books²⁶⁶ by the mid-fourteenth century, and in other lordships Tooting Bec and Bury St Edmunds had similar, less detailed, books. The fact the St Albans books did not generally include everyday occurrences like trespasses (although the Tooting Bec book did), but did include full and detailed entries on landholding suggested strongly to Levett that the books were created with the intention of using them as collections of (legal) precedents.²⁶⁷ By the early fourteenth century, court rolls have crosses, pointing fingers, and other markers to remind the clerk and/or steward of important cases as precedents, or of unresolved issues. Some of the tags seem to have been inserted by much later users, testifying to their ongoing usefulness,²⁶⁸ whilst other markers were contemporary reminders of unfinished business. For instance, in January 1318, the Walsham roll has entries from the previous court marked with a cross, with a reminder in the subsequent entry to look back at them.²⁶⁹ Written records were important enough for manorial procedure in 1288 at Broughton, Huntingdonshire that fines were levied on the reeve and beadle for failing to bring ‘the book for

²⁶³ See n 123.

²⁶⁴ Levett, ‘Rolls of St Albans Abbey’ (n 70) 70.

²⁶⁵ Beckerman, ‘Procedural Innovation’ (n 72) 197; Poos and Bonfield (n 6) xxiii.

²⁶⁶ Registers or extracts from the rolls which were easier to refer to than rolls themselves.

²⁶⁷ Levett et al, *Manorial History* (n 14) 79.

²⁶⁸ Mark Bailey, *The English Manor c. 1200-1500* (MUP 2002) 175.

²⁶⁹ *Walsham* (n 11) 67. There are many further examples on this roll.

charging the jury as is proper' (the bible, for swearing on) and the 'roll of the halmote of the last court so that it could be looked through and the pleas carried forward.'²⁷⁰

Both local and royal courts used written court rolls as authority, but neither initially treated written precedent as binding: it was possible to expressly depart from the precedents recorded in manorial rolls. At Park in 1338, the Abbot's of St Albans' council (*'magnum Concilium'*) searched the rolls for an 'ancient' rule concerning succession. Having found evidence of it, they actively overturned the rule henceforth.²⁷¹ In Methley, Yorkshire, in 1340, the more modest counsel of the jurors declared: 'whatever they may have concluded or stated otherwise between other parties, they wish and claim to hold that usage and custom for ever... and which they have delivered to the lord in writing, in which it is more fully contained.'²⁷² This looks like legislative activity creating a new custom, although it might have revived an old one, and telling the lord what to do. Methley may have had particularly active tenants, as another case from 1333 also involved creation of a new custom when the question had never 'occurred among them' before.²⁷³ However, the practice of creating extents and custumals may have routinely involved this sort of activity under the guise of stating the terms of customary tenures, which lords in general felt bound by.²⁷⁴

As well as showing the tension between and differing uses of local custom and written court records, the Worlingworth case shows that at least some villagers were willing to use the court to try and cheat the lord out of income - it is unlikely they had an honest belief in the custom, given the recent evidence in the rolls to the contrary. Trying their luck went very badly for sixty

²⁷⁰ Ault, *Open Field Farming* (n 124) 159.

²⁷¹ Levett, 'Rolls of St Albans' (n 70) 66.

²⁷² Poos and Bonfield (n 6) 20.

²⁷³ *ibid* lxiii; 132.

²⁷⁴ Pollock and Maitland, vol 1 (n 136) 382.

villeins at Paignton, Devon in 1309. They objected to an attempted change in how the harvest was gathered which would have entailed more work for them, and refused to work at all.²⁷⁵ The bailiffs hired help instead, but the villeins found out and seized the crop, scattered it across the fields, and threatened to kill anyone binding it again. The situation was only resolved when the lord, the bishop of Exeter, came in person, gathered the villagers in the village graveyard (probably the village's customary meeting place) and formally confiscated all of their tenements. The land was later returned, and fines were paid, but most importantly the villeins performed their labour services afterwards.

It seems that resort to this kind of coercion was not always an option: in 1345, a dispute between a free tenant and the Abbot of St Albans concerning unfree land ended up in the common law court when it proved impossible to resolve at local level.²⁷⁶ This should not, in theory, have been the case where unfree land was involved: the abbot should have simply been able to assert his rights. However, the adaptation of the common law theoretical model to 'rural realities' was also a feature of the notion that villeins were chattels.²⁷⁷ A clear example of the implications of this can be seen in a Walsham case in 1332, when a fine of 20s was levied against someone who had beaten a female villein: this was not dissimilar to cases mentioned elsewhere of beating oxen or killing a boar.²⁷⁸ However, when another villein, this time a man, was beaten in 1338, it was he himself who received damages and not his lord.²⁷⁹ A similar example where a villein was beaten and (unsuccessfully on the facts) sought to claim his own damages can be seen at Ingoldmells in

²⁷⁵ Catholic Church, Diocese of Exeter, and Frances Charles Hingeston-Randolph (ed) *The Register of Walter De Stapeldon, Bishop of Exeter (AD 1307-1326)* (G Bell & Sons 1892) 310; for translation see Ault, 'Common Consent' (n 225) 386.

²⁷⁶ Slota (n 5) 131.

²⁷⁷ Hyams, *KLP* (n 3) xx.

²⁷⁸ 2 December (1332): *Walsham* (n 11) 153. For beating oxen: 21 October (1327): *ibid* 105. For a boar: 7 August (1319): *ibid* 85.

²⁷⁹ 18 September (1338): *ibid* 226.

1292.²⁸⁰ There were limits on the physical harm a lord themselves could do to a villein. In a 1288 case,²⁸¹ in a trespass writ, the defendant prior of Halesown excepted that the plaintiff, who had been imprisoned, was his villein. This was inadequate as an argument: at common law the lord of a villein was permitted to take his villeins' chattels (a villein could not own them anyway, being chattels themselves) but not to imprison them. So the prior had to argue he only put the man in the stocks in order not to fall foul of the common law restrictions on a lord's power over villeins, imposed because 'the body of the villein... belong[s] to the king'.²⁸² This limitation on lordly power appears to have been the principle at least as early as 1212.²⁸³

There is always the threat of the lord's power to evict underlying manorial cases, but the records rarely evidence it brought to bear. Even powerful lords like the Abbot of St Albans being unable or unwilling to use outright coercion suggests that something more than lordly temperament governed the relationship. Too much coercion and the tenants would either resist, as in the revolt of 1381, or would flee to other lordships with friendlier management, and extra effort would be needed to maintain productivity and the labour force. Using custom rather than coercion meant that much of the day-to-day enforcement came from local officials and jurors from within the community itself, who were willing to participate in return for economic gains – a more efficient solution for all concerned.

3) *Villein Inheritance*

²⁸⁰ 3 September (1292): *Ingoldmells* (n 10) 13.

²⁸¹ *William Edrich v Abbot of Halesown* (1288) Edw 1 uncertain court 25, SS vol 123, p 564-6.

²⁸² This case is also interesting in that it refers to Domesday Book in an attempt to prove ancient demesne status with the villein arguing that the judgment only established the status of the land, and not the man: a fairly nuanced argument.

²⁸³ *Ino de Bamburch v Henry son of Walter* (1212) 6 CRR 349-50; discussed Hyams, *KLP* (n 3) 138.

A notable set of local customs departing from the common law concerned villein inheritance. Early scholars made little practical use of this area: Seebohm briefly considered how the legal denial of villein property holding was contrasted by the surrender and admittance used to transfer unfree land in manorial courts, which seemed to practically acknowledge a property right - but only to warn against reading modern notions about slavery and freehold property into medieval serfdom.²⁸⁴ Maitland similarly observed that rules as to villein land transfers were uncertain and variable.²⁸⁵ However, these rules differ so fundamentally from the common law position that local custom presents a very different picture of villein lives.

Some of the distinct features of family and property in customary law have been studied in detail by Poos and Bonfield, identifying a number of routine features including admission of heirs to unfree property, surrender and admittance as a form of land transfer, dower, merchet, and leyrwite.²⁸⁶ Common law rules notwithstanding, manorial records consistently refer to the 'heirs' of unfree tenants. Sometimes, these statements flatly contradict common law principle, as at Winslow in 1337 where land 'which fell to [a tenant] as inheritance... by right of bondage-tenure'.²⁸⁷ Villein inheritance was sometimes 'according to the custom of the manor',²⁸⁸ sometimes 'at the lord's will'.²⁸⁹ The lack of consistent distinctions is particularly obvious in the manorial court of Ingoldmells in the 1290s, when, for instance, one entry notes land is 'in villeinage', but the villein's son is his 'heir'.²⁹⁰ However, a reservation of the lord's power is inherent in the wording:

²⁸⁴ Frederic Seebohm, 'Review: Paul Vinogradoff, *Villainage in England*' (1895) 7(27) EHR 444, 455.

²⁸⁵ Postan, 'The Charters of the Villeins' in idem, *Essays on Medieval Agriculture* (1972) 123; see also Pollock and Maitland vol 1 (n 136) 382.

²⁸⁶ Poos and Bonfield (n 6) xviii.

²⁸⁷ 20 May (1337): *Winslow* (n 12) 74.

²⁸⁸ 15 May (1316): *Ingoldmells* (n 10) 57; see also *ibid* 69, 74, 99, 109 for further examples.

²⁸⁹ 7 May 1338, *Winslow* (n 12) 83.

²⁹⁰ 11 June (1292): *Ingoldmells* (n 10) 10; 3 April (1316): *ibid* 55.

'petit acceptari ad dictam terram herietandam' (he asks to be accepted to pay heriot for the said land) – the inheritance is technically a boon, not a right.²⁹¹ This did not prevent the language of 'demand' being used in respect of inherited land in villeinage in another case of 1292.²⁹² Nor did it prevent the request language being applied in respect of relief and fealty due for free land.²⁹³ A similar example at Walsham has an unfree tenant selling his 'right and claim' by inheritance.²⁹⁴ Local rules were far less concerned to deny unfree inheritance than the common law seemed to be.

The fact of inheritance was not all: manorial custom offered a range of different inheritance rules. Seebohm argued the various customs at Winslow showed fourteenth-century villeinage was 'mild' because the 'silent working of economic laws was breaking it up'.²⁹⁵ This does not fit with the chronology of the development of villeinage, but it is true that unfree Winslow widows had a right to $\frac{1}{3}$ of their husbands' holdings for life, even if they remarried, and even though 'dower' was only allowed to free tenants at common law. Walsham widows had a more generous $\frac{1}{2}$ share.²⁹⁶ A Walsham case from 1317 shows dower in unfree land granted 'following the verdict of the homage and the custom of the manor',²⁹⁷ and a later High Hall case involved another unfree widow holding 'in dower'.²⁹⁸ One Walsham widow paid to have the rolls scrutinised to establish whether she and her husband were co-tenants, presumably because this would entitle her to keep

²⁹¹ 6 March (1303): *ibid* 23.

²⁹² 11 June (1292): *ibid* 10.

²⁹³ 18 February (1314): *ibid* 35.

²⁹⁴ 28 March (1318): *Walsham* (n 11) 70.

²⁹⁵ Seebohm, *The English Village Community* (1883; 4th edn, Longmans, Green 1890) 30.

²⁹⁶ 2 May (1317): *Walsham* (n 11) 15, 54; 27 July (1328): *ibid* 113.

²⁹⁷ 11 October (1317): *ibid* 59.

²⁹⁸ 6 May (1327): *ibid* 101.

the whole tenement rather than dower of $\frac{1}{2}$.²⁹⁹ Ingoldmells widows had dower of $\frac{1}{3}$ of their husbands' land for life, but the rolls rarely record claims.³⁰⁰

At Winslow, it was also normal for the underage child of a deceased tenant to be taken into guardianship, 'according to the custom of the manor', notwithstanding that common law also reserved wardship to the free.³⁰¹ Ingoldmells also practiced guardianship of underage 'heirs' of unfree tenants from 1316,³⁰² and the St Albans manor of Barnet has the same even earlier, from 1266.³⁰³ Walsham had guardianship of underage heirs, including villeins, but the default position appears that the 'lord [had] custody until their full age', so others could be guardians only with permission.³⁰⁴ The first record of attempted guardianship in the roll ended in land confiscation,³⁰⁵ but in a second instance in the same session a mother sought custody of an underage son, and the jurors declared she should have this by right and the custom of the manor.³⁰⁶ This type of arrangement then appears routinely in the rolls henceforth, with the lord apparently disinclined to demand guardianship of all underage heirs.³⁰⁷

An unusual Walsham example in 1332 involved a husband and wife surrendering to the lord in court the custody and care of a five-year-old son and the wife's dower, in order that another

²⁹⁹ 24 September (1331): *ibid* 140.

