

# ON THE STUDY OF THE ORIGINS OF PROPERTY ENTITLEMENTS

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There would be nothing to be proclaimed to the world at large, for in theory there was no change in the law; and yet very surely the whole law of England was being changed both in form and in substance. To this administrative character of [Henry II's] reforms we may ascribe our lamentable lack of documentary evidence.

- Pollock and Maitland, *History of English Law*, vol I, 136

History is difficult because people never state their assumptions or describe the framework in which lives are led. To the extent that you do not unthinkingly supply these from your experience, you can only guess at them from what your actors said and did. There will be no more evidence for the most important lines in your picture than that they fit with the demonstrable detail. They are either obvious or wrong.

- S.F.C. Milsom, *The Legal Framework of English Feudalism*, 1

## **Introduction**

I am convinced that History was meant to be tidy. When I say this I do not mean that all the events that have ever happened were meant to be organized and without theoretical glitch; I simply mean that the chronicle of it which we honour with the word "History" was meant to be. How else can we maintain an orderly vision of what we ourselves are like, especially in a common law country where History plays such a strong and central role in the development of public reason?<sup>2</sup> The common law respects the authority of the historical development of our collective wisdom concerning the things we are willing to accept in our society and those things we are not: here lies the importance of precedent. So understanding that we like a nice orderly history to buttress our current image of our social and legal culture, consider this ...

When one's feudal tenure was in doubt in the mid 1100s, one relied on the word of one's Lord to ascertain what the scope of obligations were with respect to the Lord and to the land. Henry II changed this structure of social relations by allowing the feudal tenure to be questioned and affirmed by an authority above the Lord, thereby de-legitimizing the power of the Lord's court as the one responsible for keeping the moral universe together, at least in so far as it concerned feudal tenure. The change from feudal expectation to proprietary entitlement that such a process created sounded a death knell for feudalism. However, there is considerable debate around how it was even possible for such a change to occur, and central to this controversy is the role of Henry II in effecting "reform." History, it seems, is not as uniform as we would like, and by impinging upon our conceptions of how law worked at the outset it affects how we understand legal evolution in our own times.

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<sup>2</sup> This is Burke's argument. See Edmund Burke, *Reflections on the Revolution in France*. C.C. O'Brien ed. (Harmondsworth: Penguin, 1969).



The bare events and the consequences are generally agreed upon. With Henry II there are changes to the way in which royal jurisdiction extends to questions of the possession of land. Henry II instituted a system of assizes whereby the title to lands which have a question mark above who possessed land could be heard and assessed by a royal court in order to establish who had actual title. The effect of the new way of assessing who possessed land was to circumvent the authority of the Lord's court and of the Lord himself. Where previously the Lord would have been the one to decide who was to be seised of the land, to whom the moral obligations and rights would flow, and to whom the land would pass on the death of the tenant, now the authority of the King to enforce custom ensured that any customary expectation had given rise to a proprietary entitlement. The Lord's power waned; feudalism began to gasp; real property entitlements as we come to understand them were born.<sup>3</sup>

Maitland has argued that the changes in the feudal regime from tenurial obligation to property rights were due to the actions of Henry II in his attempt to expand and reform the jurisdiction of King's court. By creating a system whereby claims to "rightful" entitlement to a piece of land could be heard, Henry effectively replaced feudal institutions.<sup>4</sup> Milsom's heresy lies in his belief that Maitland has not paid sufficient attention to the social fabric of the time; Milsom argues the role played by the lord and his court is significant in effecting this change as well.<sup>5</sup> The problem with Maitland's analysis, according to Milsom, is that he has taken the state of affairs of the thirteenth century and extrapolated them back to the twelfth.<sup>6</sup> Recently Paul Brand has argued that Milsom goes too far in his construction of what feudal society looks like based on the evidence they have.<sup>7</sup> Further, he argues that in many cases it is hard to imagine change without action by the King that, in some sense, intended such changes.<sup>8</sup> As we can see, it is not clear what exactly happened in the 1100s under Henry II, either in his court nor in the courts of the lord.

I wish to challenge the need for a unilingual vision of "what happened." I think Milsom is trying to get away from this by arguing that we need to look at what the average citizen is doing and by arguing that we can get to this by looking at the lord's courts, but it can be moved further.<sup>9</sup> I think it is clear that we simply cannot have a complete vision of "what happened": such visions assume an objective awareness not simply of all the characters involved, but of the metaphysical understandings and social dynamics that shape the outcome of the way things

<sup>3</sup> Of course not "property" exactly as we understand it, but certainly this is one of the earliest forms of proprietary rights. See J.H. Baker, *An Introduction to English Legal History*. 3rd ed. (London: Butterworths, 1990), at 259.

<sup>4</sup> Sir Frederick Pollock and F.W. Maitland, *History of English Law*. 2nd ed. (Cambridge: Cambridge University Press, 1968).

<sup>5</sup> Milsom claims that his views are "pious" heresy because he felt that Maitland's *History* had become "classical," he imagines to Maitland's dismay. S.F.C. Milsom, "Introduction" in Pollock and Maitland, *ibid*, at xxv, xxvii. Milsom's complete views are best laid out in Milsom, *The Legal Framework of English Feudalism*. (Cambridge: Cambridge University Press, 1976); and in Milsom's updated *Historical Foundations of the Common Law*. 2nd ed. (London: Butterworths, 1981), at 1-56.

<sup>6</sup> See G.R. Elton's discussion of this in *F.W. Maitland*. (New Haven: Yale University Press, 1985), at 48-55.

<sup>7</sup> Paul Brand, "The Origins of English Land Law: Milsom and After" *The Making of the Common Law*. (London: Hambledon, 1992) 203.

<sup>8</sup> *Ibid*, at 222-25.

<sup>9</sup> Milsom, "Introduction" *supra* note 4, at xxvii.

happen. History is more than this, and it is more because rather than claim to be a complete chronology, it educates us about our own time by illuminating that which we feel is important. By forcing us to articulate the particular way we are going to proceed in “discovering” what occurred, the practice of History allows us to betray the metaphysical understandings and social dynamics of our own time, things usually left for the philosopher.<sup>10</sup>

I will argue that we can expand our understanding of “what happened” to feudal tenure as it emerged into a proprietary entitlement by moving further in the direction that Milsom points us. To be sure, we bring our own expectations and definitions to the study, but an awareness of our filters should augment the critical ability with which we approach the study of the origins of property. This means, of course, taking more chances when we try to ascertain just what it is that is going on. I will argue that the change in the nature of the feudal relationship evidenced by the new process for “trying title” in the late 1100s is not simply the result of a strong “anti-feudal” King, nor simply an accident of ruling that emerged from a particularly difficult set of feudal structures. Rather, this change, stated blandly, occurs in an historical and cultural milieu where many things are taking place. As Milsom suggests, we unnecessarily fetter our historical understanding by assuming that the law operated single-handedly to forge social change.<sup>11</sup> I argue that there is a larger and more significant process of rationalization against which such changes *could* be understood more fruitfully. Specifically, the emergence of proprietary ideas and relationships occurs in a cultural milieu where social relations are slowly being transformed from locally created and enforced social arrangements rich with moral obligation to arrangements which are transaction-based; this transformation occurs against the backdrop of an emerging ethic which privileges expediency and rational clarity over parochial values and meanings.

