

Maitland and the Rest of Us

PAUL R. HYAMS

THE AUTHOR OF the *History of English Law* was self-evidently an insider. He wrote for himself first, then the rest of his peers, the few,¹ each of whom like himself felt heir to the achievements of their legal ancestors and proud to be Englishmen. It was important and self-evidently worthwhile to give such people a clear account of the main lines of development of their Common Law and its role in the maintenance of justice and order in the kingdom of England. The first part of that great story was to reach 1272.

Patently, the failed barrister was nevertheless a fine advocate who could have made a brilliant case for the disempowered had it occurred to him to do so. This self-styled ‘dissenter from all churches’² sympathised as easily with the oppressed as any Victorian liberal. Sympathy is of course a long way from action or identification. If Maitland identified with any of the excluded groups who are my subject today, it was probably the heretics.

He never attempted the imaginative reconstruction of the feelings of those at the sharp receiving end of the sword of justice. For all his immense technical skills, not least sensitive readings of texts and what they did not say, Maitland was absolutely not a deconstructionist *avant la lettre*. His instinct, when confronted by absences, was to fill them with patterns borrowed from the better documented moments of a later period. This was the well-known and much considered method of *Domesday Book and Beyond*. The critics who place him, inexplicably to my younger self, behind Stubbs as an historian, mainly, as far as I could see, on grounds of moral force and human sympathies, may have a tiny point. A man bereft of a deep spiritual life of his own is

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¹ *Letters*, i no. 495. *Letters*, ii no. 116 is a very telling indication that the disempowered were no part of the target audience; writing to Dicey in 1896, he says: ‘The only direct utility of legal history . . . lies in its lesson that each generation has an enormous power of shaping its own law.’ Cf. *Letters*, ii no. 350, and Pollock and Maitland, ii 205 for an indication of the social level of the audience.

² Fifoot, *Life*, pp. 157, 180.

protected, as it were, from judging the past in a fully present-minded fashion, but he is poorly positioned to recreate voices that were never recorded in their own day. That is one reason why history is so often the story of the winners, a sad fact that gave Maitland no pleasure at all.

Texts like the *History of English Law* present today's readers with a huge problem. They demand first a substantial measure of technical competence, and then to be placed in their contemporary context within late Victorian intellectual and cultural history. But even after all that, the 'real' Maitland remains well-guarded by his authorial reticence, his rhetorical skills and his unequalled ability to nuance. The kind father who delighted his daughters with his reading and storytelling, the loyal and amusing friend, the man who froze up before the camera, all seem now long gone and almost beyond recovery.

The task I assign myself here is to seek out aspects of the *History* relating to the excluded and the powerless, in order to move a little forward towards an understanding of the kind of insider Maitland was, to learn something of the emotional associations and bonds that must have influenced his judgements and working methods. I leave judgements to a higher court, and endeavour here more to assemble suitable materials for submission *ad loquendum*. I shall focus on the faces that the good liberal did not normally see, together with one group, women, with whose welfare he was much involved on occasion, and another, heretics, that seems to have attracted the perpetual sceptic in our man. I shall consider them under four heads. First there are those who were not Englishmen, then those who were not male. Third comes the under-class, mostly examining villeinage. And fourth I shall see to what preliminary conclusions about the man and historian a miscellany of odd groups (in various senses), including lepers and lunatics,³ heretics and homosexuals, can lead us.

The Englishman, the Aliens and the Jews

The chorus constantly repeats how very English Maitland was. The Englishness is easy to see. Maitland constantly refers to 'our' Common

³ Reasons of space rule out lepers and lunatics from consideration here. N. Walker, *Crime and Insanity in England* (2 vols, Edinburgh, 1968), vol. i ch. 1 (based largely on plea-roll materials provided by Mr J. M. Kaye) remains the only attempt at a general account of the insane in medieval law that I know!

Law and 'we' Englishmen, who made it.⁴ He seeks in the *History* quite expressly to expound the roots of a system of law that lasted through his own life but quite largely expired around 1925 thanks to F. E. Smith.⁵ To chronicle the development of England's national law, he firmly believed, was a job for Englishmen or at worst their common-law cousins from the United States. He was proud that around 1200 the Common Law 'takes for a short while the lead among the states of Europe' (i 167), in much the way that Englishmen felt a few years later about Scott's race for the South Pole. It would be shameful, indeed, to leave the editing of the law's great texts to 'Germans, Frenchmen and Russians' (i xxxv), little less so had the Common Law failed to resist a Roman Law Reception.⁶ His trust in that Common Law's professional tradition of its own origins, 'in the main . . . sound and truthful' (i xxxiv) was one source of the *Domesday Book and Beyond* hindsight method, as of most of the errors on which posterity has been able to secure a conviction.⁷

There is a certain irony here, given how much better read he was in the various relevant European learned literatures than most of the later scholars who have followed his trail, present company not excepted.⁸ This proud Victorian was a convinced *comparatiste* from the very start of his historical career. His *History* was to disentangle in various 'Germanic strains' the roots of 'institutions which have now-a-days the most homely and English appearance' (i xxxi, xxxiii, xxxv-vi).

⁴ E.g. Pollock and Maitland, i 677, 684; ii 344, 413, 543. He had clearly internalised Savigny's view of a people's legal institutions as one more expression of its identity, J. W. Burrow, *A Liberal Descent: Victorian Historians and the English Past* (Cambridge, 1981), p. 123.

⁵ The five Property Acts of 1925 form a natural and widely recognized watershed. However, my father was admitted a solicitor in 1929, very much in their aftermath. He used to recount as the view of the established practitioners of his early days in the profession that the Land Transfer Act of 1897 marked the real start of the changes. Professor Milsom suggested to me that the Settled Land Acts earlier still also have a claim.

⁶ E.g. Pollock and Maitland, i 79; cf. ii 2 where Roman Law is called 'foreign jurisprudence'. 'The Laws of the Anglo-Saxons', *Collected Papers*, iii 447-73, a review of Liebermann's first volume, is to the point here.

⁷ The lawyer in Maitland took much more care to cite and amend the views of Coke, Hale, Blackstone and his legal forebears on medieval developments than any contemporary scholar would.

⁸ M. Graziadei, 'Changing images of the law in XIX century English legal thought (The Continental impulse)', in M. Reimann, ed., *The Reception of Continental Ideas in the Common Law World, 1820-1920* (Comp. Studies in Cont. & Anglo-American Legal History, 13, 1993), pp. 115-63 goes far to place Maitland in his intellectual context alongside both American and European scholars. I am not aware of much research on Maitland's reading in specific areas. But De L. J. Guth and M. H. Hoefflich, 'F. W. Maitland and Roman Law: an Uncollected Letter, with Comments and Notes', *U. Illinois L. R.* 2 (1982), 441-8 marks a good starting-point. And cf. *Letters*, i nos. 4, 92; *Letters*, ii nos 37, 174, 237, 285 etc. etc.

He was always alert to acknowledge Continental borrowings,⁹ and very much able to show how distinctive some English choices look in a perspective taken from the other side of the English Channel.¹⁰

This English patriotism, lightly and naturally worn, is evident in his *History's* depiction of foreign bodies within the law. Some treatment of aliens was doubtless called for by his decision (prompted perhaps by the influence of Blackstone and the *Institutes*) to follow the initial historical sketch of his first volume with some account of legal status (i 460–5). Few legal historians have made the effort since, despite some good studies of the export of English law to Wales and Ireland.¹¹ Maitland's treatment can be applauded for its existence. It is not very profound or interesting. The five pages he allowed himself did not permit mention of the problems raised by Welshmen and Scots, for example, suing in the English royal courts, a matter of some practical significance before the end of his period which he had very likely noticed in the pleas rolls. This might have enticed him into a little more of the potentially very illuminating comparisons between legal systems within the British Isles that his friendship with Neilson and his own interest in Scots law had occasionally suggested to him.¹² But since much of the better evidence for this post-dates his stated terminus of 1272, it is perhaps not surprising that he eschewed the largely manuscript researches that such investigations would have demanded.

For my present purpose, what remains with me from the pages on aliens is their workmanlike approach and tone. All this changes when one reads on a few pages to the section of very similar length on 'the

⁹ A good example is his acceptance of a Frankish derivation for the Jury, basically in the wake of Brunner, Pollock and Maitland, i 80–93. This debate burns fiercely on and on without much hope for material to lead to conclusive judgement.

¹⁰ One good illustration is the demonstration that curtesy, 'a peculiar favour shown to the husband', was unknown even in Normandy, Pollock and Maitland, ii 415–20. Compare S. F. C. Milsom, 'Inheritance by women in the 12th and 13th centuries', in his *Studies in the History of the Common Law* (London, 1985), ch. 12, esp. pp. 254 sq. with my own, 'The Common Law and the French Connection', *ANS*, 4 (1982), App. 1, 87–90, esp. at p. 90 commenting on *Glanvill*, vii 18, ed. Hall, pp. 92–3. Other illustrations in Pollock and Maitland, ii 445, 449, 484.

¹¹ G. J. P. Hand, *English Law in Ireland, 1290–1324* (Cambridge, 1967). Cf. F. H. Newark, 'The bringing of English Law to Ireland', *Northern Ireland Law Quarterly*, 23 (1972), 3–15 and Hand, 'English Law in Ireland, 1172–1351', *ibid.*, 393–422.

