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The Role of Seigneurial Jurisdiction After the Norman Conquest and the Nature of Customary Law in Medieval England

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Introduction

Our task in producing this volume in comparative legal history is to place the seigneurial or feudal courts within their jurisdictional context, as one of a variety of courts available to litigants during the middle ages and beyond, and to describe their procedures and the substantive principles of law therein applied. One object of the English legal historians engaged in our comparative study is to set out the jurisdictional boundaries of the various courts of medieval England. Because those who sought to resolve disputes in medieval England had an array of courts from which to choose, discussion is necessarily complex. In particular, we must consider the extent to which feudal courts survived in the later middle ages, a period described by historians as that of the 'centralization of justice,'[1] one in which the royal courts expanded their subject matter jurisdiction, arguably at the expense of other courts.

A second purpose of our inquiry is to illuminate the procedures employed in feudal courts, and, to the extent possible, set out the substantive principles that resolved disputes between parties who brought cases to feudal courts. In this report, I shall consider the nature of custom in one feudal jurisdiction: the manor court. A triad of questions regarding manorial custom will be addressed: in what records can custom be found; what was the legal nature of custom; and from what sources was it derived. Once again the royal courts provide the basis for comparison. English legal historians frequently contemplate these three issues by considering the extent to which feudal courts followed common law courts with respect to both procedure and substantive law.[2]

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[1] See for example *S. F. C. Milsom*, Historical Foundations of the Common Law, 2nd ed. (1981), ch. 1; and *R. C. Van Caenegem*, The Birth of the English Common Law, (1973), ch. 1.

[2] See the debate on this question between *Paul Hyams* ("What did Edwardian Villagers Understand by Law?") and myself, *Lloyd Bonfield* (What did English Villagers mean by Customary Law) in *Zvi Razi* and *R. M. Smith* eds. Medieval Society and the Manor Court (1996).

We shall begin with a sketch of the jurisdictions available to litigants in the middle ages. The specialist legal historian, particularly one of England, will recognize that the exposition is both incomplete and idiosyncratic; its purpose is to assist our continental colleagues in understanding the piece that was the feudal court within the broader jurisdictional puzzle of the medieval legal order. Having done so, we shall turn to a consideration of the nature of custom in the manor court.

The jurisdictional puzzle

Let us commence with a discussion of the various courts available to litigants by noting the jurisdictional boundaries which obtained between courts.[3] A useful way to begin is by referring to a charter or decree issued during the reign of Henry I (1100 - 35) that set out the manner of holding the shire and hundred courts. One section of the charter is devoted to the distribution of jurisdiction between courts. Three different courts are enumerated: the royal court; the shire court; and the seigneurial (the lord's) court, and the allocation of jurisdiction is as follows:

> And if henceforth a case arising concerning the division or occupation of lands – if it is between crown barons of mine the case shall be dealt with in my court ... and if it is between the vassals of a crown baron of mine, the case shall be dealt with in their lord's court ... and if it is between vassals of two lords it shall be dealt with in the county court.[4]

It should be noted that the charter does not appear to set up a hierarchy of courts with the royal court at the helm; rather, the appropriate forum for the resolution of a dispute seems to depend largely on feudal ties and an element of practicality. Controversies between vassals of the same lord, be he king or baron, are to be heard in the court of their lord; in circumstances where the adversaries share no common lord, the dispute must go to the shire court.

The extent to which the distribution of judicial authority set out in the decree was an ideal as opposed to a reality can not be ascertained. If a demandant brought his case in the 'wrong' court, but the defendant was prepared to have the claim resolved therein, it is likely that the case would proceed. Indeed, a number of early law suits suggest that considerable flexibility existed in choice of forum, though one case for which a record survives demonstrates that objections to jurisdiction were lodged and discussed.[5]

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[3] For a more full description see *John Hudson*, The Formation of the English Common Law (1996), ch. 2.

[4] *A. J. Robertson*, ed. The Laws of the Kings of England from Edmund to Henry I (1925), p. 287.

[5] *Hudson*, Formation pp. 24 - 7; *R. C. Van Caenegem*, ed., English Law Suits from William I to Richard I, vol. 1, Seldon Society, London vol 106, 1990.

The charter ignores an array of other courts which were in place by 1100. Perhaps most important amongst those jurisdictions that are absent are the ecclesiastical courts. By charter, William I separated lay and ecclesiastical causes, creating a separate spiritual jurisdiction that was to implement a separate body of jurisprudence:

> I therefore command and enjoin ... that no bishop or archdeacon shall henceforth hold pleas affecting episcopal jurisdiction in the hundred court nor shall they bring forward any case which concerns spiritual jurisdiction for the judgment of layman; but whoever has been summoned for some suit or offense which falls within the province of episcopal jurisdiction shall appear at the place appointed and named by the bishop ... and shall there make answer ... not according to the hundred court but in accordance with the Canon law.[6]

Precisely what was encompassed in the 'spiritual jurisdiction' was expressed therein and came to be refined over the next century. By then, the Church courts had jurisdiction over a variety of disputes involving both clerics and lay persons. The most significant areas of lay jurisdiction were controversies over the validity of marriage and questions of legitimacy. Where cases pending in lay courts raised such issues, judges were, at least in theory, supposed to refer relevant questions of law to the appropriate bishop's court for determination according to canon law. In addition, Church courts also supervised succession to chattels and heard cases involving allegations of defamation.

