

Maitland on Family and Kinship

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'Individuals do not cease to be individuals when there are many of them.'¹

ALTHOUGH FREDERIC WILLIAM MAITLAND DISCUSSED the medieval family in the *History of English Law* and produced some brilliantly polemical passages about it, he should not be mistaken for an historian of the family. He did not perpetuate the earlier form of family history that other lawyers had invented, according to Engels, at the beginning of the 1860s.² Nor does Maitland's work in legal history clearly foreshadow the newer kinds of family history that have been created since the 1960s.³ On the one hand, he discussed few of the topics that later assumed canonical status in the field of family history, where, in an era of self-consciously interdisciplinary research and *histoire totale*, legal historians of family institutions were joined by historical demographers, economic and social historians, analysts and psychoanalysts of familiar *mentalités*, historical geographers of the body, and historians of gender, aging, childhood, sex, and family violence; and although he was much

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¹ Pollock and Maitland, ii 247.

² Frederick Engels, *The Origin of the Family, Private Property and the State* (New York, 1942), Preface to the 4th ed. (1891), p. 7. For the reference and for insights into old and new forms of family history, I am indebted to Cynthia Patterson, *The Family in Greek History* (Cambridge, Mass., forthcoming). Beginning in 1861 with the publication of Maine's *Ancient Law* and Johannes Bachofen's *Das Mutterrecht*, "sociological" monographs' forming a 'branch of legal studies' and positing 'a direct progression from primitive society through various intermediate stages to modern society' treated the history of the family (Adam Kuper, *The Invention of Primitive Society: Transformations and Illusions* [London, 1988], pp. 2-3).

³ On work of this kind, see e.g. Lawrence Stone, 'Family history in the 1980s: past achievements and future trends', *Journal of Interdisciplinary History*, 12 (1981), 51-87; and Robert Wheaton, 'Introduction: recent trends in the historical study of the French family', in Robert Wheaton and Tamara K. Hareven, eds., *Family and Sexuality in French History* (Philadelphia, 1980), pp. 3-25; and Louise Tilly and Miriam Cohen, 'Does the family have a history? A review of theory and practice in family history', *Social Science History*, 6 (1982), 131-80. The history of medieval English peasant families is explored from many different perspectives in Barbara A. Hannawalt, *The Ties that Bind: Peasant Families in Medieval England* (New York, 1986).

better positioned, in terms of knowledge and interest, to anticipate modern studies on such topic as 'feudal society and the family in early medieval England', he never addressed this topic directly.⁴ On the other hand, writing shortly after the deaths of old-style historians of the family, such as Morgan (d. 1881), Bachofen (d. 1887), Maine (d. 1888), and Fustel de Coulanges (d. 1889), Maitland did not directly engage in what he called 'those interesting controversies about primitive tribes and savage families', which had arisen out of his predecessors' efforts to chart the family's evolution over the prehistoric or barely historic *longue durée*.⁵ Instead of either contributing to an old history of the family or helping to construct a new one, Maitland deployed a distinctive style of legal analysis to contest and undermine what he considered to be dogmas, theories, and common-places about the early history of the family. As a legal historian who was sceptical about whether the medieval English family really had much of a legal history, he was interested less in what medieval kinship groups were, what they did, or what their members thought they should be and do than he was in what they were not, what they did not do, and what the law did not allow them to be or do.

In discussing the family in the *History of English Law*, Maitland had one overriding polemical purpose, which was to contest the

⁴See J. C. Holt, 'Feudal society and the family in early medieval England: I. The revolution of 1066', *TRHS*, 5th ser. 32 (1982), 193–212; id., 'Feudal society and the family in early medieval England: II. Notions of patrimony', *TRHS*, 5th ser. 33 (1983), 193–220; id., 'Feudal society and the family in early medieval England: III. Patronage and politics', *TRHS*, 5th ser. 34 (1984), 1–25. See also id., 'What's in a name: Family nomenclature and the Norman conquest', The Stenton Lecture 1981 (University of Reading, 1982); and id., 'Politics and property in early medieval England', *PP*, 57 (1972), 3–52. On the same topic, see Sidney Painter, 'The family and the feudal system in twelfth-century England', *Speculum*, 35 (1960), 1–16, reprinted in id., *Feudalism and Liberty: Articles and Addresses of Sidney Painter*, ed. Fred A. Cazel, Jr. (Baltimore, 1961), pp. 195–219. The last decade has seen the publication of numerous studies linking English family history and legal history.

⁵Pollock and Maitland, ii 240. Discussions of Maine include: R. C. J. Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence* (Cambridge, 1988); Stefan Collini, Donald Winch and John Burrow, *That Noble Science of Politics: A Study of Nineteenth-Century Intellectual History* (Cambridge, 1983), esp. ch. 7; Stefan Collini, *Public Moralists: Political Thought and Intellectual Life in Britain, 1850–1930* (Oxford, 1991), esp. ch. 7; John Burrow, *Evolution and Society: A Study in Victorian Social Theory* (Cambridge, 1966); id., '"The Village Community" and the uses of history in late nineteenth-century England', in Neil McKendrick, ed., *Historical Perspectives: Studies in English Thought and Society in Honour of J. H. Plumb* (London, 1974), pp. 255–84; Peter Stein, *Legal Evolution: The Story of an Idea* (Cambridge, 1980), esp. pp. 86–98; G. Feaver, *From Status to Contract* (London, 1969); Kuper, *Invention of Primitive Society*, esp. chs 1–2. On Morgan, see T. R. Trautman, *Lewis Henry Morgan and the Invention of Kinship* (Berkeley, 1987); Kuper, *Invention of Primitive Society*, ch. 3. On Fustel de Coulanges, see François Hartog, *Le XIXe siècle et l'histoire: le cas Fustel de Coulanges* (Paris, 1988); and Fustel de Coulanges, *The Origin of Property in Land*, trans Margaret Ashley (2nd ed., London, 1927).

'common-place among English writers', notably Maine, that 'the family rather than the individual was the "unit" of ancient law.'⁶ 'There are some', Maitland later wrote in *Township and Borough*,

who would have us believe that groups, families, clans, rather than individual men, were the oldest 'units' of law: that there was law for groups long before there was law for individuals. In the earliest stage, we are told, all is 'collective.' Neither crime nor debt, neither property nor marriage nor paternity can be ascribed to the individual. Far [sic] rather the group itself, the clan or family, is the one and only subject of rights and duties.⁷

Although Maitland saw in this argument 'a laudable reaction against the individualism of Natural Law',⁸ he also called the thesis 'extravagant', treating it as dogma to be aggressively refuted and totally reversed.⁹ In the *History of English Law*, he wrote, 'The student of the middle ages will at first sight see communalism everywhere. It seems to be an all pervading principle . . . A little experience will make him distrust this communalism; he will begin to regard it as the thin cloak of a rough and rude individualism.'¹⁰ Determined to find a single 'all-pervading principle' of early English law and denying that role to communalism, Maitland chose what Vinogradoff later called 'anti-quarian individualism'.¹¹ Just as in *Domesday Book and Beyond* he contested earlier theories about the village community by arguing that 'so far back as we can see, the German village had a solid core of individualism',¹² he tried in the *History of English Law* to refute

⁶ Pollock and Maitland, ii 240.

⁷ F. W. Maitland, *Township and Borough* (1894; reprinted Cambridge, 1964), pp. 20-1. On Maitland's criticisms of Maine, see H. E. Bell, *Maitland: A Critical Examination and Assessment* (Cambridge, Mass., 1965), pp. 75-7; Stein, *Legal Evolution*, pp. 106-10; Cocks, *Maine*, pp. 142-5 and 145 n. 1; Burrow, 'Village Community', pp. 275-83; and id., *Whigs and Liberals: Continuity and Change in English Political Thought* (Oxford, 1988), pp. 135-45. According to Stein, 'Vinogradoff accepted Maitland's general criticism of Maine, but believed that Maine's comparative historical method was still valid' (*Legal Evolution*, p. 116).

