LAW IN THE MEDIEVAL VILLAGE COMMUNITY

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REINVIGORATING HISTORICAL JURISPRUDENCE

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For Thomas – well, it had to be really, didn't it?

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PREFACE

This book explores the medieval English village community as a legal historical concept, and a lived historical reality. It is particularly concerned with the customary laws that governed that community: how they were made, enforced, and what they tell us about law, both in medieval England and generally. The premise of the book as whole can be summarised in one essential claim: medieval customary law was law, and we should study it as such.

This claim was at one time a commonplace amongst lawyers and historians: in the nineteenth century, a fascination with law in the past led to studies of the village community which explored medieval life. Whilst this was sometimes as an object of interest in itself, it was more often studied because it was thought history could and should inform contemporary reforms and legal theoretical claims. The village community thus became the proving ground for new methodological tools in the newly developing academic discipline of history – history was no longer to be a kind of nationalistic storytelling, but had scientific aspirations. If it was possible to examine the historical evidence and to compile information – what we might now think of as a data set – on how different societies had dealt with similar social and economic problems in the past, it was hoped that this would provide useful information about how best to approach the future. If a particular society had features deemed desirable – a thriving economy, for instance – then perhaps looking to its history and how it attained its successful position might inform reforms elsewhere. And, if many different societies reacted to a particular problem in similar ways, perhaps that revealed some fundamental truths about human life. For lawyers, this might even reveal core features inherent in all 'law'.

These Victorian legal historians had observed that village communities had existed across a wide range of times and places, and historical examples in Europe seemed to function in

similar ways to the villages in contemporary colonised territories such as India. Perhaps, then, village communities were an inevitable feature of human early society. It followed that studying the way law worked there might expose timeless truths which applied across time and space. Few regions were better for studying the historical manifestations of this phenomenon than England: in addition to a particularly well-preserved collection of medieval written documents to explore, these early comparative legal historians had the 'benefit' of being able to compare the communities of the past with the villages of British India. There was a particularly close link as a number of the same men were both historians and colonial administrators influencing imperial policy based on their research. They thought Indian society ought to be encouraged to 'progress' towards modern legal and economic structures, and wanted to establish how that might be done. This formed the foundation for a new 'comparative jurisprudence' and comparative legal history which eventually developed beyond its colonial origins.

The medieval English village community remains a fascinating concept, because the records immediately suggest a picture of a society in which law seemed to operate quite differently to the modern day. Both the documentation of the centralised common law courts and local legal records seemed to showed communities with a 'bottom-up' notion of governance and a great deal of community-led decision making, especially in relation to agriculture. The role for such activity in the early common law was a deeply and thoughtfully explored topic: was there an early communalism amongst 'Germanic' societies which formed the basis for modern democracy? Or was this a misreading of a situation in which the majority of the population were subjugated peasant labourers, just trying to survive? Are people – and the property rights that people have in relation to the world around them - inherently individualistic? Is law fundamentally a tool which facilitates co-operation, or perpetuates oppression? Which story best fit with the prevailing Victorian narratives about the British constitution, and the role of the British Empire in bringing 'progress' to 'primitive' societies?

In the intervening one-hundred-and-fifty years, a number of the premises on which the early studies rested have been disproved. We are collectively more aware than ever of the risks and assumptions involved in transposing the laws and norms of one culture in colonial contexts, and we are far more willing to explore the value and uniqueness of local practices than most Victorians ever were. We also now understand more about the economics of the medieval agriculture which law in the medieval village community regulated, and in particular how co-operation can facilitate efficiency in societies with shared resources like open fields. The 'tragedy of the commons' – an idea which has had far more popularity than its most famous expression by eugenicist Garrett Hardin ever merited – has been shown to be overly simplistic as a model for societies both past and present. And more medieval English documents are readily available for scholarship than ever before with the completion of the Manorial Documents Register, numerous publications of court records, and studies of particular communities. It ought now to be possible to return to the village community and ask again – what was law doing in medieval English society? What did it look like? What were its functions and its limitations? What sorts of things merited regulation? Who made law? Who enforced it? What happened when the law was broken? What aspects of early scholarship, inherited from Victorian colonial administrators and historians just beginning to develop evidence-based methods, need to be revised and revisited? English legal history has not generally returned to the study of the village community, and more often focuses on the medieval common law and its records. These studies are, of course, worthwhile and valuable, but a relatively narrow focus on particular types of law leads to gaps in our understanding – not just concerning local communities, but also, for instance, concerning the lives of most women, and of the unfree population.