¹² For Neilson, see E. L. G. Stones, ed., *F. W. Maitland: Letters to George Neilson* (Glasgow, 1976) and *Letters*, ii s.n. Excellent examples of the 'British' approach with particular reference to Ireland will be found in P. A. Brand, *The Making of the Common Law* (London, 1992), chs 2, 13, 19–20 etc. On Scotland, see H. MacQueen, *Common Law and Feudal Society in Medieval Scotland* (Edinburgh, 1993). Minor efforts of my own in this direction are visible in my *King, Lords and Peasants in Medieval England: the Common Law of Villeinage in the 12th and 13th Centuries* (Oxford, 1980), pp. 229–32 and also in my article 'The Charter as a source for the Common Law', *Journal of Legal History*, 12 (1991), 173–89 at 179.

Jews'.¹³ This is slightly curious given that Jews, whether high-profile financiers in society or very foreign-looking paupers in the East End of London, are likely to have been one of the first connotations for anyone hearing the word 'alien' in 1895.¹⁴

We cannot take such a contrast lightly. Maitland's use of language is frequently revealing, because he patently applied such care to it. His masterly control of his pen reflects both his confidence in his ability to say exactly what he wished and a deep if unschooled interest in language. Something of a 'language maven',¹⁵ he frequently makes perceptive comments on words and language patterns both in the past and in his own day.¹⁶ In his own writings, he generally maintained a proper lawyer's preference for a stable terminology over the greater variation for stylistic variety affected by many of the historians of his day. The very fact of this double degree of attention to language invests breaches of the rule with extra significance. Thus careful study of Maitland's language may yet prove a route into some of the inner life of this private man.

The present occasion being inappropriate for an exercise of that kind, I merely point to a problem posed by his choice of language in this brief section on Jews. He refers to them in three different ways. They are, here and elsewhere (as in his private letters), 'Israelites' and 'Hebrews' as well as 'Jews'. A people (or 'race') rather than a religious group like the Saracens of the crusades, their antonym is the 'gentile' (i 469), a term I cannot find used elsewhere in the *History*. There has to be some significance to all this.¹⁷ Unlike historians, lawyers never vary their terms for purely stylistic reasons in technical writing. What is one to make of a usage so different from his normal practice? Certainly there is no necessary intent to defame. 'Hebrew', for example, had for contemporaries many positive connotations stemming from biblical associations with the Old Testament, and may have evoked

¹³ He may have found the Jews a harder task from the start, *Letters*, i no. 87. In contrast A. C. Dicey, *Law and Public Opinion in England* (London, 1948), pp. 344–5 and n. 3 refers to Jewish emancipation in a fully neutral tone.

¹⁴ Maitland must have known something of the East End. A distant cousin had held a parish there rather earlier, Fifoot, *Life*, pp. 28–30. So had J. R. Green, whose occasionally revealing letters Leslie Stephen edited in 1902. Even more to the point, Florence Maitland's first cousin, George Duckworth, was involved with Charles Booth's investigations of the area at much the time of the *History*; his papers survive, D. Feldman, *Englishmen and Jews: Social Relations and Political Culture, 1840–1914* (London, 1994), p. 166n.

¹⁵ See Steven Pinker, *The Language Instinct* (London, 1993), ch. 12.

¹⁶ The grammar of 'Law French' he wrote from scratch in his first Selden Year Book volume is cited in this context with notorious frequency, Fifoot, *Life*, pp. 260–2 and, *Letters*, i nos. 279, 301, 323, 346, 357, 376, 379, 383; *Letters*, ii no. 237. See also any of the many comments on vocabulary scattered through Pollock and Maitland, e.g. i 236 n. 3.

¹⁷ *Letters*, i no 346 shows his sensitivity to the comparably different connotations of 'Yanqui' and 'Americano' in Spanish.

special feelings among nonconformists and their liberal friends.¹⁸ No simple interpretation of this quite common usage suggests itself. Some say that 'Jew' was the shocking word, that everything Jewish shocked conventional people of the kind whom Maitland expected to find among his readers. So he may have been softening his usage in deference to feelings, his own perhaps but more likely those of others.¹⁹

How then, one may ask, could a student of Maitland's day most usefully approach this minor constituent of the population of England subject to jurisdiction in its courts? It demanded some treatment in the interests of completeness, and might by its very differentness illuminate unexpected aspects of the majority host community.²⁰ One of the more promising answering strategies to meet the challenge is to situate such a minority by analogy with some other comparable group. The choice of apposite comparison is critical and can be controversial. When well handled, this approach illuminates more than the lawyers' disposal of their difficulty in finding a place for the Jews, say, within their system. It may tell us something about the majority community's response to its minority. This is a route much travelled by recent scholarship.²¹

Maitland saw both the problem and its solution with his habitual clarity. He registered the one absolutely basic fact about the English Jewry, that it was supremely dependent upon the king. For the early middle ages, he translated this as a similarity of legal condition with that of the 'friendly stranger' under the *mund* or protection of some great man (i 460). He was possibly encouraged by this insight to point out that discrimination did not necessarily imply the Jew's disadvantage, that the Jew was 'a highly privileged person' in regard to mortgages, for example (ii 123). He also knew another quite widespread analogy in the high middle ages, that of servility, as in the chamber servitude of Jews in Germany. This is generally and plausibly held to have proved deeply damaging to Jewish condition at the time. Maitland is throughout the *History* and elsewhere so deeply engaged by the concept of seisin that one might almost term it an intellectual

¹⁸ Cf. Pollock and Maitland, ii 488-9, incl. n. 2.

¹⁹ But he follows similar usage in his correspondence about the Selden Society volume on the Exchequer of the Jews, *Letters*, i nos. 117, 118, 124, 130, 152, 158-9, 161, 163, 174, 185, 212, 311, 317; he also asks Fisher in 1906: 'How the devil can Belloc know the income of the average English Jew of the thirteenth century?', *Letters*, i no. 469.

²⁰ This was my goal in writing 'The Jews as an immigrant minority, 1066-1290', *Journal of Jewish Studies*, 25 (1974), 270-93, for a Past & Present Conference on Immigrant Minorities in English history.

²¹ See especially G. I. Langmuir, *Toward a Definition of Antisemitism* (Los Angeles, 1990). Also the contributions of Patschowsky and myself to *England and Germany in the High Middle Ages* (Oxford, forthcoming), ed. A. Haverkamp and H. Vollrath.

obsession.²² He therefore read the notion of Jewish servitude along the lines he so brilliantly recreated for villeinage in the Age of Bracton, that is, in terms of 'relativity', as he called it.²³ All stemmed from the relationship with the king, a kind of seisin over his Jews. But they suffered, he insisted, only a 'relative servility', for they were free as regards everyone except the king (i 468-9, 472). The implication, presumably, is that Jews operated in the courts and elsewhere on the basis of equality with the king's other subjects. It is true that Jews sued and were sued, sometimes, though as time went on exceptionally, in the ordinary royal courts, but it is also true that they suffered a number of legal disabilities.²⁴ Maitland's dictum is just defensible as a summary of the twelfth-century situation, which also provides our best evidence of Jewish servitude in England.²⁵ It is certainly not good law after the Jewry legislation of 1269-75 and already extremely doubtful before then. Moreover, where the relativity idea is abundantly justified for villeins, Maitland lacks any Bractonian authority for his application of it to the Jews.

This is not quite what we expect from our Maitland. His account overall shows very little indeed of the evident discomfort with the law's treatment of Jews that he feels about women. Indeed the mild emphasis he gives to the Jews' privileges might suggest that their discriminatory treatment mattered less than one might think. He noted apropos of women in their matrimonial role a special protecting function of the king. When their primary protectors, first the husband, then their blood kinsmen, defaulted on their duty, recourse might be had to the king 'that guardian of all guardians' (ii 413). He shows no similar concern for Jewish well-being, though it might have led him towards a much favoured explanation for the Expulsion in 1290, which he hardly seems to find even problematic, perhaps because it created no obvious legal problems.

The obvious fact is that Maitland had no real interest in the Jews except as a source of minor conceptual difficulties for England's secular but Christian law. Here he is in his element, supremely adept at tracing the logic of the Common-Law system as contemporaries might have

²² Graziadei, 'Changing images of the law', esp. 139-41, 149 sq. begins to make this comprehensible.

²³ Below at n. 74.

²⁴ C. Roth, *A History of the Jews in England* (3rd edn, Oxford, 1964) and H. G. Richardson, *The English Jewry under Angevin Kings* (London 1960) are the best starting-points for inquiry.