To this end, I will begin by looking at the way we will be approaching the historical questions of the period, trying to get some sense of the kinds of terms with which we are clouding the analysis. From there I will look at the interpretations of Maitland, Milsom, and Brand with respect to the origins of property rights. Then I will lay out the bare framework of a suggestion on an alternative way to understand the emergence of a property rights regime, one that differs from Milsom’s view probably only in the terms and scope I use than in the substance of it: the historical process of the rationalization of customary values and their transmutation into “law.” To describe this conception I will delve into some of the historical evidence surrounding the kinds of social patterns we find in the feudal relationship based in tenure as well as some of the other patterns which affect the understanding of the relationship by those engaged in it. Finally I return to the conceptions of property and of history that such an analysis has yielded with the hope, as one always hopes, that there is some insight into our current musings on these topics. As we shall see, there is an art to the practice of history: we hide our creativity and take pride in our discovery. That it were so tidy...

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<sup>10</sup> For a more elaborate and learned portrayal of what I have tried to convey in a few simple sentences, see Friedrich Nietzsche, “On the Use and Disadvantage of History for Life” *Untimely Meditations*. R.J. Hollingdale trans. (Cambridge: Cambridge University Press, 1983).

<sup>11</sup> Milsom, *Legal Framework*, *supra* note 4, at 1.



## 1. The study of history

When we practice the art of history, we necessarily focus on different things at different times, unfortunately only crafting the amicable image we would like to see.<sup>12</sup> When we bring terms like “title” and “property” with questions that go with them (“what was property like in the 12<sup>th</sup>-century?...”) into our analyses we tend to think of history as the dominance of better ideas over worse ones, of truth over parochialism, and of that whole panoply of things we associate with “civilization” as displacing “barbarism.” The particular questions we ask yield certain answers, betraying the way we do history: the decentralized customary authority of the lord and tenant is changed into a non-organic transaction society, and yet we lack the terms to follow it because our terms no longer connote what the relationships signified then. Can we understand seisin as the tenant did?

In his preface to a discussion of the Domesday Book, V.H. Galbraith notes that certain kinds of historical analysis come into vogue at different times: he argues that at the time of his book (1974) we were hopelessly locked into the biographical history of England rather than structural or even the factual.<sup>13</sup> He notes that we unfortunately see the history of England through the purposes we would like it to serve rather than what it might have been, and at that time we would like to see a history of heroic Kings who restructured England according to the dictates of Reason.<sup>14</sup>

Such an understanding of the “use” of history is certainly not new.<sup>15</sup> Indeed, scholars and philosophers have been quite aware of the political purposes to which we put our accounts of history.<sup>16</sup> The danger of practicing history, then, is not that we will misconstrue what really happened (is it possible to know?), but rather to approach it dogmatically with the understanding that there is a single version of it that we can ascertain. It is when we historicize in this way that we are most at risk of waving theories in a distastefully ideological fashion.<sup>17</sup>

When we import terms into the study of history, like ‘feudal’ and ‘property,’ we necessarily find that which we are looking for because we necessarily impose an

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<sup>12</sup> In a masterful study of the discipline, Trinkaus and Shipman have unveiled the way the historical and scientific analysis of the Neanderthal has been shrouded in ulterior motives. They argue that the Neanderthal has been continually created in the image that we would like to see them. Hence during the 40s and 50s we see the Neanderthal as giving expression to the “dark side” of human nature, whereas in the 60s and 70s we see that the Neanderthal was a “flower child” which expressed the latent creativity of our species. See Erik Trinkaus and Pat Shipman, *The Neandertals: Of Skeletons, Science, and Scandal*. (New York: Vintage, 1994). Such dangers are more and more apparent, especially in the study of history.

<sup>13</sup> V.H. Galbraith, *Domesday Book: Its Place in Administrative History*. (Oxford: Clarendon Press, 1974), at xi-xiii. E.P. Thompson also makes similar remarks about the way in which history is too often practiced in *Whigs and Hunters: The Origins of the Black Act*. (New York: Pantheon, 1975), at 15-17.

<sup>14</sup> *Ibid.*

<sup>15</sup> Friedrich Nietzsche, “On the Uses and Disadvantages”, *supra* note 9.

<sup>16</sup> Michel Foucault picks up on Nietzsche’s understanding of the way in which we classify things temporally and / or scientifically in *The Archeology of Knowledge*. A.M. Sheridan Smith trans. (London: Tavistock, 1972 [1969]).

<sup>17</sup> Edward W. Said has insightfully drawn our attention to the way in which Western understandings of the outsider created the justifications for European colonization and appropriation. He argues that this understanding is one which underlies our current way of perceiving those things “other,” and likewise those times “other,” i.e. history. See *Orientalism*. (New York: Vintage, 1979).

understanding on the particular kinds of social relations we want to discover.<sup>18</sup> Maitland remarked,

Now were an examiner to ask who introduced the feudal system into England? one very good answer, if properly explained, would be Henry Spelman ... If my examiner went on with his questions and asked me, when did the feudal system attain its perfect development? I should answer about the middle of the [eighteenth] century.<sup>19</sup>

Maitland means, of course, that there is no such thing as feudalism other than what we deign to call the socio-legal structure that we have found (found?) in history. Thus feudalism reaches its perfection in our terms, not in the terms of the time. Indeed, what could it mean to remark that the current regime of property rights is nearing its zenith without being castigated as an ideological zealot?

“Property” proper may not have actually existed in the time period we are studying. Because legal analysis, especially historical legal analysis, is a form of social analysis, we can see that the particular legal instruments, the methods and procedures, and the substantive criteria all point to a particular way not simply of solving disputes but of going about life. The legal historian is engaged to some extent in her own science of semiotics, looking at particular evidence and deciding what it signified to those who gave rise to it. When asking about feudal tenure and the changes that took place due to the creation of the writ of right, of the petty assizes of novel (read ‘recent’) disseisin and mort d’ancestor, the issue for the historian thus concerns what the social structure, the biographies, and the events all looked like, how they interacted and affected each other, and what the specific motivating concerns were that ran through each.<sup>20</sup> To cut to the chase about what historical analysis necessitates, the legal historian out to give an historical account is also dissecting that which animates and constitutes social relations at a given time.<sup>21</sup>

The lawyer, too, will be concerned with the social context. The issue for the lawyer concerns the nature of the expectations, the structure of legal claims, and the way they were settled. The question will be: how did the property interest arise?<sup>22</sup> To ask this question is to assume that it was not imposed by Henry’s will, nor, further, that it is was created by an act of will.<sup>23</sup> The lawyer, then, will need to

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<sup>18</sup> Social theorists are quite aware of these things, the historian less so. Compare the “Introduction” of Harold Berman’s, *Law and Revolution*. (Cambridge, Massachusetts: Harvard University Press, 1983); to Roberto Mangabiera Unger’s first chapter of *Politics: The Central Texts*. Zhiyaun Cui ed. (London: Verso, 1997), at 1-9; and the “Introduction” to *Law in Modern Society*. (New York: Free Press, 1976), at 1-46. Milsom and Maitland were both quite aware of this challenge and difficulty.