Custom was the main source or kind of law at local level in medieval society. The reluctance to study medieval legal custom may also be in part due to our collective notions of what law is, and what the proper objects of study for legal historians and lawyers are. The influence of legal theory, and in particular of the way law is defined by 'legal positivism' matters here. One of the leading paradigms in western legal theory, legal positivism tells us that laws are a part of a special hierarchy of norms and rules which are interconnected. Lawyers are generally acquainted with this model at an early stage of their training – whether implicitly or explicitly. We are encouraged to perceive a link between authority, hierarchy, and rule-following as core to the concept of 'law'. We are informed that laws are distinct from morality or habits because they have a special kind of authority, and that authority derives from a special source like a king or Parliament. However, this framework does not accommodate customary law well. Customs lack the authority that comes from the 'sovereign' because they develop amongst communities and their ways of thinking and living: they do not originate in orders from the government (although they may be formalised in such later), they are enforced in myriad ways that may not involve formal adjudicative institutions, and often they are not presented in the definite form given by writing at all. It follows that legal positivism has little interest in customs, and they are rarely considered within the proper remit of legal study from that perspective. Custom may be very interesting as a matter of social and economic history – and this is primarily where their exploration has taken place for the last century or so, but lawyers are in the habit of distinguishing the 'positive morality' of custom, religion, and social norms from 'law'.

This has not always been the approach taken by lawyers or legal historians – if it had been, Victorian village community studies would not have held the fascination they did. Whilst legal positivism is now a dominant paradigm, for much of the nineteenth century 'historical jurisprudence' was a persuasive alternative. Scholars such as Sir Henry Maine and Sir Paul

Vinogradoff argued that considering law in the context of the fullness of human life and human history was a valuable theoretical method. This meant using newly developed historical techniques and skills with primary sources to explore the history of our legal concepts: how were legal ideas used? How did they develop and change? Does the practice of law across time and space fit with the theoretical or doctrinal models we use to describe 'law'? If not, how can we adjust our theory to better describe reality?

When the Victorians looked to the substantive customary laws of village communities, they could see ways of making and conceiving of law not dependent directly on state authority protecting property rights not obviously focused on the individualistic aims prioritised in their own culture. These customs had courts, adjudication, penalties and procedure – in short, they walked like law, talked like law, and looked like law. Denying them entry into the class of things we mean by 'law' because they lack the right kind of authority would be to neglect a swathe of human life which was a key part of the social landscape for centuries – in England and elsewhere. Early attempts to grapple with this may be distasteful to us now, tinged with colonial ideas about 'primitive' laws and 'progress', and based on methodologically questionable assumptions about comparing different laws across time and place. But to give up on the attempt to understand custom, and to integrate it into our picture of 'law', is to throw the baby out with the bathwater.

This book explores how we might try again to study the medieval English village community as a meaningful legal artefact, and its significance for both legal history and legal theory. It focuses on the period c. 1200-1348: from the emergence of written records in local courts to the significant social and economic changes in the period of the Black Death. I argue that we should, and indeed must, have better descriptions of customary law in order to fully and accurately depict English medieval legal history. Even a brief study of primary materials reveals

that the day to day lives of those concerned were not played out in accordance with the theories of the common law treatise writers, or necessarily even in accordance with the rules we can see in legal records from the royal courts. We should hardly be surprised by this: how often in our modern legal system is the law in action quite different from the law in books?

Once the documentary evidence concerning medieval customary law is properly considered, its theoretical significance can be explored. The historicist challenge to anyone engaged in thinking about law is how to sensibly and accurately discuss a phenomenon so intimately linked to the complexities of social life, liable to change in response to a multitude of causes, or to stubbornly resist reform in contradiction of what appears – at least to modern eyes - most rational. To attempt to answer the question 'what is law' is, inevitably, to commit to never being perfectly right. However, in increments, we can step closer to an accurate description: we can test our theories, explore the evidence, consider how law behaves 'in the wild' to revise our models accordingly. This book attempts to offer one such increment.

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INTRODUCTION

ABSTRACT

This chapter introduces key themes which will be explored in this book. It argues that there are three strands to the existing scholarship on the medieval village community in England: the original, comparative and legal historical-theoretical approach; the economic and social history work which has flourished in the twentieth century; and the legal doctrinal work which has been prioritised by legal historians in the tradition of F W Maitland. Each of these three strands is summarised, and it is argued that a re-examination of Victorian work, and integration of subsequent developments in our understanding of the medieval world, is overdue. In this book, this takes the form of considering the village community as an institution with legal significance, and in attempting to reintegrate the disparate modes of legal doctrinal, economic and social history, and legal theoretical study which have a bearing on it. This chapter also introduces some key terminology in respect of medieval law and custom which will be used throughout the book.