²⁵ On the quite unofficial 'Leges Edwardi Confessoris', Patschowsky in *England and Germany in the High Middle Ages* is probably to be preferred to earlier views including my own in the same volume.

meant it to operate. His gift for teasing out the internal logic of institutions and rules that initially seem strange and illogical draws upon the strengths of a powerful and philosophically trained mind.²⁶

When one attempts this task, the challenge for the historian, as opposed to the advocate, is to separate his voice from the ones he is recreating. I do not think that Maitland succeeds as well here as he does elsewhere. His fondness for the historic present tense tends to exacerbate the risk, as do, ironically, all the familiar rhetorical skills. The result indisputably contains a far higher proportion of stereotype than is evident elsewhere in the book. And this seems to come from Maitland's own mouth. He is quite peremptory when he comments of Jewish landholding in fee, 'this was not to be borne' (i 473), or clothes a perfectly correct observation about the Jews' role as a social solvent with an emotive phrase on 'the touch of Jewish gold' (i 475).²⁷ When he has similar remarks to make about women, for example, he distances himself and his own voice with off-setting comment. Here there is none.

It is hard to avoid the suspicion that his presentation may be coloured by some share of the feelings current and respectable at the time. He does little to disguise his distaste for moneylending, no matter who practised it. Having discovered that chancery officials were guilty of its practise — and he should only have known the full extent of the shady business dealings that went on in Edward I's court! — he feels he must expose 'the fact, for fact it is' (ii 204). Because the Jewish gage was 'among Englishmen a novel and an alien institution', he pronounced judgement that 'this moneylending business required some governmental regulation' (i 469).²⁸ Two further dicta deserve quotation. 'Despised and disliked the once chosen people would always have been in a society of medieval Christians; perhaps they would always have been accused of occasionally massacring children and occasionally massacred; but they would not have been so persistently hated, as they were, had they not been made the engines of royal indigence' (i 470-1).

²⁶ Mathematical and philosophical studies at Cambridge and the close association with Sidgwick are patently highly formative of Maitland's approach to law reform and history. Now that James Campbell has brought to my notice A. H. Inman, *Domesday and Feudal Statistics* (London, 1900), I see that this is not all cause for congratulation. Maitland's quantitative methods in *Domesday Book and Beyond* come in for brisk criticism here!

²⁷ The footnote citations are to very partisan statements, on which see perhaps my own 'The Jews as an immigrant minority'. Fifoot, *Life*, p. 3 mentions the 1828 trip of S. R. Maitland to check on the progress of the conversion of the Jews in Central Europe; this hints at a possibly relevant influence.

²⁸ He is speaking here of the twelfth century. I doubt whether modern scholars would agree on this explanation for royal regulation, or that the novelty was any greater in England than anywhere else north of the Alps.

'The Jew belongs to a despicable race and professed a detestable creed' (i 472).

Such remarks wrongly dismiss all possibility of toleration for Jews in the middle ages, against the evidence of his own 'friendly stranger' analogy. They also betray a confusion of voice which no one writing in the area today would risk, and they cast in my mind at least a certain shadow over the great liberal. It is true that Maitland was very fond of irony, not least when his all-encompassing mind perceived difficulties in the view it wished to propound. I cannot, however, believe after careful bouts of rereading, that any of this was intended to be read in such a manner. And even if others are able to detect irony here, this would rather underline Maitland's ambivalences.

These are not too hard to guess. Maitland was an undergraduate during the years immediately following the vast extension to the franchise in 1867, years when Gladstone's Midlothian Campaign demonstrated the prizes to be won by addressing a new mass electorate. The new less romantic conception of the nation that resulted inevitably raised the requirements for conformity brought to bear upon anomalous groups like the Jews. Their anomaly status hardened too over the years. The message of liberal theologians that the Old Testament was written for a backward people, the Hebrews, incapable of assimilating the full New Testament message was rapidly coming to represent received opinion. Observations of endogamy and apartness in contemporary Jewish life promoted the identification of these English Jews with the ancient Hebrews. Otherwise, they took their public image in the 1890s still largely from the few very rich financiers increasingly often depicted in novels of a kind that Maitland had probably read. It is true that Maitland's own brand of patriotism was restrained and far from jingoist. He disapproved deeply of Joseph Chamberlain's imperialist ventures and, for example, of the Boer War in letters notable for containing some of his few expressions of political views.²⁹ But the combination of an opposition to imperialism and finance capital with coolness towards a Jewish community all too closely associated with both is pretty characteristic of many liberals of the day.³⁰

One should not press the point too far. The real message from Maitland's treatment of Jewish status is perhaps a general one concerning his model-making method. He has for once constructed his models

²⁹ *Letters*, i nos. 258, 260-1; *Letters*, ii nos. 198-200. He was much more alert to university politics, *ibid.*, ii pp. 7-11.

³⁰ I am in the main following here Feldman, *Englishmen and Jews*, chs 3-4, and am extremely grateful to the author for some personal guidance. Also Burrow, *A Liberal Descent*, chs 5-6, 11.

from a relative ignorance, so as to permit, perhaps even to require supplementation from those prejudices that we all carry within us. That there should be a degree of Victorian projection here is hardly surprising and not too important when we compare him with certain contemporaries.³¹ Feelings of this kind strike me as natural enough in the circumstances and no crime. To levy some unprovable charge of anti-semitism is of no value in this context. It was not Maitland's way to pronounce collective anathemas on any group of people. Always proud to be an Englishman himself, his references to those less fortunate are more often than not somewhat ambivalent and ironical.³² 'Hebrews', themselves English and representing a 'Jewish Historical Society' expressly called 'of England'³³ must have presented a problem. This is highly relevant to the semantic field within which Maitland, the protestant agnostic, probed the significance of religion and more especially christian orthodoxy, and is worth closer inquiry than I can give it here. In any event, it does no harm to know that our man is human.

The Gentleman and his Women

It is also pleasant to view him in action on the side of the angels. His speech in favour of women's admission to Cambridge, delivered between the two editions of the *History*, is said to have gained numerous votes for the losing side. He approached the issue in his usual whole-hearted manner, while yet conveying the impression that he felt it to be an unfortunate diversion from his real tasks. And like his mentor, Sidgwick, he was very concerned not to trample too heavily on vested interests tending in the other direction.³⁴ Nonetheless, Maitland had the right to consider himself a feminist.

He starts his account by professing unhappiness that four pages (i 482-5) must suffice for 'half the inhabitants of England'. Yet he must accept that males were, like it or not, the norm for medieval lawyers. 'The lay Englishman, free but not noble, who is of full age and who

³¹ For E. A. Freeman and Goldwin Smith (like me, of both Oxford and Cornell), see Feldman, *Englishmen and Jews*, pp. 74-5, 90-3, 99-102, 129 and Burrow, *A Liberal Descent*, Part III, esp. p. 204. I am grateful to have seen in draft R. Fleming, 'Henry Adams and the Anglo-Saxons', in P. Szarmach, ed., *The Preservation of Anglo-Saxon Culture* (in press).

³² Letters from his enforced winter holidays give a number of illustrations. E.g. *Letters*, i nos 236, 370; *Letters* ii nos 185, 199.

³³ The Jewish Historical Society of England was founded in 1893. It is a pity that Feldman did not study the society in his *Englishmen and Jews*.

³⁴ Fifoot, *Life*, pp. 105-7; *Letters*, ii p. 7. Cf. *Letters*, i nos 188, 193-4, 212. *Letters*, ii no. 152 is intriguing in this connection.

has forfeited none of his rights by crime or sin, is the law's typical *man*, typical person' (i 407, my emphasis). He can set out the principles governing the woman's legal rights and duties with trenchant concision. 'Private law with few exceptions puts women on a par with men; public law gives a woman no rights and exacts from her no duties.' (i 482; cf. i 485) Although he opposes the belief current when he wrote that women's condition improved during the period — it was rather 'waning than waxing' (ii 403, 426) — the general impression these statements give is not too bad. He does not seem particularly critical of woman's situation in the way one might expect.

He is, of course, well aware that full equality of the sexes would have been much better, and applauds any efforts of the Church that seem to move in the right direction. Just like writers of women's history today, he happily collects examples of things women actually could do despite their unequal status, and displays any discomfort he may feel in having such news to report only in the delight with which he clutches the occasional straw of gender equality.³⁵ Some of these prove rather illusory on closer examination. The husband's constant need for his wife's concurrence to his dispositions and the wife's ability to use fines as 'the married woman's conveyance' by *Bracton's day* (ii 102, 407) are true facts but not particularly nice ones. We have every reason to believe that these were occasions for the exercise of male dominance not a check upon it. Not infrequently is a wife's concurrence noted as being made 'lacrimabiliter' or accompanied by other signs of duress. These points deserve emphasis, since the ownership and control of land in medieval England must have been quite as much a key to social identity for women as it was for their menfolk. One thinks of the re-emergence of that identity in 'liege' widowhood, when having perhaps provided for her husband's soul out of his inheritance, a woman like Countess Clementia de Fougères was finally free to seek her own salvation by a benefaction from her own inheritance to her birth family's favoured Savigniac monks.³⁶

On at least two aspects of women's legal condition, Maitland's words deserve rather more extended commentary. I turn first to marriage and the relations engendered by it between husband and wife. The author of *Canon Law and the Church of England* was far better

³⁵ E.g. Pollock and Maitland, ii 407, 413. They could act as attorney, even for their husband (i 213; ii 408); do homage at least in *Bracton's day* (i 305); inherit even lands held under military tenure (i 308 and cf. i 280); stand guardian of both land and heir in socage tenure (i 321) etc. etc.

