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Charles Donahue, Jr.

WHAT CAUSES FUNDAMENTAL LEGAL IDEAS? MARITAL PROPERTY IN ENGLAND AND FRANCE IN THE THIRTEENTH CENTURY

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I. INTRODUCTION

Categorizing broadly, the marital property systems of the Western nations today are divided into two types: those in which husband and wife own all property separately except those items that they have expressly agreed to hold jointly (in a nontechnical sense) and those in which husband and wife own a substantial portion or even all of their property jointly unless they have expressly agreed to hold it separately. The system of separate property is the "common law" system, in force in most jurisdictions where the Anglo-American common law is in force. The system of joint property is the community property system, in force in eight American states and many of the countries of Western Europe. From jurisdiction to jurisdiction, however, there is considerable variation in the distinction's significance for the spouses' powers to modify the system before marriage and to control property during the marriage and for what happens to property when the marriage dissolves. Further, the distinction between the two systems has blurred noticeably over the past generation. But despite the variation and despite the blurring, separate property and community property are quite different ways of thinking about property-holding within the family unit, one of those fundamental distinctions in legal ideas that affects the way legal results are reached, if not always the result itself.¹

How did this fundamental distinction begin? What combination

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1. See generally M. GLENDON, *STATE, LAW AND FAMILY* 140-63, 264-72, 279-89 (1977); *COMPARATIVE LAW OF MATRIMONIAL PROPERTY* (A. Kiralfy ed. 1972), and sources cited in both.

of social, economic, institutional, and ideological factors produced separate property and what community property? These questions are important not only for the history of the law of marital property but also for the broader issue of what forces shape legal ideas. Asking these questions, however, involves some jurisprudential and methodological assumptions that should be treated in advance.

Legal ideas can be transplanted from societies with one set of legal institutions and social structures to societies with quite different institutions and structures.² The extent to which such transplants must change in order to grow in their new soil is still imperfectly known, but once an idea has been formed in one place it clearly can be borrowed in another for reasons independent of societal and institutional considerations any more specific than those which produce a propensity for borrowing. Thus, the adoption in the nineteenth century of community property by eight of our western states and the retention of separate property by the remainder of the American states *may* not tell us anything about the societies and institutions of those states.³ Both ideas were quite well developed at the time they were adopted in America.

If, however, we can find the origin of the distinction or if we can find a legal system that rediscovered the distinction independently of any known outside influences, we may be able to discover the social and ideological causes of the idea. At least we will have eliminated transplant as a possible cause of the idea in the system that originated or rediscovered it. Behind this approach, of course, lies the assumption that there are social and ideological "causes" of legal ideas. Few today would doubt that proposition, however, so long as "social" and ideological" are defined broadly to include social, economic and political structures and institutions and the general intellectual milieu of those who operate within those structures and institutions. At this stage of the argument I would like to assume that the legal ideas do have causes, even if their complexity frequently makes them difficult to identify.

The history of marital property in the West offers us an opportu-

2. *E.g.*, A. WATSON, *LEGAL TRANSPLANTS* (1974); compare A. WATSON, *SOCIETY AND LEGAL CHANGE* (1977).

3. A good synthetic treatment of marital property in 19th century America is badly needed. The bare outlines of the story may be found in L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 184-86, 434-35 (1973). Beyond that, recourse must be had to widely scattered treatments of specific problems, *e.g.*, Brown, *Husband and Wife — Memorandum on the Mississippi Woman's Law of 1839*, 42 MICH. L. REV. 1110 (1944); Day, *Rights Accruing to a Husband upon Marriage with Respect to the Property of His Wife*, 51 MICH. L. REV. 863 (1953); Haskins, *The Estate by the Marital Right*, 97 U. PA. L. REV. 345 (1949); McKnight, *Texas Community Property Law — Its Course of Development and Reform*, 8 CAL. W. L. REV. 117 (1971).

nity to examine what might have caused the distinction between separate and community property. The opportunity is afforded by the fact (which we will have to try to prove) that in the thirteenth century the central royal courts in England came firmly to adopt a system of separate property while many, if not most, of the customary jurisdictions in northern France came to adopt various systems of community property. This coincidence in the development of Western marital property law is fortunate because it allows us to control for many of the variables that might seem relevant to the development of the distinction:

— Both England and northern France in the thirteenth century were predominantly agricultural societies.⁴

— Both countries had a social and political structure that a later age has called “feudal.”⁵

— The clerical intellectual elite in both countries shared a common language and culture.⁶ The lay elite shared a common language and literature.⁷

— At the beginning of the century the legal ideas about marital property were roughly similar in both countries.⁸

Controlling for these variables allows us immediately to eliminate some social and ideological phenomena which have been thought to be sufficient causes of the rise of community property: primitive Germanic folk memory, Christianity, the emancipation of women as either a social or an intellectual phenomenon, and the rise of the urban middle class.⁹ Germanic peoples settled in both England and the north of France. Christianity had a pervasive influence in both countries, and there is no evidence that the English were less religious than the French. If we look to the history of ideas to discern the “emancipation of women,” we will find that writing about women in the two countries reflects similar characteristically medieval paradoxes,¹⁰ and on the social level both countries seem to have

4. See generally G. DUBY, *RURAL ECONOMY AND COUNTRY LIFE IN THE MEDIEVAL WEST* (1962); M. POSTAN, *THE MEDIEVAL ECONOMY AND SOCIETY* (The Pelican Economic History of Britain No. 1, 1975).

5. See generally F. GANSHOF, *FEUDALISM* (2d ed. 1961); M. BLOCH, *FEUDAL SOCIETY* (1961).

6. See generally D. KNOWLES, *THE EVOLUTION OF MEDIEVAL THOUGHT* (1962). One of my personal discoveries of this exercise was the similarity in intellectual method of Bracton and Beaumanoir.

7. See, e.g., R. BLOCH, *MEDIEVAL FRENCH LITERATURE AND LAW* (1977).

8. See notes 67-71 *infra* and accompanying text.

9. See, e.g., J. BRISSAUD, *MANUEL D'HISTOIRE DU DROIT PRIVÉ 785-90* (1935) and sources cited therein.

10. Eileen Power's *The Position of Women*, in *THE LEGACY OF THE MIDDLE AGES* 401-33

emerged from the intense masculinity of feudal warrior society at roughly the same time. Both countries had roughly the same amount of urbanization. Some or all of these things may be necessary conditions for the rise of community property, but we already know that they are not sufficient.

The sources of our knowledge of the marital property systems in both countries are roughly comparable. For England we have the treatises of *Glanvill*¹¹ and Bracton,¹² for France that of Pierre des Fontaines (Vermandois)¹³ and Beaumanoir (Beauvaisis),¹⁴ the *Établissements de St. Louis* (Touraine-Anjou),¹⁵ the *Livres de justice et plet* (Orléans),¹⁶ and the *coutumiers* of Artois¹⁷ and Brittany.¹⁸ A

(C. Cruick & F. Jacob ed. 1926), remains a classic on this topic. See generally WOMEN IN MEDIEVAL SOCIETY (S. Stuard ed. 1976) and bibliography in *id.* at 209-11.

11. THE TREATISE ON THE LAWS AND CUSTOMS OF ENGLAND COMMONLY CALLED GLANVILL (G. Hall ed. 1965) [hereinafter cited as *GLANVILL*]. The author is almost certainly not Henry II's justiciar, Rannulf Glanvill; but the author knew the practice of the central royal courts well, and the work can confidently be dated between 1187 and 1189. *Id.* at xxx-xxxiii.

12. BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND (G. Woodbine ed., S. Thorne trans., 4 vols. to date, 1968-) [hereinafter cited as *BRACTON*]. Formerly thought to be entirely the work of Henry of Bratton (c. 1210-1267), a royal judge, written in the middle of the 13th-century, the book is now shown to be of composite authorship with the earliest parts written in the 1220s and 1230s, perhaps even earlier, and revised, probably by Bracton, in the late 1230s and emended by him throughout his life. The result is a textual puzzle of formidable complexity. See 3 *id.* at v-vi, xiii-liv.