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Existing scholarship on the medieval English village community may be grouped into through three roughly thematic phases which developed from the original work of different Victorian scholars. The first phase, dating from approximately the publication of Henry Maine's *Ancient Law* in 1861 to the death of Sir Paul Vinogradoff (1854-1925), involved seeking to understand the origins and nature of the manor and village as legal and economic institutions. This was connected to developments in both scholarship, in the context of new methodological approaches in the social sciences and humanities, and to the politics and social changes of their milieu. Some historical work since has also engaged in manorial studies, or even in the study of the village community, but it has not been a particularly popular research topic among legal historians since the end of that period. The second phase, which had some precursors in the work of Frederic Seebohm in the 1880s, took place mainly in the mid-twentieth century and involved social and economic historians exploring the financial and demographic structures of the village community. These studies often made use of legal records as evidence, but rarely engaged with legal concepts. The third phase was begun by Frederic William Maitland in the 1880s and 1890s, and focused on the doctrinal study of legal concepts. This has developed intermittently since, with some recent work considering the role of custom in medieval law.

However, Maitland's influence (whether deliberate or not) was primarily to focus legal historical study on the common law, and away from the manorial and local studies which had first invigorated legal historical writing.

VICTORIAN HISTORICAL SCHOLARSHIP

Nineteenth-century 'scientific' history placed a new emphasise the utilisation of primary historical sources, and legal history was an exemplar of this development. The written manorial records produced across England in astonishingly consistent formats from the early thirteenth century onwards could, it was thought, be used alongside contemporaneous common law sources to provide the material for a new understanding of English history.[1] However, the volume of material was so great, and its use so logistically challenging, that it was difficult to know where to begin.[2] 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 the scholarly effort to do so peaked in the period from the 1880s to the 1920s.[3] This coincided with, and enabled, the production of sophisticated studies of English medieval history which revolutionised the field. Pollock and Maitland, for instance, noted in their revolutionary textbook 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'.[4] Whilst medieval studies have continued to grow and develop since, especially for these purposes in the production of the Manorial Documents Register, it remains true that the huge volume of medieval English

[1] 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).

[2] 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.

[3] Zvi Razi and Richard Smith (eds), *Medieval Society and the Manor Court* (OUP 1996) 2. These dates reflect the period in which Maitland and Vinogradoff were most active, both as editors themselves and in influencing others.

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

manorial records, including manorial court rolls, accounts, custumals, and other miscellaneous documents, have been little used and remain largely unpublished.[5]

There are other challenges – both then and now – in using these sources. The documents themselves are Latin records of proceedings conducted in English,[6] and it is a difficulty for historians that the written record may not always accurately represent what actually happened.[7] The sources themselves 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 when generalising from the data most readily available. Some of the early studies did exactly this: considering the records produced by large, wealthy, churches which had the need, resources, and inclination to produce and preserve them in order to generalise for the whole of medieval England.[8] At least some of the Victorian writers were simply excited by the possibilities of the new evidence-based approaches and the significance of what could be gleaned from them: nuance would develop later. In any case, as we will see, much of the significance of early village community studies was not about what we would now think of as scholarly learning, accuracy, or precision.

The nineteenth-century village community debate also shaped by notions of national identity and origins as much, if not more than, interest in 'scientific methods' and history. Lawyers, historians, and politicians fiercely debated historical narratives because it was a vital matter in contemporary politics to claim the past for one's cause. The village community was an

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[5] Razi and Smith (n 3) 2.
[6] Paul D A Harvey, *Manorial Records* (British Records Association 1984) 42.
[7] 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.
[8] Frederic W Maitland, *Select Pleas in Manorial and other Seignorial Courts* (1888) SS vol 2; the records of wealthy St Albans, for instance, are particularly fulsome: Ada E Levett, 'The Courts and Court Rolls of St Albans Abbey' (1924) 7 Transactions of the Royal Historical Society 52, 53.

ideological battleground between those looking for the origins of Western democratic society, particularly in England and Germany, in either a 'Romanist' or a 'Teutonic'[9] past. This impacted the decisions being made in Parliament and British imperial administration: arguments about whether human society was historically communal or individualistic had particularly pressing significance for India, and in respect of land legislation for Ireland. The lives of medieval peasants were examined through the distorting lenses of paradigm-shifting political events like the French (1789-99) and American (1765-91) Revolutions, the Indian Rebellion[10] (1857-8), and the Russian emancipation of serfs (1861). The history of English law was so hotly contested in contemporary politics that it was even questioned whether some aspects of it were safe to teach.[11]

The study of the medieval manor and its associated village community was initially led by two groups. Early momentum across Europe came from the rigorous scholarship of the German historical school.[12] However, in England, village community studies were famously developed by Sir Henry Maine (1822-1888).[13] Maine posited that the village community represented an early stage in the development of a 'progressive' society, and that conclusions about human life and law could be extrapolated from studying such examples. The concept of the Indian village community, as European scholars understood it, was mostly invented by Maine and

[9] 'Teutonic' or 'Germanic' was defined here by reference to the Indo-European language group that philologists were studying in the nineteenth century. Their realisation that languages such as English, German, Dutch, and the Scandinavian languages shared common features with, for instance, Indian languages, stimulated comparativists in other fields, including Sir Henry Maine, to look for what else those cultures might have in common.