³⁶ BL, Add. Charters, 39, 998 is a nice illustration, whereby the lady Clemency freed two villeins on terms that required them to contribute to a Savigny priory at Long Bennington in Lincolnshire, for which see *VCH, Lincs.*, ii 242.

read in the *Corpus Iuris Canonici* and its medieval commentaries than virtually any of the English legal historians who have followed him, despite the considerable strides that the history of canonistic legal science has made since his day. He grasped the supreme importance of the twelfth-century construction of a new definition of binding marriage destined to offer the West including England a brand-new paradigm of ideal Christian secular life. He was, however, pretty contemptuous of the results. 'The ecclesiastical court . . . is', for his taste, 'only too ready to regulate the most intimate relations between married people.' (ii 409) He has little patience for the clever, un-English impracticalities that ruled there. This is not the conclusion of recent scholarship,³⁷ basing itself largely on the case records of church courts whose very existence Maitland came to doubt.³⁸

He seems to have been especially intrigued by the conceptual complications thrown up by the biblical principle that marriage made husband and wife 'one flesh'. Since no court system could afford to assimilate into its law all the corollaries, this became just one more tag to be produced with a flourish by needy pleaders. Maitland certainly saw much of the absurdity. He waxed a trifle ironical on the law's refusal to make a husband responsible for felonies committed by his wife. He also knew to report both that the husband who maimed or killed his wife faced the normal penalties on life and limb and that the wife who killed her husband was guilty not merely of homicide but of petty treason, for which the standard penalty was death by burning.³⁹ But these observations are separated by many pages, and the failure either to juxtapose the facts or to offer comment must seem weak to readers in an age desperately concerned with wife-battering. Patently the balance of power and violence within marriage — and we know from church misericord carvings of 'shrews' that violence was not entirely unidirectional — is a matter of live interest today. What a pity, then, that he never thought to consider jurisdiction over marital cruelty, which we now know to have been virtually created from whole cloth in the Age of Bracton itself by the very English church courts whom he condemned for their meddling.⁴⁰

³⁷ As R. H. Helmholz has shown both in his *Marriage Litigation in Medieval England* (Cambridge, 1975) and in his contribution to the present volume. Also C. Donahue in N. Adams and C. Donahue, eds., *Selected Cases from the Ecclesiastical Province of Canterbury, c. 1200–1301* (Selden Soc., 95, 1981), the volume envisaged in *Letters*, ii no. 189!

³⁸ *Letters*, ii no. 328.

³⁹ Pollock and Maitland, ii 436, 511, 532; and cf. ii 406–7 incl. n. 1 for a coy explanation of the phrase 'coverte de baron'.

⁴⁰ Helmholz, *Marriage Litigation*, pp. 100–5; J. Brundage, *Law, Sex and Christian Society in Medieval Europe* (Chicago, 1987), p. 455.

Testamentary disposition was another aspect of matrimonial relations to demand attention in the church courts. Maitland guessed where we now know that men put up a prolonged resistance to church calls for married women to be allowed the freedom to make wills for the good of their souls.⁴¹ Since salvation was and long remained the major goal of last wills, it is perhaps not surprising that written testaments were slow to include express provision for widows (and children). Though Maitland drew attention to this fact (ii 339–40), he made no more of it. Yet behind lay an important issue of property that must frequently have pitted fathers-in-law, concerned for their daughters' economic security in the event of their surviving their husbands, against the husbands themselves and their expectant heirs. Custom doubtless filled the gap some of the time. We know something of the widow's share on intestacy, and I have argued elsewhere that we should read the early chapters of Magna Carta as the outcome of a contested redrawing of family custom. My point, briefly put, was that a plethora of private charters during the twelfth century represent bargains driven between family members over their shares in the family property. They attest to a prolonged struggle between the conflicting claims of different family members in their various lifetime roles. Without this pre-history, the draftsmen of 1215 could hardly have struck so satisfying a balance.⁴² Over-enthusiastic endowment weakened the heir and his line. To leave a widow without adequate provision, on the other hand, disgraced both her and her kinsmen; it constituted a disparagement almost as sharp as marriage beneath one's rank. Yet it was apparently *dampnum sine iniuria*; certainly I have noticed no litigation. On the other hand, Maitland was certainly very much aware of the volume of dower litigation concerning land and the dramatic expansion of litigation on the subject from the years surrounding 1215. Recent studies have begun to bring out some very interesting patterns of development with serious social as well as legal implications.⁴³ Had Maitland chosen to approach his law here in a slightly more overtly

⁴¹ Compare Pollock and Maitland, ii 428–9 with M. M. Sheehan, *The Will in Medieval England* (Toronto, 1963), pp. 234–9. He noted women's bequests en passant, *ibid.*, ii 317, n. 5, 329, n. 1.

⁴² Hyams, 'The Charter as a source', 173 sq.

⁴³ J. Loengard, '“Of the gift of her husband”: English dower and its consequences in the year 1200', in J. Kirschner and S. F. Wimple, eds, *Women of the Medieval World: Essays in Honour of J. H. Mundy* (Oxford, 1985), pp. 215–55; *idem*, 'Legal history and the medieval Englishwoman revisited: some new directions', in J. T. Rosenthal, ed., *Medieval Women and the Sources of Medieval History* (Athens GA and London, 1990); J. Biancalana, 'For want of justice: legal reforms of Henry II', *Columbia Law Review*, 88 (1988), 433–536 at 514–34; *idem*, 'Widows at Common Law: the development of Common Law dower', *Irish Jurist*, ns 23 (1988), 255–329; S. S. Walker, ed., *Wife and Widow in Medieval England* (Ann Arbor, MI, 1993).

sociological fashion, he might well have led the way. We are after all dealing here with the consequences of the negotiations that preceded all propertied marriages, and Maitland had himself remarked on the way that Old English betrothal texts advise that the future bride's 'kinsmen... should stipulate on her behalf for an honourable treatment as wife and widow' (ii 365). Though he understood the problem, he did not alas find reason to pursue it in the Age of Bracton.

Crime is another aspect of women's legal history where Maitland's account retains the power to stimulate research today. His observation that 'by a maxim of later law' no woman can be outlawed, 'for a woman is never in law' (i 482; ii 437) is basic and somewhat shocking in its own right. Noting analogues from Scandinavian laws and on the authority of the great Brunner, Maitland hopefully suggested that this anomaly 'may point to a time' when all women were under the *mund* of some man. I can find no later scholar taking the statement up for critical examination.⁴⁴ Reasonably enough, Maitland cited no cases, for his treatise evidence seemed to make the point. As *Fleta* put it at the end of the century, waiver of a woman 'utlagarie equipollet quo ad poenam', which was the material point.⁴⁵ For *Bracton* and his followers the logic followed from the exclusion of women (and boys under twelve years of age) from frankpledge; ergo they lacked law. That the lack of law was true in this one context only did not give them pause:

Proof of a negative is always hard. Here, however, any presumption for the Age of Glanvill can be rebutted by clear proof that the outlawry of a female was rare but not unheard of in the early part of the period covered by the *History of English Law*.⁴⁶ The Common Law had a special term for a female outlaw, 'weyve', as still noted in lawyers'

⁴⁴ R. Hunnisett, *The Medieval Coroner* (Cambridge, 1961), p. 62 registers and illustrates the dictum. Cf. Hunnisett, ed., *Bedfordshire Coroners' Rolls* (Beds. Hist. Records Soc., 41, 1961), no. 338 (1386).

⁴⁵ *Fleta*, ed. H. G. Richardson and G. O. Sayles (Selden Soc., 72, 1953), p. 70. Cf. *Bracton*, f. 125b, Thorne, ii 353; *Britton*, I. xiii. 3, ed. F. M. Nichols (2 vols, Oxford, 1865), i 50. Maitland presumably knew the dictum in *The Eyre of Kent, 6 and 7 Edward II*, ed. F. W. Maitland, L. W. V. Harcourt, and W. C. Bolland (Selden Soc. Year Books of Edward II ser., Selden Soc., 24, 1910), p. 106 (15), and *BNB*, pl. 1266 (Worcs. 1238-9), which he indexed s.v. 'waif', *ibid.*, i p. 201. This last turns out to be a fascinatingly complex set of disputes; cf. *Rolls of the Justices in Eyre for Lincs. and Worcs.*, ed. D. M. Stenton (Selden Soc., 53, 1934), no. 1298; *CRR*, xiii 115 (=BNB, pl. 250); *CRR*, xvi 117S, 138B (1221, 1227, 1237-8).

⁴⁶ *PR 27 Henry II*, p. 155 (perhaps from an 1180 eyre of Belet, Murdac and Peak, *pace PKJ*, iii pp. lxiii-lxv); *29 Henry II*, p. 90 (Derby eyre of 1185). Another possible example is *PR 28 Henry II*, p. 80 (Worcester eyre 1182). The silence of *Glanvill*, bk. XIV is to be expected. For possible Anglo-Saxon outlawries of women, see below n. 55.

companions much later.⁴⁷ The first appearance of the Latin verb to 'waive' in this special sense, from 1203, seems to show the rule already fully formed; the arsonist son is outlawed and his mother 'waivetur'.⁴⁸ Its interesting extension of the existing meaning (as in 'waifs and strays', wandering beasts) looks like some lawyer's conscious neologism, and perhaps resulted from the reaffirmation of the Assize of Clarendon on frankpledge and the sheriff's tourn in 1166. Clearly there is something here still worth pursuing.