³⁰⁰ 5 July (1346): *Ingoldmells* (n 10) xxviii; 127.

³⁰¹ *Winslow* (n 12) 14, for example, in the roll for 6 June (1329). Many examples may be found in the Winslow court book for the period under consideration. In 1332 there is an example using an indenture to secure the guardian's liability to account: *ibid* 34.

³⁰² 26 June (1316): *Ingoldmells* (n 10) 60.

³⁰³ 26 October (1266): Poos and Bonfield (n 6) cxxxii.

³⁰⁴ 13 June (1335): *Walsham* (n 11) 186.

³⁰⁵ 21 April (1317): *ibid* 51.

³⁰⁶ 21 April (1317): *ibid* 52.

³⁰⁷ 28 March (1318): *ibid* 69.

tenant could care for both child and land until the son came of age.³⁰⁸ This may have been a poverty case, as the mother had recently been fined for ‘waste’, or it may have been more complicated: the same woman had previously been made to surrender inherited chattels to an older daughter, and surrendering a son may have reflected broader family troubles. There were, then, plenty of rules concerning substantive family and property law in customary law which differed substantially from common law denials of rights, and were able to address complex fact patterns.

Some of the most challenging cases in manorial records involve illegitimate children of villeins. In Ingoldmells in 1319, the ‘township’ said the ‘custom of the manor is that if any free man begets a [child] by a native [woman] of the lord... a native he ought to remain forever.’ This was evidently an expedient developed in response to cases arising, as the roll immediately follows: ‘William son of Sarah atte Crombes of the same condition was ordained without the licence of the lord’.³⁰⁹ In High Hall in January 1320, it was announced that two daughters of a free father had given birth outside wedlock, which might mean they were liable to childwite.³¹⁰ There was some confusion: they did not live with their father and had not for some time, and this seemed relevant. Advice was to be taken before the next court as to the correct course of action.³¹¹ The matter appears in two more entries that year, awaiting consultation with the lord, before disappearing without a stated resolution.³¹² It seems the matter was not determined decisively, as many years later the free daughter of a free man living in a free tenement gave birth out of wedlock and the jurors said it was not ‘known whether she should pay childwite or not’ because her father, whilst

³⁰⁸ 11 June (1332): *Walsham* (n 11) 152.

³⁰⁹ 26 February (1319): *Ingoldmells* (n 10) 69.

³¹⁰ A fine imposed on those who gave birth to children outside of marriage. Leyrwite was a similar fine, imposed for having sexual intercourse outside marriage.

³¹¹ 20 January (1320): *Walsham* (n 11) 88.

³¹² 10 July (1320): *Walsham* (n 11) 89; 5 October (1320): *ibid* 90.

personally free, held unfree land.³¹³ A more complicated Suffolk case involved a woman living on unfree land giving her personally free daughter in marriage to an unfree husband, with a dowry of goods and chattels taken from the mother's unfree land.³¹⁴ The homage said they should not be fined, but the lord was to be consulted on this and another similar instance. A related problem seems to have arisen when a woman who was personally free and held no land from the lord married a free man: the lord was to be consulted, presumably to make sure no payment was due.³¹⁵

Whatever the common law had to say on the matter, it is clear that villein juries often did not know what to do, in contrast to other matters where they were fully alive to the common law rules. For example, Walsham jurors in a 1325 case helpfully informed the lord he would need a common law writ to act in respect of a manumission of tenant and land by charter.³¹⁶ If jurors were unable to puzzle out how to deal with illegitimate children, it is likely because the law was not settled, and not because they were not aware of the rules.

4) *Villein Chattels*

The dowry case above evidences a further rule concerning villein property: a restriction on the ability to remove chattels from unfree land. This rule followed logically from the common law doctrine of villeinage: the villein had no right to property, so their land and chattels belonged to the lord, who could resume possession at will.³¹⁷ At Ingoldmells in 1341, a free man who had married an unfree woman tried to argue he had the right to 'carry the profits' of unfree land

³¹³ 3 February (1344): *ibid* 270.

³¹⁴ 25 July (1345): *ibid* 283.

³¹⁵ 18 September (1338): *ibid* 227.

³¹⁶ 22 May (1325): *ibid* 97.

³¹⁷ Postan, 'Charters' (n 285) 112.

wherever he wished.³¹⁸ It was accepted custom that unfree tenants could not carry goods off of the land,³¹⁹ which the jury reinforced here: even a personally free tenant could not carry chattels off unfree land because ‘it [was] not the custom of the bondmen that any freeman shall carry corn growing on bond land outside the lordship’.³²⁰ This outcome may be another example of local custom deviating from the common law: *Glanvill* unambiguously said in the twelfth century that a free man who married onto a villein tenement lost all his legal rights as a free man as long as he had that tenure,³²¹ but the tenant here was only treated as unfree in respect of that particular land. However, the common law approach had changed in the century and a half intervening between *Glanvill* and *Bracton*: the latter took a narrower approach, modifying the free person’s rights in land in respect of unfree tenure, but not depriving them of personally free status. This followed because a free man holding unfree land completed unfree labour because of the *land*, but not their personal status, and they had more freedom both to leave and resist ejection, even though they could not use the assizes of mort d’ancestor or novel disseisin to do so.³²²

Nonetheless, a villein’s chattels were routinely protected, as can be seen in the concept of ‘waynage’.³²³ When an incoming tenant taking unfree land at Winslow agreed not to remove chattels,³²⁴ this was consistent with the notion that villeins had no chattels of their own. However, the rule rapidly loses meaning in the context of the widespread custom of ‘heriot’. On many manors, the death of a villein tenant triggered a liability to ‘heriot’ imposed on the incoming ‘heir’, paid from the chattels on the tenement: usually the best animal or, failing that, a lesser chattel.

³¹⁸ 5 November (1341): *Ingoldmells* (n 10) 111.

³¹⁹ 11 January (1329): *ibid* 104; another at 19 December (1330): *ibid* 107; and 5 November (1341): *ibid* 111.

³²⁰ 5 November (1341): *ibid* 112.

³²¹ *Glanvill* (n 1) 58.

³²² *Bracton*, vol 2 (n 2) 37.

³²³ See Chapter 3 n 218 and 219.

³²⁴ *Winslow* (n 12) 7.

Heriot could be waived if tenants were too poor,³²⁵ but was generally considered a lordly right and an incident of unfree tenure. But it amounts to the lord claiming a right to property which, according to common law, must have been theirs all along. The best explanation of this is that whilst villein tenants were incapable of being in possession of those chattels at common law, this was not so in the customary law of the manor, which is where heriot was enforced. For instance, the customary rule at Walsham³²⁶ and High Hall³²⁷ was that if heriot was paid on a tenement, no entry fine was to be taken, 'in accordance with the custom of the manor'. In 1329, there are several cases of Walsham tenants making arrangements which look like they may have been designed to avoid heriot: a jury reported that one recently deceased tenant held various pieces of land unfreely, but had alienated them during his life to another to hold to the use of himself and his heirs after his death. Three other tenants were to be investigated to determine whether they had disposed of land before their deaths, so no heriot was payable.³²⁸ If this was a deliberate avoidance mechanism, it parallels the later employment of uses and trusts. The inquiry was repeated at the following court,³²⁹ and the next two.³³⁰ In the latter, the stakes are raised: 'the lord consulted whether villeins who have beasts and other animals in the lord's demesne and hold no land owe relief or not, because Peter Hulke and others were in this situation'. However, it is not mentioned again, presumably because the lord protected their interest and enforced heriot.

³²⁵ 28 July (1329): *ibid* 128.

³²⁶ 16 January (1319): *Walsham* (n 11) 79; 10 October (1327): *ibid* 103.

³²⁷ 4 January (1318): *ibid* 63.

³²⁸ 24 January (1329): *ibid* 119-120.

³²⁹ 17 March (1329): *ibid* 122.

³³⁰ 8 June (1329): *ibid* 124; 28 July (1329): *ibid* 128.

E. CONCLUSION

All of the above can be summarised in the notion that the life of the villein was more complicated and less arbitrary than statements of common law principle suggest. The concern of the common law was to state the position from, usually, the perspective of a vertical hierarchy between lord and tenant. However, horizontal bonds existed and were regulated by a combination of common law and local custom. There was dialogue between the common law and manorial courts, and wherever the common law made a bold statement about villein disabilities it can be contrasted with the practice of manorial and local custom. It is only by examination of local records, particularly those of manorial courts, that this becomes evident, and it is impossible to fully understand villeinage without looking to its regulation in local custom as well as the common law rules. This was an accepted and deliberate feature of the early common law, which did not seek to regulate the area in detail. Sometimes, this amounted to local self-government by those denied individual legal personality at common law, whilst at others it qualified or elaborated on the common law position. Where this chapter has focused on the relation between the two, the next will consider the detailed mechanisms of local conflict resolution under custom independent of the common law.

CHAPTER 6

CONFLICT RESOLUTION MECHANISMS IN THE VILLAGE COMMUNITY

Business in manorial courts involved a wide range of topics, including exchanges and arrangements concerning chattels and land. Local records also demonstrate that local custom had its own institutions and officials, regulations, and relationships. Manorial rolls and, to a lesser extent, common law court records, help to illustrate that the village community acted as a unit in legal matters in a variety of ways. This was both as an object of legal action, for example in relation to taxation, and as its instigator, as when communities took to the courts to defend their customs both internally and externally. They also exercised a range of regulatory powers concerning economic management and taxation.

The substance of local rules is particularly worth investigation by way of contrast with the more abstract common law: many defined particular rights and procedures, including contracts, debts, and land rights for the unfree, long before the common law did. The previous two chapters discussed the fact that local legal regulation tended to be more flexible than the common law to reflect local conditions, and because it was harder to simply walk away from a relationship in a relatively small community. This means that, in the intense personal proximity of a village, we would expect to find that complex relationships and conflicts were both common and readily settled – with clear impact on our understanding of medieval law in general. This chapter identifies areas which have not yet been the subject of detailed investigation, but which would be fruitful areas for future research on local custom and the village community. It also begins the work of the substantive research on those topics using the case studies outlined in Chapter 5.

Much of the substance of local custom can be found in what would later be called ‘by-laws’. Warren Ault noted in 1930 that, although Vinogradoff had believed that there was a need for extra-manorial village regulation by virtue of common field farming, he had to do so on faith¹ - only through Ault’s studies was one of the first and only printed compilations of medieval by-laws produced. However, the primary evidence is now more available with the completion of the Manorial Documents Register and an ever-growing supply of printed court rolls and custumals. What is less common is their use in attempts to describe law in general, although there are a small but increasing number of technical legal studies of medieval customary law, particularly led by Lawrence Poos, Lloyd Bonfield, Phillipp Schofield, and Chris Briggs.

A. APPEALS AND REVIEW OF DECISIONS

Appeals or challenges to decisions were not necessarily part of manor court procedure. A Walsham tenant who disagreed with a presentment against him in 1329 demanded a second inquest, where he was found not guilty,² but this is an unusual example: the vast majority of presentments went unchallenged. This is the only obvious instance in the Walsham roll, although there are also cases of appeals to the lord’s steward,³ and of jurors revisiting a previous verdict.⁴ At St Albans, there were fines for breaching procedural rules by cursing jurors, lying to the court president, accusing others of lying, and challenging judgments in

¹ Warren O Ault, ‘Some Early Village By-laws’ (1930) 45 EHR 208.