[10] Known at the time as the 'Sepoy Mutiny'.

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

[12] 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).

[13] Maine produced several books and a considerable body of journalism. The most relevant texts 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).

other imperial administrators under the influence of shared intellectual interest in village communities,[14] to be deployed in myriad contemporary political contexts.[15]

Maine was particularly interested in how 'progress' came about, which for him meant the development from a society governed by custom and communal notions (like India) into an individualistic society with legislation and codified law (like Rome – England was 'progressive', but required codification of law to be entirely satisfactory). 'Progress' was exemplified in the development of property rights from a basis in 'status' – where one's property depended on one's relation with others in the community, to one in 'contract' – where agreement, markets, and bargaining determined the extent of individuals' property, regardless of social status. Maine made use of Roman law, Germanic history, and contemporary understanding of India in order to describe this – a novel combination of tools and methods which he described as 'comparative and historical jurisprudence'. Whilst this political and colonial context has little relevance to the modern framing of village community questions, many of the assumptions related to that context remain unexamined.[16]

An entire generation of scholarship across multiple disciplines encountered Maine's ideas on the use of the comparative and historical methods, ancient law, and the village community.[17] His enduring influence was in his enormous popular success: his writing generated a few followers within the academic community, and many criticisms.[18] One of the earliest scholars to respond at length was economic historian Frederic Seebohm (1833-1912).[19] Seebohm was

[14] 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.
[15] ibid; Maine, *Village Communities* (n 13) 66.
[16] Recently, Bernhard Zeller et al, *Neighbours and Strangers* (MUP 2020) has considered the impact of these perspectives on early medieval community scholarship beyond legal history.
[17] Stefan Collini, Donald Winch, and John Burrow, *That Noble Science of Politics* (CUP 1983) 209-210.
[18] Raymond Cocks, *Sir Henry Maine* (CUP 1988) 143; Peter Stein, *Legal Evolution* (CUP 1980) 110.
[19] Frederic Seebohm, *The English Village Community* (1883; 4th edn, Longmans, Green 1890).

Maine's student, and his approach to history was similar, considering broad themes and long historical arcs. However, Seebohm was a Romanist, and used Roman law and the history of Roman Britain to attempt to explain the village community as descended from Roman inhabitants and social structures. He did not agree with Maine that a shared Indo-European[20] family of languages and Germanic past explained similarities in village communities across time and space.

Many of the early claims made by Victorian scholars remain the foundations of modern scholarship on the topic, notwithstanding that some of their assertions have been disproven or discredited since. The first chapters of this book elaborate on their ideas, and seek to establish which of them have stood the test of time. A re-examination of Victorian work, and integration of subsequent developments in our understanding of the medieval world, is overdue: in twentieth-century legal history, work on the village community was neglected. This was in part because its political significance faded. In an era of indirect imperial rule, where the First and Second World Wars posed new threats to democratic society and human life in general, it was no longer as vital to establish the origins of western society as it was to protect it in the present.

The Shift to Social and Economic History

The decline in political fervour for debates concerning village communities led to the second phase of study, which followed from the economic history work of Seebohm, Vinogradoff, and others. This focused on the socio-economic origins of medieval field systems, and their

[20] The term in the texts is usually 'Aryan', which did carry notions of white supremacy at the time, but of course had not come to represent fascist ideology in the way it would in the twentieth century. I do not use the term in this book.

operation. The economic historian William Ashley (1860-1927) and Vinogradoff disagreed on many things, but shared a belief – unpopular at the time - that to understand the village community required investigation of economics as well as law.[21] They were perhaps in the minority because, as Michael Postan later noted, contemporary historians were generally trained in politics or law, but not economics.[22] Maitland, for instance, argued that an economically connected village community was not otherwise a closely connected group,[23] underestimating the importance of agricultural ties, and emphasising the role of seigneurial and governmental (legal) pressure at the expense of investigating economic regulation.[24] But the village community is best defined as a legal, administrative, and economic institution fundamentally connected by rights in land,[25] and individuals within it were connected by a complicated web of these features as well as (often) owing legal duties to the same lord.[26] The village community was a mode of economic management which also combined equally well with the differing legal structures of 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 violent coercion, the threat thereof, or manifest as simple fiscal demands). Village communities were able to respond to the prevailing social and economic environment without

[21] 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.
[22] Michael M Postan, *The Medieval Economy and Society* (Weidenfeld & Nicolson 1972) 136.
[23] Frederic William Maitland, *Domesday Book and Beyond* (CUP 1897) ('*DBB*') 407.
[24] Sir Paul Vinogradoff, *The Growth of the Manor* (1905; 2nd edn, George Allen & Company Ltd 1911) 188; Maitland, *DBB* (n 23) esp 374-415.
[25] 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).
[26] Vinogradoff, *Growth* (n 24) 86.