The primary purpose of outlawry was to make up for the inability of the Common Law, like most other laws in societies lacking an adequate police force, to guarantee the appearance in court to answer charges of an accused offender. Frankpledge and its associated institutions were supposed to commit respectable men to produce their adult male neighbours and dependants on such occasions. Perhaps they did when the accused was sure of acquittal. But when we can see the system in action on thirteenth-century plea rolls, the overwhelming majority were conspicuous by their absence only, and were recorded as fugitives. It can hardly have been much different in earlier ages. Outlawry was the penalty of final resort in such cases. It was especially the characteristic consequence of an appeal in which the appellee failed to answer four summonses at consecutive county courts.⁴⁹

To question the applicability of outlawry to women offenders is therefore to raise the broader, much more intriguing and equally neglected question of the degree and nature of the criminal responsibility of women at the time. Maitland said very little indeed on this subject. Apparently his reading of rolls and reports failed to raise the question for him. Almost the only relevant remark I have noticed in the *History* is his observation *en passant*, that husbands were never hanged for their wives' felonies (ii 532). Women were not in frankpledge.⁵⁰ One would not expect to find them at the sheriff's tourn, the major annual

⁴⁷ Cf. Oxford English Dictionary s.v. 'Waive' sb. and v¹ 1. Unfortunately *The Middle English Dictionary* has yet to reach the letter 'W'. An earlier sense denoting stray animals is clearly documented in the Latin dictionaries, e.g. R. E. Latham, *Revised Medieval Latin Wordlist* (Oxford, 1965).

⁴⁸ PKJ, iii no. 687 (Shrewsbury eyre 1203). It may be material to note that the junior justice sitting was Simon of Pateshull. I owe this reference and other help in the matter to Dr Richard Sharpe.

⁴⁹ This is not the place to discuss the nature of the appeal, the validity of its usual labelling as 'appeal of felony', or its origins within a culture that had yet to adopt from Roman Law a clear distinction between civil and criminal law. I hope to deal with at least some of these matters in my forthcoming book, *Rancor and Reconciliation in Medieval England*.

⁵⁰ W. A. Morris, *The Frankpledge System* (London, 1910), p. 81. Britton, I, xiii. 1 (Nichols, i 48-9) includes 'femmes' among those who swear the closely associated fidelity oath to the king.

meeting of the hundred court designed to check tithings and the whole functioning of frankpledge. But Maitland also noticed among the shrival abuses condemned in 1259 the coercion of 'mulieres' to attend the tourn.⁵¹ Again, the issue is of some significance, since tourns were occasions for much local business and the private equivalent, view of frankpledge, was among the commonest of seignorial liberties. But on the general question Maitland says nothing, and so, as usual, no one else does either!

We do have good studies of women's restricted right to bring appeals, a significant disadvantage even in the thirteenth century when male appeals were in a decline that looked likely to be terminal.⁵² There has been curiously little work on female plaintiffs in trespass and other forms of action for wrong.⁵³ Married women could, indeed had to be joined in actions for redress of wrongs to them and their husbands. Moreover their incapacity to serve on juries barred them from the other main legal means of avenging a grudge in the Age of Bracton, the provision of an indictment to a jury of presentment. They may occasionally have been the source for some of the information behind indictments, but overall their potential to obtain recourse other than through their menfolk still seems very inadequate and of sufficient significance to merit discussion in any modern *History of English Law*.

But this says nothing at all about women's criminal liability. Modern studies of women's liability to outlawry or some equivalent and of 'criminal' appeals and indictments against them are rare or non-existent. Women certainly figure among those delivered from gaols and presented by grand juries, though the numbers are small.⁵⁴ Women clearly are criminally liable in principle and law.⁵⁵ This being so, there

⁵¹ Pollock and Maitland, i 483-4, where the enactment is cited as Provisions of Westminster, c. 10. R. F. Treharne and I. J. Sanders, eds and trans, *Documents of the Baronial Movement of Reform and Rebellion, 1258-1267* (Oxford, 1973), p. 140 place it in c. 4. Most later commentators ignore the point. Two who picked it up are Morris, *Frankpledge*, p. 81 and H. Cam, *The Hundred and the Hundred Rolls* (London, 1930), p. 119.

⁵² C. A. F. Meekings, *The 1235 Surrey Eyre*, vol. I, (Surrey Record Society, 31, 1979), pp. 123-5 and J. M. Kaye, *Placita Corone* (Selden Society Suppl. Series 4, London, 1966), pp. xxix-xxxii are authorities on women's appeals. Cf. also B. A. Hanawalt, *Crime and Conflict in English Communities, 1300-1348* (Cambridge, Mass., 1979), pp. 54, 115-25, 152-4.

⁵³ The otherwise excellent investigation of early trespass of A. Harding, *The Roll of the Shropshire Eyre of 1256* (Selden Soc., 96, 1981), pp. xxxii sq. does not examine questions of gender.

⁵⁴ Information from my student Amy Phelan, who is currently at work on violence in the decades around 1300.

⁵⁵ Patrick Wormald kindly brought to my attention relevant Old English materials from his 'A handlist of Anglo-Saxon lawsuits', *ASE*, 17 (1988). In no. 75 (1012), a sister came to the aid of her brother, an ealdorman exiled for rebellion, and was for her pains herself made *exheredem*. Neither here (A. Campbell, ed., *Charters of Rochester*, London 1973, no. 33) nor

must have been process available for the attempt to secure their appearance in court, to justice the recalcitrant and to secure execution against them. Most women would be numbered within the mainpast of some male, which explains their exclusion from frankpledge. But there must have been exceptions, *femmes soles* who really were 'in their liege power' as widowed heiresses. Were accused women subject to the same rules as the men or different ones? Were they treated differently from the men (e.g. by being burned instead of hanged or having their sentences deferred for pregnancy etc.) and if so, how often? Did women, in short, combine like villeins effective civil rightlessness at Common Law with full 'criminal' liability? I do not know the answers to these really rather important questions, and if the experts do, they have yet to tell the rest of us. This looks to be the kind of inquiry into women's history that will materially advance our general understanding.

Patently, we have no reason to criticise Maitland for what he did not do here. On the contrary, he might experience some pride that his *aperçus* retain their power to provoke further study. How we should feel about questions unraised so long after the publication of the *History* is another matter.

I have one further point to make about Maitland's treatment of Women in the *History*. This is to emphasise his view of his task in essentially expository terms. His working method was top-down; he planned what he was going to say, then said it.⁵⁶ The hard-headed way he stuck to his self-imposed brief, combined perhaps with an ability to compartmentalize data in his mind, prevented him from passing on much that his wide reading of sources and literature had taught him. One can usefully illustrate this by glancing at just a few of the texts he knew and actually cited in the *History*.

Consider first, childbirth, a topic of keen importance to both the women who suffered it and the men who waited anxiously for healthy

in 'Handlist', no. 71 are either she or her husband specifically said to be outlawed. Other charters ('Handlist', nos 58, 68, 70, 72a, 73) certainly demonstrate that women were liable to forfeit lands and rights for offences committed both by themselves and their husbands, but they never refer specifically to outlawry as far as I can see. There is no reason to doubt that women were in principle subject to the same penalties, including outlawry, as their menfolk. However, the terminological laxity is striking; Maitland would certainly have remarked upon it. It surely carries important implications for our reading of related *leges*, such as *IV As.*, 3, 6, 6.4, 6.7 relating to woman thieves. I am most grateful to Mr Wormald for his guidance on these matters, even or especially where our views do not coincide.

⁵⁶ Cf. *Letters*, ii no. 174: 'According to my habit I made a rush at it [his chapter on the Anglican Settlement for the C. M. H.], writing chiefly from memory, in order that I might see the general outlines...' Milsom in *Haskins Society Journal*, 7 (forthcoming) has some good observations on this.

male heirs. Maitland might have taught us from a charter of Earl Gilbert de Gant's of the 1150s that founders' rights at the Augustinian priory of Bridlington extended to hospitality for their patron's wife when she was ready to give birth. Gilbert promised that he would take the habit there if anywhere and that he would be buried there where he was born and brought up.⁵⁷ Neither the apparent right nor the fact that male monks perhaps attended the woman in her labour rather than women was, however, enough to persuade Maitland to quote more than a few lines of the document.

My other childbirth text appears in the context of curtesy, the custom by which a widower might enjoy his deceased wife's lands for his lifetime, if and only if he had sired a live child by her. The required evidence, Maitland described as 'this quaint demand for a cry within four walls'.⁵⁸ The 1277 holding he cited in support (ii 416) is worth quoting at length. The husband in the case failed

because women are not admitted to make any inquisition in the king's court, and (because) the court cannot be sure whether the boy was born alive or not unless he was seen by males or heard by them calling out, and (because) he was never seen by males nor could be, because it is not permitted that males be present at *secreta* of this kind.