⁸ *Township and Borough*, p. 21. According to Burrow, 'Maine was concerned at various points in his writings to refute the notion, which he associated primarily with Rousseau, and seems to have seen as dangerously democratic, of an original state of nature and individual natural rights' ('Village Community', p. 271). See also Kuper, *Invention of Primitive Society*, pp. 17, 25, 231, 241.

⁹ 'It is quite possible that . . .' (Pollock and Maitland, ii 243); 'That there is truth in this saying we are very far from denying' (ibid., ii 240).

¹⁰ Ibid., i 616.

¹¹ 'Maitland's antiquarian individualism brought him into collision with the teaching about tribal as well as about agrarian communities' (Paul Vinogradoff, 'Frederic William Maitland', in *The Collected Papers of Paul Vinogradoff*, 2 vols. [London, 1928], i 259.)

¹² *Domesday Book and Beyond*, p. 348. For a lucid, contextualized account of Maitland's views on this subject, see Burrow, 'Village Community', esp. pp. 275-83. See also Reba N. Soffer, *Discipline and Power: The University, History, and the Making of an English Elite, 1870-1930* (Stanford, CA, 1994), ch. 3.

Maine's teachings by finding 'rough and rude individualism' in the family, which was not, he insisted, a 'group-unit' — that is a corporate group.¹³ Maitland's 'antiquarian individualism' also supported an even broader argument, in which, as Professor Burrow has shown, Maitland reversed 'a famous judgment' of Maine's by proposing that 'while the individual is the unit of ancient, the corporation is the unit of modern law.'¹⁴ This polemical agenda deeply coloured Maitland's arguments about the medieval family, which were constructed less for the purpose of creating a comprehensive legal ethnography of the medieval family than they were for the purpose of refuting Maine's dogmas.

Although Maitland attacked those teachings as the products of dogmatic, undocumentable speculation and searched diligently for texts that would document his own conclusions about early English family law,¹⁵ his own readings of texts were mediated by several interrelated interpretive strategies or schemas that helped him to argue that the English family was not a 'group-unit', could never have been the unit of early English law, and, instead, occupied a marginal position in medieval English society. Maitland achieved his polemical goal by abandoning the comparative method that Maine had used in melding evidence about many 'Indo-European societies' into a single evolutionary schema and by constructing, instead, a court-centred, judge-centred, state-centred national legal history in which kinship groups were almost invisible as active forces capable of shaping their own legal history and appeared, instead, as the passive subjects of external regulation by the state and its judges. 'At the touch of jurisprudence', as he put it in a different context, a group could become 'a mere group of individuals, each with his separate rights'.¹⁶ Because, in the *History of English Law*, Maitland evidently concurred with Pollock in sharply distinguishing 'rules of law' from 'common rules of morals and manners'¹⁷ and in equating 'law', for the purposes of historical inquiry, with 'the sum of the rules administered by courts of justice',¹⁸ and not

¹³ Gierke, p. ix.

¹⁴ *Township and Borough*, p. 15; discussed in Burrow, 'Village Community', p. 283. The most famous form of Maine's judgment was that 'the movement of the progressive societies has hitherto been a movement from *Status to Contract*': Sir Henry Maine, *Ancient Law*, Everyman's Library (London, 1965), p. 100.

¹⁵ Maitland wrote to Pollock: 'I always talk of [Maine] with reluctance, for on the few occasions on which I sought to verify his statements of fact I came to the conclusion that he trusted much to a memory that played him tricks and rarely looked at a book that he had once read': *Letters*, i no. 279.

¹⁶ *Domesday Book and Beyond*, p. 150; paraphrased by Vinogradoff as, 'communalism evaporates at the touch of legal doctrine': 'Maitland', p. 259.

¹⁷ Pollock and Maitland, i p. xciv.

¹⁸ *Ibid.*, i p. xcv.

with custom, he found no place in the legal history of the family, as later historians sometimes have, for the study of how people other than judges thought about kinship and used it in practice to legitimate claims on others.¹⁹ Moreover, because the region he studied was exceptionally well-endowed with legal records he was not obliged — as historians of continental family law have been — to rely heavily on evidence about familial practices, which, in any case, were controlled, he thought, by rules enforced from outside the family.²⁰ Though keenly aware of ‘the hundred forces which play upon our legal history’,²¹ he excluded many of them from his own writings about the family, which never treated ‘family concerns’ as ‘a driving force for [legal] change’²² and which represented medieval families as collectivities only to the extent that judges and legislators did so — which, in his opinion, wasn’t often. His discussions of family law centred on the analysis of the legal rights accorded to individual family members by English judges, who, he believed, had the power to shape the family because, by Angevin times if not earlier, they were sitting on ‘a bold high-handed court which wields the might of a strong kingship’.²³

Associated with this way of writing legal history were several other interpretive strategies or schemas that largely determined how the family would appear or not appear in Maitland’s work. In the *History of English Law*, kinship appears as an unusually weak force partly because he found ways of dissolving families into the individuals composing them, partly because he dispensed with any notion of family solidarity, group personality, or kinship ideology to represent and explain relations among kin, and partly because his penchant for deconstructing family communities contrasted sharply with what Burrow calls ‘his readiness to endorse group personalities’ under modern law²⁴ and with his readiness to treat state, church, and feudalism as unified,

¹⁹ William Ian Miller, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland* (Chicago, 1990), p. 141.

²⁰ For a different approach to the same problem, see John Hudson, *Land, Law, and Lordship in Anglo-Norman England* (Oxford, 1984), esp. p. 181; and White, *Custom*, esp. chs. 1, 2, and 5. On rules see Pierre Bourdieu, *Outline of a Theory of Practice*, trans. Richard Nice (1977; reprinted Cambridge, 1982), ch. 1; id., *The Logic of Practice*, trans. Richard Nice (Stanford, 1990), Book I, esp. pp. 37–41.

²¹ Pollock and Maitland, i 80.

²² Eileen Spring, *Law, Land & Family: Aristocratic Inheritance in England, 1300 to 1800* (Chapel Hill, NC, 1993), p. 181.

²³ Pollock and Maitland, ii 447.

²⁴ ‘Village Community’, p. 279. According to Burrow, Maitland learned ‘to see in the organized social group “no fiction, no symbol, no collective name for individuals, but a living organism and a real person”’ (ibid., p. 277; citing Gierke, p. xxvi). Although Maitland imagined a book on ‘the structure of the groups in which men of English race have stood from the days when

collective forces that powerfully shaped the law, even though they, too, could have been deconstructed into their individual elements.²⁵ Maitland, moreover, saw an inevitable conflict between the needs of the medieval state and the 'archaic habits and claims' of the family²⁶ and found signs of it in judicial and legislative decisions that he could interpret as subordinating the family's interests to the state's. Furthermore, by dividing his discussion of family law into so many different legal subtopics (e.g. inheritance, wills, intestacy, marriage, husband and wife, infancy and guardianship), Maitland ruled out the possibility of addressing practical questions about how people used kinship as an idiom for giving their claims normative force and how family members used the law; and he never really asked how the law did or did not facilitate the efforts of aristocratic kinship groups, whether or not they had true corporate identities, to maintain wealth, power, and enduring social identities.²⁷ Finally, although Maitland queried 'hasty talk about national character',²⁸ ridiculed 'ethnic theory' as an explanation for national difference,²⁹ and emphasised 'the French influence' on English law,³⁰ his comparisons of English and French family law were still constructed to emphasise English individualism, English 'precocity' in

the revengeful kindred was pursuing the blood-feud to the days when the one-man company is issuing debentures', the family, not being an organized social group, did not figure prominently in his efforts to determine 'how Englishmen have conceived their groups' and, more specifically, 'by what thoughts [Englishmen] have striven to distinguish and to reconcile the manyness of the members and the oneness of the body' (*ibid.*, p. xxvii). On 'family solidarity' as an important concept in French discussions of kinship, see e.g. White, *Custom*, pp. 6–11 *passim*. According to Pierre Bourdieu, kinship groups 'continue to exist' partly because 'they rest on a community of dispositions (*habitus*) and interests which is also the basis of undivided ownership of the material and symbolic patrimony': *Outline*, p. 35.