A second jurisdiction which Henry I's charter does not mention are the borough courts. Boroughs were urban areas or towns that had a recognized degree of legal autonomy, and in particular developed their own system of courts, procedure, and custom.[7] Some controversy exists as to whether, at least in a constitutional sense, the towns of Anglo-Saxon England should be regarded as boroughs.[8] Some sources suggest that courts were in place prior to the Conquest; other historians seem less certain. After the Conquest, however, records exist that demonstrate that certain urban areas achieved a high degree of legal autonomy. For example, the London Charter of Henry I granted significant freedom to the citizens of London to organize both their economic and legal affairs. With respect to the latter, Londoners could control the appointment of royal officers who heard pleas of the crown and were allowed to have such cases follow a particular procedure; other disputes were to be heard in their own courts.[9]

Having described in brief the two most important jurisdictions not mentioned in Henry I's charter, we may return to the three that were: the royal; the shire; and the

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[6] *Robertson*, Laws, p. 235.

[7] *M. Bateson*, ed. Borough Customs (Selden Society, London) vols. 18, 21, 1904, 1906.

[8] *Susan Reynolds*, Towns in Domeday Book, in *J. C. Holt*, ed. Domesday Studies (Woodbridge, 1987), pp. 296 - 99; *James Tate*, The Medieval English Borough, (Manchester, 1936), pp. 40 - 5.

[9] *Robertson*, Laws, pp. 289 - 90.

feudal courts. We begin with the royal jurisdiction, the one that is perhaps the most complex. In the first place, the king in his person was himself an aspect of royal jurisdiction, as were his courts and his justices. As the fount of all justice, the king might be asked by an individual to intervene in a dispute. In addition, there were particular areas of subject matter that came to be the subject of royal jurisdiction. Moreover, according to the Leges Henrici Primi, the king 'must act as kinsman and protector to all persons in holy orders, strangers and poor people who have been cast out, if they have no one else to take care of them.'[10]

Two processes occurred to strengthen royal jurisdiction: the establishment of the system of itinerant justice; and the development of the central courts. In the reign of Henry I (1100 - 35), we find evidence of royal justices in the shire keeping royal pleas. Originally, the justices may have been sent to the shire for only a single weighty case, but later in the reign the regularized perambulation of judges called the 'eyre' became a fixed part of royal jurisdiction. While it is likely that the practice which we can observe due to the survival of records was not innovative – local justices might well also have been appointed by the king in Anglo Saxon times – the eyres of the twelfth century brought royal justice to the shire. During the same period, royal jurisdiction also found a fixed place to which cases could be brought. Over the course of the twelfth century and thirteenth century, royal courts, in particular, Exchequer, Common Pleas and King's Bench, came to be fixed at Westminster and developed writs, process and procedure to hear an ever-growing number of cases within the royal jurisdiction: in particular, debt, covenant, and pleas involving freehold land.[11]

In large measure, the growth of royal jurisdiction in the twelfth century came at the expense of the shire and feudal courts. If at the beginning of the reign of Henry I one might posit three co-equal jurisdictions (royal, shire and feudal) to which cases were brought based upon common lordship, by the end of the century parity amongst the courts was not the case. The royal courts became the primary jurisdiction for free tenants even when the king was not their immediate lord. Glanvill wrote in the reign of Henry II, "no man need answer for his freehold land without the king's writ"; by that we understand him to mean that unless one had a writ of right from the king's chancery which ordered the feudal lord to do justice between the parties, the defendant could not be required to appear in his lord's court to answer the demandant.[12] This principle, royal oversight of seigneurial jurisdiction, and the creation of writs returnable in the royal courts along with the ability to attack verdicts rendered in feudal courts in royal courts, circumscribed the lord's ability (and that of his court) to remove a vassal from his landholding.[13] Because

[10] *L. J. Downer*, Leges Henrici Primi (Oxford, 1972), p. 109. For the origins of the manuscripts and speculations upon their province and author, see the Introduction.

[11] *Van Caenegem*, Birth of the Common Law, pp. 20 - 4.

[12] *G. D. G. Hall*, ed., The Treatise on the Laws and Customs of the Realm of England Commonly called Glanvill (Oxford, 1993), p. 148; *Van Caenegem*, Birth of the Common Law, pp. 25 - 6.

the principle did not apply to servile tenures, as opposed to freeholds, the feudal court of the manor continued to have jurisdiction over villein land, the so-called customary tenures; thus the law of the manor court, the custom which we shall describe below, applied largely to villein land.