It is manifestly clear that this dictum is of at least as much legal interest as the discussion of the nature of the four walls which was perhaps responsible for its exclusion from the book. Contemporary interest in the definition of separate spheres by gender needs no emphasis.⁵⁹

One more text demands admission at this point. It relates to the crime of rape and the requirements for pardon in homicide cases. In 1259 a woman was presented for killing a would-be rapist with her knife. She had already fled, presumably in the fear that her plea of self-defence might commend itself no better to thirteenth-century justices than it has on occasion to their twentieth-century successors. Her father, however, by a proffer of 40/- to the justices secured her return to the peace together with a promise that the justices would speak to the king on her behalf. The outcome of this case is unknown.⁶⁰ The issue of self-defence which must have been at its core is a very emotive one in our own day. Women's advocates argue with some force that

⁵⁷ EYC, ii no. 1138 (1150/56), cited Pollock and Maitland, ii 325 from the *Monasticon*.

⁵⁸ He was already intrigued by the 'four walls' problem in 1880, *Letters*, ii no. 3.

⁵⁹ Another case cited Pollock and Maitland, ii 399 illustrates a related matter. It shows that sometimes women not only delivered the child but also arranged his baptism and naming, all presumably in the father's absence. Names were important enough that contemporaries would, one imagines, have been shocked by this, even with a babe not expected to live.

⁶⁰ Pollock and Maitland, ii 479 n. 2. N. D. Hurnard, *The King's Pardon for Homicide Before A.D. 1307* (Oxford, 1969), the standard work on the subject, did not notice this case.

the criteria that underlie the definition of crimes of violence including rape and the defences permitted in them assume a male pattern of aggression which may not be, and in some instances demonstrably is not, applicable to women.⁶¹ There is a *prima facie* case to pursue here, and the trail leads back into our and Maitland's period. We know that statutory definitions of crime began only at the very end of the thirteenth century.⁶² Before then, offences (to call them crime is in a serious sense anachronistic) were customary in that they were what judges and juries thought they were, when convicting or acquitting. Many of these definitions, generated in a fashion at which we can only guess blindly, lasted on into Maitland's day with very little modification. If male jurors understood self-defence in terms of reasonable male behaviour patterns, who can blame them? Maitland's presentment is evocative in that it just might, in a more precedent-sensitive system than the thirteenth-century pleas of the crown contained, have led to a rape defence rule less inappropriate to the needs of complainants. I for one would much like to know whether this was the only father able to save his daughter from death or exile by a personal intervention.

I doubt that any of this would have surprised my contemporary, Maitland. He had, of course, read the texts to which I refer, and would certainly have taken on board more of their wider implications perhaps than I can. My suggestions are simply not the kind that he set out to make in the *History* or, for the most part, anywhere else in print. This is in the end an index of his very Victorian character. Each of us too can expect to be outflanked in our turn as historical change outdistances our creeds. I offer one final illustration both as further confirmation and to serve as a bridge to the next section. Maitland very happily discussed, again without moral or other comment on the implications for the women themselves, marriage controls on villeins (the deliberately nasty custom of *merchet*) as a restriction on male rights of disposal over their womenfolk (ii 372–3). Maitland did not see it as any part of his task to try to view through female eyes the system of villeinage to which I now turn.⁶³

⁶¹ I find the account of this matter in Anne Campbell, *Men, Women and Aggression* (New York, 1993), chs 6–7 very compelling.

⁶² A. Harding, 'The origins of the crime of conspiracy', *TRHS*, 5th ser. 33 (1983), 89–108.

⁶³ For seignorial control over the marriage of heiresses at a higher social level, see Pollock and Maitland, i 318–21.

Rich Man, Poor Man, Serf and Villein

There is no question that Maitland was acutely sensitive to the protection of free subjects from the arbitrary treatment that accompanied tyranny and servility. This was for him a major function of law, the very glory of our Common Law. This liberal believed in firm government and legislative simplicity as the best guarantees of Anglo-Saxon freedoms.⁶⁴ Law conferred liberty; the law as an instrument of oppression was not a theme that slid easily from his pen. Hence when he mentions the processual origins of the phrase Habeas Corpus,⁶⁵ he hopes that this may promote 'our interest in the liberty of the subject' (ii 586). And when he remarks as from a lofty height that 'no law . . . has ever been able to ignore the economic stratification of society' (ii 533), his point was not the difficulty of protecting the poor against the rich and powerful. It addressed the problem posed for king and legal system by overmighty families like those referred to in Athelstan's laws or for that matter the commercial magnates, the Melmottes, of his own day. He was commenting on the scope of the doctrine 'Respondeat superior', not protection for the powerless.

In fact he evinces throughout rather little interest in the way that power relations worked through the courts as opposed to the courts' work to impose and maintain peace and order. This is curious in a way. He had a better sense of the raw fear which Norman and Angevin kings sometimes cast on their subjects than many moderns. But still he bequeathed us here a weakness not yet fully remedied. Professor Milsom has indeed shown us how the injection of lordship and social stratification into twelfth-century legal history changes our whole picture of the early Common Law.⁶⁶ What has been done to document the power of wealth in the Age of Bracton, however, remains little enough to surprise colleagues from other historical periods.⁶⁷ We still await, for example, a study of the real meaning of the myriad proffers, routine and otherwise, so lovingly recorded on pipe, oblate and fine rolls. When is a bribe not a bribe, the outside observer must wonder?⁶⁸ Maitland palpably understates the clout of the powerful and the pull of money within his beloved Common Law.

⁶⁴ Pollock and Maitland, i 135, 406; ii 274, 631. My friend David Eastwood contends that this combination of libertarian views with central direction is much more characteristic of Victorian liberalism than popular belief would have it.

⁶⁵ On which see Paul Brand above pp. 71-2.

⁶⁶ Milsom, *Legal Framework*.

⁶⁷ One laudable exception, R. V. Turner, *The King and his Courts, 1199-1240* (Ithaca NY, 1968), primarily documents royal power-mongering.

⁶⁸ See J. T. Noonan jr., *Bribes* (New York, 1984).

With no hint in his writings of any interest in Marx, class was for him neither a tool nor a topic for treatment. He certainly knew enough to situate himself socially, though. His letters show him meticulous about the proper forms of address, including titles for his correspondents. He was quick to congratulate recipients on honours and preferments. We should be getting him wrong to infer any serious radicalism from the occasionally ironical references to peers. Though himself a modest landowner, a distinction whose significance a Gloucestershire neighbour once brought home fairly brutally to his wife, he never gained genuine financial security. Even so, he lived a good middle-class Victorian life in houses of comfortable dimensions and furnishing, predicated upon the uncriticised existence of servants. He never once speaks in his letters about paupers or the slums in which they dwelt.⁶⁹

None of this diminishes his account of villeinage law, which remains serviceable today. Its strength is his firm recognition that villeinage is a lawyers' artefact. He foresees in part (i 360), and would clearly have no difficulty with, my hypothesis of an Angevin origin for the doctrine as an unintended by-product of the Common Law's own birth.⁷⁰ Nor, I feel sure, would he have experienced any difficulty with the analytical distinction between 'serfdom' (as the answer to socio-economic questions) and 'villeinage' (answering good lawyer's questions) on which my exposition stands.⁷¹ Maitland grasped that Common Law villeinage had quite significant implications for the whole legal system, and might almost serve as a test of its character during that first period of its existence.

Villeinage is a subject that well illustrates Maitland's feel for the concrete. The passage in which he sought to show the physical reality behind the legal definition of the manor (i 596 sq.) is one really rather extraordinary example.⁷² His knowledge of manorial court rolls and other records enable him to relate Common Law doctrine to the manorial context in which the dramas mostly played out. By this I mean less the conflicts of everyday life than the realities of the power

⁶⁹ I base these impressions mostly on the two volumes of *Letters*. For the Gloucestershire manor and the revealing snub made in ignorance of it, see Fifoot, *Life*, pp. 171 sq., *Letters*, ii, pp. 3-4 examines finances. I fancy that G. Raverat, *Period Piece: a Cambridge Childhood* (London, 1960), esp. ch. VI 'Propriety' might be a good place to start a real attempt to place Maitland socially.

⁷⁰ I refer to my own *King, Lords, and Peasants*, ch. 13.

⁷¹ *Ibid.*, pp. vii, 232-3.

⁷² Compare this with Pollock and Maitland, i 168, surely a most odd use for time-travel!

balance in the manor court itself.⁷³ He saw well how the content of custom turned on who controlled the court that administered it.

It apparently amused him to illustrate the way the doctrine of villeinage encouraged lords to treat their peasants as human property, 'agricultural capital', even an incorporeal hereditament, but not, as he dryly observes, an object that could be stolen (ii 145, 150, 363, 499)! Although he sees with lawyer's eyes that the crux of the system is the very limited extent to which a villein had rights (by which he mostly meant rights enforceable at Common Law), he also understands that tenure has much more practical importance than status. He locates the institution's conceptual essence in the lord's desire for cheap labour. In identifying 'certainty' as the significant test (i 369-76) — the serf with his obligation to labour for his lord always knows for certain in the evening what he must do the next day, and the week after Hocketide too — he is only partly right as to the developing law. Yet a comparison of his account with that of Vinogradoff, who is the source of most of its ideas, leaves the reader in no doubt as to the superiority of Maitland's intellect and analytical abilities.⁷⁴

The law of villein status he brilliantly reconstructs after *Bracton* on the basis of seisin. For *Bracton*, and the lawyers who imbibed his view from Edward I's day on,⁷⁵ the villein was free as regards everyone save his lord. The disabilities thus bit less deep, a fact that is perhaps underrated in accounts of the eventual and much later disappearance of serfdom.