being derived exclusively from any one condition, whether demands from lords, community and/or egalitarian sentiment, or economic incentives.[27]

It was, in short, too complex a phenomenon for its economic significance to remain unstudied for long. Whilst these questions had been a part of the earliest village community debates, it was in the mid-twentieth century that village community studies became primary concerned with economic and social history. This involved investigations of medieval agriculture, economic efficiency, and demography – all of which often used legal sources for evidence, but did not study legal concepts or institutions directly.[28]

As a result of developments in these disciplines, we can now say with some confidence that English agriculture from c. 1200 was, for a large swathe through the centre of the country, operating using a highly regulated common field system. This necessitates a brief description in order to understand its legal and economic workings: medieval English village communities and their law cannot be properly understood without reference to land and agriculture[29] Medieval England had both 'open fields', meaning large pieces of 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 usually two or three open fields in a village and intermittently left land fallow to restore its nutrients. Villages and manors required regulation or management

[27] Vinogradoff, *English Society in the Eleventh Century* (Clarendon Press 1908) 477; Maitland, *DBB* (n 23) 181. For a reiteration, see the discussion of Susan Reynolds' work in Chapter 4.
[28] 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.
[29] The map in Hoffmann (n 25) 26 shows a rough distribution.

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', ie taking the benefits of the commons without bearing any of the costs. Regulatory mechanisms were needed to determine, inter alia, 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.[30] This was not a free-market system based on property and contract, but a system of internal – perhaps even 'corporate' - decision-making.

Part of the difficulty in studying the history of these economic institutions is that open field agriculture seems to have fully developed at roughly the same time as the legal structures of the manorial system, 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 the legal structures imposed by manors create pressure and cause the development of economic practices in open field farming and village regulation, or simply make use of an existing structure?[31]

The earliest scholarship attempting to date the development of open fields and common agriculture had been directly connected to the same questions as legal historical inquiries: which culture had produced them, and had they originated amongst a free or unfree populace? Common field farming under a variety of lordship conditions might be explicable because the

[30] Paul Vinogradoff, *Villainage in England* (Clarendon Press 1892) 4, 11.

[31] 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 5 of this book.

system pre-dated lordship, and/or was essential for the survival of the communities from which lords extracted wealth and labour.[32] 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 Old English charters and laws.

Two opposing sides had emerged which made claims concerning law, economics, and society based on the village community. The 'Romanists' and 'Germanists' argued that medieval social and economic institutions were, respectively, Roman and German in origin. Germanists were constrained to a later date of emergence than Romanists, in order to avoid the possibility of ongoing Roman influence.[33] There were incentives to nucleate (ie to build houses closer together and live in physically closer communities) villages at least as early as the Roman period. However, the evidence that building of both nucleated villages and dispersed hamlets continued showed that both were viable options. It seemed that it was only after waves of Germanic invasion that the incentives to nucleate became more persuasive for the purposes of both cultivation and defence – hamlets required lower population density and a larger supply of land.[34] Maitland doubted the evidence could even go so far as to prove open fields any earlier than the ninth century,[35] and argued that common rights were a later, fourteenth-century, addition.[36]

[32] See eg Henry S Bennett, *Life on the English Manor* (CUP 1937) 100.
[33] Postan (n 22) 89.
[34] Vinogradoff, *Growth* (n 24) 18; 147.
[35] Seebohm, *Village Community* (n 19) 109, Maitland, *DBB* (n 23) 425.
[36] Frederic W Maitland, 'Book Review: *Commons and Common Fields* by Thomas Edward Scrutton' (1888) 3(1)) EHR 568, 568.

The date of emergence of this mode of agriculture remains an active research question,[37] but with less political baggage. By the thirteenth century, if not earlier, it is established that many English villages, especially in the 'central belt', had collective agriculture in large open fields nominally divided into smaller plots possessed by villagers. All but the poorest tenants held multiple long, thin, unenclosed plots ('strips') scattered non-adjacently across different fields. Entire fields were enclosed by fences or hedges whilst crops were growing 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.[38] Patches of uncultivated land at the ends of fields provided turning room for the large ploughs required to churn the heavily clay soil common where this mode of agriculture was most prevalent.[39]

Common field farming was less typical in the east and furthest west of England, where less rigid field systems or a lack of communal cropping were more usual.[40] However, even outside the communities engaged in common field farming, arrangements with a strong communal element often existed in the form of management of drainage and commons (including 'waste',[41] marsh, and woodland) across England.[42] 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'. The latter term denotes any 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

[37] For instance, Helena Hamerow, *Rural Settlements in Anglo-Saxon England* (OUP 2012); Chris Wickham, *Framing the Early Middle Ages* (OUP 2005).
[38] Vinogradoff, *Villainage* (n 30) 233.
[39] 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.
[40] David Hall, *The Open Fields of England* (OUP 2014) 1.
[41] 'Waste' in this context could mean either uncultivated or uncultivatable land and was a word with roots shared across Old French, Old High German, and Latin: see 'waste, adj' in *OED Online*. September 2022. Oxford University Press. https://www.oed.com/view/Entry/226028 (accessed September 12, 2022).
[42] Hall (n 40) 128.

corporatisation, are used to prevent exhaustion of the resource from overuse.[43] Inevitable regional variations do, however, mean that it is necessary to be extremely cautious in generalising to 'all manors' or 'all village communities'.