² 8 June (1329): Roy Lock and Mark Bailey (eds), *The Court Rolls of Walsham Le Willows, 1303-1350* (Boydell & Brewer 1998) 124.

³ 22 March (1328): *ibid* 9; 107.

⁴ 30 May (1328): *ibid* 110.

court.⁵ The involvement of the Abbot's council, which Maitland called an appeal court, suggests not all decisions were made by the village community. However, whilst the central court at St Albans may have carried out some appeal functions, there is no evidence it was held primarily for that purpose. Levett found one example at Park in 1338, where lord and council exercised a legislative type of power during an unusual period of local rule consolidation and legal retrenching,⁶ and another at Winslow in 1336.⁷ Cases referred to abbot and council were not in any obvious way unusual, difficult, or technical.⁸

Maitland extrapolated from this and a handful of other examples that there were councils advising all the great prelates. However, there is only evidence of councils used on some manors, not all; and although they had some role in manor court decision making, it was not as a formal appeal court. Many manors seem not to have used a lord's council at all: at Hatfield Chase in 1342, when the written evidence required was not on the rolls, an inquest was used, not a referral.⁹ At Ely, where a council sometimes considered challenges to decisions, the court responded to an accusation of clerical error in 1321 by searching the rolls and holding an inquest: the council was not an exclusive mechanism for resolving challenges.¹⁰ But elsewhere, at Crowle, Lincolnshire in 1319, a case was referred to the lord's council for similar

⁵ Ada Levett, 'The Courts and Court Rolls of St Albans Abbey' (1924) 7 Transactions of the Royal Historical Society 52, 74.

⁶ *ibid* 75; see also Leon A Slota 'Law, Land Transfer and Lordship on the Estates of St Albans Abbey in the Thirteenth and Fourteenth Centuries' (1988) 6 LHR 119, who claims the Abbot at St Albans could alter inheritance customs, leases, and entry fines at will: 132.

⁷ Levett, 'St Albans' (n 5) 60; see also David Noy, *Winslow Manor Court Books Part I 1327-1377* (2011) 35 Buckinghamshire Record Society Publications xvi. Beckerman examined a wider range of manors and was also unable to find evidence of lord's courts functioning as appeal courts: 'Customary Law in English Manorial Courts' (DPhil Thesis, University of London 1972) 46.

⁸ Ada E Levett, 'Baronial Councils and their relation to manorial courts' reprinted in *idem et al, Studies in Manorial History* et al, *Studies in Manorial History* (Clarendon Press 1938) 31.

⁹ Lawrence Poos and Lloyd Bonfield (eds), *Select Cases in Manorial Courts, 1250-1550* (1998) SS vol 114, p 62.

¹⁰ Frederic William Maitland and William Paley Baildon (eds), *The Court Baron* (1891) SS vol 4, p 134.

reasons: a tenant vouched the court rolls, but their evidence could not be found.¹¹ If nothing else, these cases demonstrate the varied procedure and practices adopted when a court decision was questioned in different manors, and therefore a lack of a regular appeals system. In some instances, the council does look more like an appeal body due to the presence of a royal justice.¹² A case concerning a land transfer from an impoverished tenant to a new one at Great Waltham in 1327 was decided by the ‘council of the lord earl [of Hereford and Essex], namely by the lord abbot of Walden and Sir Humphrey de Walden.’¹³ The latter was a judge, but also sometime steward of the lord.¹⁴ A writ of ‘tolt’ allowed a challenge to a manorial jury decision in the county court,¹⁵ but as royal writs were increasingly unavailable to the unfree as villeinage tests developed, they offered little assistance to many manorial tenants.

Nonetheless, there were informal appeals to higher authorities. Some, but not all, of the manors which evidence this practice, like Durham and Ely, had special jurisdictional arrangements.¹⁶ At Ely, a letter from the Bishop to the steward informed him a tenant had appealed and the rolls were to be searched on his behalf. If nothing was found, the question was to put to ‘good and lawful folk’.¹⁷ In initiating a procedure rather than making a decision, the bishop here looks less like an appeal court than an actor initiating an appeal procedure in the local court. At Ingoldmells in 1328, it was suggested the defendant ‘produce a letter of the

¹¹ 19 April (1319): *ibid* 7. The case was resolved between the parties: 21 May (1319): *ibid* 8.

¹² Levett, ‘Baronial Councils’ (n 8) 27 found examples at Broughton, Westminster, and St Albans.

¹³ Poos and Bonfield (n 9) 100-1.

¹⁴ For evidence of this in relation to a 1320-2 petition see John Strachey (ed), *Rotuli Parliamentorum*, vol 1 (1767) 398.

¹⁵ John Hudson, *The Oxford History of the Laws of England*, vol 2 (OUP 2012) 570.

¹⁶ Maitland and Paley Baildon (n 10) 21.

¹⁷ *ibid* 121.

lord or his steward which ought to acquit him of the said amercement'.¹⁸ A letter from a lord was, however, an extra-legal remedy, for instance in a 1326 Ingoldmells case where a new tenant's rent was set 'by letter of the lord',¹⁹ and at Walsham in 1328 where unauthorised land sales were allowed 'by the lady's letter'.²⁰

The use of lords' councils may also explain why the *Leges Henrici Primi*²¹ referred to neighbouring landowners or friends of the lord being invited to help suitors judge.²² It is unclear whether this was restricted to hard cases, but the *Leges* indicates this council was to act as judge in cases where the lord proceeded at law against his own man, presumably because a lord ought not be judged by his own tenants.²³ In the reign of Henry I, in 1121 at Bath Priory, the Bishop of Bath's court presented a case to the assembled body of 'friends and barons', although a subset of these who were 'gravest and most knowing in the law' actually considered the case and gave judgment on behalf of the rest.²⁴

There are further early examples: at Bylands Abbey, a lord's council was involved in manor court decision making in 1140,²⁵ and the Abbot of Thorney's court at Charwelton in c.

¹⁸ 17 February (1328): William Oswald Massingberd, *Court Rolls of the Manor of Ingoldmells in the County of Lincoln* (Spottiswoode & Co 1902) 100.

¹⁹ 24 January (1326): *ibid* 96.

²⁰ 27 July (1328): *Walsham* (n 2) 112.

²¹ Leslie John Downer (ed), *Leges Henrici Primi* (Clarendon Press 1972) 135; c 32, 3.

²² Paul Brand described these neighbouring landowners or friends of the lord as there to assist the jury – if they were a part of the lord's council this would be a slightly different role: *The Making of the Common Law* (Hambleton Press 1992) 91.

²³ *Leges Henrici Primi* (n 21) 135; c 32.

²⁴ Theodore Madox, *The History and Antiquities of the Exchequer* (Bowyer 1711) 75. Also discussed by Brand, *Making* (n 22) 91.

²⁵ Printed in Frank Merry Stenton, *The First Century of English Feudalism* (Clarendon Press 1961) 72.

1101-1111, had a judgment delivered by a group of named jurors as well as ‘men of the saint’.²⁶ For the fourteenth century, the Bishop of Ely’s court at Littleport referred an appeal to the bishop’s council in 1327.²⁷ In Great Horwood, Buckinghamshire in 1331, when the scope of a custom was unclear, it was referred to the lord’s council;²⁸ and in Burnham Thorpe in 1334, a custom was referred to the lord’s council because the jurors claimed it had never been practised before (but nonetheless presented someone for it)²⁹ - this may have been an attempt to introduce a new custom. At Ingoldmells in July 1313, a dispute concerning an allegation of unfreedom was to wait until the next court ‘unless the council of the lord comes first’.³⁰

Lord’s councils generally performed extra-judicial duties in hard cases, rather than acting as an appeal or review court within the local legal landscape. At Great Horwood in 1331, the whole homage was asked to provide information on the history of an inheritance dispute, but they were uncertain. They referred the case to the lord’s council and, perhaps surprisingly, the latter found the lord in the wrong.³¹ Poos and Bonfield think this shows the lord submitted to a voluntary limitation on the power to claim forfeiture, but only when the court approved it through the appropriate procedure.³² In these cases it seems the council was used as a fact finder in the absence of the type of evidence the court usually relied on, like jurors’ recollections and court rolls.

²⁶ Printed in Doris M Stenton, *English Justice Between the Norman Conquest and the Great Charter* (American Philosophical Society 1964) 138.

²⁷ Maitland and Paley Baildon (n 10) 111; 147.

²⁸ Poos and Bonfield (n 9) lxxii; 6.

²⁹ *ibid* 133.

³⁰ 30 July (1313): *Ingoldmells* (n 18) 32.

³¹ Poos and Bonfield (n 9) 6.

³² *ibid* xcviij, 5. See also the Crowle case mentioned above (n 11).

B. OFFICIALS

Effective direct supervision would have involved more cost and bureaucracy than was viable for many thirteenth- and fourteenth-century lords.³³ Instead, manors were managed by a variety of local officials, under procedural rules primarily determined at a local level. Maitland believed that controlling officials was a challenge, and manor court rolls emerged as economic documents to check them, only later developing into a full chronicle of manorial affairs.³⁴ That is doubtful: for example, at St Albans, the concerns in the earliest manor court rolls are predominantly legal, although the rolls do contain economic information.³⁵ Officials enforced and were constrained by customary rules, protecting both community and lordly interests – sometimes simultaneously, sometimes in alternation.³⁶ This makes them difficult to define in clear terms, but they were essential to the machinery of the village community from the perspective of both lords and tenants.

A reeve was the agricultural manager for one manor.³⁷ They were financially accountable to and with the bailiff, if there was one. The latter was a higher official with responsibility for multiple manors, managing several reeves and accountable to the lord via common law writs. A steward was a legal official employed by the lord to hold their seigneurial and franchisal courts.³⁸ Both senior officials were professionals and unlikely to have a

³³ Marjorie K McIntosh, *Autonomy and Community* (CUP 2002) 13. See generally John Sabapathy, *Officers and Accountability in Medieval England 1170-1300* (OUP 2014).

³⁴ Frederic W Maitland, *Select Pleas in Manorial and other Seignorial Courts* (1888) SS vol 2, p xiv

³⁵ Levett, 'St Albans' (n 5) 57.

³⁶ Paul Vinogradoff, *Villainage in England* (Clarendon Press 1892) 354.

³⁷ On reeves see generally Henry S Bennett, 'The Reeve and the Manor in the Fourteenth Century' (1926) 41 EHR 358; Paul D A Harvey, 'The Manorial Reeve in Twelfth Century England' in Ralph Evans (ed), *Lordship and Learning* (Woodbridge 2004).

³⁸ See generally, Paul Brand, 'Stewards, Bailiffs and the Emerging Legal Profession' in Evans (n 37) 140.

community tie to those they governed, but the reeve was usually a local, familiar with the tenants and area. The existence of a reeve gave lords the assurance that there was someone who could be held accountable for the manorial economy³⁹ and enabled utilisation of local knowledge and connections.⁴⁰

It was not only lords who benefitted from the existence of officials: for members of the community it meant access to, at best, perquisites,⁴¹ and at worst illicit personal profit,⁴² whilst also acting as a conduit for power, influence, and perhaps professional training.⁴³ The natural limitation of such a system was that it was possible that individual desire for personal influence, community power, or simply a conflict of interests might mean that the officials sometimes acted contrary to the lord's interests, or even actively opposed them.⁴⁴ To some extent, the community also monitored this: presentments for carelessness or incompetence were not uncommon, as will be discussed further below, but they fell short of presentment for inadequately efficient or effective decision making.⁴⁵

³⁹ Henry S Bennett, *Life on the English Manor* (CUP 1937) 168.

⁴⁰ Chris Briggs, 'Monitoring Demesne Managers through the Manor Court Before and After the Black Death' in Richard Goddard, John Langdon and Miriam Muller (eds), *Survival and Discord in Medieval Society* (Brepols 2010) 179, 180.

⁴¹ 'Perks' or benefits from holding office.

⁴² Sherri Olson, *A Chronicle of All that Happens* (Pontifical Institute of Mediaeval Studies 1996) 100-1.

⁴³ *ibid* 104-11; 150.

⁴⁴ Briggs (n 40) 180.