²⁵ Positing the existence of a 'feudal force', which was backed by strong 'moral sentiments', Maitland thought that the 'real importance' of homage and fealty lay 'but partly within the field of law': Pollock and Maitland, i 300, 297.

²⁶ *Ibid.*, i 31. Although the phrase is presumably Pollock's, it would not have troubled Maitland, who wrote that the law of the state was prepared to crush the family 'into atoms': *ibid.*, ii 243.

²⁷ *Ibid.*, ii 240–447. For discussion of many of the same issues from perspectives very different from Maitland's, see, e.g., Spring *Law, Land, and Family* and Jack Goody, Joan Thirsk and E. P. Thompson, eds., *Family and Inheritance: Rural Society in Western Europe, 1200–1800* (Cambridge, 1976).

²⁸ Pollock and Maitland, i p. cvi.

²⁹ *Ibid.*, ii 402.

³⁰ *Ibid.*, i 81. He also noted 'how exceedingly like our common law once was to a French *coutume*' (*ibid.*, i p. cvi; see also i 87; ii 445) and how many 'invaluable hint[s] for the solution of specifically English problems' could be found in the writings of continental medievalists' (*ibid.*, p. cvi).

suppressing archaisms in family law,³¹ and 'a premature simplicity imposed [in England] from above'.³²

All the interpretive strategies that facilitated Maitland's attack on Maine's teachings about the family were at work in two important sections on the family in the *History of English Law*: first, the brief discussion of feuding that prefaced his entire discussion of the family; and, second, the analysis of the consent of heirs to the alienation of land — a topic to which he returned so often in his *History* as to suggest that he found it particularly important and troubling.³³ In order to incorporate analyses of these two topics into his polemic against Maine, Maitland was obliged to make numerous choices about how to read sparse, difficult evidence; he also had to rely on many different assumptions about matters on which the evidence was largely or completely silent. The choices and assumptions he made may have been sounder than Maine's; but when they are read in the light of the ones subsequently made by writers on the same topics in both England and France, we can see that although Maitland's readings of texts were relatively plausible and harmonized well with his polemic against Maine, they were not the only plausible readings available. Seeing how Maitland bridged the gaps between his attack on Maine and the texts on which he grounded it helps to bridge the gap between the two sides of Maitland identified by Professor Burrow. On the one hand, we have the historian revered for 'the political chastity of his historical writing' and admired for making the *History of English Law* 'the paradigm of a new historical objectivity'. On the other hand, we have Maine's polemical adversary and the author of work on corporations that 'became', as Burrow puts it, 'a political inspiration to social pluralists'.³⁴ In the middle we have an historian whose 'habits of mind' (as he called them) enabled him to interpret texts in such a way as to create a *History* that was meant to be objective and politically chaste and that included a polemically charged refutation of Maine.³⁵

Immediately preceding a longer critique of 'the popular theory that land was owned by families or households before it was owned by individuals',³⁶ Maitland's brief analysis of blood-feuds set both the

³¹ *Ibid.*, i 224; see ii 313, 402, 445–7.

³² *Ibid.*, ii 447.

³³ *Ibid.*, ii 13, 15, 17, 20, 213, 248, 251, 254, 255, 308–13.

³⁴ See Burrow, 'Village Community', p. 276.

³⁵ Letter to Paul Vinogradoff, *Letters*, i no. 59. On the letter and on Maitland's politics generally, see Burrow, 'Village Community'; and *id.*, *Whigs and Politics*, pp. 135–45. On Maine's 'political agenda' in *Ancient Law*, see Kuper, *Invention of Primitive Society*, p. 23.

³⁶ Pollock and Maitland, ii 245; see also 'the common saying that the land-owning unit was not an individual but a *maegð*, a clan, or *gens*': ii 244.

analytical agenda and the polemical tone of his entire argument on the family by justifying 'warnings' against the 'temptation' of believing 'the common-place . . . that the family rather than the individual was the "unit" of ancient law'.³⁷ Rhetorically, the warnings were effective partly because of Maitland's ironically judicious concessions to dogma and mainly because of his ability to contrast 'theories', 'dogmas', and 'guesses'³⁸ with statements of what is 'clear' and 'plain' because it is 'what we see'.³⁹ Before — or after — rejecting a theory, he liked to note that it might be true.⁴⁰ But dogmas about the family, it turned out, might be true only of societies about which nothing was or could be known. What Maitland 'saw' he saw clearly revealed in what he saw as perfectly transparent texts.

To attack the dogma that families were the units of early law, Maitland invoked 'rules about . . . blood-feud' in Anglo-Saxon codes and the *Leges Henrici Primi*,⁴¹ which he interpreted in such a way as to represent families as fleeting associations of individuals. Several rules stipulated that compensation for homicide was due from the slayer's maternal and paternal kin and was payable to the victim's maternal and paternal kin; other rules provided that a married woman's blood-kinsmen were entitled to her *wer* and that they, rather than her husband and his kin, were liable for vengeance for her misdeeds. What Maitland saw in these 'rules of blood-feud' was 'a practical denial of [the family's] existence' as a legally recognised unit.⁴² Unable to resist the temptation of twice proposing extravagantly that under these rules 'there were as many "blood-feud groups" as there were living persons', he withdrew judiciously to the more defensible position that 'at all events each set of brothers and sisters was the centre of a different group'.⁴³ If so, then 'the blood-feud group' could not have been 'a permanently organized unit':

If there is a feud to be borne or *wer* to be paid or received, [the group] may organize itself *ad hoc*; but the organization will be of a fleeting kind. The very next deed of violence that is done will call some other blood-feud group

³⁷ Pollock and Maitland, ii 244.

³⁸ Also: what 'may be', what 'some will surmise', what 'others will argue' and what 'others, again, may think' (ibid., ii 240–44).

³⁹ Ibid., ii 242, 243.

⁴⁰ 'It may be that in the history of every nation' (ibid., ii 241); 'It is quite possible that' (ii 243).

⁴¹ Ibid., ii 241.

⁴² Ibid., ii 243–4.

⁴³ Ibid., ii 242. He implied, for a second time, that every individual must have had a different family, when he wrote that 'We must resist the temptation to speak of "the *maegð*" as if it were a kind of corporation, otherwise we have as many corporations as there are men and women': ibid., ii 244.

into existence. Along with his brothers and paternal uncles a man goes out to avenge his father's death and is slain. His maternal uncles and cousins, who stood outside the old feud, will claim a share in his *wer*.

This is what we see as soon as we see our ancestors.⁴⁴

Although members of a vengeance group would presumably 'meet together and take counsel over a plan of campaign,' they could have no collective legal identity under 'a system which divides the *wergild* among *individual men*.'⁴⁵ Could they have any collective identity at all? Finally, after baldly asserting that 'if the law were to treat the clan as an unit for any purpose whatever, this would surely be the purpose of *wer* and blood-feud,'⁴⁶ he extended his conclusions about 'blood-feud groups' to the family generally. Since 'the blood-feud group' was a cognatic kindred, not a patrilineal or matrilineal descent group, 'the exclusive domination of either "father-right" or "mother-right" . . . should be placed for our race beyond the extreme limit of history.'⁴⁷ For the same reason, 'a system of mutually exclusive clans is impossible,'⁴⁸ and 'we ought not to talk of clans at all.'⁴⁹ The conclusion that any organization of the 'blood-feud group' will be of 'a fleeting kind'⁵⁰ pointed toward a similar conclusion about the family, which could never have played the role in early law that Maine had assigned to it.