<sup>19</sup> Cited in Milsom, “Introduction” *supra* note 4, at xxviii.

<sup>20</sup> See John Hudson, *Land, Law, and Lordship in Anglo-Norman England*. (Oxford: Clarendon Press, 1994), at 6-10.

<sup>21</sup> See E.P. Thompson, *Whigs and Hunters*, *supra* note 12, at xx; Milsom, *Legal Framework*, *supra* note 4, at 2-4; and Milsom, “Introduction” *supra* note 4, xxiii-xxviii.

<sup>22</sup> See A.W.B. Simpson, *A History of the Land Law*. 2nd ed. (Oxford: Clarendon Press, 1986), at ch. 1 and ch. 3; Hudson, *Land, Law, supra* note 19, at 9-11; Milsom, *Legal Framework*, *supra* note 4, at 1-7, 37ff; Baker, *Introduction*, *supra* note 2, at 255-6, 262.

<sup>23</sup> In this sense I think that Brand goes further than Maitland wished to go by asserting the primacy of intention underlying Henry II’s creation of proprietary institutions. It seems as though Maitland was all too aware of the dangers in overstepping what the evidence would permit to be inferred. Compare the lack of



ask many questions concerning the conditions under which the property interest appeared if she is to fully understand what property signified in those times. In modern times we phrase such archeology into legal jargon as “policy arguments”; but these are no more than the peculiarly contemporary reasons underlying the accepted public conception of justice. Though there is considerable difference as to what a given conception means at a particular time, we all understand the use of the terms because we understand our own contexts as insiders. The goal of the lawyer in ascertaining the nature of the origin of property, then, also concerns an understanding of the social conditions that saw it arise.

A balanced account of legal analysis and historical scrutiny will conceptualize the law as a social function, *one that results from social and historical patterns but in turn acts upon it*. In this way we can see that the particular customary arrangements that create the space for a legal regime of property to appear are not simply its cause; likewise the subsequent breakdown of customary patterns of tenure are not, in the pure sense of the word, simply caused by proprietary institutions. The two institutions, that is the customary arrangements of feudal tenure and the legal regime of proprietary entitlements, affect the other: is it not too much consistency to ask from the events that one set of relationships *caused* the other?

I think it is more useful to look at the different trends and contexts into which these developments fit rather than treat them as variables. That is to say, rather than reify things called “feudal tenure” and its succeeding “property interest” into distinct categories which are related in a causal change by the institution of a particular form of appeal (another reification), we may do better seeing the continuum of developments on their own terms. Thus, the bare events that are seen in this continuum have become classified: the relationship between the tenant and the lord in the 1100s changed because of Henry II’s reforms to the process of authenticating one’s “right” to a piece of territory by creating an entitlement at law based on an expectation which had arisen according to feudal custom. Is this the correct relationship?

## 2. The debate

- **Maitland’s view - the biographical determinist.**

Maitland understood that the changes to the seigniorial system enforced by manorial courts came to an end when centralized government replaced feudal authority.<sup>24</sup> Henry II instituted a system to give quick resolution to questions of concerning rights of possession. Maitland notes that the institution of the inquest by way of the assize is an exceptional addition to the common law by Henry II.

Under Henry II the exceptional becomes normal. The king concedes to his subjects as a royal boon his own prerogative procedure. This is done bit by bit, now for this class of cases and now for that. It is probable that while not yet king he had done

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volitional language in Pollock and Maitland, *History*, *supra* note 3, vol I at 136-39, 144-48, 149-152, and Brand, “Milsom and After” *supra* note 6, at 219-225.

<sup>24</sup> Pollock and Maitland, *History*, *supra* note 3, at 137-53, 229-240; Elton, *Maitland*, *supra* note 5, at 45; Arthur Bryant, *The Medieval Foundation of England*. (New York: Doubleday, 1967), at ch. 3.

something of the same kind in Normandy.... On the whole we take it that the jury has much the same history in Scotland and in England: it spreads outwards from the king; it is an 'assize,' an institution established by ordinance.<sup>25</sup>

Thus, the challenge to the feudal court's authority was directly challenged by the king's attempt to enforce a particular kind of procedural right, thereby importing his justice.

Henry was active as an organizer and a governor rather than a legislator *per se*.<sup>26</sup> Still, Maitland remarks that while law-making at that time was not necessarily legislative in form, Henry's creation of the grand assize by ordinance amounted to a full scale overhauling of the law.<sup>27</sup> Hence Maitland is able to say that by the end of Henry's reign "we must already begin to think of royal justice," with Henry being the primary force behind the creation of a political entity which also enforces legal norms on its citizens.<sup>28</sup> But what drove Henry to institute the regime that he did?

Maitland notes that in the twelfth century the Church was attempting to establish a practice whereby any litigation (our word not theirs) about land that had been given by way of alms should come before the Church's courts.<sup>29</sup> Henry's underlying concern was that where the Church and state's jurisdiction (of sorts: it is doubtful that it was conceived of jurisdictionally) was at issue, "neither should be judge in its own cause."<sup>30</sup> Already by 1164 Henry asserted that a procedure whereby the 'recognition' by twelve lawful men to decide whether the land in question was alms or lay fee ought to be part of the regular machinery of justice.<sup>31</sup> By classifying land according to 'objective observers' in the countryside, the idea that there was an area for the king to have a say over land and an area for the Church became embedded. But more importantly, the institution of the *assize* marked the beginning of a procedure for deciding the basis of title. The plaintiff could elect to go before a jury of presentment to have the case heard on sworn oaths or to have it go by way of battle. The institution of the alternative way of proceeding, that is, by way of assize rather than battle, marked an important step toward a system of proprietary entitlements.

The institution of the assizes at Clarendon and Northampton marked Henry's attempt to change, among other things, the administration of justice with respect to dispossession of land with the assize of novel disseisin and the assize of mort d'ancestor. The assize of novel disseisin concerned the tenant who had been recently (novel) and unjustly disseised of his land; the assize would establish his right to be re-seised of the land with respect to the current possessor.<sup>32</sup> Though "ownership" *per se* was a foreign concept to in a system of feudal tenures, with this new process to try 'rightful possession' we see a move toward it. The assize of novel disseisin is significant because it entrenched the protection of every seisin of

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<sup>25</sup> Pollock and Maitland, *History*, *supra* note 3, vol. I at 144, 144n.

<sup>26</sup> *Ibid*, at 136.

<sup>27</sup> *Ibid*, at 143, 144-5, 147, and 151.