It is surely legitimate to ask once more what he may have thought about all this. Villeinage law remains, when all is said and done, a doctrine designed to curtail not just the rights but the humanity of one very large portion of the population in the interests of another very small minority. We can detect through the lawyer's inscrutable objectivity hints of moral criticism. He distances himself and his reader from the system with the timely reminder that 'the religion of the time saw nothing wrong' with the exploitation of serfs (i 77, 379). He reminds his reader that *Bracton* used 'the worst word he had got' to denote

⁷³ There has been remarkably little empirical study of the balance of power between lord and villagers in 'their' court since Maitland's day. I discount the assertions, made on the basis of one ideology or another, of seignorial oppression or the manor as the villagers' court. See very briefly *King, Lords, and Peasants*, pp. 49-50.

⁷⁴ See on all this *King, Lords, and Peasants*, chs 8 (iii), 11. Maitland read and praised P. Vinogradoff, *Villainage in England* (Oxford, 1892), but for purpose of comparison his essay on 'Agricultural Services', reprinted in his own *Collected Papers* (Oxford, 1928), i ch. III is still more enlightening.

⁷⁵ I underestimated the eventual triumph of the Bractonian 'relativity of villeinage' view in *King, Lords, and Peasants*.

villeins, the same word as for chattel slaves (i 412), and very possibly exaggerates the nastiness of the word 'sequela' as used for the villein's 'brood', or issue (i 381).⁷⁶ That the liberal should show his colours in this context more than elsewhere is quite understandable. Slavery was in his day an issue far more live than it seems now, and had within the memory of Maitland himself been a fiercely disputed one in his own circles.⁷⁷

My own preference is to cast my moral gaze in a slightly different direction. Villeinage being hereditary, it seems appropriate to analyse it for once from the viewpoint of the women from whose bellies villeins emerged. I have recently tried to do this.⁷⁸ My most spectacular if hesitant finding was the almost complete absence of the sexual exploitation of female villeins by their lords. This is in sharp contrast to what we are told, for example, about slavery in ante-bellum America. I had expected to find some evidence at least, and had in my doctoral days made a vigorous and prurient search for the reality behind the *Ius primae noctis*. I found nothing of substance, and I think I now understand the reason. Lords, who were in any case mostly resident far from the manor, possessed too little actual control over the physical persons of their villeins to have much opportunity. In other words, even the serfdom behind legal villeinage is very different from slavery. This, if I am right, and the point is so unwelcome to some as to be heavily disputed, is an interesting conclusion to say the least, though one that might easily have been reached by a less sordid route. And if serfdom is not slavery, Maitland, the good Victorian liberal, is similarly no emotional twentieth-century do-gooder.

Heretics, Homosexuals, Maitland, and the 'rest of us'

In this paper, I have chosen to focus on a rather miscellaneous set of social groups with little in common beyond their imperfect represen-

⁷⁶ The alternative form 'secta' suggests to me a less emotive reading. *Sequela* is certainly found in more respectable contexts than the famous clause of Magna Carta. W. Croft Dickinson, 'What were *Sequels*?', *Juridical Review*, 52 (1940), 117-25, an article Maitland would have enjoyed, neatly illustrates the point from Scotland, where breweries could have their *sequela*. A villein's children follow him in his hereditary obligations, much as other tenants must do suit to mill or court as a function of their tenure. *Letters*, i no. 422 suggests that Maitland might not have been too hard to persuade.

⁷⁷ Cf. *Letters*, i no. 86; Pollock and Maitland, i 430 n. 2.

⁷⁸ I presented my arguments in a Ralph Karrhas Lecture at the College of Law, Syracuse in December 1994 under the portentous title 'Toward a Feminist View of Common-Law Villeinage', and earlier in less developed versions to audiences at Harvard Law School and the International Medieval Studies Congress at Kalamazoo, MI.

tation by the mainstream of English law. I set out to learn something of Maitland and his approach to law by scrutinizing the Law's border territory. This is not, it is true, the best route to a full understanding of the subject's heartland. Outlawry, to give only an example already used, obviously does define a certain aspect of that law which it withdraws from its object. But no study of outlawry can convey much of the richness and potential of the Common Law or any other legal system. Even so, I feel that I at least have learned something new from writing this paper both about Maitland and the law that unites us.

I should hate to end on any note of disrespect or unfairness to a great man. Historical characters, as Maitland now assuredly is, were what they were in their lifetime. That they were not as we should like to be *now* is not just beside the point; it is literally pointless. I therefore close with some reflections on the territory as our man saw it in his still great *History*. Maitland made no bones about his position despite all the reservations with which he habitually clothed his uncertainties. Law was a good thing. On the whole the more of it a people enjoyed, the better it fared. He looked down upon his law from the highest pinnacle of its capital city, in the way a legislator might, or at least through the eyes of judge and jurist. He identified most of the time with those who purveyed its benefits, peace and prosperity, much less with 'the rest of us' at the receiving end, rather more often sharp and painful than comforting.⁷⁹

The legal borderland, or marcher areas, which I have surveyed here, exist only in an outwards perspective proceeding from the nation and its capital. It is thus natural and very forgivable in a way that Maitland should expend but little of that enviable stock of intellectual energy and creativity on the effort to empathise with Women or Jews or the 'Lower Classes'. This was just not his thing. And that is why the real borderers, as it were, make such brief entries onto his scene.⁸⁰

My final subject doublet offers an instructive contrast. I referred to Maitland at the outset as an insider figure. Like many of us, he liked to think of himself more as a sceptic and maverick. He had had hopes of becoming, in the nicest possible way, a reforming thorn to prick the establishment of his younger days on its proper road. Something of this must explain why he allotted nearly ten pages of his second volume to heresy (ii 534–52). Why so lavish? To all intents and purposes, medieval England had no heresy; heresy presented few or no pressing

⁷⁹ See above n. 1 for telling remark to Dicey.

⁸⁰ Women are a partial exception, due to their inevitable involvement in marriage, a matter whose legal consequences to men and property were undeniable.

problems to practising English lawyers, canon or common. Of course, the topic gave him licence to expatiate on one of his favourite leit-motivs, the situation of the English Church squarely within the canonical legal culture of a western Christendom that had constructed for itself very good reasons to think hard about heresy. But Maitland is less objective here than elsewhere; his sympathies are throughout thoroughly on the heretic's side. It is hardly too much to discern a self-identification as heretic, which it is amusing to compare with that of his most acute critic two generations later.⁸¹ He even went out of his way and beyond his period by much the same two generations to express 'some satisfaction' at the fate suffered by a fourteenth-century Franciscan heresy-hunter who found himself accused in his turn (ii 549–50).

Contrast, if you will, this favour to heresy with the miserable paragraph grudgingly permitted to something entitled 'Unnatural Crime' quite close by (ii 556–7). This he glosses unhelpfully in the text as 'the crime against nature', secure in the confidence that his readership would neither require nor wish for further detail. The major point he makes is probably correct. He reads the 1553 statute on the subject as an indication that the various authorities took little interest in prosecution of the offence during the later middle ages.⁸²

We may recall that 1895 was not just the year that saw the publication of the first edition of Pollock and Maitland and a new periodical called *The American Historical Review*.⁸³ It was also, to most people more obviously, the year of the trials of Mr Oscar Wilde, among various 'headline' events. This ought to give Maitland's readers pause. One is bound to be struck by the total absence from our man's letters and other papers not just of the whole Decadence phenomenon of the

⁸¹ See Milsom in Pollock and Maitland (1968 reissue), i pp. xxv, xxvii, lxxiii. Several of the symposium participants gave eloquent personal testimony to the continuing attractions to intellectuals of the heretic persona in a society that conducts no burnings! See further *Letters*, i no. 337; *Letters*, ii no. 251 and *Collected Papers*, iii 191–2.

⁸² The account of the treatment of homosexuals in medieval laws and culture in R. I. Moore, *The Formation of a Persecuting Society* (Oxford, 1987) may usefully be compared with the independent and intelligent summary of recent literature in S. Katz, *The Holocaust in Historical Context*, vol. I (Oxford, 1994). There is precious little indication of Maitland's own feelings on this subject beyond tiny scraps such as those in *Letters*, i p. 337 n. 3, *Letters*, ii no. 282.

⁸³ The rambling review of Pollock and Maitland by M. M. Bigelow, *American Historical Review*, 1 (1895), 112–20 is not mentioned in 'History language, and reading: waiting for Crillon', contributed to the anniversary issue *ibid.* 100 (1995), 799–828 by my Cornell colleague, Dominick LaCapra.

'naughty nineties' but of virtually every other stirring happening in his lifetime, war and politics excepted.⁸⁴

Let us compare him briefly to a fictional contemporary, Ibsen's 'Enemy of the People'. Can anyone seriously believe that Frederic William Maitland would have taken up any cause so sordid and unpopular as public hygiene and the provision of sewers? Would he ever have situated himself so far ahead of the respectable opinion of the day as to constitute a minority of one? Surely not.