Polemically effective as this attack on Maine was, Maitland's reading of rules about wergeld took him far beyond what was immediately visible in the texts he read. What he said we saw when he first saw his ancestors he had artfully and imaginatively constructed from texts he read in the light of various unsubstantiated, unstated assumptions, including these: that rules about paying compensation in Anglo-Saxon codes actually regulated this practice and corresponded closely to prevailing kinship ideology about paying compensation; that the composition of actual vengeance groups and support groups closely resembled the composition of the groups that can be reconstructed by identifying the categories of people who, according to legislators, were either

⁴⁴ *Ibid.*, ii 243; italics added. See also *ibid.*, i 32: 'We need not, however, regard the kindred as a defined body like a tribe or clan, indeed this would not stand with the fact that the burden of making and the duty of exacting compensation ran on the mother's side as well as the father's. A father and son, or two half-brothers, would . . . have some of the same kindred in common, but by no means all.'

⁴⁵ *Ibid.*, ii 244; italics added.

⁴⁶ *Ibid.*, ii 242.

⁴⁷ *Ibid.*, ii 243.

⁴⁸ *Ibid.*, ii 241.

⁴⁹ *Ibid.*, ii 242.

⁵⁰ *Ibid.*, ii 242.

legally obligated to pay *wer* or legally entitled to claim it;⁵¹ that cognatic kindreds can have no enduring group identity; that the existence of lineages is incompatible with recognition of close ties to kin outside the lineage; and, finally, that the feuding groups that he thought he saw and that he pictured for his readers can be taken as a model for all other significant kinship groups — in short, for the family.⁵² An associated assumption is that externally enforced legal rules formulated by rulers not only constrain familial practices but virtually constitute them.

Only by making such assumptions could Maitland have moved from rules about paying compensation to end blood-feuds, to the practice of paying compensation to end blood-feuds, to feuds themselves, to the recruitment of kin into 'blood-feud groups', to the 'fleeting' character of blood-feud groups, and, finally, to the absence of permanently organized families of any kind. By making these leaps across the gaps in his evidence, Maitland did more than attack Maine's ideas about the early legal history of the family; he also represented groups of kin as being associations so individualistic and ephemeral that their ability to act collectively for any purpose, however fleeting, was in doubt. Instead of trying to determine how feuds worked and what they revealed about kinship,⁵³ Maitland studied feuding in order to determine why feuding could *not* have worked — or, at least, why the family could not have been a 'permanent and mutually exclusive [unit]'.⁵⁴ He conceded that 'strong family groups' may well have 'formed themselves

⁵¹ 'Liability to a public fine or, in grave cases, corporal or capital punishment, may concur with liability to make redress to a person wronged or slain, or to his kindred, or incur his feud in default': Pollock and Maitland, i 38; italics added.

⁵² For discussions of medieval kinship that query some of these assumptions see, for example, T. M. Charles-Edwards, 'Kinship, status and the origins of the hide', *PP*, 56 (1972), 21–5, esp. 21 n. 35; Jack Goody, *The Development of the Family and Marriage in Europe* (Cambridge, 1983), p. 226; David Herlihy, *Medieval Households* (Cambridge, Mass., 1985), pp. 82–103; Miller, *Bloodtaking and Peacemaking*, ch. 5; and White, *Custom*, ch. 4.

⁵³ On 'permitted or justified private war, of which we do find considerable traces in England', see Pollock and Maitland, i 39; see also i 46–8, 53, 58, 75. For a recent effort to show that 'feud does not cease to be a topic for study after 1066', see Paul R. Hyams, 'Feud in medieval England', *Haskins Society Journal*, 3 (1991), 1–21. On French feuds in roughly the same period, see Stephen D. White, 'Feuding and peace-making in the Touraine around the year 1100', *Traditio*, 42 (1986), 195–263. Theoretical problems involved in the study of medieval feuds are explored in Miller, *Bloodtaking and Peacemaking*, ch. 6; and Stephen D. White, 'Clotild's Revenge: Politics, Kinship, and Ideology in the Merovingian Bloodfeud', in *Portraits of Medieval and Renaissance Living: Essays in Memory of David Herlihy* (Ann Arbor, Mich., forthcoming). On feuding, see also Patrick Wormald, 'The Age of Bede and Aethelbald', in James Campbell, Eric John, Patrick Wormald, *The Anglo-Saxons* (Oxford, 1982), p. 98.

⁵⁴ Pollock and Maitland, ii 241. English people, he asserted, could not have been 'grouped together into mutually exclusive clans': *ibid.*, ii 240.

and that the law had to reckon with them'.⁵⁵ 'It is quite possible', he wrote, that:

in England men as a matter of fact dwelt together in large groups tilling the land by cooperation, that the members of each group were, or deemed themselves to be, kinsmen in blood, and that as a force for keeping them in these local groups spear-sibship was stronger than spindle-sibship . . . We get a hint of such permanent cohesive groups when we find King Aethelstan legislating against the *maegð* that is so strong . . . that it denies the king's rights and harbours thieves.⁵⁶

Maitland insisted, however, that such groups were doomed; they led the precarious life of outlaws. In a society where the state and the family were enemies, strong family groups formed themselves in opposition to 'a principle which . . . seems to be incompatible with the existence of mutually exclusive gentes as legal entities';⁵⁷ such families lived in opposition to the law of the state, which 'will, if possible, treat the *maegð* as an "unit" by crushing it into atoms.'⁵⁸

Just as Maitland cited the 'fleeting' organization of 'blood-feud groups', the law's individualistic *wergild* system, and the state's hostility to powerful kindreds to show that families could not have been permanently organized group-units, he used a similar but more complicated strategy to contest 'the common saying that the [early] land-owning unit was not an individual but a *maegð*, a clan, or a *gens*.'⁵⁹ Although his attack on 'the popular theory that land was owned by families or households before it was owned by individuals'⁶⁰ relied on the argument that medieval families were not corporate groups, his discussion of land law down to the early thirteenth century also attacked other dogmas. In addition to denying that true 'family ownership' had ever

⁵⁵ Ibid., ii 245.

⁵⁶ Ibid., ii 243; italics added.

⁵⁷ Ibid., ii 245.

⁵⁸ Ibid., ii 243.

⁵⁹ Ibid., ii 244. According to Vinogradoff, Maitland was 'opposed to the idea of a primitive collectivism shaping the early land law of Indo-European nations, and of England in particular' ('Maitland', p. 259). According to Burrow, *Whigs and Liberals*, p. 142, 'Maitland constantly challenged Maine's version of the history of property relations'.

⁶⁰ Pollock and Maitland, ii 245. In *Domesday Book and Beyond* Maitland referred to the same 'theory' (p. 340) and, before moving on to argue that land was not owned by village communities (pp. 346–56), recapitulated arguments previously used in the *History* (pp. 340–6). In 1874 Maine had written: 'The collective ownership of the soil by groups of men either in fact united by blood-relationship, or believing or assuming that they are so united, is now entitled to rank as an ascertained primitive phenomenon, once universally characterizing those communities of mankind between whose civilization and our own there is any distinct connection or analogy': Sir Henry Sumner Maine, *Lectures on the Early History of Institutions* (1875; reprinted London, 1966), pp. 1–2.

'prevailed among the English in England,'⁶¹ Maitland denied that before the thirteenth century, when the 'common law of inheritance', he thought, 'was rapidly assuming its final form,'⁶² there had been 'a steady movement' in England towards more individualistic forms of property ownership.⁶³ He also denied that in England and France the history of property law and family law had followed the same paths.⁶⁴ To sustain these attacks on Maine's teachings, Maitland had to reinterpret practices 'commonly regarded as the relics of family ownership',⁶⁵ notably the widespread practice — French as well as English — of giving land with the consent of one or more of the donor's kin.⁶⁶ For the English variant of this practice, Maitland proposed an ingenious but contestable interpretation that was designed to undermine the theory that the family had ever owned land.⁶⁷

⁶¹ Pollock and Maitland, ii 255.