Turning to the shire court, and to the hundred courts below it, these two courts were the primary jurisdiction in Anglo-Saxon England. That the charter of Henry I is concerned with insuring that shire and hundred courts are properly attended and kept is testimony to the importance of the shire court. The charter and the *Leges Henrici Primi* manifest concern as to whether the appropriate personages attended the monthly meetings, because the jurisdiction of the shire court went beyond merely disputes between vassals of different lords, a subject matter which it also lost in the reign of Henry II.[14] The shire court dealt with the administration of the county, a matter of the utmost interest to the crown and heard less serious land claims, those against property and theft. When more serious cases came before the shire court, it referred them to royal justice. As the century progressed, land disputes went directly to the royal court; thereafter, the shire court declined in prestige and took on the appearance of subordinate branch of the royal court.[15]

If the shire court was absorbed gracefully into the royal court, the seigneurial courts faced a more ignominious end. The logic of the feudal court was to provide a forum to mediate relationships between lord and his vassals. The greater vassals met at the honour court, and the lesser at the manor court or hallmoot. While land may have been the basis of the feudal relationship and the honour courts convened to memorialize grants of land, the lord also maintained considerable jurisdiction over offences against the persons and goods of his vassals, and even over offenses committed by others on his land, the so called 'sake and soke' jurisdiction. Such jurisdiction was sometimes expanded by royal franchise (and sometimes usurped without royal concurrence) to subject matter normally within the purview of royal justice. In certain areas of the kingdom, usually those more distant from the center of administration, London, and in particular, with respect to lands controlled by ecclesiastical foundations, broader claims to pervasive jurisdiction was claimed.

Two trends led to a decline in honour courts. Like the shire courts, expansion in the royal courts' control over freehold land removed a significant aspect of jurisdiction. Moreover, attempts to circumscribe the claims of lords to franchise jurisdiction which characterized the reign of Edward I further led to the decline of honour courts.[16] By the last decades of the thirteenth century, the only significant aspect of feudal jurisdiction that remained was over the unfree in the manor court.

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[13] For a detailed discussion, see *S. F. C. Milsom*, The Legal Framework of English Feudalism (Cambridge, 1976).

[14] *Hudson*, Formation, pp. 35 - 7.

[15] *Robert Palmer*, The County Court of Medieval England 1150 - 1350 (Princeton, 1982), pp. 297 - 303.

[16] *D. W. Sutherland*, Quo Warranto Proceedings in the Reign of Edward I (Oxford, 1963).

The nature of custom

Having set out the structure of jurisdiction in medieval England, we turn to a consideration of the substantive principles of law produced by and implemented in the feudal court that has left to us the most extensive records, the manor court. We may now turn to our triad of questions regarding manorial custom and make some progress towards resolving the related queries set out above: in what records can custom be found; from what source was it derived; and what was the legal nature of custom? But before doing so, the character of the manor court as a legal institution must be addressed.

At the outset, we must concede that our inquiry is not path-breaking: these are not uncharted waters. Over the course of the past quarter century, the manor court (and by that we mean the thousands of separate and largely unconnected tribunals which existed in rural England) has come under rather detailed scrutiny by legal historians, as well as by those scholars interested in the social and economic relations of medieval society.[17] The records of the manor court are an appropriate source for both legal history, and for more wide-ranging historical inquiries by social and economic historians, because the manor court's competence greatly exceeded that of an adjudicative body: the manor court regulated agricultural practices; established village by-laws; elected local officials; inquired into disturbances of public order; and monitored payments and services owed to the lord.[18] The manor court was therefore a political and economic entity as well as a legal forum. It has been suggested, and not without justification, that few villeins did not participate in its business, and fewer still would have avoided attending the regular meetings of the manor court.[19]

The variety of functions that the manor court served rendered it rather extraordinary as a court. Likewise was its personnel exceptional: those who owed suit to the manor court were mostly villeins. At least in legal theory, though perhaps less so in practice, the villeins who assembled at regular meetings of the manor court, the homage, were in law the property of the lord whose steward presided over the proceedings. This rather unusual relationship between the presiding officer of a court and its participants has led to considerable skepticism amongst historians regarding the evenhandedness of manorial court proceedings.[20]

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[17] *Razi* and *Smith*, eds. provide a useful bibliography of research into manorial courts.

[18] For a general discussion, see *Lloyd Bonfield*, "The Nature of Customary Law in the Manor Courts of Medieval England", Comparative Studies in Society and History, vol. 31, pp. 517 - 21; and *L. R. Poos* and *Lloyd Bonfield*, eds., Select Cases in Manorial Courts: property and family law, Selden Society vol 113 (1997) (cited hereafter as *Poos* and *Bonfield*, Cases).

[19] *Zvi Razi*, Life, Marriage and Death in a Medieval Parish: economy, society and demography in Halesowen 1270 - 1440 (1980), pp. 1 - 10.

[20] For a discussion of peasant status see *R. H. Hilton*, A Medieval Society: the west midlands at the end of the thirteenth century (1966); and for a discussion of the legal status of

Yet too much can be made of this apparent power imbalance, and let me explain why. If seigneurial interference was linked to the element of seigneurial interest, the lord had no stake in the outcome in much of the business which came before the manor court. For the purposes of illustrating the issue of curial evenhandedness, it may be sensible to divide court business into two spheres: those controversies in which the lord's interest was directly at stake (for example, a dispute over the extent of services owed by the tenant of a particular holding of customary land, and whether the service had been properly performed); and other cases between villeins in which the lord's interest was absent (for examples, whether payment had been made pursuant to a mortgage agreement between two villeins; whether a promise had been made or whether it had been performed; which villein had the greater right to possession of a customary tenement). Unfortunately, the universe of human conduct, at least as it obtained in the manor court, is not so neatly divided. While most cases between villeins probably fell somewhere towards the lesser realm of lordly concern, seigneurial interest in many such cases was not entirely absent (for example, an inheritance custom in which the property might pass to a woman married to a man not of the homage affected the lord because he would be required to accept the husband as his villein). It may therefore be more accurate to regard court business as a continuum in which few issues that came before the court fell on either end: compelling seigneurial interest, or complete lack thereof. Though a rough and ready calculus, one might argue that evenhandedness in the manor court was case specific, and curial influence might be brought to bear to the extent the lord had an interest in the outcome.