Victorian writers could not see how common field agriculture could be economically efficient: the customary rules governing common field systems seemingly discouraged and prevented the innovation and investment prized in their own individualistic culture. 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,[44] that they were incapable of independent action: they all had to follow the same timetable and plant the same crops.[45] Some Victorians viewed the result as 'absurdly uneconomical': Seebohm speculated that the inconveniences must have once been worthwhile, but this did not amount to a defence.[46] Vinogradoff said English peasants were particularly entrepreneurial, notwithstanding the limitations of custom,[47] for example in cultivating new land ('assarting').[48] 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 and officials could have been dispensed with otherwise.[49] It seemed the only explanation was 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.[50]

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[43] For a detailed consideration of the economics of commons see Elinor Ostrom, *Governing the Commons* (1990; 2nd edn, CUP 2015).
[44] Seebohm, *Village Community* (n 19) 15.
[45] Frederic Seebohm, *Customary Acres and Their Historical Importance* (Longmans, Green 1914) 2.
[46] Seebohm, *Village Community* (n 19) 15-6.
[47] Vinogradoff, *English Societ*y (n 27) 459, 477; idem, *Villainage* (n 30) 181.
[48] Vinogradoff, *Villainage* (n 30) 332.
[49] ibid 230-237.
[50] Maitland, *DBB* (n 23) 18; Deidre McCloskey, 'The Persistence of English Common Fields' in Parker and Jones (n 25) 97.

Since then, twentieth-century economics scholarship has shown how intermixed strips could in fact have been an economically efficient mode of agriculture. If each landholder had two primary concerns, (1) to keep themselves and their households alive via subsistence agriculture, 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.[51] 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.[52] 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 more complex ways than the first phase of scholarship described. The latter half of this book will seek to reinitiate these connections between the economic and legal models of the village community.

LEGAL HISTORIANS TURN ELSEWHERE

Whilst twentieth-century economic and social historians examined life in the village community, legal historians turned away from its study as a part of a general tightening of methods and scope in the discipline. These developments can be credited mainly to Frederic W Maitland (1850-1906) and Sir Paul Vinogradoff (1854-1925). Maitland and Vinogradoff shared the general fascination with village community, and were particularly interested in its interaction with medieval legal custom as local rules created and enforced in distinct territorial areas. However, they thought the early village community debate too political, too careless

[51] Hoffmann (n 25) 28.
[52] For consideration of the latter, see Gregory Clark, 'Factory Discipline' (1994) 54(10) The Journal of Economic History 128.

with its information, and insufficiently grounded in evidence to survive once rigorous standards of evidence and method were established. Maitland applied the technical skills of a legal practitioner in relation to the authority and corroboration of sources, and prioritised the study of legal doctrine and primary evidence in legal records.[53] Christopher Dyer has suggested an active choice was made at this time, with significant consequences: a revisionism which 'sought to diminish the importance of the English village community'.[54] 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.[55] In Maitland's case, this was arguably an attempt to produce methodologically sound historical work in response to the inappropriately broad generalisations made by Maine and Seebohm, but it was also based on philosophical and methodological commitments: he felt neither politics nor vaguely defined community concepts were appropriate in writing about history and law.

Vinogradoff took a different approach. He attempted to synthesise both rigorous legal studies of the type Maitland pursued and the broader social questions studied by Maine and Seebohm.[56] 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 – developed. However, on Vinogradoff's death, his method was largely abandoned in favour of a split between doctrinal approaches in legal history – meaning here studying the history of legal doctrine analytically; and sociological

[53] See especially Maitland, *DBB* (n 23).
[54] Christopher Dyer, 'Power and Conflict in the Medieval Village' in Della Hooke (ed), *Medieval Villages* (OUP 1985).
[55] See Chapter 2 and 3 in relation to Maitland's views; Chapter 4 in relation to Macfarlane; for Campbell see eg *English Seigniorial Agriculture 1250–1450* (CUP 2000).
[56] Vinogradoff, *Growth* (n 24).

jurisprudence in other fields – meaning the study of law in relation to philosophy, history, anthropology and other social sciences, but not only analytically or in the abstract.[57] As a result, twentieth-century legal history rarely considered the village community, local custom, or local government.