⁶² Ibid., ii 260.

⁶³ Ibid., ii 250. On Maitland's 'contemptuous attitude towards historical laws' and on one of his protests 'against the generalizations of anthropology, comparative jurisprudence, and inductive politics on laws and stages of development', see Vinogradoff, 'Maitland', p. 269.

⁶⁴ Pollock and Maitland, ii 255.

⁶⁵ Ibid., ii 251. On 'the inalienability of the family lands' see H. Cabot Lodge, 'Anglo-Saxon land law', in *Essays in Anglo-Saxon Law* (1876; reprinted Boston, 1905) p. 75. Arguing more cautiously than Maine had, Lodge wrote: 'It is of course purely matter of conjecture that the family as such ever held land. It is, however, a fair inference that in pre-historic times the Germanic family was regarded more as a legal entity than as an aggregation of individuals. The course of historical development took the form of the disintegration of the family, and the further back we go the closer the bond of family becomes, and the stronger the probability that it held land in its collective capacity'; *ibid.*, p. 74 n. 3.

⁶⁶ On approval of French sales by infant expectant heirs, see Pollock and Maitland, ii 213.

⁶⁷ As Maitland noted (*ibid.*, ii 251 n. 3), his own reading of Anglo-Saxon charters differed from the one proposed by Lodge in 'Anglo-Saxon land law', pp. 74–7. More recent discussion of the consent of heirs to alienations of land in England include: S. E. Thorne, 'English feudalism and estates in land', *CLJ*, ns 6 (1959), 193–209, reprinted in *id.*, *Essays in English Legal History* (London, 1985), pp. 31–50; Milsom, *Legal Framework*, esp. pp. 121–4; and Hudson, *Land, Law, and Lordship*, ch. 6. On the French *laudatio parentum* and on previous discussions of it, see White, *Custom*, which should be reexamined in the light of: reviews by Anita Guerreau-Jalabert in *Annales E.S.C.*, 45 (1990), 101–5 and by Gérard Giordanengo in *Revue historique*, 574 (1990), 349–51; Barbara H. Rosenwein, *To be a Neighbor of Saint Peter: The Social Meaning of Cluny's Property, 900–1049* (Ithaca, NY, 1989); Constance Brittain Bouchard, *Sword, Miter, and Cloister: Nobility and the Church in Burgundy, 980–1198* (Ithaca, NY, 1987); Emily Zack Tabuteau, *Transfers of Property in Eleventh-Century Norman Law* (Chapel Hill, NC, 1988); and Dominique Barthélemy, *La société dans le comté de Vendôme de l'an mil au XIVe siècle* (Paris, 1993). Earlier discussions of the French *laudatio* include: Louis Falletti, *Le retrait lignager en droit coutumier français* (Paris, 1923); J. de Laplanche, *La réserve coutumière dans l'ancien droit français* (Paris, 1925); F. Olivier-Martin, *Histoire du droit français des origines à la révolution* (1948; reprinted Paris, 1984); Georges Duby, *La société au XIe et XIIe siècles dans la région mâconnaise* (1953; reprinted Paris, 1971); *id.*, 'Lineage, nobility, and knighthood', in *id.*, *The Chivalrous Society*, trans. Cynthia Postan (1977; reprinted Berkeley, 1980), pp. 59–80; *id.*, 'The structure of kinship and nobility', in *Chivalrous Society*, pp. 134–48; Robert Fossier, *La terre et les hommes en Picardie jusqu'à la fin du XIIIe siècle* (2 vols, Paris, 1968); Paul Ourliac and J. de

Maitland's argument on ownership fell into three main parts. *First*, he construed 'family ownership' as an archaic system in which 'a child... acquires [birth-rights] in ancestral land, and this not by gift, bequest, inheritance or any title known to our modern law.'⁶⁸ *Next*, having thus transformed the study of family ownership and collective rights in land into the study of the individual birth-rights of children, Maitland then argued that birth-rights could take three different forms — ranging from strong to weaker to very weak — and explained the differences among them by positing a fundamental conflict of interest between the owner and his heir over the question of whether land should be alienated. With 'a strong form of "birthright"',⁶⁹ 'the child was born a landowner' and could block alienations made without his consent. A weaker form of birth-right 'only allows [the child] to recall the alienated land after his father's death'. The weakest form of birth-right is 'a mere *droit de retrait*, a right to redeem the alienated land at the price that has been given for it'.⁷⁰

Third, having reduced family ownership to a system of progressively weaker individual birth-rights defined in ways that presupposed intrafamilial conflict between an individual landholder and his individual heir and that rendered all other family members virtually invisible, Maitland traced the history of birth-rights down to the time of their disappearance in the early thirteenth century, at which time French birth-rights still survived in the very weak form of a *droit de retrait*. Writing of ancestors and heirs generally, he usually limited himself to discussing alienations by upper-class people.⁷¹ Although he rejected 'the theory that among [the Anglo-Saxons] there prevailed anything that ought to be called "family ownership"',⁷² he found two points when the birth-rights of heirs were 'not waning in strength but waxing'.⁷³ First, 'the

Malafosse, *Histoire du droit privé* (3 vols., Paris, 1968–71); Robert Haidu, 'Family and feudal ties in Poitou, 1100–1300', *Journal of Interdisciplinary History*, 8 (1977), 117–28; Penny Schine Gold, *The Lady and the Virgin: Image, Attitude, and Experience in Twelfth-Century France* (Chicago, Ill., 1985), ch. 4; Jean-Pierre Poly and Eric Bournazel, *La mutation féodale, Xe–XIIe siècle* (2nd ed., Paris, 1991), pp. 185–93.

⁶⁸ Pollock and Maitland, ii 248. He reached this position by reducing corporate family ownership to various forms of co-ownership; *ibid.*, ii 245–8.

⁶⁹ *Ibid.*, ii 255.

⁷⁰ *Ibid.*, ii 248–9.

⁷¹ On whether Maitland's writing on land law is or is not 'directly relevant to all groups in medieval society', see Alan Macfarlane, *The Culture of Capitalism* (Oxford, 1987), p. 195, responding to a review of *id.*, *The Origins of English Individualism: The Family, Property and Social Transition* (Oxford, 1978) by Rodney Hilton ('Individualism and the English peasantry', *New Left Review*, 120 [1980], pp. 109–11).

⁷² Pollock and Maitland, ii 251.

⁷³ *Ibid.*, ii 255.

current of legislation' moved 'in favour of the expectant heirs' in around 900, when the alienation of book-land outside the kindred was forbidden.⁷⁴ Doubting that this effort to strengthen birth-rights had had a lasting effect, at least on upper-class practice,⁷⁵ Maitland also identified a second period following the conquest when 'the rights of the expectant heir' were strengthened in ways revealed by a comparison of late Anglo-Saxon and Anglo-Norman charters. Whereas 'the Anglo-Saxon thegn who holds book-land does not profess to have his heir's consent when he gives part of that land to a church,' Maitland wrote, 'his successor, the Norman baron, will rarely execute a charter of feoffment which does not express the consent of one heir or many heirs.'⁷⁶ To explain the difference between pre-and post-Conquest charters, Maitland asserted that, soon after 1066, when fiefs were heritable and impartible but not yet governed, he thought, by strict primogeniture, a legal rule barring tenants from alienating fiefs without the consent of heirs came into being and was enforced for over a century before it 'silently disappeared' in the early 1200s,⁷⁷ 'when the tenant ... has a perfect right to disappoint his expectant heirs by conveying away the whole of his land by act *inter vivos*'.⁷⁸

Maitland's history of birth-rights was designed to challenge several dogmas about the history of family law. *First*, because even after reducing family ownership to 'a strong form of "birth-right"' he found no evidence that it had ever 'prevailed among the English in England',⁷⁹ he could reject both the theory that land was owned by families before it was owned by individuals and the theory that the family was the basic unit of early English law. *Second*, the finding that after 1200 birth-rights totally disappeared in England but survived in France in the form of the *retrait lignager*⁸⁰ not only demonstrated England's precociousness in legal development,⁸¹ it also undermined the 'unwarrantable hypothesis' that 'the family law of every nation must needs

⁷⁴ Ibid., ii 253. For a recent discussion of bookland with references to other recent work on it, see Susan Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted* (Oxford, 1994), pp. 324–42 *passim*.