13. LE CONSEIL DE PIERRE DE FONTAINES (M. Marnier ed. 1846) [hereinafter cited as *CONSEIL*]. The author was a royal counsellor and bailiff of Vermandois (northeast of Paris) in the middle of the 13th century. The work was probably written in the 1250s. *Id.* at i-x, xx & n.2.

14. P. DE BEAUMANOIR, COUTUMES DE BEAUVAISIS (A. Salmon ed., 2 vols. 1899) [hereinafter cited as *BEAUMANOIR*]. Unquestionably the work of Philippe de Remi, sire de Beaumanoir (c. 1250-1296), poet, royal official, and bailiff of the small customary jurisdiction of the county of Clermont en Beauvaisis near Paris. The first draft of the treatise was completed in 1283, but Beaumanoir made later additions, see 1 *id.* at xiii-xviii.

15. LES ÉTABLISSEMENTS DE SAINT LOUIS (P. Viollet ed. 4 vols. 1881-1886) [hereinafter cited as *ÉTAB*]. A composite work, compiled just before 1273. Chapters 1-9 of book 1 concern the *prévôté* of Paris and give the work its title; chapters 10-175 of the same book are based on the *coutume* of Touraine-Anjou (the primitive text of which is reproduced in the third volume of the edition); book 2 is based on the *coutume* of Orléans. See 1 *id.* at 85.

16. LI LIVRES DE JUSTICE ET DE PLET (L. Rapetti ed. 1850) [hereinafter cited as *J & P*]. Not a *coutumier*, although the customary rules it cites tend to be those of Orléans, the book is rather a mélange of Roman-canon and customary law, perhaps composed by a student associated with the university of Orléans, probably around 1260. See *id.* at xiii-xiv, xxvi-xxxiii.

17. COUTUMIER D'ARTOIS (A. Tardif ed. 1883) [hereinafter cited as *ARTOIS*]. A short, anonymous redaction of customs of this northern customary jurisdiction. It dates from around 1300. See *id.* at xiv-xv.

18. LA TRÈS ANCIENNE COUTUME DE BRETAGNE (M. Planiol ed. 1896) [hereinafter cited as *TACB*]. The authorship is uncertain, but it is almost certainly the work of men who knew the practice of the ducal court of Brittany well; its redaction dates from the first quarter of the 14th century. See *id.* at 5-15. Among the surviving customs of particular cities the most important for our purposes are those from Amiens: *Ancienne coutume municipale d'Amiens: Première coutume* [hereinafter cited as 1 *Amiens*], in 1 RECUEIL DES MONUMENTS INÉDITS DE L'HISTOIRE DU TIERS ÉTAT 128-50 (J. Thierry ed. 1850). Of anonymous authorship, it dates from the first half of the 13th century. See *id.* at 122. *Ancienne coutume municipale d'Amiens:*

large number of charters from both countries survive, and they give us valuable, though frequently puzzling, insights into actual practice.¹⁹ Records of litigated cases are extraordinarily rich for thirteenth-century England, much less so for France.²⁰ Thus, while we know as much or more about what the professionals thought the rules were in France, we know less of how the rules were applied and of the mechanics of their development.

There are some difficulties with our comparison which it would be well to admit before we start. The time periods do not quite coincide. The development of separate property in English law took place, as we shall see, in the last quarter of the twelfth and the first half of the thirteenth century, from roughly the time of Glanvill to that of Bracton. We cannot compare the French law in quite this period. The French *coutumiers* with which we will be dealing date from the second half of the thirteenth and the beginning of the fourteenth century. With the advantage of hindsight we can see where France is going by the end of the thirteenth century, just as we know where England is going by the time of Bracton. Thus, when we return to the social, economic and political factors that may explain the difference, we will have to ask why it was that England became firmly committed to separate property at a time when society was more feudal and slightly less urban than it was when France ultimately came to adopt community property.

In England we will be looking at the law applied by the royal courts. This was a relatively unified body of law, generally applicable to freehold tenures of land throughout the country, and strongly influenced by upper-class feudal custom. In France, on the other

Seconde coutume [hereinafter cited as 2 *Amiens*], in *id.* at 157-76. Again anonymous, it probably dates from the last years of the 13th century. See *id.* at 151. Missing, because it was unfortunately unavailable to me, is the 13th-century *coutumier* of Champagne. L'ANCIEN COUTUMIER DE CHAMPAGNE (P. Portejoie ed. 1956).

19. A full analysis of the numerous surviving cartularies for England and northern France of the late twelfth and thirteenth centuries is out of the question in a piece of this scope. In addition to examining such classics as SIR CHRISTOPHER HATTON'S BOOK OF SEALS (L. Loyd & D. Stenton eds. Northamptonshire Rec. Socy. Pub. No. 15, 1950); DOCUMENTS ILLUSTRATIVE OF THE SOCIAL AND ECONOMIC HISTORY OF THE DANELAW (F. Stenton ed. British Academy, Records of the Social and Economic History of England and Wales No. 5, 1920), and CARTULAIRE LE L'ABBAYE DE LA SAINTE TRINITÉ DE TIRON[-GARDAIS] (L. Merlet ed. 2 vols. 1883) to get a feel for earlier charter style, I have attempted some "soundings" of a statistical nature. See note 117 *infra*.

20. Fifteen volumes of GREAT BRITAIN, CURIA REGIS, CURIA REGIS ROLLS (1922-1972) are in print, dating from the 1190s to 1237. For other printed records of the central royal courts, see C. GROSS, A BIBLIOGRAPHY OF ENGLISH HISTORY TO 1485 at 524-33 (E. Graves ed. 1975). By contrast the records of the judgments of the *parlement* of Paris (LES OLIM OU REGISTRES DES ARRÊTS (L. Beugnot ed. 3 vols. in 4 1839-1848)) are late and not particularly helpful for our purposes.

hand, there was no unified body of royal law. We can keep our comparison between laws of similar scope if we exclude anything for France specifically labeled as *burgage* or *roturier* (commoners') custom, and also if we focus on what seem to be the common denominators of the French customs. Thus we will not spend much time with the local variations in the west of France where division by thirds rather than halves was the custom²¹ or with those in the far north of modern France (and parts of modern Belgium) which tended toward a system of total community,²² just as we will ignore manorial or *burgage* custom in England and the *gavelkind* custom of Kent.²³ We will also discount those areas where foreign influence was obviously at work: the southern third of France, the *pays de droit écrit*, where Roman law influence was strong,²⁴ and Normandy where English influence was strong.²⁵

Thus, while there are undeniable difficulties, the comparison will be drawn basically between likes: the laws of two feudal societies in two rural areas at roughly the same time. The social patterns, degrees of urbanization, and economies of the two countries were roughly similar. There are obvious differences between the world described by M.M. Postan²⁶ and that described by Marc Bloch,²⁷ but they are recognizably the same world.

II. THE LAW

The aphorism, "At English common law the husband and wife were one and that one was the husband," may be amusing, but it is misleading. The fundamental characteristic of the thirteenth century common law of marital property by the time of Bracton was not the unity of husband and wife but their separation.²⁸ The husband had

21. See Yver, *Les caractères originaux du groupe des coutumes de l'Ouest de la France*, 30 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 18, 39-40 (1952); see generally *id.*

22. See 3 P. OURLIAC & J. DE MALAFOSSE, *HISTOIRE DU DROIT PRIVÉ* 9-10, 253-54 (1968) [hereinafter cited as OURLIAC & MALAFOSSE]; Lemaire, *Les origines de la communauté de biens entre époux dans le droit coutumier français*, 7 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 584, 629 & n.4 (1928).

23. See 2 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 268-73, 279-83, 418-19 (2d ed. reissue 1968) [hereinafter cited as P & M]; Howell, *Peasant Inheritance Customs in the Midlands, 1280-1700*, in *FAMILY AND INHERITANCE* 112-55 (J. Goody, J. Thirsk & E. Thompson eds. 1976).