<sup>28</sup> *Ibid*, at 151.

<sup>29</sup> *Ibid*, at 144-5.

<sup>30</sup> *Ibid*, at 145.

<sup>31</sup> *Ibid*.

<sup>32</sup> Baker, *supra* note 2, at 267.





free tenement by withdrawing the final word on seisin from feudal courts and making it at the leisure of the king (that is, through the king's vision of how justice is to be administered).<sup>33</sup>

The assize of mort d'ancestor goes one step further by creating a forum for the assertion of the expectation of being the heir to a given tenant. The right is asserted usually against the lord for having denied the rightful tenant a seisin he is entitled to according to customary arrangements and obligations.

Another and heavy blow is thus struck at feudal justice, for the defendant in an assize of mort d'ancestor is very likely to be the dead tenant's lord, who will have seized the lands upon some pretext of making good his seigniorial claims.<sup>34</sup>

The institution of the assizes is thus the way the king asserts his conception of the just realm over the realm: (i) by creating a forum to question the jurisdiction of the Church with respect to land, thereby creating a jurisdiction of the "realm" or (today's word:) "state"; and (ii) by giving them a forum for the feudal relationship to be scrutinized according to expectations it has generated.

The result of Henry's actions, Maitland claims, is "that the whole of English law is centralized and unified by the institution of a permanent court of professional judges, by the frequent mission of itinerant judges throughout the land, by the introduction of the 'inquest' or 'recognition' and the 'original writ' as normal parts of the machinery of justice."<sup>35</sup> By creating a system where the feudal relationship could be *questioned*, Henry forced feudal tenure to become accountable not only to itself but to standards that would exist separately from it. Henry had, perhaps unwittingly, created institutions of property.

• **Milsom's view - the structural determinist.**

S.F.C. Milsom challenges Maitland's view by asking us to inquire into our entire view of what the social structure of medieval English feudalism is all about.<sup>36</sup> He notes that what is lacking in Maitland's account is that he did not sufficiently consider the importance of the feudal court and the relationships it represented.<sup>37</sup>

They are important to any picture of the life of ordinary people until long after the period covered by this book. They are important as the sources of custom from which the common law came. But they

<sup>33</sup> Pollock and Maitland, *History*, *supra* note 3, at 146.

<sup>34</sup> *Ibid*, at 148.

<sup>35</sup> Pollock and Maitland, *History*, *supra* note 3, vol. I at 138.

<sup>36</sup> Elton, *Maitland*, *supra* note 5, at 45. Milsom ideas on this are contained in numerous places: Milsom, *Legal Framework*, *supra* note 4; Milsom, *Studies in the History of the Common Law*. (London: Hambledon, 1985); Milsom, *Historical Foundations*, *supra* note 4; Baker, *Introduction*, *supra* note 2. See and compare the perspectives offered by Robert C. Palmer, "The Origins of Property in England" (1985) 3 *Law and History Review* 1; T.G. Watkin, "Feudal Theory, Social Needs and the Rise of the Heritable Fee" (1979) 10 *Cambrian Law Review* 39; and S.L. Waugh, "Tenure to Contract: Lordship and Clientage in 13th-century England" (1986) 101 *English Historical Review* 811.

<sup>37</sup> Milsom, "Introduction" *supra* note 4, at xxvii.

are also important to the interpretation of what we see in the king's courts themselves; and this is the point now in question.<sup>38</sup>

Thus, Milsom argues that the content of the procedural and substantive developments of "law" with respect to property, the king's assizes were not creating law but were giving voice to customary concepts and categories which were formed in the courts and through the practices occurring in the feudal systems "below."<sup>39</sup>

Milsom argues that the assizes are not possessory in the nature of the questions they tried, rather we have simply come to term them such.<sup>40</sup> The assizes represent a stage in the process of a social history we have not endeavored to fully outline discover. Milsom notes that the relationship represented at the assize of novel disseisin between the claimant and the lord necessarily involves the current tenant, just as the assize of mort d'ancestor necessarily involved the lord as well.<sup>41</sup> In an assize of novel disseisin, the lord is not a passive bystander: he is at the centre being asked to account for an abuse of his power.<sup>42</sup> But Milsom notes that the evidence with which the assize provides does not go far enough to tell us with certainty that the scenarios under which such "tests" could arise are limited to the case of the evil lord, but could also apply to the lazy tenant who has been distrained by the lord in order to force him to do his obligation.<sup>43</sup> Milsom is essentially using the lack of clarity surrounding the purposes Henry can be inferred to be pursuing to clarify that it is very likely that there is much more going on before the institutions of the assizes and the writ of right than is recognized, and that hence the question of "jurisdiction" is perhaps more a question of historical institutional accident than it is about the specific volition of the king.<sup>44</sup> Indeed he remarks in a later revision of his views that the use of the writ of right to enforce hereditary claims to seisin is more of an accident of procedure than it is any grand design that Henry could have had.<sup>45</sup>

The proprietary language that Maitland uses in assessing what kinds of interests are at stake at the outset reflects a deeper misunderstanding of what the social relationships are about.<sup>46</sup> In the feudal system, obligations of seisin ensure that "[i]t is tenures that are being protected: not property rights, but arrangements by which land is held for a return."<sup>47</sup> Milsom notes that such proprietary language is not appropriate because the reciprocal obligations that are reflected by feudal tenure do not contemplate the kinds of obligations, freedoms, and abilities that we associate with "property."<sup>48</sup> Instead he goes into very descriptive detail as to the

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<sup>38</sup> *Ibid.*

<sup>39</sup> "Below" is our term; it is probably more correct to say "over there." *Ibid.*

<sup>40</sup> Elton notes that the term "possessory" as a reference to the assizes was one that Maitland coined, hence demonstrating that the term and the idea were brought to the reality rather than the other way around. See Elton, *Maitland*, *supra* note 5, at 46; see also Milsom, "Introduction" *supra* note 4, at xxvii-xxviii.

<sup>41</sup> Milsom, *Legal Framework*, *supra* note 4, at 7ff.

<sup>42</sup> *Ibid.*, at 11.

<sup>43</sup> *Ibid.*, at 14-21.

<sup>44</sup> See *Ibid.*, at 30-35.

<sup>45</sup> Milsom, *Historical Foundations*, *supra* note 4, at 128-29.

<sup>46</sup> Milsom, *Legal Framework*, *supra* note 4, at ch. 2 generally.

<sup>47</sup> Milsom, *Legal Framework*, *supra* note 4, at 38.