⁷⁵ He thought it 'very likely' that 'among those men who had no books', 'a restraint in favour of the expectant heirs was established': Pollock and Maitland, ii 243.

⁷⁶ Ibid., ii 255; see also ii 251.

⁷⁷ Ibid., ii 13.

⁷⁸ Ibid., ii 308.

⁷⁹ Ibid., ii 255.

⁸⁰ See *ibid.*, i 344, 647; ii, 249, 311, 313, 330, 446.

⁸¹ Ibid., i 224.

traverse the same route'.⁸² *Third*, without denying that English land law became more individualistic when the modern right of inheritance replaced the archaic birth-right, Maitland contested the 'belief' that the history of family law and land law revealed 'steady movement in one direction', as 'birth-rights' and other 'relics' of family ownership slowly, steadily, and inexorably disappeared.⁸³ Rejecting the 'natural' assumption that 'those forms of birth-right which are least in accord with our own ideas are also the most archaic [and] that the weaker forms are degenerate forms of the stronger',⁸⁴ he argued that 'restraints' on a landholder's power of alienation were not 'relics of family ownership',⁸⁵ but rather products of judicial compromises between two 'conflicting forces': the interests of landholders, on the one hand, and the interests of heirs, on the other.⁸⁶ Maitland also went out of his way to deny that this conflict had changed significantly between the Anglo-Saxon era and his own day:

In the days before the Conquest a dead man's heirs sometimes attempted to recover land which he had given away. They often did so in the thirteenth century; they sometimes do so at the present day. At the present day a man's expectant heirs do not attempt to interfere with his gifts so long as he is alive; this was not done in the thirteenth century; we have no proof that it was done before the Conquest.⁸⁷

In this way Maitland replaced a theory of natural, steady, inexorable evolution from family ownership of land to individual ownership with a model representing change in land law as 'a series of compromises'⁸⁸ that the law had periodically imposed to adjudicate 'a struggle' between owner and heir. The struggle, which continued to the present day, had begun at some ill-defined moment with the appearance of 'purchasers for land' and of 'bishops and priests desirous of acquiring land by gift and willing to offer spiritual benefits in return'.⁸⁹

Like other arguments of Maitland's, this revisionist history of land law depended on textual interpretations that were shaped by his own

⁸² *Ibid.*, ii 255. Maitland also queried the distinction associated with this hypothesis between 'successful races', whose family laws had all allegedly traversed one route, and 'backward peoples', whose family laws had allegedly 'wandered from the right road'; *ibid.*, ii 255. If every nation's family law had had a different history, how clear was Maine's distinction between 'progressive' and 'non-progressive' peoples (on which see Burrow, 'Village Community', p. 271).

⁸³ Pollock and Maitland, ii 250.

⁸⁴ *Ibid.*, ii 248.

⁸⁵ See Lodge, 'Anglo-Saxon land law'.

⁸⁶ Pollock and Maitland, ii 250.

⁸⁷ *Ibid.*, ii 252.

⁸⁸ *Ibid.*, ii 250.

⁸⁹ *Ibid.*, ii 249.

way of seeing and not seeing the family. Treating Anglo-Norman and Angevin charters as evidence of restraints on alienation but not 'family ownership',⁹⁰ Maitland followed his usual strategies of privileging, when he could, the legal rights of individuals and assuming that the practices of kinship groups were determined by externally enforced legal rules. These interpretive strategies were at work not just when he analysed the consent of heirs to gifts but even when he described this practice. Although he acknowledged that many gifts were made for religious motives,⁹¹ he understood them as alienations similar to sales, not as exchanges of land for prayers for living and/or dead kin.⁹² This way of reading gifts had significant implications for Maitland's interpretation of the heir's consent because, in draining gifts of religious meanings, it trivialised the roles of the donor's dead and living kin as beneficiaries of his gifts⁹³ and limited discussion of questions about why such gifts were made to issues of proprietary right.

In a similar way, Maitland did not see what others have seen as the collective familial dimension of gifts when he represented as the consent of 'heirs'⁹⁴ a practice that French historians have long known as 'the consent of kin' (*laudatio parentum*). This choice of descriptive terminology was significant because it prefigured his entire interpretation of the heir's consent. Certain gifts, he found, were made with the consent of kin groups that included wives, sons, daughters, brothers, nephews or grandchildren; other gifts, he indicated, were approved by 'all [the donor's] kinsfolk' or by 'as many of [his] near kinsfolk as can be induced to approve the gift'.⁹⁵ Nevertheless, he saw no significance in the exact composition of these groups, which historians of the French *laudatio parentum* have since treated as important evidence about the

⁹⁰ See *ibid.*, ii 245–55 *passim*.

⁹¹ He noted that twelfth-century charters often mentioned 'the good of the donor's soul and the souls of his kinsfolk . . . as the motive for the gift' and that 'the prayers of the donees' were sometimes treated as 'services done in return for the land': *ibid.*, ii 243.

⁹² 'Every alienation of land, a sale, an onerous lease in fee farm, is a "gift" but no "gift" of land is gratuitous; the donee will always be liable to render service, though it be but the service of prayers': *ibid.*, ii 213.

⁹³ On this issue, see, e.g., Patrick J. Geary, 'Exchange and interaction between the living and the dead in early medieval society', in *id.*, *Living with the Dead in the Middle Ages* (Ithaca, NY, 1994), pp. 77–92. For theoretical discussions of alienation, see C. A. Gregory, *Gifts and Commodities* (London, 1982); and Annette B. Weiner, *Inalienable Possessions: The Paradox of Keeping-While-Giving* (Cambridge, 1992). On medieval practice and ideology, see Rosenwein, *To be a Neighbor*; and White, *Custom*.

⁹⁴ Maitland referred to those who consented to a tenant's gifts as 'apparent or presumptive heirs' (Pollock and Maitland, ii 13), 'expectant heirs' (ii 15), 'apparent or presumptive heirs' (ii 17), 'expectant heirs' (ii 251), 'one heir or many heirs' (ii 255), and 'expectant heirs' (ii 309).

⁹⁵ *Ibid.*, ii 310; on the consent of wives, see ii 411, 424.

history of the medieval family.⁹⁶ Instead, by describing the groups as groups of heirs or potential heirs — that is, kin who might have inherited the land alienated with their consent⁹⁷ — he simply excluded the possibility of interpreting consent to gifts as a collective familial act of a group with present, not future, interests in the property being given and as a transaction in which living members of a family returned land to the dead kin from whom they had received it.⁹⁸ To be sure, Maitland acknowledged that the gifts of donors with more than one son were to be approved by several heirs because he believed that a 'stringent' form of primogeniture was not observed in England until around 1200.⁹⁹ He also noted cases where gifts were made jointly by tenants and heirs¹⁰⁰ or were approved by as many as nine different kin.¹⁰¹ But as he described it, consent of a donor's kin to his gift could be understood only as a set of individual acts performed by heirs who were waiving individual rights.