⁴⁵ *ibid* 193.

1) Election

A reeve was meant to be the best husbandman, a villein tenant elected by the ‘*villata*’ or body of tenants.⁴⁶ Walter of Henley advised lords that villeins should elect their reeve so that they were responsible for any related costs – a good demonstration of the cost consciousness around manorial officials.⁴⁷ This advice was followed at, for instance, Gloucester, where communal liability was imposed in return for tenants’ power to elect.⁴⁸ Willingness to buy that privilege probably also related to a desire on the part of villagers to avoid corrupt or oppressive officials.⁴⁹ Court rolls often show a homage or community of the vill (‘*communitas*’) - terms which do not make explicit distinctions concerning personal freedom - responsible for choosing a reeve and other officials and guaranteeing their behaviour⁵⁰. Walsham officials were elected,⁵¹ and at High Hall, election was initially ‘by the whole homage’,⁵² although this migrated to ‘all the customary tenants’ in the 1330s.⁵³ In Wakefield in 1274 it was sometimes the whole township and sometimes the customary tenants (‘*nativi*’) who chose and answered for the reeve, even in the same court session.⁵⁴

⁴⁶ Dorothea Oschinsky (ed) *Walter of Henley and other Treatises on Estate Management and Accounting* (Clarendon Press 1971) 95, 275.

⁴⁷ *ibid* 441.

⁴⁸ William Henry Hart, *Historia et Cartularium Monasterii Sancti Petri Gloucestriae*, vol 3 (1863-1867) 33 RS p 221.

⁴⁹ Susan Reynolds, *Kingdoms and Communities in Western Europe 900-1300* (1984; 2nd edn, Clarendon Press 1997) 133.

⁵⁰ Paul Vinogradoff, *The Growth of the Manor* (1905; 2nd edn, George Allen & Company Ltd 1911) 356; Harvey, ‘Reeve’ (n 37) 133.

⁵¹ 11 October (1317): *Walsham* (n 2) 62.

⁵² 5 August (1318): *ibid* 74.

⁵³ 22 February (1334): *ibid* 172.

⁵⁴ In Wakefield, reeves were ‘graves’: William Paley Baildon, *Court Rolls of the Manor of Wakefield*, vol 1: 1274-1297 (1901) 29 Yorkshire Archaeological Society 85.

Usually, a reeve managed a whole vill or manor. However, odd records at Walsham High Hall in 1326 refer to a reeve and hayward for particular tenements elected by the whole homage.⁵⁵ In 1327, a reeve ‘for the tenement of Aprilles’ was elected;⁵⁶ in 1333, a reeve for another tenement was elected by ‘all the customary tenants’;⁵⁷ and in 1344 and 1346, a collector was elected ‘for the tenement of John Wodebite’.⁵⁸ Both electees in the first instance paid fines not to serve, suggesting this odd phenomenon may have been an income generation measure creating undesirable mini-offices, but if not it shows an unusual fracturing of agricultural management.

Details of selection processes for local officials were varied and only sometimes recorded: in Newington, Oxfordshire, the villagers shortlisted six men for reeve and the steward selected one in 1339;⁵⁹ and the Battle Abbey customal describes the same process in the thirteenth century.⁶⁰ At Brightwaltham, Berkshire, only four ‘best men’ were shortlisted.⁶¹ Elsewhere the description is often of simple ‘election’, or purchase of the right to elect.⁶² On some manors reeve was a rotating position;⁶³ attached to a particular tenement, as at Kirton,

⁵⁵ 17 November (1326): *Walsham* (n 2) 98; see also 18 October (1346): *ibid* 295, where a man was elected reeve ‘for his own tenement’.

⁵⁶ 21 October (1327): *ibid* 105; 7 October (1341): *ibid* 252.

⁵⁷ 24 November (1333): *ibid* 166.

⁵⁸ 18 October (1344): *ibid* 275; 18 October (1346): *ibid* 295.

⁵⁹ (1339): Ault, ‘Early Village By-laws’ (n 1) 224.

⁶⁰ Samuel Robert Scargill-Bird, *Customals of Battle Abbey, in the Reigns of Edward I and Edward II (1283-1312)* (Camden Society 1887) 66.

⁶¹ Maitland, *Select Pleas* (n 34) 168.

⁶² See e.g. George Homans, *English Villagers of the Thirteenth Century* (HUP 1941) 298; Warren O Ault, *Private Jurisdiction in England* (YUP 1923) 300; Bennett, ‘Reeve’ (n 37) 361.

⁶³ E.g. at Hatfield Chase, Yorkshire, 11 June (1348): Poos and Bonfield (n 9) 137.

Lincolnshire in 1300;⁶⁴ or an appointment made by the lord. Even in the latter case the villagers monitored reeve behaviour: at Cuxham, the reeve was presented to the manor court in 1341 for failing to stock the lord's land with pigs.⁶⁵

Smaller official roles like hayward and woodward were also often elected.⁶⁶ There is one document describing shortlisting of candidates for official roles under gavelkind custom in Kent, with the final choice made by the lord.⁶⁷ However, this is unlikely to have been the general rule: it is not mentioned in other descriptions of Kentish custom.⁶⁸ Other elected roles included tax officials:⁶⁹ in the management manuals in *The Court Baron*, 'taxers' (also called 'affectors') were appointed to assess and collect fines for trespass. The manual recommends use of two free and two unfree tenants.⁷⁰ Tax officials were at least sometimes unfree,⁷¹ and like a reeveship, the role could be associated with a particular piece of land: at Stowe, Lincolnshire in 1283 the beadle held a bovate of land for the service of collecting monies owed to the lord and rents.⁷² Two affectors were appointed by the tenants on the Walsham manors⁷³

⁶⁴ 5 October (1300): 'Inquisitions Post Mortem, Edward I, Files 95 to 97', in John Sharp and Alfred Stamp (eds), *Calendar of Inquisitions Post Mortem: Volume 3, Edward I* (HMSO 1912) 470. See also examples at Walsham, although the first may be scribal error: 15 November (1330): *Walsham* (n 2) 139; 24 November (1333): *ibid* 166.

⁶⁵ Paul D A Harvey, *A Medieval Oxfordshire Village* (OUP 1965) 65.

⁶⁶ A hayward managed mowing, whilst a woodward managed 'forest': an area of land designated as such, primarily for hunting. See e.g. Cuxham (1296): *ibid* 146; Hallingbury, Essex (1275): Homans, *English Villagers* (n 62) 290.

⁶⁷ Nellie Neilson, 'Custom and the Common Law in Kent' (1924) 38 *Harv Law Rev* 482, 491.

⁶⁸ For brief discussion of these sources see Paul Brand, 'Local Custom in the Early Common Law' in Pauline Stafford, Janet Nelson, and Jane Martindale (eds), *Law, Laity and Solidarities* (MUP 2001) 158.

⁶⁹ E.g. Great Horwood, Buckinghamshire (1320), the court elected three men to apportion lord's aid: Warren Ault, 'Village Assemblies in Medieval England' in Helen Maud Cam (ed), *Studies Presented to the International Commission for the History of Representative and Parliamentary Institutions XXIII* (Publications Universitaires de Louvain 1960) 15.

⁷⁰ Maitland and Paley Baildon (n 10) 101.

⁷¹ See e.g. in relation to taxes levied in 1290 and 1294, Walter S Thomson (ed), *A Lincolnshire Assize Roll for 1298* (London Record Society 1944) xliii-xlvi. John Paris was an example of a villein sub-taxer: *ibid* 250.

⁷² Bennett (n 39) 181 and sources therein.

⁷³ 18 January (1317): *Walsham* (n 2) 49 is the earliest instance of names mentioned in that roll, then it is routine there.

- they could be the same people as the reeve and hayward.⁷⁴ The roles of keeper of the wood⁷⁵ and warren were also elected.⁷⁶ The roll for 1328 mentions an elected 'parker', although they were sanctioned for failing to perform, concealing wrongdoers, and trespassing,⁷⁷ then allowed to remain in office.

There were disputes over manorial officialdom. The tenantry could be fined if nobody was willing to serve⁷⁸ and individuals sometimes paid voluntarily in order to avoid office.⁷⁹ In the twelfth century, the *Leges Henrici Primi* said a man could generally refuse to accept a reeveship,⁸⁰ but this usually came at a price. At Walsham, unfree tenants were often willing to pay to avoid becoming reeve or hayward,⁸¹ or keeper of the woods, or to avoid suit of court for a year.⁸² These could be large sums: in 1346, the fine not to be reeve was 26s 8d, and for hayward 13s 4d.⁸³ In one instance, a woodward paid to be released in the middle of his term, both through choice 'and because he did not perform his duties'.⁸⁴ At Ingoldmells, some paid for release from wardenship of the assizes of ale and bread.⁸⁵

⁷⁴ 11 May (1328): *ibid* 109, the reeve and hayward were named as affeerors on 30 May (1328): *ibid* 111.

⁷⁵ *ibid*.

⁷⁶ E.g. 12 October (1316): *ibid* 41; 18 January (1317): *ibid* 48.

⁷⁷ 22 March (1328): *ibid* 108.

⁷⁸ E.g. Bulverhythe (1222), a 20s fine: Roger Gale, *Register of the Honour of Richmond* (Gosling 1722) Appendix, p 45.

⁷⁹ Nellie Neilson, *Customary Rents* (1910) 2 Oxford Studies in Social and Legal History 110; see e.g. Clitheroe (1324): Ault, *Jurisdiction* (n 62) 299-300.

⁸⁰ *Leges Henrici Primi* (n 21) c 56, 7 at p 177. The former part of the statement is clearer: '*unicuique uero licet secundum legem preposituram non suscipere*', than the second half '*custodiam non licet*', which does not necessarily fit with Downer's translation as the inability to refuse to protect a lord's property.

⁸¹ 12 October (1316) two tenants paid not to be haywards, one not to be reeve, and another not to be keeper of the wood: *Walsham* (n 2) 41.

⁸² 11 October (1317): *ibid* 61. Failure to do so could result in a fine: e.g. 5 August (1318): *ibid* 77.

⁸³ 20 October (1346), the latter fine voided because the person elected decided to perform: *ibid* 297.

⁸⁴ 18 January (1317): *ibid* 45.

⁸⁵ 30 January (1292): *Ingoldmells* (n 18) 5.

Whilst tenants were occasionally arrested or punished for refusing to serve as reeve, this is exceptional.⁸⁶ Tenant reactions to unwelcome appointments could be dramatic: when the steward of Preston tried to appoint Hildebrand Reynberd as reeve in the manor of Upwick in 1280, the latter gathered fifty-three men and attacked the stewards' house with fire, killing his animals and threatening his life.⁸⁷ The men of Cadland, Hampshire, paid not to elect a reeve in 1262, refused to elect in 1310, and refused to co-operate on the issue for several more decades. The abbot was unable or unwilling to unilaterally appoint one.⁸⁸ When a tenant elected as reeve at Walsham in 1342 'refused to perform the office', his villeinage land was confiscated.⁸⁹ However, a tenant at Newton Longville in 1293 argued that local custom decreed no tenant (including, in this case, his deceased father) could be compelled, nor could his land be confiscated for refusing, to move to another manor in order to serve as official there – the jury agreed and his father's land was returned.⁹⁰ A more complicated arrangement between abbot and customary tenants at Halesowen in 1327 decided they would elect a greater and a lesser reeve, and could not be distrained to act as beadles.⁹¹

⁸⁶ E.g. Simon of Paris had been sheriff of London but was arrested in 1308 as a fugitive villein when he refused to serve as reeve on his native manor, although the jury found he was free: *Simon of Paris v Bailiff of Robert Toun* (1308) YB 1 Edw II, SS vol 17 p 11-12; discussed Frederick Pollock and Frederic W Maitland, *The History of English Law Before the Time of Edward I*, vol 1 (1895; 2nd edn, CUP 1905) 456.

⁸⁷ Louis F Salzman 'The Borough of Hove', in idem (ed), *A History of the County of Sussex: Volume 7, the Rape of Lewes* (OUP 1940) 265.