<sup>48</sup> Milsom, *Legal Framework*, *supra* note 4, at 39ff. Bruce Ziff notes that we are troubled by the idea of thinking of property as a bundle of rights in relation to other people rather than capacities we have with respect to things: Ziff, *Principles of Property Law*. (Toronto: Carswell, 1993), at 1-6. If we change the lens



kinds of relationships as between tenants, claimants, and lords to demonstrate the nature of the kind of “ownership” that was being disputed by a particular claim at an assize.<sup>49</sup>

Milsom describes a system of social relationships that reflects the very different claims arising where the claimant asserts against one who claims to be seised of the same lord, where the claimant asserts against the lord in demesne, where the claimant asserts against a tenant holding of another lord, or where the claimant asserts against tenant as one seised by him.<sup>50</sup> Through an articulation of the dynamics latent within each claim Milsom shows in his learned and precise fashion that the evolution away from feudal ideas toward proprietary ones involves these complex types of claims, which reflect particular changes occurring in feudal society.<sup>51</sup> Milsom disagrees that the feudal court was a kind of impartial tribunal that decided questions of title within its feudal jurisdiction, and instead argues that the seigneurial relationship reflected the supreme authority of the lord over the land to enforce things as he would.<sup>52</sup> However Milsom also notes that customary expectations constrained the lord’s ability to choose between following or disregarding custom because they slowly solidified into serious customary (not legal or rule-bound) obligations that the lord would be hard pressed to disregard.<sup>53</sup>

Thus the way in which Maitland describes the proprietary jurisdiction as shifting to the King is troublesome for Milsom.<sup>54</sup> The confusion concerning the relationship between claimants, tenants and lords is telling because on Milsom’s view seisin concerns obligations whereas the assize questions that obligation by directing attention toward who will be entitled to be seised. By making seisin itself subject of title, title to the land is decided by questioning the reality of the moral obligation a tenant has with a specific lord. “A tenant is not just one physically in possession but one who has been seised by a lord. The lord seises the tenant of his tenement, and to seise is as much a transitive verb as to disseise: the subject of both was a lord and the object was a tenant.”<sup>55</sup> The land itself serves only as a signifier of the moral bond. When seisin becomes scrutinized for verity as a way to ascertain who is entitled to be seised, the bond becomes the signifier of the real concern: who possesses the land. Milsom notes that such a change in the feudal relationship may have actually changed before the institution of the assize since its occurrence is certainly not dependent on it.<sup>56</sup>

The Milsomian view of the feudal relationship and the legal developments surrounding the institution of the assizes of novel disseisin and mort d’ancestor are based in an understanding of the social structure of feudalism and the kinds of

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through which we conceive of property, and expand it past a relationship with things and what we are entitled to do and understand that it is a particular way of framing relationships among people (usually hierarchically), then we would see that Milsom’s argument concerning the inappropriateness of proprietary language and ideas in the feudal context is on point: feudal tenure is based in a series of obligations that we would do well to analyze and understand on their own terms rather than on ours.

<sup>49</sup> Milsom, *Legal Framework*, *supra* note 4, at 66-7, 71 specifically, and 71-102.

<sup>50</sup> *Ibid*, at 71. John Hudson notes that there were instances where the lord would ask the king to get involved. See Hudson, *Land, Law*, *supra* note 19, at 37ff.

<sup>51</sup> For example, *ibid*, at 45ff.

<sup>52</sup> *Ibid*, at 39.

<sup>53</sup> See *Ibid*, at 39-40; Milsom, “Introduction” *supra* note 4, at xxxiv-xxxv.

<sup>54</sup> See Milsom, *Legal Framework*, *supra* note 4, at 65, and ch. 3 generally.

<sup>55</sup> *Ibid*, at 39-40.

<sup>56</sup> *Ibid*, at 40.

demands which arise out of that structure that only become apparent at the assize. In this case of a lord not enforcing custom in his feudal jurisdiction, Henry II simply responds to that which occurs in the feudal system; it is the nature of that response that changes the nature of obligations and expectations by turning them into proprietary entitlements. Thus Milsom understands the origins of proprietary entitlement, insofar as these assizes are involved, to be rooted more in structural dynamics and historical accident than the result of a centralizing King. "Henry II and his advisors did great things; but they did not reach out from their own world."<sup>57</sup>

• **Brand's critique - recasting Henry II as a strong king.**

Paul Brand has put Milsom's analysis to a critical scrutiny.<sup>58</sup> Basically, he wonders if Milsom has not overdone the analysis by not giving enough weight to the influence of Henry II. I wonder if this is quibbling about intentions or not. Milsom would certainly not disagree that the institution of the assizes was to have an incredible impact, but he would not simply assert that Henry changed the way things were done outright, nor that he intended to. Each has a particular approach to legal historical analysis which comes out in their work.

It is interesting to compare the way in which Brand approaches the study of the origins of property law:

My concern is with what English customary land law was like before the reign of Henry II and with the principal mechanisms of change created during Henry's reign, the purposes behind their creation, and their longer-term effects.<sup>59</sup>

By framing the concern as such, Brand is already demonstrating how he sees the operation of legal cultural change: customary law emerges into law proper through an act of state rather than through strictly social structural changes. It is "created." What is at issue here then is not simply the nature and evolution of proprietary entitlements, but an entire approach to legal history and how aspects of law and society evolve with each reflected in the other.

Brand argues that we need to question the original purposes served by things like the writ of right and the assize of novel disseisin. In questioning in this manner, Brand is asking us to ascertain the role that these institutions played with respect to the administration of justice. He carefully goes through Milsom's analysis of what occurs at the level of the feudal court, testing the validity of the inferences that Milsom has drawn based on the scant evidence that is available.

The major element of Brand's criticism involves the degree to which he finds Milsom's structuring of the feudal world credible. Among much hairsplitting Brand does find a few general areas of contention. He feels that there is more royal interference in the local courts than Milsom is willing to recognize.<sup>60</sup> He also argues that the original purpose of the assize of novel disseisin is better understood

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<sup>57</sup> Milsom, *Legal Framework*, *supra* note 4, at 3.

<sup>58</sup> Brand, "Milsom and After" *supra* note 6.

<sup>59</sup> *Ibid*, at 203.

<sup>60</sup> *Ibid*, at 219.



in terms of the public order function it served with respect to free tenements.<sup>61</sup> To substantiate why he claims that this marked the limit as to when serious public order considerations might arise.<sup>62</sup> Such a claim is clearly conjectural, and Brand's language suggests that he simply sees it as a "more reasonable" outcome. It is never clear what the standard of such reason is, but one wonders if it is not according to our own vision of reasonableness. With respect to the role of the jury at the assize, Brand again uses the same language to make it seem apparent that this is what must have been happening because it is simply more apparent:

[i]t also seems not unreasonable in the light of other measures during the reign to see the king and his advisers as embarking on a deliberate policy of expanding the areas where jury trial, as opposed to trial by battle and compurgation, was the method of proof to decide litigation: attempting gradually to extend the areas where more rational methods of proof prevailed.<sup>63</sup>

Unfortunately we are not offered reasons for these inferences. I can accept the criticism Brand metes out at the way Milsom has constructed a vision of the feudal world based on inferences regarding what can be known from feudal relationships on the rolls and from the writs, but Milsom acknowledges these as well.<sup>64</sup> Brand's arguments, however, unfortunately either simply go to some of the details within the structure Milsom considers or else simply denies their possibility out of hand in favour of the anti-feudal king.<sup>65</sup>

In the final analysis of Brand's written word it is necessary to realize the way in which he is conceiving feudal reality to be working: he always tries to understand the purpose for which a given institution was instituted by looking at the effect it had, and then seeing if there is any reason why this was not the intended effect. Though I have stated Brand's approach in a rather simplistic way, the essence of his criticism demonstrates the need for his concluding remarks to be taken seriously:

I hope I have shown why, although Milsom and Palmer have to be read and taken seriously, it would be wrong to suppose that they are necessarily right, that their work represents a new orthodoxy to which all English legal historians interested in the beginnings of the common law must now subscribe.<sup>66</sup>

Indeed, I think Milsom would agree. There is no benefit in holding an orthodox view of history, and Milsom certainly seems to want to encourage such a reading

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<sup>61</sup> *Ibid*, at 224.