Maitland's preference for individualistic readings of the consent of kin became even clearer when he turned to consider why gifts were made with consent and why this practice eventually disappeared. Without noting that numerous post-Conquest gifts were made without consent¹⁰² and without asking why consenting heirs might have wished to approve gifts,¹⁰³ Maitland assumed that donors and donees extracted the consent of heirs in accordance with a binding legal rule. He reached this conclusion after first finding 'numerous examples' of gifts made with the consent of heirs;¹⁰⁴ then by inflating a practice that would 'probably' be found in charters¹⁰⁵ into a practice without which charters were 'rarely executed';¹⁰⁶ and finally by concluding that donors 'had

⁹⁶ See White, *Custom*, esp. pp. 13–4 and ch. 4. Unlike Maitland, writers on the French *laudatio parentum* (e.g. Fossier, *Picardie*) have studied the consent of heirs, other kin, and wives concurrently.

⁹⁷ See Pollock and Maitland, ii 310.

⁹⁸ See White, *Custom*, ch. 5.

⁹⁹ *Ibid.*, ii 312; see generally ii 260–313. 'That absolute and uncompromising form of primogeniture which prevails in England belongs, not to feudalism in general but to a highly centralized feudalism, in which the king has not much to fear from the power of his mightiest vassals, and is strong enough to impose a law that in his eyes has many merits, above all the great merit of simplicity': *ibid.*, ii 265.

¹⁰⁰ *Ibid.*, ii 311.

¹⁰¹ *Ibid.*, ii 309–10.

¹⁰² Hudson finds that 'the inclusion of consent clauses is not standard practice even in the charters of lesser laymen' (*Land, Law, and Lordship*, p. 188) and is rare in royal charters and in great laymen's charters (pp. 184, 185).

¹⁰³ See *ibid.*, pp. 188–97; see also White, *Custom*, ch. 5.

¹⁰⁴ Pollock and Maitland, ii 309.

¹⁰⁵ *Ibid.*, ii 251.

¹⁰⁶ *Ibid.*, ii 255.

very commonly to seek [it]'.¹⁰⁷ He then asked why the law sanctioned this 'restraint' on a landowner's power of alienation.

He answered his question in two ways, focusing first on how the heir acquired the right to restrain alienations and then on why the judges enforced the right. Instead of seeing the heir's right as a 'relic of family ownership' or at least as an adjunct of the heir's weak birth-right to his ancestor's land, Maitland saw it as originating either in a 'common-law rule forbidding disherison or in the form of a [lord's] gift [to the tenant and his heirs,] which seemed to declare that after the donee's death the land was to be enjoyed by his heir and by none other'.¹⁰⁸ In either case, the heir did not acquire the power to restrain alienations by virtue of his genealogical position in a family.¹⁰⁹ Whether the power came from the state or whether it came from the ancestor's lord and was then enforced by the state, the power was no longer based, as it once had been, according to Maitland, on birth into a family. Preparing the way for the power's silent disappearance in around 1200, Maitland was silently transforming the archaic birth-right into something that looked more like a title recognized by modern law.

As to why judges, as a matter of policy, enforced the rule against alienating land without the heir's consent, Maitland, with no evidence to guide him, was free to speculate and did so in a revealing passage. Convinced that common law judges barely recognized, much less protected, the family's interests in land, he insisted that 'the object of the restraint' [was not] solely, perhaps not mainly, the retention of land "in a family".¹¹⁰ Its main purpose, before the establishment of strict primogeniture, was to '[secure] an equal division of land among sons'.¹¹¹ The rule achieved this goal by empowering the tenant's sons to restrain him from alienating too much of the fief that they would divide on his death and from making gifts to one or more sons that could undermine the principle of equal division among sons. Constructing a choice for himself between a very late date for the advent of strict primogeniture and a rule designed to keep land 'in a family', Maitland took the first option, which harmonized better with his polemic against Maine. Although he noted that a donor's kin sometimes tried to block his gifts or to recover them¹¹² and although he could have used such cases as evidence about the primary social function of consent,¹¹³ he slighted

¹⁰⁷ Ibid., ii 13.

¹⁰⁸ Ibid., ii 13.

¹⁰⁹ As it was in French models of the *laudatio parentum*.

¹¹⁰ Pollock and Maitland, ii 312.

¹¹¹ Ibid., ii 312.

¹¹² Ibid., ii 310, 311 n.3.

¹¹³ For discussions of such cases see White, *Custom*, esp. chs. 2-5.

this evidence on the grounds that in *any* age 'expectant heirs do not like to see property given away'.¹¹⁴

Maitland's assumption that kinship groups were strictly controlled by law resurfaced even when he described the disappearance of the practice of making gifts with the consent of heirs. 'The change', he wrote, 'if we consider its great importance, seems to have been effected rapidly, even suddenly'.¹¹⁵ But how sudden was the change? Just as Maitland exaggerated the frequency with which Anglo-Norman gifts were made with the consent of heirs because he saw donors and their kin as following a legal rule that he had largely invented for them to obey,¹¹⁶ he exaggerated the suddenness with which the practice disappeared probably because he assumed that the judges could simply abolish it and did so. In fact, the practice of making gifts with the consent of heirs probably did *not* disappear rapidly or suddenly. Instead, the percentage of gifts made with the consent of kin — which, in a Yorkshire sample, reached a peak of only 55 per cent in the 1150s — dropped steadily during the second half of the century, until, in Yorkshire, it stood at 15 per cent in the 1190s.¹¹⁷ A similar decline in the *laudatio parentum* occurred in various regions of thirteenth-century France.¹¹⁸ Evidence of this kind from both France and England would have been difficult to fit into a model in which judges determined the history of family law.

Maitland invoked this model once more when he attributed the disappearance of the heir's consent to a judicial act. He saw this 'sudden' change as 'the complement of that new stringent primogeniture which the king's court had begun to enforce'.¹¹⁹ Once it became clear, he thought, that a tenancy would not be divided among the tenant's sons and that the eldest son would have it all, then a practice that had previously served the benevolent purpose of preventing the tenant from unduly privileging one son over the others by barring him from alienating land without their consent became 'useless, inappropriate, unbearable' — unbearable because the eldest son, the only heir, would now use it to prevent the tenant from providing for his younger sons.¹²⁰ Why the disinheritance of younger sons, though unbearable for

¹¹⁴ Pollock and Maitland, ii 252. Maitland was here writing of wills but the remark applies perfectly well to other alienations.

¹¹⁵ *Ibid.*, ii 311.

¹¹⁶ Practice was Maitland's only evidence for the existence of the rule before the time of *Glanvill*: Pollock and Maitland, ii 208–11.

¹¹⁷ These rough statistics are based on charters in *EYC*, vols. 1–11.

¹¹⁸ Fossier, *Picardie*, i 265–6.

¹¹⁹ Pollock and Maitland, ii 312.

¹²⁰ *Ibid.*, ii 312.

judges, was promoted by fathers was a question that Maitland could have answered only by shifting the focus of his entire discussion from courts to families. But instead of seeing either primogeniture or changes in the roles that kin played — or didn't play in gifts — as long-term processes associated with long-term changes in family organization, Maitland attributed both developments to judicial acts. As he saw it, these changes in family law were largely determined by the fact that 'above our law at a critical moment stood a high-handed court of professional justices who were all for simplicity and could abolish a whole chapter of ancient jurisprudence by two or three bold decisions.'¹²¹

When Maitland interpreted documents very similar to ones later analysed by other historians in France as well as in England, the logic of his polemic against Maine, his decision to write a certain kind of legal history, and other interpretive choices he made often led him to see kinship groups as associations of individuals. Later, many of his successors, especially in France, preferred the opposite interpretive strategy of privileging familial collectivism. Whether or not Maitland chose the right strategy or the wrong one and whether he fully appreciated the force of arguments for alternative ways of writing family history, his own ways of looking at kinship groups, interpreting texts, and evaluating earlier historical work left marks on the way in which he wrote the legal history of the family. Yet Maitland's own work on this subject was far from being a dated exercise in polemics, ideological projection, and tendentious readings of evidence. As a lens through which to examine the history of the family, his legal individualism, combined with his scepticism about evolutionary thought, had strengths, enabling him to see enough to contest the theories of Maine and other 'speculative lawyers'¹²² and to grasp important issues in the history of medieval kinship.