Having categorized the cases in the manor in this fashion, we note that our focus in this paper will be with disputes between peasants over rights in customary land and other property resolved by reference to custom, rather than with controversies between lord and villein over services owed; we shall deal with causes in the manor court on the lesser end on the continuum of lordly interest. The custom which we shall observe, then, may have been produced with rather modest levels seigneurial interference, or at least so our records reveal. Although it was not unheard of in the court rolls for a cause to be submitted to the lord or to his council for resolution, such reference was exceptional.[21] Manor court juries, comprised of the villeins themselves, largely presided over the articulation and application of custom in such cases.

We must also note that the customs which we shall illuminate, like the manor courts that expressed them, were largely local. Medieval England was comprised of thousands of manors each with its own court. Theoretically, these courts were unconnected, and each manor was free to develop its own procedure and customs. Moreover, there was no regular process of appeal to another court, and therefore

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villeins see *Paul R. Hyams*, Kings, Lords and Peasants in Medieval England: the common law of villeinage in the twelfth and thirteenth centuries (1980).

[21] *Poos* and *Bonfield*, eds., Cases, no. 4, 49, 114, 174.

no means existed to harmonize decisions in individual manor courts on similar questions. Arguably, at least, there were as many ways of handling causes, and as many sets of legal terminology in which to express custom, as there were manors. Nonetheless, the records exhibit a fair degree of uniformity. To the historian of court rolls, there are certain familiar procedural patterns in which most manors handled their more routine business: for example, of admitting heirs to their ancestors' property; or permitting one tenant to surrender property so that another tenant might be admitted; or granting to widows the portion of their deceased husbands' lands owing to them as dower or free bench under local custom; or exacting money from servile women for permission to marry (merchet); or as punishment for fornication (lyrewite). Even if an individual manor held to a distinctive custom of inheritance, or expressed the custom in a particular terminology, the records of each manor court are on the whole quite similar to those of another.

Having considered the manor court as a legal institution, let us return to our triad of questions regarding its custom, and address the first: where was custom expressed? The answer to this question is straightforward: in the manor court rolls (strips of parchment sewn together in which a scribe memorialized the panoply of court business in abbreviated Latin probably redacted after the court session from contemporaneous notes). Custom appears in manorial court rolls in two guises: it is proffered either in support of the complainant's plea or the defendant's denial; or it is pronounced by the jury as a justification of its verdict.

Having said that the court roll is our source for the custom of the manor, we must concede that an individual court roll does not, unlike a modern case reporter, reproduce case after case in which custom is pronounced. To the contrary; manorial custom appears in the rolls only very infrequently. The researcher can scour herds of sheep' membranes and uncover only a few statements of custom. There are several explanations for the dearth of allegations of customs by litigants and proclamations of custom by the manorial court jury. In the first place, it must be noted that most of the cases that were formally commenced in the manor courts went unresolved. Such court business, of course, produced no recitation of custom, save where the parties pleaded custom to support their claim or denial. The historian, of course, can only speculate as to why a case commenced at not inconsiderable expense to a complainant was thereafter dropped, often with the incursion of additional expense. Then, as now, a variety of explanations can be offered to account for the many suits that were not pressed to conclusion: from attempting to achieve the settlement of a tenuous claim through vexation of enemies.

Such suits aside, custom also did not play a role in causes that turned exclusively on differing apprehensions of factual matters held by the parties. The distinction between law and fact can be illustrated by considering an hypothetical case where the eldest son seeks to enter his deceased father's holding. The issue might be one of fact: I am the eldest legitimate son; and not law: what is the inheritance custom in a particular manor. Many other cases similarly raise questions of fact: for exam-

ple, did a plaintiff alienate entailed customary land;[22] was a piece of customary land leased under condition that the lessees would not sublet it;[23] did a plaintiff's father make a grant of customary land to the plaintiff's bastard brother?[24]

Another reason why the rolls cite custom only sparingly is that those cases that did reach a conclusion and raised an issue of custom were frequently resolved by modes of proof that leave the historian with few clues as to the manor court jury's logic or with an understanding of custom that may have resolved the conflict. Wager of law, long a means of resolving disputes in communal courts, continued to be employed in manor courts into the sixteenth century; the ceremony of oath-making produces no custom. Moreover, even where a case might be referred to a jury for resolution, the general issue might have been pleaded; the complainant stated his claim, the defendant denied it, and the jury found for one party or the other without elaboration upon the logic that might support its verdict. Even in cases in which custom had been pleaded, juries might determine particular cases without specific confirmation or denial of a particular custom. Thus in a case where a plaintiff challenged a defendant's entry to customary land on the grounds that the transfer was against custom, the jury might affirm or deny the plaintiff's claim with a verdict which fell short of confirming the custom, suggesting (perhaps) that its verdict could have rested upon the facts or even upon a different custom.