24. See 1 E. CHÉNON, *HISTOIRE GÉNÉRALE DU DROIT FRANÇAIS PUBLIC ET PRIVÉ DES ORIGINES À 1815* at ¶ 192 (1926).

25. See R. BESNIER, *LA COUTUME DE NORMANDIE — HISTOIRE EXTERNE* 56-69 (1935).

26. M. POSTAN, *supra* note 4.

27. M. BLOCH, *FRENCH RURAL HISTORY* (1973).

28. The basic outlines of this scheme appear already in *Glanvill's* remarkable treatise on *dos* (including dower, *maritagium* and inheritance law generally). *GLANVILL*, *supra* note 11,

his lands, the wife hers. The husband's heirs succeeded to his lands, the wife's heirs to hers, and as a general rule neither husband nor wife had the power of testamentary disposition over land. True, the husband's lands were subject to the wife's dower — her right to a life estate, normally in one-third of those lands, if he predeceased her²⁹ — and the wife's lands were subject to the husband's right to take the rents and profits during the marriage and to his right to a life estate in the whole if she predeceased him and if a child were born of the marriage. Each party had to join in a conveyance if the land was to be sold free of that party's interest, but the husband could sell his interest both in his land and in that of his wife without her consent. These were the rules for land; in the case of personal property we can be considerably less certain.³⁰ It would seem that during the marriage the husband had the power to manage and to alienate both his chattels and those of his wife, a fact which led later courts to suggest that he "owned" his wife's chattels. If he predeceased his wife, she was apparently entitled to whatever was left of her chattels and to one-third of his. If she predeceased him, he may have been entitled only to a third of what was left of her chattels.

So strong was the notion of separate property within the marital unit that conveyances to husband and wife tended to be treated as separate property of one or the other of them. The commonest form of such conveyance was the *liberum maritagium*, which the early charters describe as a grant of property by the woman's family (normally her father or brother) to the husband with the woman. In Glanvill's time the effect of such a grant was, in modern terms, to give any husband of the woman a life estate in the property with a remainder to the heirs of her body, usually for three generations, and with a reversion to the grantor and his heirs in default of heirs of her body.³¹ By Bracton's time a development, still imperfectly under-

chs. 6-7. To this we must add BRACTON, *supra* note 12, fols. 17-24 (on gifts subject to *modus* including *maritagia*); fols. 60-61b (on *causa mortis* gifts and wills); fols. 92-98 (on dower); fols. 296-317 (actions concerning dower); fols. 321b-323 (writs of entry *cui in vita* and writs concerning dower); fols. 438-39 (on curtesy). See 2 P & M, *supra* note 23, at 399-436, whose statement of the rules remains fundamental, at least for Bracton's time.

29. In Glanvill's time one-third was the "reasonable" dower, at least for military tenures. At the time of the marriage the husband could "name" less but not more than one-third. GLANVILL, *supra* note 11, 6.1. Widows of socage tenants may have been entitled to one-half, but one-third remained the norm. 2 P & M, *supra* note 23, at 420-22. See notes 79-83 *infra* and accompanying text.

30. See 2 P & M, *supra* note 23, at 427-33.

31. GLANVILL, *supra* note 11, 7.18. If the wife survived the husband, she probably got a life estate, unless there was an heir, in which case he may have taken immediately. See Milson, *Inheritance by Women in the Twelfth and Early Thirteenth Centuries*, in ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE (M. Arnold, T. Green, S. Scully & S. White eds., forthcoming). By Bracton's time the widow probably got a

stood, was leading to holdings that *maritagia* could be alienated in fee simple (by husband alone? by husband and wife together? by widows and widowers alone?) as soon as issue had been born to the marriage. This result was reversed by the famous statute De Donis in 1285, and as a consequence the unbarrable entail made its appearance in English law.³²

The *maritagium* is the only form of joint holding by husband and wife discussed at any length by the treatise writers, and as we have seen it came to be treated like the wife's separate inheritance with a peculiar descent pattern rather than like any form of community property. There are also examples in the feet of fines of husbands and wives taking property in both their names and not as *maritagium*.³³ How the descent pattern in such conveyances worked we do not know. It seems likely that the land passed to the survivor of the husband and wife and thence to their heirs, at least when their heirs were the same. We cannot even speculate as to what happened when their heirs differed (*i.e.*, in default of issue).³⁴ Almost certainly the making of the fine would bar any reversion in the grantor. A later age would call this form of co-tenancy a tenancy by the entireties, and the heirs of the surviving spouse would take to the exclusion of the heirs of the first dying spouse.³⁵

If the fundamental characteristic of marital property in England was separation despite the marriage and the fundamental division is between land and chattels, in France the concept of separate property co-existed with that of a community of property because of the marriage, and the fundamental divisions were among family land (*propres* or *héritages*), acquired land (*acquêts* or *conquêts*), and moveables (*meubles*).³⁶ The husband's family land is his separate property, or perhaps it might be better to say the separate property of his family, because the husband's power to alienate was tightly con-

life estate even if there were an heir, at least if she had been named as a grantee. See BRACTON, *supra* note 12, fols. 77b at 224, 262b; compare *id.* fols. 21-24, 28b-29, 92b at 267, 130b at 368.

32. For these developments, see T. PLUCKNETT, *LEGISLATION OF EDWARD I*, at 128-35 (1949).

33. *E.g.*, 2 P & M, *supra* note 23, at 434 and sources cited therein; PEDES FINIUM, COMMONLY CALLED FEET OF FINES FOR THE COUNTY OF SOMERSET, RICHARD I TO EDWARD I, no. 78, at 6-7; no. 49, at 14-15; no. 35, at 18 (E. Green ed., Somerset Rec. Socy. no. 6, 1892).

34. BRACTON, *supra* note 12, fol. 28b, at 96, discussing a gift (not a fine) made to husband and wife and their heirs and not in *maritagium*, says that if common heirs of the two fail, "their separate heirs (so it seems) are admitted." Compare *id.* fol. 262b.

35. See 2 P & M, *supra* note 23, at 434.

36. See R. GRÄFE, *DAS EHERECHT IN DEN COUTUMIERS DES 13. JAHRHUNDERTS* 93-162 (Göttinger Studien zur Rechtsgeschichte No. 6, 1972) [hereinafter cited as GRÄFE] and sources cited therein; see generally 3 OURLIAC & MALAFOSSE, *supra* note 22, at 240-60, 479-98.

trolled in the interest of his heirs.³⁷ The husband's family land was also subject to a dower interest in his wife, generally a life estate of one-half, which further impeded his power to alienate it.³⁸ The wife's family land was subject to the same limitations with respect to her heirs, but the husband had no dower interest in it.³⁹ The acquets, on the other hand, were — I use the term with some hesitation — community property of husband and wife. The usual pattern called for their equal division upon the death of one spouse between that spouse's heirs and the surviving spouse.⁴⁰ Each spouse's half was subject to his or her testamentary disposition,⁴¹ and in some areas the husband's sale or gift of acquets required the wife's consent.⁴² The rules about inoveables were as uncertain as those in England about personal property. Suffice it to say that the husband had extensive powers of management and control over them, but the wife's right of succession to all or part of them was leading some writers to conceive of them as being community property as well.⁴³

To attribute community property to thirteenth-century France runs counter to the trend of modern scholarship which would place it, at the earliest, in the fourteenth century when the word "community" was first used in the context of marital property.⁴⁴ No doubt

37. See text at notes 94-95 *infra*. See generally 3 OURLIAC & MALAFOSSE, *supra* note 22, at 479-98; GRÄFE, *supra* note 36, at 104-18.

38. 3 OURLIAC & MALAFOSSE, *supra* note 22, at 248-52 and sources cited therein; GRÄFE, *supra* note 36, at 118-38.

39. See notes 36 & 38 *supra*. For the custom of *veufeté* in Normandy and in some of the western French customs, see 3 OURLIAC & MALAFOSSE, *supra* note 22, at 252 and sources cited therein.