⁸⁸ David G Watts, 'Peasant Discontent on the Manors of Titchfield Abbey, 1245-1405' (1983) *Proceedings of the Hampshire Field Club Archaeological Society* 121, 126-7; see also Reynolds, *Kingdoms* (n 49) 133.

⁸⁹ 25 September (1342): *Walsham* (n 2) 261. The land was eventually returned 'at the lord's order': 11 December (1344): *ibid* 277.

⁹⁰ 4 November (1293): Poos and Bonfield (n 9) xcvi; liv; 48-49.

⁹¹ 25 March (1327): Treadway Nash, *Collections for the History of Worcestershire* (1781; 2nd edn, John White 1799) 513; see also Homans, *English Villagers* (n 62) 282.

2) *Accountability*

The quality of local officials varied. The reeve was neither exclusive agent of the lord nor of the tenants: they might side with tenants against the lord, but also reported matters the jury overlooked, such failure to present offenders in respect of wrongs to the lord.⁹² In Newington, Oxfordshire in 1300, the village was fined 4d per landholder for failing to mow the lord's meadow. The two 'wardens of the mowers' appointed by the tenants were singled out – presumably their job included preventing exactly this.⁹³ In Hemingford, Huntingdonshire, in 1326, the reeve was removed as 'useless to the lord and the community' after refusing to account to tax collectors appointed by the vill.⁹⁴ Officials who failed to report or enforce punishments for wrongdoing were routinely fined at Walsham and High Hall, for instance for failing to present the cutting of the lord's tree;⁹⁵ or not enforcing a court order.⁹⁶

It was not unusual for officials to be amerced for simple failures to do their basic duties, for example a 'keeper of the cows' who allowed the lord's own cows to damage wheat;⁹⁷ another official who caused the death of an animal through defective custody;⁹⁸ or the Walsham aletasters who begin to appear in 1327 and were immediately fined for non-performance.⁹⁹ These failings could be serious: the neglect of Ingoldmells 'grave[s] (reeve[s])

⁹² E.g. 9 October (1319): *Walsham* (n 2) 86.

⁹³ Warren O Ault, *Open Field Farming in Medieval England* (Allen & Unwin 1972) 25.

⁹⁴ *ibid* 71.

⁹⁵ 28 March (1318): *Walsham* (n 2) 69.

⁹⁶ 5 August (1318): *ibid* 73.

⁹⁷ 5 August (1318): *ibid* 74.

⁹⁸ A 'stot' (bullock) in this case: 16 January (1319) *ibid* 80; see also at High Hall 23 October (1340): *ibid* 245.

⁹⁹ 10 October (1327): *ibid* 104.

of the sea dike' meant 'many persons' cut the sea defence, resulting in flooding.¹⁰⁰ The High Hall reeve and hayward were fined in 1333 for failing to allocate enough drivers to the lord's plough, to the lord's great loss.¹⁰¹ At High Hall, more senior officials could also be held responsible when lesser officials failed in their tasks: for instance a bad plough holder,¹⁰² a keeper of the lord's pigs who failed to prevent them from eating the lord's wheat;¹⁰³ a tenant who beat one of the lord's oxen;¹⁰⁴ and even in one case for the loss occasioned by a tenant's failure to perform works - although this is probably best explained by the fact the reeve was also pledge for the offender.¹⁰⁵

Officials could take advantage of their position to actively do wrong, for instance when the ploughman of the manor at Walsham damaged the lord's wheat, took some, and was sheltered by other tenants;¹⁰⁶ or the reeve who used a cart to take straw from the lord's mill to his own house, along with various household items 'for his own use'.¹⁰⁷ The reeve at High Hall was fined in the same year for accepting a bribe from villeins who trespassed in the lord's corn.¹⁰⁸ Worse, the bailiff in 1348 sold the lord's crops, used his horses, sold his cows, and disobeyed orders.¹⁰⁹ Sometimes valuable demesne property was destroyed: a High Hall official

¹⁰⁰ 20 October (1315): *Ingoldmells* (n 18) 43.

¹⁰¹ 5 May (1333): *Walsham* (n 2) 158.

¹⁰² 16 April 1345: *ibid* 282.

¹⁰³ 7 March (1319): *ibid* 81; similarly, 25 September (1321): *ibid* 91.

¹⁰⁴ 21 October (1327): *ibid* 105. Failure to keep horses properly and defective ploughing were also both blamed on this reeve.

¹⁰⁵ 9 October (1319): *ibid* 87.

¹⁰⁶ 24 September (1331): *ibid* 141.

¹⁰⁷ 19 June (1340) – the carter was also fined: *ibid* 243.

¹⁰⁸ 5 August (1318): *ibid* 74.

¹⁰⁹ 29 January (1348): *ibid* 208.

struck the lord's horse so it lost an eye in 1337,¹¹⁰ and in 1344 the plough driver and plough holder did not treat the animals properly, and caused an ox to lose a horn.¹¹¹ The community led accusations against officials on at least some occasions, such as when a former High Hall reeve was fined for not paying a carter properly in 1320.¹¹² It is sometimes more obvious than others why villagers might want to report officials' wrongdoing, for example when the official gained some unfair advantage over the community at large.¹¹³ However, the jury reported the reeve, hayward, and woodward at Walsham in March 1329 for cutting and selling trees, for no reason other than their secretive behaviour (cutting '*sine visum*') – although perhaps this was another instance of unfair advantage.¹¹⁴ The monitoring of officials was just one instance of the many collective actions to protect their interests.¹¹⁵

C. COMMUNAL LEGAL ACTION

Susan Reynolds focuses on the '*communitas*' as a loose, non-legalistic concept opposed to studies of supposedly centralised, directive, and oppressive lordship.¹¹⁶ She argues this enables better examination of the individual character and development of communities in medieval Europe. As Reynolds has repeatedly argued, collective action was not the privilege of any one time or place. The format, range, and character of that action responded regularly

¹¹⁰ 3 October (1337): *ibid* 217.

¹¹¹ 18 October (1344): *ibid* 274. They were also an ineffective team: the driver gave the holder the wrong orders and lost a day of ploughing.

¹¹² 20 January (1320): *ibid* 88.

¹¹³ E.g. the reeve grazed their animals on the lord's pasture, and the jurors queried their accounts: 26 January (1324): *ibid* 93.

¹¹⁴ 17 March (1329): *ibid* 121.

¹¹⁵ Cam collected thirteenth-century examples: *Law Finders* (n 171) 79.

¹¹⁶ See also Joan Wake, 'Communitas Villae' (1922) 37(147) EHR 406.

to changing social, economic and political contexts.¹¹⁷ It could involve both positive action to benefit the community and its members, and the management of collective impositions considered in the next section. A simple example of the former is that at Ingoldmells the entire township could act as a pledge.¹¹⁸ Collective activity was so often taken for granted and required for the working of government that it is often hard to distinguish purely voluntary groups from compulsory ones.¹¹⁹

This is especially true in relation to the parish, which was formed on the initiative of local communities, not the behest of the church or landlord. Parishes provided a forum for collective activity based around the church. For example, at Haxey, Lincolnshire, parishioners claimed in 1291 they should have the right to appoint the holy water carrier in their local church, and charters of liberties and declarations of custom sometimes used the word ‘parishioner’ for the group to whom they were granted.¹²⁰ Churches were often one to a village, even in villages split between multiple manors¹²¹ - although, sometimes separate manors in a vill had separate parishes. Reepham, Norfolk had three churches in one churchyard serving three manors, keeping the community fragmented at all levels.¹²² However, the existence of single churches in vills with more than one lord has been cited as an example of community manifesting itself.¹²³

¹¹⁷ See Chapter 4 and the citations therein.

¹¹⁸ 17 October (1319): *Ingoldmells* (n 18) 71.

¹¹⁹ Reynolds, *Kingdoms* (n 49) liii.

¹²⁰ Reynolds, *Kingdoms* (n 49) 95-6.

¹²¹ *ibid* 79.

¹²² *ibid* 90.

¹²³ Peter Sawyer, ‘The Anglo-Norman Village’ in Della Hooke (ed), *Medieval Villages* (OUP 1985) 5 Oxford University Committee for Archaeology 6.

The secular Quo Warranto proceedings also recognised towns and villages as rights-holders, having no need for technical distinctions between groups and individuals as holders of franchises,¹²⁴ consistent with the broader common law. For example, in a 1285 case concerning unpaid rent,¹²⁵ a new rector in Passenham, Northamptonshire, claimed rent arrears due under his predecessor. The defendants argued that arrears could only be claimed in respect of a personal seisin, so that the new rector could not enforce the old rector's dues. However, it was decided that both the rector and the church itself were seised:

If a rector has common of pasture which is the right of his church and dies seised and his immediate successor drives his animals into this pasture and, before they have taken even a mouthful of the grass, the chief lord comes and drives them out, I tell you that the rector is disseised and this is based on the seisin of his church rather than his own seisin.¹²⁶

It was objected that such a claim required a special writ, but Saham J disagreed, noting the Statute of Marlborough provided for a successor's claim.¹²⁷ The focus then shifted back to the seisin of the rector's predecessors.¹²⁸ The court's thinking switched fluidly between rector as individual and what would now be called the 'corporate' church without further need for definition or technical precision. This is an unusual common law case, but many years later when William, the vicar of Winslow, helped himself to the lord's marl pit, he made a very similar argument in the manor court. He claimed the land was a free holding pertaining to his church, held by him and his predecessors 'since time out of mind', so he need not reply without a writ.¹²⁹ The vill could also be the defendant in a legal action: the Prior of Dunstable sued

¹²⁴ Reynolds, *Kingdoms* (n 49) 63.

¹²⁵ *Rector of Passenham v Abbot of Greteine and others* (1285) 85 Northants 9, SS vol 122, p 232.

¹²⁶ *ibid*, per Saham J.

¹²⁷ *ibid* 233; Statute of Marlborough (1267) c 28 provides that ecclesiastical officer's successors where the former suffered depredations or forcible seizures could recover church goods, even if the action was not begun in their predecessors' lifetimes, if it happened shortly before their death.

¹²⁸ *Rector of Passenham* (n 125) 233-4.

¹²⁹ 8 June (1327); *Winslow* (n 7) 3.

seventeen freemen and villeins by writ in 1293 when he was disseised of land in Toddington, Bedfordshire.¹³⁰ His complaint was upheld by the novel disseisin justices: the community as a group was disseisor.

There are also more complex examples of collective action seeking to gain rights rather than just defend them. For example, in 1230 the men of Lothingland, Suffolk requested a royal charter granting them farm of the vill and other privileges. Negotiations were protracted and vill representatives had to return for further instruction.¹³¹ This is one of multiple examples of late twelfth- and early thirteenth-century royal manors and vills seeking to buy their farm: the men of Kingston on Thames failed to bid high enough in 1194 under King Richard but succeeded with King John in 1200;¹³² four royal vills offered fines for their own farms in 1201, but were outbid by one individual farmer;¹³³ the men of Basingstoke, Hampshire, held that manor (and associated hundred) at farm on-and-off from 1207 to 1256, as their ability to meet the payments varied;¹³⁴ and in 1213 the men of Brill, Buckinghamshire, won a bidding contest with the farmer of the royal manor for the vill of Boarstall.¹³⁵

Non-royal vills could also enter into legally enforceable agreements with lords. For example, Thomas de Holbeach made an agreement with his tenants at Holbeach and

¹³⁰ Henry Richards Luard (ed), *Annales Monastici*, vol 5 (Longman 1869) 378; Ault, 'Village Assemblies' (n 69) 15; Helen Cam, 'Community of the Vill' in idem, *Law Finders and Law Makers in Medieval England* (Merlin 1962) 78. The township had granted the land to his predecessor as Prior, by 'unanimous consent' in an 'assembly'.

¹³¹ Walter W Shirley, *Royal and Other Historical Letters Illustrative of the Reign of Henry III*, vol 1 (Longmans 1862-6) 381-2, see also Cam, 'Community' (n 130) 79.

¹³² Robert S Hoyt, *The Royal Demesne in English Constitutional History 1066-1272* (Cornell University Press 1950) 105, 137 and citations therein.