Accordingly, a compilation of rather sporadically articulated customs that resolved cases in the manor court like we have produced might strike the observer as a litany of oddities distilled from examinations of court rolls. And narrowly tailored they might be: for example, should a tenant's eldest son inherit all his land, or should the eldest son of each of his successive marriages inherit property which the father acquired during each individual marriage[25]; or should a daughter be barred from an inheritance if she has been married with a marriage-portion stemming from the inheritance?[26]

Random though the pronouncements may be, the process of custom making discussed above reveals much about the nature of customary law in medieval England, and provides a basis for comparison with feudal law on the Continent. The manorial custom that can be analyzed by English historians was spawned in the context of disputes between litigants, and at two points in the controversy: in the pleading; and / or in the judgment. More frequently in our records, custom was expressed by the jury in explanation of its judgment, though the parties themselves in some causes offered their own version of custom to support their claim. Moreover, custom is local, particular to each individual manor.

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22 *Poos* and *Bonfield*, eds., Cases, no. 33.

23 Ibid., Case no. 75.

24 Ibid., Case no. 183.

25 Ibid., Case no. 10.

26 Ibid., Case nos 16, 24.

Manor court rolls are the English legal historian's exclusive documentary source for pronouncements of custom in manor courts in the middle ages, and as such our evidence differs, at least in part, from sources available to, for example, our French colleagues: there are no compilations of customary law that resemble the French customals.[27] Manorial law in the middle ages in England so far as we can tell from surviving documents was rarely, if ever, systematized in the fashion of French customary law in the fifteenth and sixteenth centuries. Those English customals of the middle ages which do survive are primarily lists of villein services to be exacted, rather than catalogues of customs governing rights or inheritance practices with respect to customary land.[28] Custom in England as it obtained to villein interests in customary land, as opposed to services due, was largely case specific, and can be found exclusively in the records of litigation. Because custom in England was rarely redacted and never systematized, those principles of custom distilled cannot be considered a rudimentary code of substantive provisions recognized by the manor court to which reference could be made by the jury when a case reached judgment.

Our discussion of where manorial custom is found has led us to our second issue: its intellectual source. If custom is to be found in the pleading and resolution of causes in the manor court rolls, from what jurisprudential fount did it spring? To this question there are perhaps as many responses as there are historians who have considered the issue. G. C. Homans was the first scholar to consider this question in detail, and he did so as an historical sociologist rather than a lawyer. His *English Villagers in the Thirteenth Century*[29] was an ambitious attempt to derive a jurisprudential theory of customary law by an examination of cases in the court rolls. On the basis of his extensive research, Homans concluded that '[customs] must have been developed in the course of a long-continued process of interaction among many factors'; and in particular, the recurrent effects of interaction among individuals, collective peasant sentiment, and the need to further collective enterprise, namely agricultural production and human reproduction.[30] With respect to the most important aspect of custom, those dealing with inheritance to land, Homans regarded them as part of the 'mutual adaptation of the institutions of society,'[31] part of an elaborate web of reciprocal understandings that was so comprehensive that when resolving a complex dispute between parties the jury 'asserted that they had rules of custom to apply even in questions as intricate as this, which

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[27] The English legal historian marvels at the comprehensiveness of, for example, the compilation of Philippe de Beaumanoir, The Coutumes de Beauvaisis (trans. *F. R. P. Akehurst*) (1992).

[28] For an example, see the compilation of Sussex customals, *W. D. Peckham*, ed., Thirteen Customals of the Sussex manors of the Bishop of Chichester, Sussex Record Society, vol. 31 (1925).

[29] (1941).

[30] Ibid., pp. 404 - 7; quotation from p. 404.

[31] Ibid., p. 414.

can have arisen only rarely.'[32] In Homans' view, even the lord of the manor might at times be subject to the collective judgment of the homage as if he were being treated 'much like any other villager.'[33]

More recently, Homans' view of the nature and origins of custom has been challenged. One emerging argument suggests that custom was not spontaneously derived from peasant culture, but rather was greatly influenced by other legal orders: the canon law of the English ecclesiastical courts and the common law of the royal court. One prong of the argument focuses upon procedural change in manor court; an alteration in the manner in which cases came before and were resolved by the manor court is stressed and can be summarized in the following fashion. Most legal historians since Maitland have noted that the manor court began to adopt the procedural forms of the royal court, in particular, the jury of presentment. The rolls illustrate that during the first half of the fourteenth century the manor court was gradually – again, at a demonstrably uneven pace from manor to manor – abandoning the practice of compelling the entire homage of all suitors to court to act as the court's decision-making or fact-finding authority; the rolls indicate that the manor court was delegating decisions in litigation to trial juries, whose verdicts also increasingly determined cases that might earlier have been settled by wager of law. Likewise, a growing proportion of the regulatory business of the court came into the record as the result of declarations by juries of presentment.[34] Finally, the procedure by which customary land was transferred in the fourteenth century began to be phrased in terms reminiscent of the common law.

The argument of adaptation of the common law procedure has been extended to substance, with some historians arguing that, for example, that the canon law on the formation of marriage was assimilated.[35] Other historians suggest that the manor court in areas of private law should be regarded by the close of the thirteenth century almost as a subordinate branch of the royal court.[36] This view, should it prevail, dates the disappearance of custom as a discrete though incomplete set of functional rules produced by the manor court (as opposed to a body of law that the court was to some extent required to adopt) nearly three centuries before the manor courts as dispute resolution forums began to disappear. Arguably, there would be

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[32] Ibid., p. 190.