40. The key text is J & P, *supra* note 16, 12.24.5, at 256: "Et se home conquiert, lui et sa feme, et meure, sa feme sera heir en la moitié, par la reson de la compoignie; et des meubles ausint." See TACB, *supra* note 18, § 217; 1 *Amiens*, *supra* note 18, § 63; BEAUMANOIR, *supra* note 14, §§ 503, 621, 930-31, 1407-09, 1639. The Burgundy customs of the 13th century are to the same effect. Cited in Lemaire, *supra* note 22, at 637-38.

41. See BEAUMANOIR, *supra* note 14, § 365; J & P, *supra* note 16, 12.3.1; compare BEAUMANOIR, *supra* note 14, § 1973.

42. J & P, *supra* note 16, 8.3.1 - .2; see TACB, *supra* note 16, § 40.

43. See ÉTAB., *supra* note 15, 1.143; J & P, *supra* note 16, 12.24.5; 1 *Amiens*, *supra* note 18, § 63; cf. TACB, *supra* note 18, § 42; 2 *Amiens*, *supra* note 18, § 47 (both dividing moveables into thirds).

44. *Coutumes tenues toutes notoires et iugees au chastelet de Paris* § 14, in 2 J. BRODEAU, COMMENTAIRE SUR LA COUSTUME DE LA PREVOSTÉ ET VICOMTÉ DE PARIS App. I at 5 (1658); *Décisions de messire Jean des Marès* [hereinafter cited as *Pseudo-des-Marès*] § 247, in *id.* App. II at 37 (for both of these late 14th-century works, see 1 F. OLIVIER-MARTIN, HISTOIRE DE LA COUTUME DE LA PRÉVÔTÉ ET VICOMTÉ DE PARIS 88-89 (1922)); but cf. ÉTAB., *supra* note 15, 1.143 ("Et einsinc puet l'en entendre que li meuble sunt communal."). For the trend, see Roussier, *La donation des biens communs par le mari en droit coutumier parisien* (pt. 1), 31 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 498 (1953); Petot, *Les meubles des époux au moyen âge d'après les coutumes françaises*, 3 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITÉ [2 MÉLANGES FERNAND DE VISSCHER] 213 (1949); OURLIAC & MALAFOSSE, *supra* note 22, at 252-60; GRÄFE, *supra* note 36, at 96-100.

the thirteenth-century system lacked many of the refinements of the later system, and moveables and acquests had not yet been firmly brought together conceptually.⁴⁵ Further, the distinction between separate and community property was blurred by the fact that all thirteenth-century European legal systems suppressed the wife's legal power to possess, enjoy and convey any property during coverture, and many gave her a well-nigh unbarrable share of her husband's separate property if she survived him. Thus all of the thirteenth-century systems of marital property tended to look something like, in modern terms, ownership in the husband with an expectancy or future interest in the wife.

On the other hand, in a world in which commercial sale of land was relatively rare, its testamentary disposition was severely limited, and credit transactions were fairly primitive, the most important practical indication of community property was to be found in succession patterns. In many places in France moveables and acquests were divided equally between husband and wife without regard to who died first. The facts that many thirteenth-century authors noted the similarity of succession customs regarding acquests and moveables⁴⁶ and that at least one attributed the succession pattern for moveables and acquests to the partnership (*compagnie*) between husband and wife⁴⁷ indicate that these authors were struggling, however imperfectly, with a concept for which we have no better term than "community property."

We must take care not to exaggerate the differences between the English and French systems. In both systems family land passed to children and in the absence of children to the heirs on the side from whence it came, although primogeniture was not nearly so strong in France as in England.⁴⁸ In both systems the widow was entitled to be endowed of her husband's family lands, and hence such lands were not fully alienable without her consent. In both, the husband had some power over the wife's land, but this power did not extend to full alienation. In both, the husband's power over moveables during coverture was great, but the wife stood to inherit a part of them, at least if her husband predeceased her. Further and perhaps most

45. See especially Roussier, *supra* note 44, at 503-04; Petot, *supra* note 44, at 214.

46. 1 *Amiens*, *supra* note 18, § 63; 1 *ÉTAB.*, *supra* note 15, 1.143; J & P, *supra* note 16, 12.24.5; Burgundy customs, cited in Lemaire, *supra* note 22, at 637-38; compare BEAUMANOIR, *supra* note 14, § 1639; *Pseudo-des-Marès*, *supra* note 44, § 247.

47. J & P, *supra* note 16, 12.24.5; compare BEAUMANOIR, *supra* note 14, § 622, which speaks of the *compagnie* between husband and wife but does not tie it to the succession provisions for moveables and acquests.

48. See 3 OURLIAC & MALAFOSSE, *supra* note 22, at 401-04.

important, it was possible in each country to achieve by private arrangement results similar to those in the other country so long as the requisite consents were obtained. The scarcity of secular charters in both countries during this period makes it difficult, perhaps impossible, to discover how far one could replicate the French system in England and vice versa and how commonly this was done. But enough has survived to show that people changed the rules by private agreement in both countries.⁴⁹

But there were differences. The power to alienate family land was much greater in England than in France. In France acquests were normally divided in halves upon the death of one of the parties, and the woman's right to her share did not depend on her surviving her husband. In the case of a childless marriage, her heirs, not his, inherited her half. In addition, in France both parties seem to have had the power of testamentary disposition over their portion of the acquests.⁵⁰ While the rules about moveables are considerably less clear, in England the basic notion seems to have been one of separate treatment and division into thirds, while in France the basic notion seems to have been, or at least to have been heading toward, community treatment and division into halves.⁵¹

Thus, there was a difference and the difference, as we noted above, is reflected in the language of the contemporary writers. The question is why the difference?

III. HOW THE DIFFERENCE CAME ABOUT

The English common law system of the thirteenth century was already quite professionalized; the customary French jurisdictions were less professionalized, but the *coutumiers* themselves show that professionalization was increasing by the second half of the century.

49. In both countries the surviving charters deal principally with gifts or sales to the church. See sources cited in note 19 *supra*. While some of these charters raise issues relevant to our purposes, they rarely show us grantors attempting to change the descent pattern of land within the family. (But cf. 2 CHARTES ET DOCUMENTS DE L'ABBAYE DE SAINT-MAGLOIRE (A. Terroine & L. Fossier eds. Institut de recherche et d'histoire des textes, Documents, études et répertoires No. 12, 1966), for a remarkable series of documents in which husbands and wives convey to the abbey, specifically revoking their rights and those of their families.) We know, however, that English grantors frequently attempted to favor younger sons and daughters, see generally MILSOM, *supra* note 31, and that French grantors/testators frequently attempted to shift the inheritance patterns within their families. See generally J. YVER, ÉGALITÉ ENTRE HÉRITIERS ET EXCLUSION DES ENFANTS DOTÉS (1966).

50. See H. AUFFROY, ÉVOLUTION DU TESTAMENT EN FRANCE 619-29 (1889); BEAUMANOIR, *supra* note 14, § 365; J & P, *supra* note 16, 12.3.1; compare BEAUMANOIR, *supra* note 14, § 1973.

51. See Petot, *supra* note 44; for division into thirds in the west of France, see Yver, *supra* note 21, at 38-39.

Before we seek any economic, political, or social explanations of the differences between the two countries' marital property systems, we should look to see if the differences in the legal ideas available in each system sufficiently explain the differences in marital property. It may be that the thirteenth-century rules for marital property in the two countries were simply the product of logical deduction from pre-existing legal rules that differed between the two countries. This discovery would not preclude the possibility that thirteenth-century economic, political, or social forces also helped to produce the rules, but it would deprive us of any need for such explanations. It would also suggest that a more fruitful time to look for such explanations would be the time when the logical antecedents of the thirteenth-century rules arose.