First, Maitland's scepticism about theories of unilinear evolution made him quick to spot evidence indicating that the history of English family law did not move steadily and inexorably from archaic collectivism to modern individualism. Whether or not he always interpreted the evidence correctly, he used it effectively in the 1890s to anticipate campaigns that historians of the medieval family were waging in the 1960s against the view, still espoused by Marc Bloch and others, that

¹²¹ *Ibid.*, ii 313.

¹²² Kuper, *Invention of Primitive Society*, p. 8.

family ties grew steadily weaker over the course of the middle ages. When Georges Duby, Robert Fossier, and David Herlihy contested the theory, each, in his own way, followed Maitland in citing changes in the roles that kin played in alienating land.¹²³ Moreover, in arguing that there were significant discrepancies between medieval English and medieval French family law and in associating them with the relative freedom of English, as compared with French, landholders to alienate land away from their kin, Maitland not only foreshadowed Alan Macfarlane's bold argument of the late 1970s for England's precocious, individualistic exceptionalism;¹²⁴ Maitland also drew attention to significant differences, after 1200, between the two regions with respect to the participation of kin in the alienation of land. In fact, the differences are evident even earlier than he thought they were. Comparisons of English and Northwestern French charters indicate, first, that throughout the twelfth century, English gifts were less likely to be made with the consent of kin than French gifts were and, second, that English kin groups participating in gifts to churches were smaller in size, simpler in structure, and less likely to include collateral kin or non-co-residential kin than their counterparts in France were.¹²⁵ Although these findings do not necessarily confirm Maitland's belief

¹²³ According to David Herlihy, 'Perhaps the most evident weakness with the concept of progressive nuclearization is the assumption that this movement toward nuclear families was, or had to be, progressive': 'Family solidarity in medieval Italian history', reprinted in id., *The Social History of Italy* (London, 1978), pp. 174–5. Fossier cited both Duby's work and data from Picardy to justify 'l'opinion nuancée qui refuse de voir dans l'histoire familiale une courbe continue, évolution régulière': *Picardie*, i 266. See also id., 'Les structures de la famille en occident au moyen âge', in *XVe Congrès international des sciences historiques* (2 vols., Bucarest, 1980), ii 225–35; idem, *Enfance de l'Europe, Xe–XIIe siècles: aspects économiques et sociaux* (2 vols., Paris, 1982), ii 905–27; and White, *Custom*, ch. 3.

¹²⁴ *Origins of English Individualism*. According to Elton, *Maitland*, pp. 100–1 Macfarlane found in Maitland's work 'the guidance he needed to break out of the traditional opinions concerning the "peasantry" of England and to fight his way to an interpretation so shocking to convention that the conventional have ganged up to drown him'. In addition to the critiques of this book that Macfarlane cites in *Culture of Capitalism* at pp. 240–41 and discusses at pp. 191–222, see Stephen D. White and Richard T. Vann, 'The invention of English individualism: Alan Macfarlane and the modernization of pre-modern England', *Social History*, 8 (1983), 345–63.

¹²⁵ These conclusions are supported both by soundings of English and French twelfth-century charters and by a detailed statistical analysis of the participation of kin in twelfth-century gifts to religious houses in Yorkshire and the regions around Chartres. The Yorkshire charters surveyed are in *EYC*, vols. 1–11. The French documents studied are in: *Cartulaire de la Sainte-Trinité de Tiron*, ed. L. Merlet (2 vols., Chartres, 1883); *Cartulaire de Saint-Jean-en-Vallée de Chartres*, ed. R. Merlet, Collection de cartulaires chartrains, vol. 1 (Chartres, 1906); *Cartulaire du Grand-Beaulieu-lès-Chartres et du prieuré de Notre-Dame de la Bourdinière*, ed. R. Merlet and M. Jusselin, Collection de cartulaires chartrains, vol. 2, part 1 (Chartres, 1909); *Cartulaire de Notre-Dame de Josaphat*, ed. Charles Métails (2 vols., Chartres, 1909). I am indebted to the late David Herlihy for help in compiling the statistics.

in the 'precocity' of English legal development in the sphere of family law and although they are hard to reconcile with his belief that the relative simplicity of English family was imposed from above, they are at least consistent with his underlying idea that kinship somehow counted for less in twelfth-century England than it did in twelfth-century France.

Finally, when considering how Maitland's antiquarian individualism sometimes facilitated understanding of medieval kinship, it is worth noting that although he exaggerated the ephemerality of medieval kinship groups,¹²⁶ the power and will of medieval states to control them, and the freedom of medieval people to act independently of them, he raised a critical question about medieval families that subsequent writers on the medieval family have frequently overlooked by reflexively reifying family cohesion, lineage solidarity, kinship structure, and familial collectivism: How were kinship groups actually formed and re-formed for such purposes as feuding or approving gifts of land? Maitland was surely right in seeing this as a problem¹²⁷ and in thinking that people had to be actively recruited into larger kin groups by members of smaller ones or by individuals.¹²⁸ From there, it is not a long step to anthropological 'action theories' about how individual entrepreneurs recruit people into non-groups or quasi-groups¹²⁹ and to the position of one recent writer on medieval feuds that 'it always fell to someone' — that is, to some individual — 'to recruit his or her kin for the particular enterprise at hand.'¹³⁰ Whatever the theoretical merits of the individualistic 'action theories' that Maitland's antiquarian indi-

¹²⁶ See Miller, *Bloodtaking and Peacemaking*, p. 155.

¹²⁷ The problem would have worried him even more if he had had access to evidence indicating that in both England and France different alienations by a single donor were approved by kin groups so different in composition that the differences cannot be explained either by assuming that the gifts concerned different inheritances or by relying on the usual expedients of killing off some relatives, bringing others into the world at the proper moment, and sending others still on crusade or on other journeys from which they can be recalled when needed to approve a gift. See White, *Custom*, ch. 3.

¹²⁸ Pollock and Maitland, ii 242. Maitland's observation that consent to alienations is procured from 'as many of the donor's near kinsfolk as can be induced to approve [it]' (*ibid.*, ii 310) helps us to see the kin groups that participated in such gifts, not, as some historians have suggested, as enduring 'families', but rather as groups that were recruited for specific purposes. See White, *Custom*, ch. 3. For English evidence indicating how much variation there could be in the composition of the groups that approved different gifts by a single donor, see the gifts by Adam son of Peter de Birkin: *EYC*, iii nos. 1722, 1725–35, 1737–43, 1745, 1747, 1871, 1872; vi no. 67; *The Chartulary of Rievaulx* (Surtees Society, 83, 1887), nos. 92, 97, 100, 356.

¹²⁹ See Joan Vincent, *Anthropology and Politics: Visions, Traditions, and Trends* (Tucson, 1990), pp. 341–53; and Ted C. Lewellen, *Political Anthropology: An Introduction* (2nd ed., Westport, CT, 1992), chs. 6–7.

¹³⁰ Miller, *Bloodtaking and Peacemaking*, p. 155.

vidualism foreshadows, his belief that medieval communalism was 'a thin cloak for a rough and rude individualism' is still an effective antidote, at times, to 'easy talk', as Maitland would have called it, about family cohesion or lineage solidarity and to the tendency to confuse the family, understood as a cultural category, with actual groups of kin and to conflate kinship ideology with kinship practice.¹³¹ As a weapon against the dogma that 'the family was the unit of ancient law' and against other kinds of easy talk about the early history of family, Maitland provided a counter-maxim that has remained thought-provokingly effective. Although he never said that there was no such thing as the medieval family, there were only individuals, he did say: 'Individuals do not cease to be individuals when there are many of them.'¹³²

¹³¹ As formulated in Roger M. Keesing, *Kin Groups and Social Structure* (New York, 1975), pp. 9-11, the distinction is used in White, *Custom*, pp. 127-9.

¹³² Pollock and Maitland, ii 247.

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*