However, a third phase of village community studies continued to investigate the legal and personal status of peasants at common law, and the impact this had on their lives. Legal historical work towards the end of the twentieth century did explore the role of custom as discussed in common law records, especially Year Book cases. But a wider range of sources is required, because it became clear that custom did more in medieval society than common law records alone show. Local manorial records consistently demonstrate that local custom had its own institutions and officials, regulations, and relationships. This deserves much more study as law than it has hitherto received, particularly in light of the enormous number of primary sources available to illuminate this area. The village community was a place where law was made, and legal institutions existed: it is worth ongoing study as such.

Even if the focus of twentieth-century legal history has been the common law and its rules and institutions, there remained a role for local custom in that literature. 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.[58] However, in light of recent studies

[57] 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. 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.

[58] 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 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 Razi and Smith (n 3); Lloyd Bonfield, 'What did English Villagers

examining the juristic nature of 'customary law' in the early English legal system and its role there,[59] the nature of law within the village community is ripe for reconsideration. Leading legal history work including Sir John Baker's key textbook on English legal history and John Hudson's volume of the *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 suggeest that the customs and practices within such communities varied so much that little more can be said with any certainty.[60] Whilst it has already been noted over-generalisation is indeed 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 likely relates – whether explicitly or implicitly - to the prevailing definition of what 'law' is as an object of study. A researcher with a legal positivist framework in the analytical jurisprudential tradition might ignore customary practices, institutions, and records as 'positive morality' and not law. They might do so consciously, having considered the issue explicitly, or implicitly do so by choosing objects of study which are more clearly

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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.

[59] 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.

[60] 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 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 58).

'law', like common law rules. Another researcher, one who is interested in social history and demography, might be less interested in the legal rules or practices as 'law' than what they reveal about a past society and its population. The substantive law therefore has an ongoing tendency to fall through a research gap. And whilst the institutional, economic, and legal historical aspects can be separated in order to facilitate analysis, it is worth reiterating that they are always interdependent in reality. The later chapters of this book strive to begin the process of integrating legal historical work, ideas about law, and studies of the village community once again.

A Note on Terminology

The study of the village community necessarily involves a certain amount of understanding of English medieval history. Local court records and common law sources are generally in abbreviated Latin, and full of technical terminology specific to the rules of procedure and substance in the early common law. Villagers in local courts were 'amerced' where we would now say they were 'fined'[61] when a 'presentment' brought wrongdoing to the court's attention; 'tenements' of land at common law was 'enfeoffed' to a 'feoffee' by a 'feoffer'; goods were 'distrained' when they were confiscated through legal process. When referring to individuals, a number of terms used to denote legal and economic status require particular explanation in order to discuss the village community.

When referring to medieval English peasants – where 'peasant' itself is used as a nonspecific term denoting agricultural labourers – it is conventional to contrast the free and the unfree. In this 'feudal'[62] society, everyone except the king was nominally responsible to some lord who

[61] 'Amercement' technically also indicates that the penalty was discretionary, and as such could be waived. The phrases 'under penalty of a fine' or 'on pain of [a fine]' are also used in medieval records.
[62] The definition and usefulness of the term 'feudalism' is so controversial that I will seek to avoid it except in quotations.

demanded income, services, and loyalty from them. Property in land was the medium through which these obligations were imposed and provided for: possession of land was granted by a lord to a tenant in return for a commitment to perform certain services and pay certain dues. It is also important to note that both persons and land itself could be free or unfree, and that an unfree person did not necessarily hold unfree land, nor did a free person necessarily hold free land. The link between the status of the individual and the type of land held was, however, more consistent before the Black Death caused significant population changes in the mid-fourteenth century.[63]

Both personal status and what land was held by an individual, and from whom, were core features in determining a persons' position in society. Even free persons were subject to numerous obligations relating to their land which affected their day to day lives, their economic position, and their legal rights. The unfree were constrained by more burdensome legal, economic, and social rules than free persons, but they were not chattel slaves, and it is a mistake to think of them as lacking any control over their lives. They were in many cases able to accumulate land and wealth, to be geographically mobile, and to take legal action in both local and royal courts to protect their interests. Being unfree did often amount to a life less self-determined – but the distinction should not be overstated.

Different terminology for unfreedom reflects the focus, at any one moment, on different social and economic elements. There are four different sub-categories in the vocabulary which appears in medieval records, focusing respectively on social standing, economic condition, the services performed for the lord, and land holding. Terms referring to social standing included the Norman term '*villanus*', 'villein':[64] an unfree person in servitude - but whether this meant

[63] See generally Mark Bailey, *After the Black Death* (OUP 2021).
[64] In Victorian writing, the spelling 'villain' was conventional.

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 (ie unfree) tenure. The less technical Latin '*rusticus'* was similarly used, often in non-legal sources, and in Domesday Book seems to mean much the same as '*villanus*', ie a rural labourer, although that person might have been personally unfree, free, renting or bound to the land.[65] 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.[66] In 1172, a protagonist was both a '*rusticus'* and a man of the people ('*plebejus*') in different versions of the record – this, again, does not reveal much about his legal status.[67] '*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, but this said nothing of their landholding.