Some scholars of a previous generation saw community property as the inevitable result of provisions in the codes of the Germanic invaders of Europe.⁵² Frequently cited in support of this proposition were provisions in the seventh-century code of the Riparian Franks, in the Visigothic Code of the same century, and in a portion ascribed to the Westphalians of the early ninth-century Old Saxon Code.⁵³ It is hard to accept this explanation today. If the argument to be derived from these provisions is that all the Germanic peoples had community property and that they preserved the institution as a kind of folk practice whence it was codified in the customary law of the High Middle Ages, then we cannot explain why England, which was if anything more Germanic than the north of France, did not adopt community property, while most of the north of France did. If the argument is that some of the Germanic peoples had community property, while some did not, we would expect to find customs of community dominant only in those areas settled by tribes that are thought to have had it. The actual pattern of community property

52. This view is particularly noticeable in older German writers, e.g., R. HUEBNER, A HISTORY OF GERMANIC PRIVATE LAW 621-46 (Continental Legal History Series No. 4, 1918); even R. SCHRÖDER, GESCHICHTE DES EHELICHEN GÜTERRECHTS (2 vols. in 4, 1863-1874) [hereinafter cited as SCHRÖDER], though he is considerably more cautious and detailed, tends to overemphasize continuity at the expense of change. W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY §§ 8, 13-18 (2d ed. 1971), is a particularly egregious modern example.

53. Lex Ribuaria 37.2, in 5 MONUMENTA GERMANIAE HISTORICA: LEGUM 232 (1875-1889): "*Si autem per seriem scripturarum ei nihil contulerit, si virum supervixerit, 50 solidos in dotem recipiat, et tertiam partem de omni re quam simul conlaboraverant, sibi studeat evindicare, vel quicquid ei in morgangeba traditum fuerat, similiter faciat.*" Lex Visigothorum 4.2.16 (division of acquets according to the wealth of the spouses), in 1.1 MONUMENTA GERMANIAE HISTORICA: LEGES NATIONUM GERMANICARUM 183 (1902). Lex Saxonum c. 48 (giving the woman one-half of the acquets), in 5 MONUMENTA, *supra* at 74. For the dates, see 1 H. CONRAD, DEUTSCHE RECHTSGESCHICHTE 59, 132, 133-34 (2d ed. 1962).

customs is much too complex for such a simple explanation: The southern portion of the area settled by the Visigoths (the north of modern Spain) seems to have had community property in the High Middle Ages, but much of the northern portion (southern France) did not;⁵⁴ systems of community exist generally in the area settled by the Franks, both in those settled by the Ripuarian Franks and in those settled by the Salian Franks, whose primitive code shows no evidence of community;⁵⁵ community is found in a number of areas where the Saxons settled, but is not so dominant in Westphalia as the primitive Saxon code would lead us to expect.⁵⁶

Perhaps more important, none of the provisions in the Germanic codes has the kind of precision which would allow us to say that it represented anything more than a tendency in the direction of community property.⁵⁷ Provisions similar to, if not quite the same as, those in the Ripuarian and Visigothic Codes may be found in a number of Germanic codes from areas, including England, where community property ultimately was not accepted.⁵⁸ And none of the Germanic peoples kept nearly enough ethnic cohesion to suggest that a custom peculiar to one tribe remained intact in the turbulent years between the redaction of the early Germanic codes and the thirteenth century.

So far as the north of France is concerned, the generally accepted view today⁵⁹ would trace the origins of community property to the break-up of the ethnic cohesion of the Germanic peoples in the eighth and ninth centuries and the consequent uncertainty about the rules governing the widow's rights in her husband's property. (These rights had been fixed at a half or a third in at least some of the Germanic codes.)⁶⁰ What had been a legal right became a contract right. At the time of marriage men would agree to endow their wives with

54. For the system in Spain, see W. DE FUNIAK & M. VAUGHN, *supra* note 52, §§ 23-36; for that in the south of France, see OURLIAC & MALAFOSSE, *supra* note 22, at 279-86.

55. See generally 2.2 SCHRÖDER, *supra* note 52.

56. No fewer than five main systems of community property existed in Saxony in the High Middle Ages, ranging from total separation to total community. The system of total separation did not exist in Westphalia, but the other four did, including two which gave the surviving spouse only an expectancy in some or all of the first-dying spouse's property. Clearly more than the survival of the primitive provision is needed to account for these variations. See 2.3 SCHRÖDER, *supra* note 52, at 1-80.

57. For a recent reinterpretation of the Visigothic provisions, see M. MERÊA, *ESTUDOS DE DIREITO VISIGOTICO* 23-48 (1948).

58. Cf. 1 SCHRÖDER, *supra* note 52, at 84-89 (Lombard law); *id.* at 94-98 (Anglo-Saxon law); compare *id.* at 103-06 (Burgundian and Alamannian law).

59. Lemaire, *supra* note 22, is the leading article. For its general acceptance, see Petot, *supra* note 44, at 213.

60. Lemaire, *supra* note 22, at 586-88; see notes 52-53 *supra*.

a third or a half of their family lands or, significantly, their family lands and their acquests.⁶¹ Independent of this conventional dower in acquests, husbands and wives in the tenth and eleventh centuries came more and more to take acquests during the marriage in both their names.⁶²

This system, totally dependent upon private agreement, lasted in France until the beginning of the thirteenth century. At that point, it became the rule that dower could exist only in family land, but it would exist even absent agreement.⁶³ At the same time, family land was sharply distinguished from acquests. The heirs' rights in family land solidified in a way that greatly impeded its alienation. By contrast, the woman's rights in acquests, which were not subject to the heirs' control, were expanded from a conventional to a legal right to one-half, from a life estate dependent upon survival to an estate in inheritance without regard to survival.⁶⁴ In short, dower in acquests and the practice of taking acquests jointly merged into a legal rule that acquests belonged one-half to the wife. It was only in the latter part of the thirteenth century or perhaps not until the fourteenth that moveables and debts were fully incorporated into this system.⁶⁵

Now this describes how this development occurred; it does not explain why it occurred. The combination of the ideas of conventional dower in acquests and the practice of joint acquisition of land is understandable, but nothing in the logic of either idea requires that the combination be made or that a matter of agreement become a matter of rule. The history, however, of the way the French arrived at the notion of community property suggests where we ought to look in order to determine why the English did not arrive at the same notion. We are unlikely, for example, to get much help from

61. Lemaire, *supra* note 22, at 588-609.

62. *Id.* at 610-21.

63. *Id.* at 609. BEAUMANOIR, *supra* note 14, § 445, attributes this result to an *ordonnance* of Philip Augustus of 1214. Compare CONSEIL, *supra* note 13, 21.45, for evidence contemporary with Beaumanoir of the *ordonnance*. Both the existence of the *ordonnance* and its import are controversial. See GRÄFE, *supra* note 36, at 120 & n.550. The evidence suggests, at the very least, that there was legislative activity in this regard at the beginning of the thirteenth century. See note 102 *infra*.

64. Lemaire, *supra* note 22, at 626-43. Not all of the 13th-century customs had arrived at this point. For Pierre des Fontaines it is still a matter of agreement: "Il n'est mie usée chose par nostre usage, que on puist riens covenantier à sa feme à l'espouser, de son héritage, qu'ele le tiengne come propre héritage après le mariage; mès de son conquest le puet-on fère." CONSEIL, *supra* note 13, 15.12. The *coutume* of Artois recognizes only an unbarrable dower in acquests, even though it recognizes community in moveables and debts. ARTOIS, *supra* note 17, 32.3, 34.3. Both customs, moreover, distinguish between *propres* and *acquêts* for purposes of allowing freer alienation of the latter than the former. *Id.* at 36.3; CONSEIL, *supra* note 13, 33.15.