Were he to return to us today from Clio's compound in Elysium, he would at once regain his rightful place as our intellectual peer and superior. He would reign once more as the last surviving Founding Fellow of the British Academy, the 'Tribe of Israel' as he liked to call it.⁸⁵ He would devour with genuine enjoyment the legal history written since his time, to castigate its gaps and failings politely and without mercy. He would be enthralled, astounded and horrified by much that he saw.⁸⁶

I imagine that he would be much keener to read all than to see all. He would not, I should wager, press to be permitted to join the throbbing, multicultural crowds at, say the Notting Hill Carnival or a Lords Test Match. Yet historians have something to learn from every quarter of their culture, even from the least unlikely corners. Lords or the Notting Hill Carnival might have helped in the understanding of one passage cited from the early thirteenth-century Civilian, Azo, on the supposed etymology of the Latin word 'Pactum', meaning agreement: '... vel dicitur [pactum] a percussione palmarum; veteres enim consentientes, palmas ad invicem percutiebant in signum non violandae fidei.' Maitland's understanding of this as 'that mutual grasp of hands ... whereby men were wont to bind a bargain' must be an error. It is not possible to read *percussio* as part of any gentlemanly handshake. It makes much more sense as part of the grand, percussive gesture of the 'high (or low) five' with which Afro-Caribbean Britons

⁸⁴ Maitland's letters are a very incomplete source for his interests. Many are business communications. Very few are personal, as one can see from the fact one alone in *Letters*, ii is to a first-name correspondent; see *ibid.*, no. 275. (I owe this observation to John Gillingham.) I am well aware of the great need for expert guidance as to what one may legitimately deduce from the content of such letters at this time, but have nevertheless used the letters heavily.

⁸⁵ *Letters*, i nos 353, 372.

⁸⁶ I like to think that he might be less puzzled than we are by Russia, having missed both 1917 and 1989.

and their African-American fellows have enriched our culture.⁸⁷ This trivial slip may well serve as an apt if unfair symbol of the distance that now divides our divine contemporary, Maitland, from 'the rest of us' today.⁸⁸

⁸⁷ Pollock and Maitland, ii 194 cited Azo, *Summa Codicis*, tit. de pactis (2, 3); cf. *ibid.*, 189–90. D. Ibbetson, 'From Property to Contract: the transformation of sale in the Middle Ages', *Journal of Legal History*, 13 (1992), 1–22, esp. 5–6; Mr Ibbetson is certainly right to doubt that the Civilian 'five' was as high and enthusiastic as today's tastes dictate.

⁸⁸ I should like to remember here an old tutor, Lady Rosalind Clay, to whom I owe my copy of Pollock and Maitland. I also wish to thank Professor Reba Soffer, author of the fine forthcoming volume on *Discipline and Power: the University, History and the Making of an English Elite, 1870–1930* (Stanford U. P., 1995) for much help (including a copy of page proofs) and encouragement.

Abbreviations

- ANS — *Proceedings of the Battle Conference on Anglo-Norman Studies*.
 ASC — *Anglo-Saxon Chronicle*.
 ASE — *Anglo-Saxon England*.
 (BI)HR — (*Bulletin of the Institute of Historical Research*).
 BL — British Library
 BN — Bibliothèque Nationale.
 Bracton, Thorne — *Bracton De Legibus et Consuetudinibus Angliae*, ed. & trans S. E. Thorne (4 vols, Cambridge, Mass., 1968–77).
 BNB — *Bracton's Note Book*, ed. F. W. Maitland (3 vols, London, 1887).
 CLJ — *Cambridge Law Journal*
 CMA — *Chronicon Monasterii de Abingdon*, ed. J. Stevenson (2 vols, London, 1858).
 Collected Papers — H. A. L. Fisher, ed., *The Collected Papers of Frederic William Maitland* (3 vols, Cambridge, 1911).
 CRR — *Curia Regis Rolls* (HMSO, 1922–).
 DB — *Domesday Book seu Liber Censualis Wilhelmi Primi Regis Angliae*, ed. A. Farley and H. Ellis (4 vols, London, 1783, 1816).
 Dialogus — Richard FitzNigel, *Dialogus de Scaccario*, ed. & trans C. Johnson, rev. F. E. L. Carter & D. E. Greenway (Oxford, 1983).
 Domesday Book and Beyond — F. W. Maitland, *Domesday Book and Beyond* (repr. with Foreword by J. C. Holt, Cambridge, 1987).
 EHR — *English Historical Review*
 Elton, Maitland — G. R. Elton, *F. W. Maitland* (London, 1985)
 English Lawsuits — *English Lawsuits from William I to Richard I*, ed. R. C. van Caenegem (2 vols, Selden Soc., 106, 107, 1990–1).
 EYC — *Early Yorkshire Charters*, vols. I–III, ed. W. Farrer (Edinburgh, 1914–16); index to vols. I–III, ed. C. T. & E. M. Clay; vols. IV–XII, ed. C. T. Clay (Yorks. Arch. Soc. Rec. Ser. Extra Ser., 1935–65).
 Fauroux, Recueil — *Recueil des actes des ducs de Normandie*, ed. M. Fauroux (Mémoires de la société des antiquaires de Normandie, 26, Caen, 1961).
 Fifoot, Life — C. H. S. Fifoot, *Frederic William Maitland: a Life* (Cambridge, Mass., 1971).
 Garnett and Hudson, Law and Government — G. S. Garnett and J. G. H. Hudson, eds, *Law and Government in Medieval England and Normandy: Essays in Honour of Sir James Holt* (Cambridge, 1994).
 Gervase — Gervase of Canterbury, *The Historical Works of Gervase of Canterbury*, ed. W. Stubbs (2 vols, London, 1879–80).
 Gesetze — *Die Gesetze der Angelsachsen*, ed. F. Liebermann, (3 vols, Halle, 1903–16).

- Gierke — F. W. Maitland, trans, *Political Theories of the Middle Age*, by Otto Gierke (Cambridge, 1900).
- Glanvill, Hall — *Tractatus de Legibus et Consuetudinibus Regni Anglie qui Glanvilla vocatur*, ed. and trans G. D. G. Hall (Edinburgh, 1965).
- Holt, *Magna Carta* — J. C. Holt, *Magna Carta* (2nd edn, Cambridge, 1992).
- JMH — *Journal of Medieval History*.
- Letters, i — C. H. S. Fifoot, ed., *The Letters of Frederic William Maitland*, vol. i (Selden Soc., Supplementary Ser., 1, 1965).
- Letters, ii — P. N. R. Zutshi, ed., *The Letters of Frederic William Maitland*, vol. ii (Selden Soc., Supplementary Ser., 11, 1995).
- Letters to George Neilson — F. W. Maitland. *Letters to George Neilson*, ed. E. L. G. Stones (Glasgow, 1976).
- LHP, Downer — *Leges Henrici Primi*, ed. & trans L. J. Downer (Oxford, 1972).
- LQR — *Law Quarterly Review*
- Maitland, *Constitutional History* — F. W. Maitland, *The Constitutional History of England* (Cambridge, 1908).
- MGH — *Monumenta Germaniae Historica*.
- Milsom, *Legal Framework* — S. F. C. Milsom, *The Legal Framework of English Feudalism* (Cambridge, 1976).
- ns — New Series
- PBA — *Proceedings of the British Academy*.
- PKJ — *Pleas before the King or his Justices, 1198–1202*, ed. D. M. Stenton (4 vols, Selden Soc., 67, 68, 83, 84, 1952–67).
- Pollock and Maitland — Sir Frederick Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I* (2 vols, 2nd edn reissued with a new introduction and select bibliography by S. F. C. Milsom, Cambridge, 1968).
- PP — *Past and Present*.
- PR — *Pipe Rolls*
- PRO — Public Record Office
- PRS — Pipe Roll Society
- RCR — *Rotuli Curiae Regis. Rolls and Records of the Court held before the King's Justiciars or Justices*, ed. F. Palgrave (2 vols, Record Commission, 1835).
- Reading Cartularies — *Reading Abbey Cartularies*, ed. B. R. Kemp, (2 vols, Camden Soc., 4th Ser. 31, 33, 1986, 1987).
- Reg. Ant. Linc. — *The Registrum Antiquissimum of the Cathedral Church of Lincoln*, ed. C. W. Foster and K. Major (10 vols, Lincoln Rec. Soc., 1931–73).
- RRAN — *Regesta Regum Anglo-Normannorum, 1066–1154*, ed. H. W. C. Davis *et al.* (4 vols, Oxford, 1913–69).
- S — P. H. Sawyer, *Anglo-Saxon Charters: an Annotated List and Bibliography* (London, 1968).
- Stenton, *English Feudalism* — F. M. Stenton, *The First Century of English Feudalism 1066–1166* (2nd edn, Oxford, 1961).
- Stubbs, *Charters* — *Select Charters and other Illustrations of English Constitutional History*, ed. W. Stubbs (9th edn, Oxford, 1913).
- TRHS — *Transactions of the Royal Historical Society*
- VCH — *Victoria County History*