Terminology which focused on the economic position of an individual was less common, but included words like *'niet'* or *'neat'*, derived from the Old English term '*geneat'*: this indicated a person who cultivated land held in a standard-sized package in return for particular services to their lord. These tenants were more free, in the sense of having more economic weight, than a '*cottar'* - an unfree tenant who had a house to live that they held from their lord, in but had no rights involving arable land. These latter would have to labour for wages on the land of others, or hold land in other localities, in order to make a living. This distinction between unfree persons who held arable land and those who did not was not picked up by the legal terminology, which would class both as '*villani'* or '*villeins'*. Briefly after the Conquest the terms

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[65] Vinogradoff, *Villainage* (n 30) 140; Rosamond Faith, *The English Peasantry and the Growth of Lordship* (Leicester University Press 1997) 125.
[66] *Gilbert Foliot v Robert, Earl of Leicester* (date unknown) *Lawsuits from William I to Richard I*, SS vol 106(2) 484.
[67] ibid 507; 509.

'burus' and '*buriman*' were also used, based on the Old English word *'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, also later evolved into terms like 'bondman', 'bondage'. The terminology of 'villeinage' ('*in villanagio*') and 'bondage' ('*in bondagio*') often appears interchangeably in written records. For example, in one fourteenth century dispute which took place over nearly twenty years,[68] *'in villanagio'* and '*in bondagio'* were both used in reference to the same piece of land at different points: in 1317 ('*villanagio*'); 1330 ('*villanagio*'); and 1331 ('*bondagio'*, then '*villanagio*').

Terms referring to agricultural work were common, including *'operarii', 'consuetudinarii', 'custumarii'*. These described the services due from the person to their lord, and when used in contrast to '*villein*' probably indicated a person who was personally free, but held land which was not free and performed services associated with that unfree tenure. These services were seen as less dignified, or as indicators of lower social status, than the services commonly associated with free holdings. For instance, groups of tenants who held only small plots of unfree arable land were sometimes made to perform the service of following the ploughs: these were '*akermanni*' or '*carucarii',* and *'gersumarii'* were peasants who were obliged to pay a fine to their lord if they wanted to be married. The obligation to pay the latter fine, known as 'merchet' was often used as an indicator that a person was not free.[69]

Finally, some terms referred to the type of landholding a person held: a *'hidarii'* often held only part of a 'hide' – a standard sized parcel of land. The services the lord demanded from such a parcel would be due from the whole hide, such that these individuals with smaller portions would likely need to co-operate in order to meet their collective obligations. Terms like

[68] Lawrence Poos and Lloyd Bonfield (eds), *Select Cases in Manorial Courts, 1250-1550* (1998) SS vol 114 p 3, 5.
[69] Vinogradoff, *Villainage* (n 30) 141-7. See also 'landsettus'.

'virgatarius' and '*yerdling'* also referred to standard measurements of land, and where persons were described as a 'half villein', 'full villein', or '*ferlingseti'* it was their landholding, and not their personal status, which was indicated. Those with land rights which did not give them access to the local commons (a key economic and legal right, as will be discussed) were '*cotter, cotsetle, cottagiarii, cottarii'* because their land rights did not extend beyond their dwelling houses. '*Bordarii'* also appear in Domesday Book as an equivalent term which disappears later. 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.[70] In the early common law this had limited significance, but it became a specialised kind of land when these manors became a 'testing ground' for the rapidly developing royal administrative system in the twelfth century.[71] 'Ancient demesne' – land which had historically been in crown hands, supposedly at the time of the Norman Conquest - also came to be distinguished, with its unfree inhabitants endowed with particular privileges in royal courts.[72]

'*Villanus*' is by far the most common term in the common law legal sources, reflecting the centralisation and organisation of society in those documents in terms of general legal concepts (a person was simply 'free' or 'unfree') rather than detailed terms expressing economic, political, or social differences. This term was adequate for questions concerning lordly interests, as it classified persons according to the services they owed, although the freedom or unfreedom of their landholding was also independently important insofar as it affected the services owed from it. 'Villeins' came to have clear legal disabilities in common law courts. This involved an artificial simplification of individuals' positions: the lord's power to demand particular services or not was all that mattered in relation to accessing the royal courts,

[70] Faith, *English Peasantry* (n 65) 261.
[71] Robert S Hoyt, *The Royal Demesne in English Constitutional History 1066-1272* (Cornell University Press 1950) 107.
[72] ibid 136.

regardless of whether that person was a very wealthy local landowner or the poorest cottager, or their role in their local community.[73] Most thirteenth-century peasants were 'villeins' in this sense.[74]

[73] Vinogradoff, *Villainage* (n 30) 83.
[74] ibid 43-4.