65. Petot, *supra* note 44, at 213; GRÄFE, *supra* note 36, at 147-65.

the fact that in England (probably to a greater extent than in France) jurisdiction over succession to land and succession to chattels was in separate courts (the king's courts for the former, the church's for the latter). The separation of jurisdictions cannot explain what happened in England because community property, or at least that part of it which is most different from English practice, began not with moveables but with acquests of land. Nor can the upper-class character of the English common law fully explain its aversion to community property. The charters in which the French developments can be traced come chiefly from the marriage settlements of the feudal nobility.⁶⁶

If we look to the legal elements which led to community property in France, we find that they all existed in England at the beginning of the thirteenth century:

— In England as in France there was a tradition dating back to

66. Here we must depart from Maitland, who, as far as I know, is the only authority who seriously considers why France adopted community property and England rejected it. 2 P & M, *supra* note 23, at 402-03. Maitland, like us, notes that at times English lawyers do not seem far from the idea of community. See *id.* at 400-01, 407, 427-33. Like us, he rejects any "ethnic" explanation (*id.* at 402) and any based on the emancipation of women (*id.* at 403). He settles on two explanations: (1) "about the year 1200 our property law was cut in twain. The whole province of succession to moveables was made over to the tribunals of the church"; and (2) the upper-class character of English law ("in England the law for the great becomes the law for all"). *Id.* at 402. Both explanations seem to me to rest on assumptions (which admittedly Maitland did not spell out) that are wrong. (In fairness to Maitland, I should hasten to add that these assumptions were based on the best Continental scholarship of his day.) In the case of the ecclesiastical jurisdiction explanation the assumptions seem to be two: (1) that the division of succession jurisdiction between ecclesiastical and secular courts on the basis of whether the property at issue was moveable or immoveable was peculiar to England. (It wasn't, although the line may have been sharper in England than it was in France. See, e.g., A. LEFEBVRE-TEILLARD, *LES OFFICIALITÉS A LA VEILLE DU CONCILE DE TRENTE* 116-19 (1973); P. FOURNIER, *LES OFFICIALITÉS AU MOYEN-ÂGE* 87-88 (1880)). (2) That chattel were critical to the rise of community property in France. (They were not, as we have seen; they were a later addition.) Once we know that community property began with a specialized treatment of acquests of land, the separation of jurisdictions so far as testaments of chattel are concerned does not help us very much. Rebuttal of the second argument "The law for the great becomes the law for all" is harder, because Maitland's aphorisms always have some truth in them. If what he meant was that feudal considerations may have played a role in the development of separate property, I think he was right. See text at notes 76-86, 97-103 *infra*. If what he meant was that the existence of a common royal feudal law played a role, again, I think he was right. See text at notes 86, 101-05 *infra*. In both cases, however, it remains to explain how and why those two phenomena produced that result. I think, however, Maitland was trying to suggest something a bit different and something which I do not think is right. Maitland saw community property as essentially an urban middle-class phenomenon to which the feudal aristocracy in Europe came late, if at all. Now, however correct Maitland may have been that the process of development of the common law was one in which rules designed for a feudal aristocracy became the rules for all, this process can not explain the absence of community property in England, unless it can be shown that community property was not a system used by the feudal aristocracy elsewhere. While the evidence is by no means all in, the prevailing view today would suggest that we can see the origins of community property in the charters of the feudal aristocracy as early as the 11th century. So the question remains: why was it not accepted by the feudal aristocracy in England?

the time of the Germanic codes that the widow be entitled to a share of the marital property upon her husband's death.⁶⁷ Indeed, the provision in the Ripuarian Code that some have seen as the basis of community property is quoted with some alterations in the *Laws of Henry I*.⁶⁸

— In England as in France it was customary, although not required, that the husband endow his wife with a share not only of his family land but also of acquests.⁶⁹

— In England as in France married couples frequently acquired title to property in both their names.⁷⁰

— Perhaps most important, the distinction between family land and acquests, a distinction critical to the rise of community property in France, also existed in England. For example, *Glanvill* reports that without his heirs' consent a landowner can give away all of his acquests but only a reasonable part of his family land.⁷¹

The question then is why did these elements not combine in England to produce the same result as in France? For by the end of the thirteenth century the distinction between family land and acquests had all but disappeared, at least in the king's courts,⁷² and although the practice of acquiring land in the name of both husband and wife remained,⁷³ it never became a rule of law as it did in France.

Our examination of the way in which community property developed in Northern France suggested that the critical distinction was between family land and acquests. As a result of recent work by S.F.C. Milsom⁷⁴ we are now in a position to explain how it was that the English common law came to obliterate that distinction. Building on earlier work by S.J. Bailey and S.E. Thorne,⁷⁵ Milsom has

67. See 1 SCHRÖDER, *supra* note 52, at 94-98, and sources cited therein.

68. LEGES HENRICI PRIMI 70.22, at 224 (L. Downer ed. 1972); see 2 P & M, *supra* note 23, at 402.

69. See GLANVILL, *supra* note 11, 6.2.

70. See sources cited in note 33 *supra*.

71. GLANVILL, *supra* note 11, 7.1, at 70-71. See Holt, *Politics and Property in Early Medieval England*, 57 PAST & PRESENT 3 (1972), which clearly establishes that the distinction existed in England before Glanvill's time, however controversial its other conclusions may be.

72. See T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 526-30 (5th ed. 1956); S. MILSOM, THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM 121-27 (1976).

73. *E.g.*, PEDES FINIUM, *supra* note 33, no. 49, at 250-51; no. 54, at 252. Even here, however, the tendency is to put the inheritance in one line or the other. *E.g.*, *id.* no. 26, at 243 (to husband and wife and the heirs of the husband); no. 44, at 249 (to husband and wife for life, remainder in tail to their son, remainder in tail to their other son, remainder in tail to the heirs of the wife, reversion to the grantor).

74. S. MILSOM, *supra* note 72.

75. Bailey, *Warranties of Land in the Thirteenth Century* (pts. 1 & 2), 8 CAMBRIDGE L.J. 274 (1944); 9 CAMBRIDGE L.J. 82 (1945); Bailey, *Warranties of Land in the Reign of Richard I*,

shown how hereditability of land came to be firmly established in the late twelfth century because the royal courts forced lords and their heirs to honor the warranty to a man and his heirs implicit in the taking of homage. The rules designed to ensure hereditability also operated, probably unintentionally in Milsom's view, to make land freely alienable inter vivos but not alienable at all by testament. Another result, probably also unintended, was the obliteration of the distinction between family lands and acquests.

A few simple examples may serve to illustrate.⁷⁶ Suppose William holds land of Ralph as his father and grandfather have before him. Ralph dies and his son, fitz Ralph, succeeds, or William dies and his son, fitz William, succeeds. The form of action will depend on what has happened, but the result will be the same: the homage Ralph took from William will bind fitz Ralph and will inure to the benefit of both William and fitz William.

Now let us suppose that William alienates the land to Thomas and then dies. Normally he will have taken Thomas' homage, *i.e.*, the alienation will be by way of subinfeudation rather than substitution.⁷⁷ When fitz William seeks to recover the land, on the ground, let us say, that the land was family land rather than acquest, he will be met with the same argument that fitz Ralph was met with in the preceding case: you are bound by the homage which your ancestor took from me.⁷⁸

If, on the other hand, William attempts to alienate the land to Thomas by testament, there is no homage by which fitz William can be bound, nor is there any reason why Ralph should let Thomas in. If he does let Thomas in, he is in trouble: he must both honor his warranty to fitz William and find Thomas an exchange tenement.

The key figure in the whole scheme is the heir. He is bound by his ancestor's warranties, and he benefits from the warranties made to his ancestor. The remarkable thing is not that community property did not develop out of this system, but that any scheme of marital property did. It did so because elements of the warranty system were taken to inure to the benefit of the surviving spouse.

Again, a few simple examples may serve to illustrate. Suppose

9 CAMBRIDGE L.J. 192 (1946); Thorne, *English Feudalism and Estates in Land*, [1959] CAMBRIDGE L.J. 193.

76. All of the following examples are loosely based on MILSOM, *supra* note 72.

77. *I.e.*, Thomas will hold the land of William who in turn will still hold it of his lord (subinfeudation), rather than Thomas holding it of William's lord directly (substitution).

78. See S. MILSOM, *supra* note 72, at 125-26, where such a claim is made, but the case proves the point: the grant had been in *maritagium* and in all probability no homage was taken.