<sup>62</sup> *Ibid*.

<sup>63</sup> *Ibid*.

<sup>64</sup> See Milsom, "Introduction" *supra* note 4, xxiii-xxxi; *Legal Framework*, *supra* note 4, at 1-8.

<sup>65</sup> Brand, "Milsom and After" *supra* note 6, at 225. The intricacies of what is happening at the level of the feudal court have been described in superb detail by John Hudson's *Land, Law, and Lordship in Anglo-Norman England*. To the extent that he endorses the approach taken by Milsom by arguing that the nature of norms are inextricably linked to land-holding and jurisdiction, I think he gives us enough primary evidence to argue against a vision of "the great Angevin leap forward" thesis. See Hudson, *Land, Law*, *supra* note 19, at 7-8.

<sup>66</sup> Brand, "Milsom and After" *supra* note 6, at 225.

of history.<sup>67</sup> In the end, we simply are left, as Brand is, endorsing a view that seems to be more historically consistent and believable given what we imagine about the world generally. And given the tenor of our discussion so far, to think there is more involved in history is balderdash.

### 3. An Alternative Conception of Legal Change

By looking at the nature of the social relations underlying the feudal structure we see first, as noted, that the relationships with respect to land originally had land as an epiphenomenon (the object of the verb “seise,” but the verb itself signifying the relationship between the participants)<sup>68</sup> to the tenant being seised of the lord: the feudal bond existed between man and lord, and involved obligations to the other that certainly had other-worldly significance.<sup>69</sup> Homage ceremonies were central features of the feudal bond between lord and vassal.<sup>70</sup> Though it changes as we move out of the twelfth century (thus making the evidence from *Glanvill* difficult to use), previously its ceremony marked the significance of the moral obligation. Thus, holding land could not be separated from one’s station and relationship with the lord:

This is according to the mode of tenure of land and the obligations inherent in that mode of tenure. A man must be knight owing military service, or a serjeant owing some specific service; he must be a socager paying rent or some render in kind; or he must be unfree and do servile work; or, grandest of all, he or some religious corporation may hold by simply praying.<sup>71</sup>

Previously in Anglo-Saxon times, the holding of land in a feudal way was rich with moral significance and ceremony,<sup>72</sup> as was the understanding of property in 11th-century Norman law.<sup>73</sup> The entire understanding of the feudal relationship was based in the set of relationships which hung around the provisioning of their

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<sup>67</sup> Milsom, “Introduction” *supra* note 4, at 1. Reading Milsom closely, as Brand indeed notes, demonstrates that he is using what is known to draw inferences in directions that they have not been drawn previously. Because of this, Brand ends up conceding that he simply finds his view more convincing based on the historical evidence and that the soundness of Milsom’s argument isn’t proof of its ground in historical reality. Brand, “Milsom and After” *supra* note 6, at 225.

<sup>68</sup> I would quibble and banter with Milsom’s discussion of the way in which the word “seisin” denotes its particular relationship with the land. For as he has stated, seisin itself denotes a realm of obligations and is between tenant and lord; thus the land cannot be the ‘primary’ object (read ‘purpose’) of seisin. To go through an analysis of the verb’s transitive use is, I think, to assert our grammatical categories onto twelfth century reality. The language will bewitch us, and our understanding of direct objects will perhaps allow us to infer grander purposes where perhaps there were none. See Milsom, *Legal Framework*, *supra* note 4, at 40.

<sup>69</sup> *Ibid.*

<sup>70</sup> Pollock and Maitland, *History*, *supra* note 3, vol. I at 296-8; Hudson, *Land, Law*, *supra* note 19, at 16-21.

<sup>71</sup> Austin Lane Poole, *The Obligations of Society in the XII and XIII Centuries*. (Oxford: Clarendon Press, 1946), at 2-3.

<sup>72</sup> Frank Barlow, *The Feudal Kingdom of England, 1042-1216*. (London: Longman, 1972), at 1-42; see the discussion of the elaborate “systems” described by Eric John in *Land Tenure in Early England*. (Leicester: Leicester University Press, 1964). John however places perhaps an over-reliance on the scant written evidence that survives, when we know that writing itself did not play a central function in these early times. See M.T. Clanchy, *From Memory to Written Record: England 1066-1307*. (London: Edward Arnold, 1979), at 1-2.

<sup>73</sup> Emily Zack Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*. (Chapel Hill: University of North Carolina Press, 1988), at 97-112.



discrete societies through land, and hence land becomes the symbol of the deep texture of the relationships which give rise to such provisioning.<sup>74</sup> The social order reflected the moral one, and the use of the land reflected the success or failure of this moral order.

What kinds of factors could be said to have induced the change in the outlook that animated the relationship between tenant and lord? Generally the changes in the social structure of feudalism reflect an evolution towards a rationalizing of the feudal relationship into one based less on personal tie and more on the impersonal transaction. “Already in this period a society based on tenures and services is beginning to pass into a society based on money, on rents and taxes.”<sup>75</sup> In the late 1100s we see changes in *weltanschauung* with respect to what obligations mean, changes in the structural integrity of landholding systems due to baronial wars, the emergence of monarchical hegemony (on the biographical theory), and changes in the economic processes of production which all reflect the trend toward a generalized rationalizing of social relations.<sup>76</sup>

Max Weber has articulated that the rationalization of social relations occurs through law by taking value-based relationships and subjecting them to standards of reason and scrutiny which necessarily destroy their basis by making them uniform, i.e. *impersonal* across all relationships.<sup>77</sup> Hence rationalizing customary moral obligations into law requires that the rules governing the tenure of land must be the reducible to uniformity among the various relationships that exist between lord and tenant across fiefdoms. The significance of the new rationalized tenurial relationship, in being defined by rules that will govern how it is to be transferred (arguably the most important part of the *seisin* ceremony), is reduced to the immediate transaction of the valued good with the previous import of the moral obligations having no significance because they no longer play a part. Values cannot, Weber claims, be based in reason, nor in scrutiny.<sup>78</sup>

The legacy of rationalization from Roman times existed among the conceptions of law inherited by legal scholars at the turn of the millenium.<sup>79</sup> The Roman *ratio* is that reason which structures human action according to standards. Standardization

<sup>74</sup> To see how the feudal relationship “hung” together through the relationships as expressed through land, see Poole, *Obligations*, *supra* note 70, 1-11; see J.C. Holt’s general description of life at the feudal level, “Politics and Property in Early Medieval England” in T.H. Aston ed. *Landlords, Peasants and Politics in Medieval England*. (Cambridge: Cambridge University Press, 1987) 65, at 68-77; and Arthur Bryant, *Medieval Foundations*, *supra* note 23, at 163-183; finally, for a dated account of how the feudal system used to appear, Sir Francis Palgrave describes a system which is also quite integrated and contingently based on obligation rather than land in *The Lord and the Vassal*. (London: John Parker West, 1844).