[33] Ibid., p. 323.

[34] These arguments have been developed in particular by *J. S. Beckerman*, and are summarized in his "Procedural Innovation and Institutional Change in Medieval English Manorial Courts," Law and History Review, vol. 10 (1992), pp. 197 - 252; they are also discussed in *R. M. Smith* "'Some Thoughts on 'Hereditary' and 'Proprietary' Rights in Land under Customary Law in Thirteenth and Early Fourteenth Century England", Law and History Review, vol.1, (1983), pp. 99 - 107.

[35] *R. M. Smith*, "Marriage Processes in the English Past: Some Continuities", in *Lloyd Bonfield, Richard M. Smith* and *Keith Wrightson* eds., The World We Have Gained: Histories of Population and Social Structure (1986), pp. 43 - 99.

[36] *Hyams*, "Edwardian Villagers".

no conflict between Homans' notion of custom as peasant consciousness and the position that the manor court was assimilating learned law, as well as procedure, if it could be demonstrated that the two developmental streams were connected, a proposition which might be demonstrated if the personnel of the two courts were similar. As yet no such link has been substantiated.

Those historians who argue for an adaptation of the common law by manorial courts are not without evidence to support their view. In a number of substantive areas of family and property law, custom resembled the common law. By this, I mean that a given rule (for example, a bastard cannot inherit customary land from his ancestors) was applied both in manor courts and common law courts. Moreover, in cases in which the issue of illegitimacy is raised, manor courts seem to implement the canon law position on the point at which marriage was formed. Yet adoption of common law is not always in evidence. There are also cases in which the court seems less sure of the rule, and one in which they refer the matter to the lord. Moreover, problems exist with the concept of "adoption" or reception. To so argue it should be necessary to prove that manor courts changed an existing position. It is not clear what constituted 'marriage' in the peasant consciousness, and in the manor court, prior to the so-called 'Alexandrine marriage formation rules'; perhaps there was no need to receive canon law because the peasantry had never required more formality than trothplight for a marriage to be valid. Thus, that an individual principle of custom resembles the common law is not necessarily evidence that custom has mimicked common law. Logic might require a consideration of the reverse; to what extent did common law follow principles of customary law?

Moreover, the adoption of principles of common law in a manor court might not always be complete. While royal law might affect manorial custom, reception did not always mirror common law when rights in customary land were at issue. For example, in the second quarter of the fourteenth century, the common law adopted the principle that illegitimate villeins were of free rather than servile status. An entry in the court rolls in 1341 of Ingoldmells in Lincolnshire acknowledged the rule: hereafter, bastards in the manor would be regarded as free.[37] Yet the court does not adapt customary land law to the altered view of illegitimate status. In Ingoldmells, only villeins could hold customary land, and prior to the change in common law principle, villein bastards held customary land, though they could not inherit it. After bastards were deemed to be free by the common law, bastard villeins were excluded from holding customary land by the manor court, even though at common law bastards could hold free land. Thus manorial custom adopted common law with regard to status, but did not alter the custom with respect to the ability of such individuals to hold customary land. The manorial court refused to yield its right to determine who might hold customary land, and the implications of illegitimacy differed in Ingoldmells depending upon whether customary land or freehold was at stake.

[37] *Poos* and *Bonfield*, eds., pp. clxxxvi.

The Ingoldmells case provides some evidence to support the Homans' notion that custom may emerge from the peasant consciousness rather than from canon or royal law. The 'peasant consciousness' in the manor would not allow free persons to hold customary land. Other evidence of divergence from common law can be cited. In the first place, perhaps most directly, statements can be found in the judgment of manor courts, admittedly uncommon, in which the jury asserts that its rule does not follow the common law.[37a] Such statements, of course, are not dispositive of the question, because royal courts did in certain circumstances permit divergence from the common law. Moreover, it is also significant that the forms of action that were required to pursue a cause in the royal courts and through which the common law came to structure legal principles were largely absent in manor courts, and conspicuously so. The adoption of some of the procedural formalities of the royal court has been noted above; yet it is curious that such a fundamental and relatively simple alteration of the language used to bring business before the court was not adopted if manor courts were adopting substantive law and regarded themselves as subordinate branches of the royal courts.

We may bridge the gap between a discussion of the source of custom and its legal or authoritative nature by considering the function of the court rolls as memorials of custom. At the onset of our discussion, we should note that the court rolls are only rarely cited when the manorial jury expounds custom suggesting that juries rarely sought guidance in resolving a dispute by scouring earlier rolls for statements of custom the way modern common judges look to earlier cases for precedent. Manor court juries resorted to the rolls far more frequently when issues of fact were in need of clarification.