William has married an heiress, Bertha. She cannot do homage for her land to her lord, Payn, but William can and does. If Bertha predeceases William, Payn's homage to William is still good. William is tenant "by the law of England," and the only unusual things about his situation are that he may be put out of the land if a living child has not been born to his marriage with Bertha and that her heirs, if they are different from his, will ultimately inherit the land. If William predeceases Bertha, there will be a squabble. Ultimately it will be established that she will be able to recover the land from fitz William and from William's alienee, but neither of these results is dictated by the logic of warranty.⁷⁹

If William has brought land into the marriage, he may have endowed Bertha with a specific part of it. He has not taken Bertha's homage for it, but perhaps the marriage substitutes for homage. If William predeceases her, she may recover the land from fitz William who is said to be bound to warrant her dower. If William has alienated the land to Thomas, fitz William must warrant both Thomas and Bertha, finding an exchange teneement for the former and giving the land to the latter. If there is not enough land for both Bertha and Thomas, Bertha has priority.⁸⁰

During the course of the thirteenth century Bertha's rights expanded in two directions. First, she came to have a claim against fitz William for "reasonable" dower, normally a one-third life estate in the land of which her husband was seised at the time of the marriage, unless he had expressly endowed her of less, even if fitz William did not have enough land to satisfy her claim. Thus, she had priority over William's alienees even for unspecified dower.⁸¹ Second, from her entitlement to dower in those lands which her husband acquired during the marriage, if he had expressly endowed her of acquests at the time of the marriage,⁸² she came to be entitled to be endowed of all lands of which her husband was seised at any time

79. See generally Milsom, *Inheritance by Women*, *supra* note 31. The mechanism by which she recovers from William's alienee is the writ of entry *cui in vita*. See BRACTON, *supra* note 12, fols. 321b-323. The mechanism by which she got the land in preference to fitz William is imperfectly known. Milsom suggests that the development came quite late. It may be related to Magna Carta c.7 (1217). That women could do homage in Bracton's day (BRACTON, *supra* note 12, fol. 78b) but not in Glanvill's (GLANVILL, *supra* note 11, 9.1.2) is symptomatic of the change if not its cause.

80. I think this was the rule even in Glanvill's time at least so far as specified dower was concerned. See GLANVILL, *supra* note 11, 6.11-6.13; S. MILSOM, *supra* note 72, at 43 & n.1; compare *id.* at 72-73, 126-27.

81. See BRACTON, *supra* note 12, fols. 94, at 270-71, 300b, at 368; compare GLANVILL, *supra* note 11, 6.17. The cases are sparse.

82. This was already possible in Glanvill's time. GLANVILL, *supra* note 11, 6.2; see BRACTON, *supra* note 12, fols. 93, at 268, 94-94b, at 271-72.

during coverture. It was not until the fourteenth century that it became clear that this entitlement was a minimum. Her husband could expressly endow her of more, not of less.⁸³

Each one of these steps expanded the warranty obligation of the heir — an obligation, as we suggested above, that was derived not from his ancestor's taking of homage but from his marriage and one that ultimately came to depend not on any express or implied conveyance by his ancestor but on a rule of law.⁸⁴ To have held further that the heir was bound to give the widow one-half of the acquets outright would have put a much greater burden on him than the law was willing to impose even at the end of the century. To have given the widow one-half of the acquets without the heir's warranty would have left her defenseless both against him and against the lord of the land.

In summary, then, the logic of the English warranty system produced a scheme in which all land was alienable and none of it devisable. There was no room in this system for the distinction between family land and acquets. Soon after Glanvill the distinction disappeared as a basis for the heir to object to his ancestor's alienations.⁸⁵ It survived somewhat longer as a basis for determining dower, but was gone for this purpose probably by mid-century.⁸⁶ Dower itself survived, somewhat surprisingly, but only because it became incorporated in the warranty system.

Thus, England, unlike France, did not have a distinction between family property and acquets on which to build a community property system. France, on the other hand, did not have a comprehensive system of royal courts to enforce lords' obligations of warranty. Thus, the logic of warranty, which obliterated the distinction be-

83. See 2 P & M, *supra* note 23, at 421-22.

84. The relationship between warranty implied from homage and warranty implied from conveyance is a difficult one. We have been suggesting that the former is the older of the two concepts. Warranties are not lacking in twelfth century charters, but they tend to be found in grants to the Church. See Douglas, *Tenure in elemosina: Origins and Establishment in Twelfth Century England*, AM. J. LEGAL HIST. (forthcoming.) While we cannot preclude the possibility that our perception of this tendency is the result of the greater survival rate of ecclesiastical charters, it may be that the ecclesiastical grantees were trying to achieve by agreement what secular tenants got by custom. Ultimately, any grant, whether homage was taken or not, will carry with it certain warranty obligations, even if the warranty was not expressed. Bailey, *Warranties of Land in the Thirteenth Century* (pts. 1 & 2), 8 CAMBRIDGE L.J. 274, 280-82 (1944), 9 CAMBRIDGE L.J. 82, 100-03 (1945); compare GLANVILL, *supra* note 11, 7.2. That this development had not yet been realized in Glanvill's time is suggested by the fact that the obligations of *maritagium* (where homage was not taken) were enforced in the ecclesiastical courts. GLANVILL, *supra* note 11, 7.18; see Milsom, *Inheritance by Women*, *supra* note 31.

85. See T. PLUCKNETT, *supra* note 72, at 526-30.

86. *Id.* at 566-67. See also notes 82-83 *supra* and accompanying text.

tween family property and acquests in England, was never a controlling force in France.

IV. THE REASON WHY

We have seen how the French came to community property by means of a distinction between family land and acquests and how this route was apparently barred to the English. The story leaves almost as many questions unanswered as it answers. In the case of France we still have no satisfactory explanation of why half the husband's acquests came to be regarded as belonging to the wife and vice versa. In the case of England we are required to accept a model of legal development in which the courts cannot distinguish between rules designed to keep lords honest and rules which allow a man to disinherit his wife and children so long as he does it while he is still breathing. Further, we have to believe that the mechanism of the distinction between family property and acquests was so important to the development of community property, at least in thirteenth-century feudal society, that England could not get there by any other route.⁸⁷

For some, the history traced above will be sufficient explanation of why England and France differed, granted the state of what is known and perhaps of what is knowable about how the doctrines in the two countries developed. There is no question that legal ideas do have a powerful force, that both the English and the French legal systems were profoundly conservative, and that there is much which we still do not know about how the ideas were used so as to produce the results which we have sketched above. Perhaps what we cannot explain by the legal ideas that we know is based on our ignorance, and seeking for explanations outside of the closed system of the law is a waste of time.

In my view of legal development, however, forces outside of the closed legal system play a greater role. While I would not deny that further research is desirable into the mechanisms by which community property developed in France and by which it was rejected in England, I think it unlikely that such research will produce an explanation which will avoid the leaps in logic we had to make above.

87. Interestingly, Artois, which, as we noted in note 64 *supra*, had a system of community of moveables and debts at the beginning of the 14th century, but did not use the distinction between *propres* and *acquêts* for marital property purposes, ultimately came to adopt community in acquests as well in the 16th century. Compare *Anciennes coutumes d'Artois* tit. 7 (1509), with *Nouvelles coutumes d'Artois* tit. 7 (1544), in 1 C. BOURDOT DE RICHEBOURG, NOUVEAU COUTUMIER GÉNÉRAL 250-51, 272-73 (Paris, 1724).

Thus, I think that we will find nothing inevitable within the logic of the closed legal system that forces community property in France to follow from the distinction between family land and acquests, and separate property in England to follow from warranty run amok.⁸⁸

If we look outside the closed legal system, we can roughly categorize the proposed explanations for the rise of community property into ethnic, economic, political, and social. We probably can reject out of hand any ethnic explanation based on the marital property practices of the Germanic peoples, for reasons which we discussed above.⁸⁹ We probably can also reject any economic explanation, although perhaps quite not so facilely as the ethnic. Unquestionably, by the end of the thirteenth century forms of community property seem to flourish in urban areas. Further, respectable authority sees a relationship between impartible inheritance and open-field agriculture,⁹⁰ and impartible inheritance is basically incompatible with the scheme of community property that was developed in France. Nonetheless, I think we can reject any economic explanation of the difference between England and the north of France in the thirteenth century based on such economic factors. Community property did exist in urban areas in France, but it also existed in nonurban areas. Partible inheritance existed only outside of open-field country in England, but community property existed in open-field country in France.⁹¹

Failing a satisfactory ethnic or economic explanation, we are driven to the social and political. To do this we must look a little more closely at the differences between the two systems and at whose interests were favored by each system:

— In the French system the woman had more control. This is not to say that she had much in either system, but in some parts of France the husband could not sell acquired land without her consent, while in England he could sell it subject to her inchoate dower.⁹² Further, some of the French customs seem to have recognized the woman's power to dispose of her share of acquired land by

88. The heir's obligation to warrant could have been expanded to cover acquests as it was to cover dower; the *cui in vita* could have been made available to the widow seeking to reclaim half the acquests which her husband had alienated; the *sur cui in vita* could have been made available to her heir. None of these things seems to have happened, but there is nothing in the logic to prevent it from happening.