<sup>75</sup> Poole, *Obligations*, *supra* note 70, at 4.

<sup>76</sup> On the changes in the *weltanschauung* see the inferences Milsom draws in the beginning of *Legal Framework*, *supra* note 4, at and at the start of “Introduction” *supra* note 4. He notes that there is a breakdown occurring within the feudal order that provides the impetus for Henry II to demand that “custom” be enforced. On the general rationalizing tendency of the economy, see Richard H. Britnell, “Commercialisation and Economic Development in England, 1000-1300” in Richard H. Britnell and Bruce M.S. Campbell eds. *A Commercialising Economy, England 1086 to c. 1300*. (New York: Manchester University Press, 1995) 7; and Barlow, *Feudal Kingdom*, *supra* note 71, at 113-33, 235-82.

<sup>77</sup> Max Weber, *Economy and Society*. 2 vols. G. Roth & C. Wittich trans. ed. (Berkeley: University of California Press, 1978), at 666-831, esp. 809-16, & 880-895.

<sup>78</sup> *Ibid*, at 4-9; see also Unger, *Politics*, *supra* note 17, at 1-18; Unger, *Law in Modern Society*, *supra* note 17, at 29-34ff.

<sup>79</sup> See Pollock and Maitland, *History*, *supra* note 3, at 2-12, 20-24.

is the key to codification.<sup>80</sup> The reason Justinian is heralded as a great figure in the history of law is not because of any demonstrable change in the social good, but because he took what appears to have been an irrational array of customary and mixed legal arrangements and made them into uniform code that understood “classes” of social relations and social action.<sup>81</sup> We can also see the concern for a specific kind of rationalizing in pre-conquest Norman understandings of property transfer.<sup>82</sup> Tabuteau relates a vision of Norman law that is at once based in custom but is also continually moving toward its own rationalization in a form of “law,”<sup>83</sup> and this vision of law was brought into England after 1066.<sup>84</sup>

I think it is clear that Henry II arrives into a history that was already striking a course. The creation of an administrative state was, for the ruling elite, a way to ensure that ruling could be done effectively, and it does not matter if such rationalization was conscious or if it was simply based in an immediate expediency arising from customs which were not flexible enough to compensate for the existence of a pan-customary realm. For instance, the rationality of the Domesday Book reflects such a move toward an administrative society, providing a model upon which further administrative actions would be based.<sup>85</sup> The goal was to provide for certainty with respect to landholdings throughout the realm, which is entirely consistent with the goals of bureaucracy generally.<sup>86</sup>

Similarly, the move to a writing society reflects a rationalizing society.<sup>87</sup> As Clanchy notes, writing only developed as a major way of expression during the 1100s, especially with respect to business of the state.<sup>88</sup> This proliferation was simply due to a change in the orientation toward a “literate mentality.” However, looking deeper, we see that the practical purpose of moving to a system of writing as opposed to one of memory and orality is based in an increasing drive to rationalize a system of governance.

In Anglo-Saxon England, and generally in early medieval Europe, writing had been primarily associated with monasticism, sacred Scripture and the liberal arts of antiquity. Only in the twelfth century did the number of documents, and the number of persons who understood them, begin to increase at a fast rate under the pressures of emerging bureaucracy. Practical business was the foundation of this new literacy.<sup>89</sup>

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<sup>80</sup> Note that Maitland uses all the metaphors of the Enlightenment, with the absence of standardized law and the rule of random custom as the “dark ages” while the codification of custom (really the codification of reason according to those doing the job) into principles of law is seen as an incredible advance: *ibid*, at 1ff.

<sup>81</sup> Maitland claims the *Digest* to be his real achievement and not the Institutes. Nonetheless, Justinian’s achievement as a codifier is what gives the label its import when called Edward I the “English Justinian.” *Ibid*, at 9-11.

<sup>82</sup> Tabuteau, *Transfers of Property*, *supra* note 72.

<sup>83</sup> *Ibid*, at 223-29.

<sup>84</sup> Hudson, *Land, Law*, *supra* note 19, at 3.

<sup>85</sup> For an in depth discussion of the role of the Domesday, see Galbraith, *Domesday Book*, *supra* note 12. The entire book explains its origins, its development, and its subsequent influence.

<sup>86</sup> Weber, *Economy and Society*, *supra* note 75, at 969-73.

<sup>87</sup> M.T. Clanchy, *Memory to Written Record*, *supra* note 71.

<sup>88</sup> *Ibid*, at 1-9.

<sup>89</sup> *Ibid*, at 265.





At bottom, the social forces of governing a large state required rationalization, and such rationalization, as I have shown, was already latent within the cultures which formed England.

How do property entitlements and the Assize fit into this? The relationship between the feudal lord and the tenant becomes rationalized when it becomes subject to an outside “questioner.” As soon as the nature of the moral bond becomes transposed into a standardized form for land ownership, that is, as soon as the series of expectations and understandings surrounding what might have been the serious relationship called “seisin” becomes nothing more than a “right,” the moral universe surrounding the feudal bond has collapsed. It is important to note that the nature of the relationship changes when we look at it from an administrative position rather than as “insiders” to the culture itself.

This rationalizing played itself out in twelfth century England by creating a different set of values within the feudal structure. Hence the moral bond which undergirded the obligations of seisin was already in peril when the changes wrought by Henry II arrived: had it not been, there would have been a tumultuous change.<sup>90</sup> We therefore see that the emergence of “law” in England at this time is more than simply the assertion of power by a King who would ensure jurisdiction, and yet it may also be more than an accidental policy enacted by a King who simply wanted to ensure certainty in title relations. As we have discussed in this section, there is good reason to doubt that such things like “title” as we understand it existed. Indeed, there is good reason to think that the types of social relations that did exist were much more “organic” for lack of a better word. If there are historical trends going on, then we simply cannot blame (reward) the disappearance of the feudal bond as manifested in tenure on Henry II.

#### 4. Reconsideration

Thus we can reconsider, in a more critical way, what we mean to do when we approach the origins of property as a historical study.<sup>91</sup> If we are trying to figure out when a social practice became a legal entitlement at law, we run into the problem of looking through the lens of law and identifying certain things in a legal context when it may have in fact not existed.