Rarely though not invariably: two cases can be cited in which courts use the rolls to confirm or to justify by 'precedent' its application of custom: a case at Cranfield,[38] when the jury deprived a bastard-bearing heiress of her property by citing 'the rolls of the preceding court of the manor by record and ... the verdict of various inquests'; and also at Burnham Thorpe, where the jury claimed not to know whether an elder or younger daughter ought to inherit according to the custom of the manor, and therefore 'the roll of the aforesaid court is to be searched'.[39] That the record exhibits few such cases, and then generally regarding guidance fact rather than law is not dispositive of the question of the rolls as repositories of custom. Yet rare recourse to the rolls for support suggests that custom seems to be recorded more as an explanation or justification for a particular decision rather than as guidance for a future resolution of claims between parties. It is arguable, then, that the lack of reference to the written record suggests that peasant legal culture in medieval England was largely oral (or at times might have so been) rather than written; and the manor court was able if need be, as

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[37a] Ibid., no. 2.

[38] Ibid., no. 167.

[39] Ibid., no. 204a.

Professor Jack Goody notes, to reform its law by forgetting what it had done in the past.[40]

That is not to say that custom once articulated by the manor court jury was not regarded as binding. There is reasonable consistency in the application of custom. However, entries can be found of the same manor court reversing itself on a point in different cases which appear similar (or even in subsequent entries in the same cause). An example is the following case over dower rights. When Richard Panyot and his wife Denise brought a plea of land against Denise's sister Maud to recover lands that the sisters' father had died seised, and which their mother had held as free bench in Little Dunmow in Essex, the inquest agreed that as the elder daughter Denise should succeed according to the custom of the manor. The court returned the verdict in favor of the married couple, even though nearly a decade earlier the court had found that Maud was heir to the same customary tenement because Denise had married outside the homage.[41] Although we should not consider the ostensible changing of custom by a manorial court jury (since the court in admitting Maud in 1328 opined that Denise had no right in the land because she married outside the homage, and later recognized Denise to be the heir regardless of the marriage) as frequent, it is also incorrect to consider custom as immutable. Moreover, the controversy over whether custom is binding obscures an equally important issue; how did the manor court deal with new legal problems? For controversies might come before manor courts which might be unique on the facts or embody disputes over rights in circumstances that might have occurred sufficiently infrequently for the community to have likely not recalled its substantive position upon a detailed question. Take for example, the following case between a tenant's widow and his heir at customary law over dower rights: if a manor's custom dictated that a widow who was the first wife of the deceased tenant should receive the deceased's entire tenement as free bench, but if a second wife only a cottage and half an acre, and if a third wife nothing, how often would each generation of jurors be called upon to adjudicate the disputed claim of a second or third wife against the children of successive marriages?[42] Indeed this case raised a more arcane point of law; the issue was not about the particular custom – about which both parties agreed – but rather about whether the rule applied to *all* the land of which the deceased died seised, or whether the counting process commence with *each successive marriage* during which the property was purchased. How often indeed.

Legislation might be needed in circumstances in which the jury admitted that it was unaware of the apposite custom in a dispute. When Robert de Houghton sought a messuage and half oxgang of customary land in Methley in Yorkshire from his cousin on the grounds that the defendant's father was a bastard, the inquest 'questioned as to which of them should have greater right according to the

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[40] *Jack Goody*, The Logic of Writing (1989).

[41] *Poos* and *Bonfield*, eds., Cases, no. 14.

[42] Ibid., no. 128.

custom of the manor,' and said that 'they do not know, because this situation never occurred among them.' The particular conundrum on the question of illegitimacy at issue in the case arose because the defendant's father had not been considered a bastard before his death. After admitting the gap in custom, the jury made custom, finding for the defendant, and therefore adopting the principle that a person ought not be bastardized after his death.[43] To resolve the cause, the jury in Methley was required, perhaps, to go beyond principles of custom that were probably widely understood and implemented with some frequency (the definition of illegitimacy, and its effect on succession to customary land) to circumstances that might be novel, or at least only very infrequently recurring (whether a person regarded as legitimate during his life, but thereafter alleged to be illegitimate, might inherit). In straightforward cases, though, one may wonder why, if the custom was so fixed and apparent to the jury, the party who lost was not similarly aware of the custom.

In addition to its need to create custom in unique or infrequent cases, the manor court jury was not beyond even more obvious custom making. Some proclamations of custom certainly smack of law-making rather than law-finding. In a case from High Easter, for example, the manor court jury confirmed the ability of villeins to make deathbed transfers as long standing custom.[44] That such was the case in the manor was dubious. In the first place, the steward was himself doubtful about the practice; and second, no previous examples of such transfers were found in the court rolls. In another case regarding deathbed transfers, this one from Hatfield Chase, the manor court seems to have extended the circumstances under such transfers would be valid. When the villein who had made the transfer *in extremis* recovered and lived for another four years, the court allowed the expression of volition to be implemented (even though the survival rendered the logic of deathbed transfers moribund) because the court found no evidence that he had changed his mind regarding the transfer to executors to pay debts.[45]

Other juries might be more candid in their 'custom making.' For example, a jury faced with declaring whether a neif woman could inherit neif property after marrying a free man declared that 'whatever they may have concluded or stated otherwise between other parties, they wish and claim to hold that usage and custom forever'; and the new custom was entered into the rolls;[46] Or a jury faced with deciding the claim of a plaintiff against a cousin who inherited from a bastard might frankly declare that they did not know who had greater right 'because this situation never occurred among them' before (the court then decided not to declare a villein a bastard after his death).[47]

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[43] Ibid., no. 173.

[44] Ibid., no. 29.