¹³³ *ibid* 137; Doris M Stenton, *The Great Roll of the Pipe for the Third Year of the Reign of King John: Michaelmas 1201 (Pipe Roll 47)* (Pipe Roll Society 1936) 254.

¹³⁴ Hoyt (n 132) 137.

¹³⁵ *ibid* 153 and citations therein.

Queppelode in 1287.¹³⁶ In a common law case in 1266, the entire vill of Peatling, Lincolnshire had made an agreement with soldiers who took them hostage after the battle of Evesham. A woman brokered an agreement later confirmed by the reeve, and it was upheld at common law as binding the township.¹³⁷ The hundred of Wirksworth, Derby, similarly raised money from landholders in the 1260s to buy off royalist soldiers – evidently the Anarchy sometimes necessitated locals taking matters into their own hands.¹³⁸

1) *Representative Institutions*

The reeve and four men (and, in earlier iterations of the custom, the local priest) attended the hundred, the shire or county court, and the Eyre as representatives of their vill, and not of their manor – the institution may have originated outside manors.¹³⁹ Their selection was a communal act of self-administration: as with other local officials, no authority told them how to choose. Further, the ‘remarkable’ frequency with which unfree reeves acted for their lords in county courts by the early fourteenth century suggests that the working relationship had more to it than simple exploitation.¹⁴⁰ A case of 1253 evidence that the impetus for this institution was not purely seigneurial:¹⁴¹ the *Leges Henrici Primi* said a vill was to be represented in the shire and hundred by the reeve and four men of the vill,¹⁴² but a dispute arose in Canterbury when the archbishop’s bailiff refused to recognise these representatives of the vill

¹³⁶ Cam, ‘Community’ (n 130) 81; Nellie Neilson and Adolphus Ballard (eds), *A Terrier of Fleet, Lincolnshire* (OUP 1920) 4 Publications for the British Academy 110.

¹³⁷ *Anon v Anon* (1266) CRR 175 m 29, SS vol 60, p 42-5; see also Cam, ‘Community’ (n 130) 81.

¹³⁸ Reynolds, *Kingdoms* (n 49) 149.

¹³⁹ Homans, *English Villagers* (n 62) 335.

¹⁴⁰ John R Maddicott, ‘The County Community and the Making of Public Opinion in Fourteenth-Century England’ in (1978) 28 TRHC 27, 32-3.

¹⁴¹ Cam, ‘Community’ (n 130) 79.

¹⁴² *Leges Henrici Primi* (n 21) c 7, 7b, p 101.

of Sibton.¹⁴³ The outcome was a royal writ obtained by the vill ordering the bailiff to allow it, by reference to the *Leges Henrici Primi*.

The importance of the reeve and four men extended beyond court attendance. From at least 1194, the coroner inquiring into a sudden death would summon the four ‘best’ men of the nearest four vills, they were used to gather facts for Domesday Book and the Hundred Rolls, and to report the names of suspicious persons. The thirteenth-century common law made use of them for keeping watch, following the hue and cry, holding frankpledge, and custody of criminals. In addition, Cam found that hundred juries, manorial juries, and village juries were all used to compile the Hundred Rolls. In the latter, she described villages with ‘extra-hundredal status’ recorded on separate membranes to the main Hundred Roll, and how some areas, such as Essex and Norfolk, evidenced village juries making returns which were then grouped into hundreds.¹⁴⁴ The village jury was not just a local phenomenon, but engaged in the process of government at the common law level, too. Cam argued all of this was part of the process whereby Anglo-Norman and Angevin kings preserved and invigorated the institutions of the vill by utilising them.¹⁴⁵

Sending this group to the shire, hundred, and coroner was an obligation, but the same institution could be used voluntarily to prosecute or defend community interests.¹⁴⁶ Cam found examples including the vill of Helpringham acting in the Eyre in 1272 via a reeve and four

¹⁴³ ‘Close Rolls, March 1255’, in Albert Stamp (ed), *Calendar of Close Rolls, Henry III: Volume 9, 1254-1256* (HMSO 1931) 173, first identified by Cam, ‘Community’ (n 130) 79-80.

¹⁴⁴ Helen Cam, ‘Studies in the Hundred Rolls’ in Paul Vinogradoff (ed), *Oxford Studies in Social and Legal History*, vol 6 (OUP 1914) esp 129.

¹⁴⁵ Cam, ‘Community’ (n 130) 71. On the use of local juries to present wrongdoers in the period prior to the Assize of Clarendon in 1166 see Naomi Hurnard, ‘The Jury of Presentment and the Assize of Clarendon’ (1941) 56 EHR 374.

¹⁴⁶ Reynolds, *Kingdoms* (n 49) 148.

men against two other villis represented the same way; and the bailiff of Headington acting for the king, himself, and the reeve and four men of Headington in 1294.¹⁴⁷ This latter looks like an action via an attorney, rather than the reeve and four men, and this was not uncommon. In 1258, one man acted as spokesperson for the vill of Witley, Surrey, in a complaint against their lord over increased rents.¹⁴⁸ Similar occurred at Graveley in 1275.¹⁴⁹ Even the *Court Baron* manual contemplated two individual men paying a fine to the lord on behalf of a township in order to gain carting privileges.¹⁵⁰ The high incidence of reeves and bailiffs appearing as defendants in novel disseisin actions, often against other communities, also looks like group litigation conducted via community officials.¹⁵¹ There are even examples of a community attorney disputing with a lord in common law courts. At Somercotes, Lincolnshire in 1327, the Abbot of Louth Park tried to fine five men for filling in his sewer, which had existed ‘from olden times’, causing flooding.¹⁵² The men replied via their attorney that the ditch, which had previously been flooding their land instead, was only forty years old and on community land, not the Abbot’s. The question went to a jury, with no recorded outcome. This sort of action did not necessarily constitute defiance of the lord – although clearly it could – because it may have been the first attempt to legally define the claim in question. The court action could function as a way to set out and provide definitional protection of rights in the same way that an extent or custumal did.

¹⁴⁷ See Cam, ‘Community’ (n 130) 80-1 and citations therein.

¹⁴⁸ *Eudes of Timperly and Others v Peter of Savoy* (1258) Eyre, SS vol 66, p 91. Ancient demesne may have been relevant here as the villagers appear to previously farmed the vill from the king.

¹⁴⁹ 12 May (1275): Maitland, *Select Pleas* (n 34) 150.

¹⁵⁰ Maitland and Paley Baildon (n 70) 142.

¹⁵¹ Stroud Francis Charles Milsom, *Historical Foundations of the Common Law* (1969; 2nd edn, Butterworths 1981) 141.

¹⁵² *Anselm son of Anselm and others v Abbot of Louth Park* (1327) SS vol 32, p 218.

2) *Defending the Community*

Communities could and did use law and custom to protect themselves from outside interference. For example, the manor court in Ellington, farmed to its tenants by Ramsey Abbey, in 1311 forbid anyone to enter or leave the manor without the licence of the lord.¹⁵³ This was an apparently ad hoc response to a disruptive outsider who had married into the manor the year before¹⁵⁴ - a manorial court solving a practical problem, rather than developing abstract rights of the sort the common law was evolving. Notwithstanding the role of the lord's licence, the exclusion of outsiders was generally viewed as benefitting the community. In the St Albans manor of Park, Hertfordshire in 1265, the jurors claimed a particular plot could not be alienated without their consent. Why they did so is unclear: it may have been the vill protecting its communal agriculture. Communal motives were clearly differentiated at another St Albans manor in 1339, when the jurors at Winslow presented a couple for, firstly, offending the lord's interests by alienating land without licence.¹⁵⁵ The more serious problem was they demised it to an 'outsider' for a term of years, against the custom of the manor and 'to the harm of the whole bondage'. Where the demand for land was higher than the supply, leasing or selling land to outsiders might deprive the community. Alternatively, it may have been that outsiders were not known to be trustworthy, and thus represented a risk that individuals alone should not be taking, as in the Ellington case.

Outsiders were routinely treated with suspicion by manorial custom: in Little Dunmow, Essex, in 1328, an heir to unfree land could not inherit according to the custom of the manor,

¹⁵³ Olson, *Chronicle* (n 42) 33.

¹⁵⁴ Sherri Olson, *A Mute Gospel* (Pontifical Institute of Mediaeval Studies 2009) 84.

¹⁵⁵ 15 December (1339): *Winslow* (n 7) 99.

because she ‘was married outside the homage’.¹⁵⁶ This appears to be a straightforward question of keeping the land within the community. However, nearly ten years later the same woman succeeded in her second attempt: this time it was held that there was nothing ‘according to the usage or custom of this manor’ which prevented it.¹⁵⁷ Poos and Bonfield suggest the jury may have changed the custom here on purpose:¹⁵⁸ perhaps keeping land within the community was less of a priority in 1337 than it had been in 1328.

It was not just landholdings but the rights appurtenant to them which had to be protected from outsiders in order to maintain the integrity and function of the commons. It was normal to require that only cattle kept in the village (sometimes only those overwintered there) could be pastured there in order to prevent abuse of the commons by selling rights to outsiders.¹⁵⁹ Presentments for such abuses were common: at Walsham in August 1317, cows from outside the manor had been grazing the lord’s land without permission;¹⁶⁰ ‘foreign’ sheep from the vill of Westhorpe intruded on the herbage of Walsham in 1334 and 1346;¹⁶¹ and at High Hall sheep from outside the manor were overstocking the common.¹⁶² Even between Walsham and High Hall there was a grazing boundary: a tenant of High Hall could be presented for grazing on Walsham common.¹⁶³ When anonymous ‘outside’ merchants used the lord’s land and made paths in 1342;¹⁶⁴ and ‘outsiders’ grazed sheep and made roads in 1345, the community

¹⁵⁶ 18 November (1328): Poos and Bonfield (n 9) 14.

¹⁵⁷ 12 April (1337): *ibid* 16.

¹⁵⁸ *ibid* lxxxviii.

¹⁵⁹ Vinogradoff, *Villainage* (n 36) 262.

¹⁶⁰ 9 August (1317): *Walsham* (n 2) 58.

¹⁶¹ 3 February (1334): *ibid* 171; 24 March (1346): *ibid* 290.

¹⁶² 22 February (1334): *ibid* 172; 9 June (1335): *ibid* 183.

¹⁶³ 5 November (1336): *ibid* 206.

¹⁶⁴ 22 October (1342): *ibid* 263.

presented them in the manorial court.¹⁶⁵ These presentments were frequent enough to show jurors were alert to who did and did not have commoning rights, even as between such closely related manors. Similar examples can be found elsewhere, for example in May 1344, jurors at Winslow reported that a neighbouring landlord was taking money for the enjoyment of common rights which belonged to St Albans.¹⁶⁶

Defensive action was not limited to intra-community business: one vill could sue another with no need for lordly involvement. The villagers of Culham, Oxfordshire, sued those of Sutton, Berkshire, in 1212 in the royal courts via plaint.¹⁶⁷ In a more complicated example, the ‘king’s men of Norbiton’, Surrey, brought a plaint against the bailiff of Ralph of Hengham in relation to their rights of common in the neighbouring town of Coombe.¹⁶⁸ In the manor of Ellington, the bailiff and all the customary tenants were ordered to proceed against the bailiffs of the Bishop of Lincoln and the count of Hereford for wrongs by their tenants in the neighbouring vill of Eston between 1280 and 1311.¹⁶⁹ Since the manor of Ellington was farmed to its tenants, this order presumably came from some sub-set of the tenants, not the lord, but it is noteworthy that the same order was made in neighbouring Upwood in 1279/80 in relation to the tenants of a major freeholder.¹⁷⁰ This suggests either that it made no difference to this sort of action whether the command to enforce came from the lord or the community, with both capable of doing so, or that the lord had intervened in the farmed manor of Ellington

¹⁶⁵ 16 April (1345): *ibid* 282.

¹⁶⁶ 29 May (1346): *Winslow* (n 7) 178.

¹⁶⁷ *Men of Culham v Abbot of Abingdon* (1212) CRR vol 6, p 390-1.