Thus, the nature of historical study demands a few things. It demands first that we become aware of the purposes with which we approach the task of re-creating an age. Second, we must get over the idea that we will inevitably understand what

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<sup>90</sup> In a similar kind of loss, Alasdair MacIntyre describes how Captain Cook’s explorers were shocked by the Polynesians’ strict prohibitions on men and women eating together, which they called *taboo*, side by side with lax sexual habits. When Cook and his men inquired after the meaning of *taboo* they received no answer, as it appeared that the original meaning of the word had lost constitutive significance for them. This was evidenced by the lack of social consequences when Kamehameha II abolished the taboos: no one noticed. Had there been a gigantic change in the way land was conceived and understood when Henry II instituted the assize there most likely would have been customary reactions against a policy which would break down the integrity of their feudal bond: it was in decline any way. See *After Virtue*. 2nd ed. (Notre Dame: University of Notre Dame Press, 1983) at 105, and the book generally on the way in which the constitutive significance of categories fades and then becomes reflected in social structures and decrees.

<sup>91</sup> In many ways, the basis for knowledge is laid in process it establishes for historical study: see Roberto Unger, *Politics*, *supra* note 17; Foucault, *Archeology*, *supra* note 15; Said, *Orientalism*, *supra* note 16.

happened according to a coherent “theory.” Things will simply seem more or less believable. Third, to ascertain what is happening in the “legal” realm (in addition to watching the definitions we use) we necessarily must immerse ourselves in the social practices of the time to understand just what the bases of those social relationships were. Otherwise the social historian and the legal historian end up on either sides of the elephant claiming to have seen the “true” elephant. As this essay has suggested, there is always more to learn from historical processes than simply by looking to the itinerant details in certain situations. Our eye must be trained to understand that there is much to the historical accidents which occur through larger and more general trends and forces, that many times things occurring in society are occurring without the knowledge of the participants.<sup>92</sup> Our eye must also be trained to see that the things that are occurring with the knowledge of the participants occur in a deeply embedded culture that the outsider necessarily must understand if he or she is to see it in their terms.

What do such lessons on the study of origins themselves yield in the understanding of property and how it evolved?<sup>93</sup> The processes occurring, which we only see now concerning rationalization, enlighten us to the way in which centralized authority changes the shape and nature of local custom and institutions by virtue of their involvement with them. And yet the elaborate systems of seisin, of the moral obligations that flowed from this system of relations between lord and tenant and land, existed in terms that we can no longer see but that we are forced to surmise or infer. It is easy to infer that local customary arrangements were, for all intents and purposes, customs which had significance for the participants. As all agree, “property” becomes that entitlement which is named through participation in a way of organizing affairs from the outside.

Whether it is imposed by a King or is consistent with a general esprit that is slowly overtaking customary arrangements, the nature of change generally becomes important when we try to establish how the change occurred and what it resulted in. Hence if we are to see “property” as that emergent type of legal institution created as an offshoot of the legal reforms of Henry II, then property simply exists as one more “right” that conquers custom as a superior way to organize landholding. If however we can see the emergence of property rights as intricately tied to social patterns and historical trends, then property rights lose their mystique in face of these other dynamics which give rise to them. And in understanding such dynamics we are able to approach that history much more critically, alive to the fact that we need to continually approach it on its own terms.

## **Conclusion**

The change from the feudal obligation to the proprietary entitlement, if the product of the King, assumes that centralized control over social structure occurs through law. It assumes an enlightened King who understood the nature of law, legal entitlement, and the power of legal jurisdiction before such things had ever been properly established. Indeed, it accords so much significance to the way in which legal doctrine works to “conquer” custom that we end up missing some of the

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<sup>92</sup> Such is the argument to be made today with respect to the way in which capitalist society evolves according to its own logic and not the dictates of specific groups or individuals.

<sup>93</sup> Bruce Ziff, *Principles*, *supra* note 47; C.B. Macpherson, *The Political Theory of Possessive Individualism, Hobbes to Locke*. (Oxford: Oxford University Press, 1962).



action of the time, things like baronial wars, pestilence, and personality. Law as we understand it today is much more powerful and respected than it was then. The idea that covenants without swords are but words implies that covenants hold much sway.<sup>94</sup> We know that writing was only beginning to take hold of the society in an organizational way, and that legal meaning was contained more in the fact of political presence than it was through what was written. Indeed, we often remark at how little was written.

The legal practitioner looks to legal doctrine and the practices that informed them to try piece together how it is that certain ideas came to be translated into legal practice, what purposes these were thought to serve, and what consequences they had. The legal historian is an etymologist of legal practice, tracing the meaning attaching to signs through ages of evolution and change. Property today is not what it was.

The historian wants to see everything in its context, to read the text as it appeared, to understand the occurrences of the day as they occurred. The historian laments missing detail because of ideological blinders, which is why they get so upset when others do not share their own.

The social theorist understands that things are occurring through time, and wants to know if there is a general theme or underlying dynamic to such change. She is sure that things are occurring according to a process and believes that we cannot understand the ideological blinders we wear today without digging into the processes that shaped the past.

I realize now that I have tried to do all three. I have tried to figure out some of the problems that surrounded the movement into proprietary language from feudal tenure, following Milsom's erudite lead. I have tried to dig through different historical literature to see if there could have been historical practices that have remained hidden from our view with respect to feudal practices and relationships. And I have tried to understand this process of historical legal change according to the dictates of a process of rationalization that seems present throughout this history.

At last, I see that I too have fallen prey to the problems that beset historical analysis. I too have imposed my own categories of rationality and organization onto a set of historical events that speak it in my language and not theirs. I too am colonizing the past for purposes of the present. Perhaps a new understanding of history is a bad thing. Perhaps that crazy bird of Minerva may think it sees things in a greater perspective once it goes to paint its grey on grey when really it only sees their blur;<sup>95</sup> and perhaps the vertiginous grasping of one who looks backward continually while hurtling through space trying to understand where she really is confuses our relation in time.<sup>96</sup> Perhaps instead we simply look through the present and the future toward the past and define what we would like to see there,

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<sup>94</sup> These were Hobbes' words in *The Leviathan*.

<sup>95</sup> Hegel, "Preface" *Philosophy of Right*. T.M. Knox trans. (Oxford: Oxford University Press, 1967), at 13.

<sup>96</sup> Walter Benjamin, "Theses on the Philosophy of History" *Illuminations*. H. Arendt trans. ed. (New York: Schocken, 1968), at 255, 257-58.

continually amending the past to suit the needs of the future.<sup>97</sup> In which case my analysis should tell us about today's concerns rather than yesterday's. I am sure it has been done before. There I go again ....

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<sup>97</sup> This is the theme of Trinkaus and Shipman, *Neandertals*, *supra* note 11. This is the view of Heidegger's discussion of being-towards-death in *Being and Time*. J. Macquarrie and E.G. Robinson trans. (San Francisco: Harper Collins, 1962), at 219-311.