[45] Ibid., no. 74. Indeed the Hatfield Chase court treated deathbed transfers with inconsistency.

[46] Ibid., no. 117.

[47] Ibid., no. 173.

At times, custom changing occurred with more formality when the homage as a whole petitioned or otherwise came to agreement with the lord. This process may imply that major alterations in some manors required seigneurial approval or acquiescence. In such cases, custom changing may be viewed as more similar to legislation than to adjudication, evidence of the multifarious role of the manor court. Homans cited examples of negotiations between villeins and lords to change a manor's custom of inheritance from ultimogeniture to primogeniture and vice versa.[48]

Although procedures in the manor court may have been fixed and followed strictly, we should not remove the manor court from its context; the resolution of disputes must also be viewed as related to the society it served. By that I suggest that the court may not have decided cases by a rote application of custom, even though the court may well have required strict adherence to its procedure. After all with respect to flaws in procedure, the offending party often had the ability to bring the action a second time. There might not be the ability to cure once a substantive pronouncement was made. And because by modern standards (and even by contemporary ones), the manor court served a rather small universe, the incentive to reach a just result despite custom must have been great. Litigants frequently must have known one another; and what is perhaps more relevant, the jury may have been aware of the merits of the cause, and the relative standing of the litigants in the community. Under these circumstances, it may have been the case that controversies were resolved as much by considering factual equities as the prevailing custom (that is to say the jury strove for the just result if possible rather than to follow the dictates of custom if it would lead to an 'injustice'). Indeed in some cases we may regard the dispute as the script of a drama, with the complainant, defendant, and the court with a role to play, the more intricate cases that we have found rather resemble a dialogue between the parties. The script might even include a role for the court.

Consider, for example, the case of Thomas the son of Robert de Salden, who prays to enter the messuage and half yard land of customary land in Great Horwood.[49] There is a tenant in possession but we hear little of him perhaps because the complaint is against the lord for admitting the wrong villein. We first meet Thomas in court on 16 August 1330, when he sought to be admitted to the land of his father, alleging his father's possession and his own heirship. It was then found by the inquest that Robert's father had forfeited the land, and that the lord had admitted another tenant. The inquest confirmed both the fact of the father's ill fame and the appropriateness of the forfeiture as penalty. About sixteen months later, however, Thomas was back in court claiming the very same parcels of customary land, once again alleging his father's right and his status as heir. But he further pleaded that his father's wife had been admitted to the same land as her dower.

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[48] *Homans*, English Villagers, 126 - 7.

[49] *Poos* and *Bonfield*, eds., Cases, no. 4.

The homage responded with the same story regarding the forfeiture for ill fame, and the lord's subsequent admission of another villein. Robert may then have questioned the appropriateness of the forfeiture (or the jury did so on its own, perhaps struck by the probable inconsistency of allowing dower in lands forfeited by the widow's husband), because the circumstances under which the forfeiture occurred were more fully explored. Was he convicted of a crime? No. If he gave up the land voluntarily, presumably by fleeing, was that a ground for forfeiture? The jury, uncertain of custom (and seemingly reluctant to declare it), referred the matter to the lord.

The case exhibits a number of themes which we have been considering: the lack of comprehensiveness of custom; the difficulty of applying custom to circumstances which occurred only very infrequently; the personal nature of the litigation; and the desire to achieve the just result. Elsewhere, I tentatively suggested that the manor court might be better regarded an alternative dispute resolution forum rather than a court. The hostility with which this modest suggestion met from medievalists must be noted, but I am still prepared to wonder whether the analogy though flawed is not entirely unhelpful. Law was not necessarily followed; disputes were resolved.[50]

Conclusion

This report has addressed two issues with regards to seigneurial jurisdictions in medieval England. In the first section of the report, the place of seigneurial courts in the array of courts which constituted the legal order in medieval England was set out. The report also pondered the nature of the law implemented in the lowest rung on the ladder of seigneurial jurisdictions, the manor court.[51] Conclusions must be offered with circumspection given the shear number of manor courts which were determining disputes between peasants in medieval England. However, our research would suggest a rather broader view of the variety of rules, some even contradictory, which comprised customary law thus to regard it as a system of rules which cloned the English common law is misplaced. The manor court presided over a jurisprudential order that consisted of more than merely rules regardless of the origins of their substance. Aside from the principles of custom, customary law consisted of the procedures and reasoning processes of the various courts and their juries, suitors and officials which resolved disputes. There was an accepted set of disputes cognizable in manor courts, an agreed procedure to bring them before the

[50] *Bonfield,* Nature of Customary Law, pp. 530 - 34.

[51] It is perhaps worth noting that those who owed suit to the court included those holding land by customary tenure and in some cases those of personally unfree status; and since some disputes or other matters involving free land were heard in the manorial court as well those suitors might include the personally free or freehold tenants of the manor. Cf. *Maitland,* ed., Select Pleas, lx - lxxii.

court, and a process of finding, creating and applying customary norms to resolve the controversy before the tribunal. There was no strict uniformity of procedure, process, or legal reasoning shared by all manorial jurisdictions. Rather, there was an understanding of how disputes between those who owed suit to the manor court ought to be resolved.[52]

[52] For a more detailed expression of the arguments herein see *Poos* and *Bonfield*, eds., Introduction.