¹⁶⁸ *Men of Norbiton v Nicholas, Bailiff of Ralph Hengham* (late thirteenth century) Eyre Henry III, SS vol 60, p 92. They were advised to proceed by writ, as novel disseisin was inappropriate: the bailiff’s predecessor also excluded them.

¹⁶⁹ Olson, *Chronicle* (n 42) 18; 191n.

¹⁷⁰ *ibid* 18.

with this direction. The latter would be unusual: farmed villas were usually more self-organised and independent, as is clearly demonstrated in respect of taxation and communal burdens.

D. COMMUNAL COSTS

The importance of the community capacity to administer tax and levies has often been underappreciated. Maitland thought the proportion of taxation a villager paid corresponded to their holding, so there was no need for discussion, but Cam and Stenton both argued that collective financial responsibility was one of the reasons active communal organisation remained an ongoing feature of local medieval life:¹⁷¹ the lord commanded the vill as one unit, and taxed and fined them as one. Hyams has tied Maitland's general 'top-down' approach into the latter observation by claiming that villagers' ability to use representative legal action was a by-product of externally-imposed fiscal and peacekeeping duties.¹⁷² In contrast, Ault argued a village assembly capable of levying tax and providing for its collection and expenditure was a mature and meaningful institution, and self-led, not driven by external pressure.¹⁷³ The management of communal burdens is therefore a key topic in determining to what extent the village community was a self-governing institution. The most obvious examples of villages being treated as one unit were when they were made liable for an imposition like tallage, or fined by a lord for trespass or other infractions. Reynolds argued that when Henry II steadily developed taxes like aids, gifts, and tallage, he seems to have paradoxically stimulated group activity in encouraging communal responsibility.¹⁷⁴ A recent Europe-wide study of

¹⁷¹ Cam, 'Community' (n 130) 73; Frank Stenton, *Anglo-Saxon England* (1943; 3rd edn, Clarendon Press 2001) 298.

¹⁷² Paul Hyams, 'What Did Edwardian Villagers Understand by "Law"?' in Zvi Razi and Richard Smith (eds), *Medieval Society and the Manor Court* (OUP 1996) 78.

¹⁷³ Ault, *Farming* (n 93) 77.

¹⁷⁴ Susan Reynolds, *An Introduction to the History of English Medieval Towns* (Clarendon Press 1977) 107.

communities in the early Middle Ages found that paying lords' dues was most likely a collective obligation, even when the liability itself was individual and not a collective work task.¹⁷⁵

1) *Obligations*

The vill itself often had to allocate burdens like crown taxes and tallage amongst the community in order to gather the sum. Dyer's study of taxation in late medieval communities raises a number of relevant points.¹⁷⁶ Direct taxes on moveable goods levied by the crown were assessed by villages and towns, rather than appointed officials, from 1334 onwards. Each taxpaying town or village negotiated a lump sum to pay to the crown, and collected that sum themselves.¹⁷⁷ For example, in 1332 the jurors at Walsham were instructed to report who should be apportioned to 3s 8d of 'sheriff's aid' and to ensure that this was apportioned by a set date under a disproportionately high penalty of 20s.¹⁷⁸ The local delegation of authority in itself indicates the crown was confident that locals would already be able to undertake this task smoothly and efficiently.

The inhabitants would have had some experience in apportioning burdens and liabilities from the practice of apportioning tenements. Having a jury 'view' land was a fairly simple way to resolve some disputes. For example, they might determine who owned a particular piece of land or a crop on it, as at Ingoldmells in 1303;¹⁷⁹ or 'place markers and

¹⁷⁵ Bernhard Zeller et al, *Neighbours and Strangers* (MUP 2020) 93.

¹⁷⁶ See generally Christopher Dyer, 'Taxation and Communities in Late Medieval England' in Richard Britnell and John Hatcher (eds), *Progress and Problems in Medieval England* (CUP 1996).

¹⁷⁷ Except in Kent, which continued to tax individuals and used the hundred as the smallest unit of assessment: *ibid* 173.

¹⁷⁸ 2 December (1332): *Walsham* (n 2) 155.

¹⁷⁹ 10 July (1303): *Ingoldmells* (n 18) 27.

divisions' on a holding, as Winslow tenants requested from time to time.¹⁸⁰ At Walsham and High Hall, tenants also paid to have tenements 'apportioned'¹⁸¹ and to have this recorded on the roll.¹⁸² At High Hall, this boundary setting mechanism was used for the lord's land, too: in 1324 a dispute over demesne land was resolved by setting the bounds 'by the custom of the manor'.¹⁸³

As with disputes over custom, when the issues were long running or complicated, resort might be made to the whole homage to properly measure and apportion rights. The whole homage in a 1332 Walsham case was ordered to apportion a tenement after investigating who held it, and how much land it consisted of – they were given various questions, and distinguished as a group from the jurors, who had also inquired themselves.¹⁸⁴ The whole homage was also used when a straightforward apportionment of a tenement was paid for by two tenants who 'each hold a part' in 1334.¹⁸⁵ In a 1342 Winslow case, a reversion was granted to three people to divide equally 'on the view and consideration of the bailiffs and neighbours of the same vill'.¹⁸⁶ In 1337, two additional Walsham tenants alongside the general enquiry of fourteen jurors were to apportion three tenements before a set date later in the year.¹⁸⁷ On another occasion, four named tenants 'having co-opted as many others of the homage as are necessary' were to apportion a named tenement, under a penalty of 2s each,¹⁸⁸ and Walsham's

¹⁸⁰ 28 November (1340): *Winslow* (n 7) 108; 29 May (1346): *ibid* 178; 8 October (1347): *ibid* 207.

¹⁸¹ 11 June (1332): *Walsham* (n 2) 152; 7 May (1337): *ibid* 213; 13 April (1345): *ibid* 280; 24 October (1348): *ibid* 314.

¹⁸² 21 April (1347): *ibid* 300.

¹⁸³ 2 August (1324): *ibid* 94.

¹⁸⁴ 2 December (1332): *ibid* 154.

¹⁸⁵ 3 February (1334): *ibid* 170.

¹⁸⁶ 4 June (1342): *Winslow* (n 7) 129.

¹⁸⁷ 14 February (1337): *Walsham* (n 2) 211.

¹⁸⁸ 13 January (1334): *Walsham* (n 2) 167.

‘whole homage’ was repeatedly ordered to apportion a tenement in 1334.¹⁸⁹ The Ingoldmells court was also utilised to measure land, both when it was taken into the lord’s custody¹⁹⁰ and when it changed tenant,¹⁹¹ to ensure that the correct rent was paid. One case of measurement makes reference to ‘certifying the steward’ after the measuring,¹⁹² another indicates that permission was required before a tenant was allowed to measure land.¹⁹³ There seems to have been no set rules as to who was to conduct an apportionment of land, as long as it was an appropriate group for the task.

Measuring land was an important job: in Walsham in 1333 a piece of land was measured by ‘Nicholas Goche and others of the lord’s men’ and it was found ‘by the testimony of Nicholas’ to be no larger than it was meant to be. The result was to void an order to take ½ an acre into the lord’s hands - ‘at [Nicholas] peril’.¹⁹⁴ The seriousness and threatened accountability is no surprise: how land was measured directly affected the services and customs it was liable for. In January 1319, at Walsham, two tenants paid a fine to be ‘apportioned’ in a tenement but not ‘for services and customs in any other way than as joint partners in the same tenure [nor for] other service or custom for other land which they do not hold’.¹⁹⁵ There is evidently a story here, perhaps to do with the partners in this venture being treated as liable for the services of the other partner elsewhere, but it was not recorded. In another instance of co-tenants on land a fine for waste was simply shared amongst them.¹⁹⁶

¹⁸⁹ 29 April (1334): *ibid* 173.

¹⁹⁰ 2 April (1292): *Ingoldmells* (n 18) 8.

¹⁹¹ 30 April (1292): *ibid* 9; 9 January (1303): *ibid* 20; 16 April (1320): *ibid* 80; 15 October (1341): *ibid* 111.

¹⁹² 14 May (1320): *ibid* 80

¹⁹³ 25 June (1320): *ibid* 82.

¹⁹⁴ 18 October (1333): *Walsham* (n 2) 164.

¹⁹⁵ 16 January (1319): *ibid* 79.

¹⁹⁶ 21 October (1327): *ibid* 105.

It is harder to discover how exactly local financial burdens were assessed due to the lack of written records.¹⁹⁷ However, Walsham jurors assessing liability for a local tax called ‘Shytenesyeld’ in 1339 used the same process as for apportioning land: in both the whole homage were given a day to apportion a particular tenement ‘according to the value of each acre separately’, under the same penalty.¹⁹⁸ Later, fifteenth- and sixteenth-century records show churchwardens and constables administering taxes, use of animals to assess liability, and common funds to pay for collective burdens like church maintenance. All are suggestive of how the process might have been worked in the earlier period.¹⁹⁹ There is also some evidence of continuity: in the Gloucester Cartulary, unfree tenants apportioned tallage based on animals and land, but details like this are unusual, with descriptions often limited to the brief ‘*in communi*’ or similar.²⁰⁰ A case from 1306 where a villager in Sutton, Lincolnshire paid proportionately more tax because his neighbours decided he had more than he needed indicates at least that apportionment was not simply mechanical.²⁰¹

Cam collected examples of early local administration of crown taxes, which also made use of the reeve and four men institution: for example, for the ‘fifteenth’ in 1225, and similarly in 1232 and 1237. In 1334, the royal assessors agreed with the communities of cities, boroughs, and men of vills as to tax collection.²⁰² Military service was also a royal demand and often a collective obligation. Henry II’s assize of armies expressly excluded villeins, but other royal

¹⁹⁷ Dyer, ‘Taxation’ (n 176) 185.

¹⁹⁸ 19 July (1339): *ibid* 236.

¹⁹⁹ Dyer, ‘Taxation’ (n 176) 186–7.

²⁰⁰ Hart (n 48) 50–7, 180–8, 206. See also Bennett, *English Manor* (n 39) 141; Vinogradoff, *Villainage* (n 36) 293.

²⁰¹ Homans, *English Villagers* (n 62) 332.

²⁰² See Cam, ‘Community’ (n 130) 73 and citations therein.

military actions, like the 1242 decree concerning constables and the 1253 decree making the entire township responsible for providing arms, did not. For the Scottish campaign in 1315, Parliament required each vill to send one man, regardless of personal status.²⁰³ When a thirteenth-century vill was required to send a particular number of soldiers to war, they both self-selected individuals and paid their expenses.²⁰⁴

There were also church and public works, drains, dykes, roads, and bridges to be built and maintained - often by 'the township' or 'men of the township'.²⁰⁵ Bridge maintenance was noted in the 1215 charter,²⁰⁶ and could be imposed on both lord and vill, or just the vill.²⁰⁷ Local court rolls provide some evidence of how this was arranged. At Walsoken, Norfolk, rolls from 1295 and 1299 show cows taken to help pay for the widening of a sea-dike. Two tenants objected to the fact the taxers elected by 'common consent' of the village²⁰⁸ had taken the animals by force, and raised the hue and cry, ending in a presentment at the view of frankpledge rather than the regular local court. Walsoken was divided between three lords, so community action may have been particularly important there, but this sort of behaviour was not restricted to divided vills. A similar instance appears in the rolls for the Bec manor of Blakenham, Suffolk in 1247, when two villagers were fined for refusing to pay the tallage 'set upon them by their neighbours'.²⁰⁹ Another, later, example comes from Walsham in 1344: the

²⁰³ *ibid* 71-2.

²⁰⁴ See e.g. Halesowen in 1295 for an example: Homans, *English Villagers* (n 62) 330; also Thomson (ed) *Lincolnshire Assize Roll* (n 71) 58-9 for payments to cover military service.

²⁰⁵ Reynolds, *Kingdoms* (n 49) 149.

²⁰⁶ C 23: see generally James C Holt, *Magna Carta* (1965; 3rd edn CUP 2015) esp 363, 385.

²⁰⁷ E.g. at Warboys in 1322 the vill alone had to repair the royal road: John Raftis, *Tenure and Mobility* (Pontifical Institute of Mediaeval Studies 1964) 122.

²⁰⁸ The election of tax officials was normal: e.g. the 'whole homage' at High Hall elected a man to 'collect and pay the castle ward' on 23 November (1335): *Walsham* (n 2) 193.

²⁰⁹ Maitland, *Select Pleas* (n 34) 12.

detention of money from the two men who were responsible for the upkeep of the church fabric (*'collectoribus op' ecclesie'*) was referred to as part of a bigger debt owed by the town, and 'under consideration of the lord and townspeople' the two debtors claimed a part refund because they had already paid a fine elsewhere.²¹⁰

The risk of being made to pay the same tax in more than one place when administration was so decentralised was the subject of a royal court case concerning the vill of Appleby in 1341.²¹¹ It was also central in a 1344 case,²¹² where cattle were taken to pay a royal wool tax, but the plaintiff had been taxed twice: once in the vill where they resided, and again where they commoned. Tithings were also used for tax assessments: a plaintiff in 1346²¹³ objected that they had been taxed²¹⁴ in the wrong tithing because of the location of their sub-tenants.²¹⁵ In Ellington in 1290, a whole tithing was fined because 'they gave nothing towards the ½ mark with the vill' (the capitagium tax).²¹⁶

The whole community might be fined for a failure to pay as a whole,²¹⁷ but the consequence of refusing to co-operate and pay your share in communally assessed taxation could be severe: in Scarborough in 1259 a man who refused to pay his share of a tallage was

²¹⁰ 26 July (1344): *Walsham* (n 2) 272.

²¹¹ *Anon v Anon* (1341) 15 Edw III 44, 31B, vol 6 RS p 264.

²¹² *Anon v Anon* (1344) 18 Edw III 39, 31B, vol 10 RS p 612.

²¹³ *Anon v Anon* (1346) 20 Edw III 18, 31B, vol 14 RS p 528. The amount of payable was explicitly linked to the land and goods held.

²¹⁴ The word 'tallagium' is used, suggesting unfree tenants.

²¹⁵ To add insult to injury, eleven of his pigs had been taken and three died from poor care.

²¹⁶ Olson, *Chronicle* (n 42) 168.

²¹⁷ As one Durham vill did for failure to compensate war services: William H D Longstaffe and John Booth (eds), *Halmota Prioratus Dunelmensis* (1889) 82 Surtees Society xxi, 1.

put out of the community and ‘banned’ by the whole vill.²¹⁸ Even disclosure of tax liabilities could have negative consequences for some, as a villager in Hemingford Abbots in 1332 found when he was brought to court by his neighbours for various offences including trespass and telling the village taxors about ‘hidden things’ - to his neighbours’ disadvantage.²¹⁹

2) *Fines and Collective Punishment*

Fines were regularly levied on the ‘community of the vill’²²⁰ or subsets thereof, and the groups which could be subject to this were not precisely defined or limited: it was generally up to the community to co-operate or not, and to work out how – as long as they did not subvert good order or the supposed needs of the community.²²¹ The ‘whole homage’ of the manor,²²² or the ‘whole vill’, was often fined for failure to present offences. For example, the ‘township’ of Ingoldmells was fined for a false inquisition in 1292;²²³ concealing marriages in 1312;²²⁴ and concealing an absent unfree tenant in 1315.²²⁵ Similarly the vill of Horwood (part of Winslow) was amerced for concealment of a marriage without licence in November 1329.²²⁶

²¹⁸ See discussion in Henry R T Summerson, ‘The Structure of Law Enforcement in Thirteenth Century England’ (1979) 23 *AJLH* 313, 5.

²¹⁹ Raftis (n 207) 97.

²²⁰ E.g. sheep trespass at Bermtun and damage to millstones at Neuton Beule both led to community fines on Durham manors: Longstaffe and Booth (n 217) xxi, 22; 33.

²²¹ Reynolds, *Kingdoms* (n 49) lv-lvi.

²²² 23 November (1335): *Walsham* (n 2) 193.

²²³ 30 April (1292): *Ingoldmells* (n 18) 9.

²²⁴ 27 September (1312): *ibid* 28.

²²⁵ 7 July (1315): *ibid* 40.

²²⁶ 6 November (1329): *Winslow* (n 7) 17.

As with the officials discussed above, the manors of Walsham and High Hall record anomalous uses of standard terminology. The ‘whole homage’ was referred to the tenants of a particular tenement at High Hall in 1335,²²⁷ although elsewhere they were referred to more conventionally²²⁸ - the odd terminology may have been used to indicate that only the unfree tenants were being discussed. The ‘*vicini*’ (neighbours), of ‘Upstreet’ were also accused of damaging corn at High Hall in October 1303,²²⁹ and fined as a unit (this time as ‘inhabitants’) for damaging the lord’s crops in 1330.²³⁰ The tenants of a particular tenement were also fined as a group at Walsham in 1332.²³¹ This roll may be unusual in its frequent mention of smaller groups, but there was no legal reason not to use them. Commoners could also be treated as a collective: at Ingoldmells in 1319, ‘all having common’ on a certain field were held responsible for harm done by pigs.²³² More often, it was the jurors who were addressed as smaller groups: the jurors of Winslow and Shipton were fined for concealing a demise of a holding without licence in 1330,²³³ as were the jurors of Horwood in 1335.²³⁴ Even the men of another lord might be noted in court rolls for a wrong, even if there was little that court could do in response.²³⁵ These collectivities were flexible, often informal, and non-corporate, but nonetheless frequently served as the object of legal action.

²²⁷ 23 November (1335): *Walsham* (n 2) 193.

²²⁸ 23 November (1335): *ibid* 192.

²²⁹ 16 October (1303): *ibid* 29.

²³⁰ 30 July (1330): *ibid* 138.

²³¹ 28 April (1332): *ibid* 148.

²³² 17 October (1319): *Ingoldmells* (n 18) 71; 7 November 1319: *ibid* 72.

²³³ 7 November (1330): *Winslow* (n 7) 22.

²³⁴ 24 October (1335): *ibid* 59.

²³⁵ 14 March (1328): *ibid* 102.

E. CONCLUSION

This chapter has used a small number of case studies to begin to evidence some of the many ways in which thirteenth- and fourteenth-century local communities acted as what would later be called 'legal persons', whether through their officials, in relation to them, or as a group. The lack of legal definition of the corporate or associational status of groups, or more precise rules about the capabilities of representative institutions did not inhibit their use – in fact the lack of strict definition may have often enabled their use in ways that profited the full range of those concerned: local communities, lords, and the emerging common law. The complexity demonstrated in both the institutions and the ways in which they were used presents a very different picture to early village community studies. The procedure and substance of the rules in manorial courts were not 'mere positive morality' but a worked out and functioning set of laws.

Chapter 7

CONCLUSION

This thesis has described the historiography of the idea of a medieval village community from its inception in the early to mid-nineteenth century to the modern day. Early debate was characterised by numerous unfounded assumptions and generalisations, the reaction to which encouraged the development of a more precise methodology for legal history in the hands of Maitland and Vinogradoff. However, having cleared the ground of unfounded claims, Maitland's scepticism did much to discourage interest in the village community in future scholarship. In his enthusiasm to disprove the existence of a Teutonic free village community from ancient history, he swept away the essential organisational ties between agriculture and local custom, and the relation of that custom to the common law. Whilst Vinogradoff did much to lay the groundwork for an alternative perspective, his line of thinking was taken up by historians and sociologists but not lawyers or legal historians, and legal historical scholarship and historical studies of this area drifted apart.

Manorial records provide ample evidence that the village community created, modified, and enforced village by-laws, which were binding legal rules applicable to all members of the village community and which had an existence independent of seigniorial obligations. This institution is difficult to see, for two reasons. Firstly, the surviving documentary evidence was produced by manorial and common law courts, which had limited interest in or overlap with the agricultural regulations within villages. Early scholars, in their enthusiasm to use these new materials, may have relied too strictly on them in reaching the conclusion that no other institutions existed, despite the economic necessities of the open-field system suggesting otherwise. Secondly, a positivist conception of law which focuses on centralised legislation, or a system of elite adjudication such as Maitland's, leaves little room

for a communal body which had powers of self-regulation, but a limited existence recognised in the common law. The village community was not subject to clear enough legal definitions to be called a corporation by contemporaries, who in any case may not have understood that as a concept, but that did not stop it from regulating village affairs in practical terms. It had limited powers of enforcement, and sometimes had to turn to manorial or even common law courts to enforce its rules, but day-to-day, it was capable of enforcing penalties, distraining goods, and collecting fines as well as setting its own rules.

As well as the tie between the particular form of agriculture practiced in the village community and legal regulation, there is evidence of commitment to legal process and economic efficiency, manifested as the lords exerting their power over their tenants not by sheer force, but in most instances through recognised procedures and customs. These customs were often appropriated or preserved from unfree community practices, and simply adjusted or perpetuated in order to ensure that the community served the lord's needs, even though they originated in the servile community's own ideas, needs, and customs. Thus, the institutional structures were either created or appropriated by the manorial system, but underneath remained the same self-governing village community with its open field agriculture.

This insight is valuable not just for the purposes of historical inquiry and understanding how people lived in the past. It is also important because it recognises that as well as the common law courts which were formed in this period, there was another way in which law was created, understood, and enforced by the populace in medieval England. This was not legislated or statutory law, nor did it arise from judicial decision making, but was embedded in the idea of custom and traditional practice. It was enforced by community sanction, and recognised by the common law to have value and importance on occasion in the

surviving documents. As Henry Maine once argued for Indian customary communities, the existence of this sort of legal system in practice, and proof that it not only worked but survived for hundreds of years alongside or beneath the common law system poses an alternative vision to positivist conceptions of the nature of law by showing how practices generated by groups without a central legal authority could flourish.

Even recognising the scope for local and regional variation, village communities across the realm can be seen engaged in a range of legal activities in the thirteenth and fourteenth centuries. They had procedural rules, such as those requiring respect of jurors and their decisions, the ability to respite a case for the coming of the steward and his higher authority, or the referral of cases to a lord's council. In establishing the validity of an alleged rule, the local courts made use of concepts like 'time immemorial' analogous to common law concepts but with much less precision. It was possible to show that a rule had existed 'since time immemorial' by reference to court rolls or communal memory, and it was at least sometimes possible to actively change a custom by the legal fiction of immemoriality. This ability to change and adapt in a conscious fashion reflects the fact that the rules of customary law were practical and adaptable, and this is further evidenced on some manors by responsiveness, whether fast or slow, to common law developments affecting the village community. Other common law rules effectively established the outer limits of the customary law's jurisdiction, by setting the tests by which the common law would recognise a custom as valid without interfering with the variable internal content of those rules.

This internal content reflected a variety of interests. Inheritance rules commonly enabled villein tenants to plan for the future of their families without concern that the default common law rule that they had no heirs would deprive their offspring of the means of sustenance. This also benefitted lords, who needed to worry less about the administrative

business of establishing new tenants in this way. A concern to avoid administrative burdens, which may have been completely impractical to manage without tenant co-operation, is evident throughout customary law practices, and is most starkly so in the instance of the presentment jury. In co-operating with the lord's requirement that they present breaches of seigneurial rights, the village community secured a forum which they could use for the swift and cheap resolution of their disputes on a much wider range of matters. They were able to record their business dealings, their agreements and debts, and enforce them when things went awry. They were also able to obtain remedies for defamation by other villagers, a wrong evidently considered very serious, in a forum which was public and therefore satisfactory for resolving a damaged reputation, but which also avoided the need to resort to drawn out and costly violence and feuding.

In short, the village community was made up of a diversity of people of varying economic and legal status working together in a complex agricultural system which prioritised the minimisation of risks and maximisation of co-operation for all participants. The legal structures appended to and essential for the management of this system prioritised administrative efficiency and adaptability for both the community and the lords who nominally ruled over them. The remit of the community to manage themselves was delineated by the common law, and occasionally by seigneurial coercion, but broadly speaking it was in the economic interests of all that the village community self-govern. This is precisely what it did.

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