89. See notes 52-58 *supra* and accompanying text.

90. G. HOMANS, *ENGLISH VILLAGERS OF THE THIRTEENTH CENTURY* chs. 8-9 (1941).

91. See M. BLOCH, *supra* note 27, at 35-63.

92. Compare J & P, *supra* note 16, 8.3.2, 9.1.4, and GRAFE, *supra* note 36, at 138-47 with sources cited in notes 80-81 *supra*.

testament (something which neither party could do in England) and her power to dispose by testament of her share of the moveables (something she could do in England, at least so far as the king's courts were concerned, only with her husband's consent).⁹³

— Perhaps even more striking than the amount of control the woman had in marital property is the amount of control the families of both husband and wife had in it. Family land could not be sold except for cause, and the family had what amounted to a right of first refusal in any sale of family land that came from its side (*retrait lignagier*).⁹⁴ No more than one-fifth of the family land (one-third in the west) could be devised by either husband or wife or the two together (*réserve coutumière*). In some areas this restriction also applied to gifts; in others a system of *légitime* came to ensure that an heir would receive no less than one-half of what he would have received in intestacy; in still others no child could be favored to the detriment of his sibs.⁹⁵ All these legal institutions placed considerable limitation on both the husband's and the wife's power to give and to devise.

— The French system ensured that much more property passed to the wife's family if the marriage were childless than did the English system. Her relatives got her family lands back immediately rather than having to wait for the husband to die (as they did in England if a child had been born to the marriage and predeceased its father) and they took one-half of the acquired lands (and in many areas one-half of the moveables as well), rather than losing the whole to the husband.⁹⁶

It is hard to escape the general conclusion that what looks at first blush like a system more favorable to the woman was in fact a system more favorable to the woman's family. She was given a power to veto the sale of family land and in some areas the sale of acquets as well, but she had no power to alienate without her husband's consent during coverture, and alienation of her family land was subject to the restrictions mentioned above. The proceeds of the sale of acquets fell into the community to be subject ultimately to the rights

93. Compare H. AUFFROY, *supra* note 50, at 613-15, with Sheehan, *Influence of Canon Law on the Property Rights of Married Women in England*, 25 *MEDIAEVAL STUDIES* 109 (1963).

94. See L. FALLET, *LE RETRAIT LIGNAGIER* 62-180 (1923); 2 P. OURLIAC & J. DE MALAFOSSE, *HISTOIRE DU DROIT PRIVÉ* 421-39 (2d ed. 1971).

95. See 3 OURLIAC & MALAFOSSE, *supra* note 22, at 479-98; J. DE LAPLANCHE, *LA RÉSERVE COUTUMIÈRE DANS L'ANCIEN DROIT FRANÇAIS* 115-339 (1925); J. YVER, *ÉGALITÉ ENTRE HÉRITIERS ET EXCLUSION DES ENFANTS DOTÉS: ESSAI DE GÉOGRAPHIE COUTUMIÈRE* (1966).

96. See text at notes 40-43, 50-51 *supra*.

of the respective families, and family land or acquests could still be subject to the heirs' right of *légitime*. On the other hand, the most striking feature of the English system is not its demeaning treatment of married women but rather the extraordinary freedom of alienation that it gave to the man who had seisin of land in his own right, a freedom that could, of course, work to his wife's detriment (subject, however, to her dower rights), but even more to the detriment of his heirs, and, to the extent that the two differed, of hers.

One final major difference: As has often been pointed out,⁹⁷ the English system was remarkably simple for its time. Not only was it essentially the same system for all the freehold land in the country, a marked contrast to the multiplicity of French customs, but it also exhibited a great drive toward unifying control in one person and passing what he had intact to a single member of the next generation.

Thus, the English system looks like one consciously devised to simplify the law by concentrating the power of alienation in the hands of the living holder of the seisin and then passing his estate to a single male heir. The French system, on the other hand, shows far less evidence of conscious design. Rather, it appears to be the result of a number of compromises, varying in detail almost randomly from place to place, between two lineages, represented for the nonce by the husband and wife. In short, the English system seems to have favored the individual and suppressed the wife's interest in the process, while the French favored the lineage and enhanced the wife's interest as a result.

Before we reach the conclusion, however, that the English were more individualistic than the French, we must look to see how this individualism came about. From the point of view of the lord, the system of warranty that we outlined above had a number of advantages. True, some discretion was lost, but so little by the thirteenth century that it could hardly have seemed important. In place of this discretion the lord achieved greater certainty. A rule that says "Take the homage of the eldest son for all lands of which the tenant died seised in demesne or in service" considerably eases the tricky problem of homage-taking.⁹⁸ A rule that clearly compels the tenant's heir to do likewise for all lands of which his ancestor died seised in ser-

97. *E.g.*, 2 P & M, *supra* note 23, at 273-74.

98. If he takes the wrong man's homage, he will have to provide *escambium* when the king's court makes him give the land to the right man. *See generally* S. MILSOM, *supra* note 72. When a tenant left only daughters, the early 13th-century lord probably took the homage only of the eldest (or of her husband) with the younger holding of her. This was to change, but not until the latter half of the century. *See* Milsom, *Inheritance by Women*, *supra* note 31.

vice reduces the chances of quarrels between the lord's tenants and their tenants. And the whole system was tilted against partition, something which was not in the lord's interest, particularly so long as services remained an important part of the lord/tenant relationship.⁹⁹ The lord took only one homage and looked to the person whose homage he had taken for the services; testamentary disposition was prohibited, and conveyances *inter vivos* by substitution were still rare and may have required the lord's consent.¹⁰⁰

But the lord was also himself a member of a family, and what was in his interest as lord may not have been in his interest as family member. He may have wanted to see that his heir not dissipate the family fortune while the rest of the family stood by helpless, and he certainly would have liked to see a part of what his daughters and sons-in-law acquired during their marriage come to his family if the marriage proved childless — to take two of the notable differences between the two countries. His problem, then, was that if he insisted too much on what was in his interest as lord, he might have found the same rules being used to his disadvantage as a member of a family when he was dealing with his lord.

Now the only lord who did not have to worry about his lord imposing anti-family rules on him was the lord who had no lord — the king. Thus we would expect to find the king, if he had the power, imposing rules which advantaged him as lord, and incidentally all lords as lords, without too much concern about their possible detrimental effects on his position as the member of a family and on other lords' positions as members of a family.¹⁰¹

The key words in the last sentence, of course, are "if he had the power." The peculiarly powerful position of the twelfth- and thir-

99. So long as services were important (whether they were personal or commuted for money), the lord wanted to have one person to whom he could look for the performance of those services and to ensure that the land was kept as an integral economic unit so that it could produce the surplus to support the services. As the incidents, such as wardship and marriage, became more important to the lord than the services (something which happened over the course of the 13th century because of the declining real value of fixed money payments), the desirability of a single homage declined, though the need for an integral economic unit remained. By this time some rules had become too well established to be changed, even though they were designed more to meet the needs of the old system: primogeniture, the prohibition on testamentary disposition of land, and — dare we add? — the absence of any right in the widow to more than dower in acquests. Some things did change to accommodate the new realities. Lords came to take the homage of all female heirs, *see* note 98 *supra*, and conveyance by subinfeudation was abolished by the statute *Quia emptores*. 18 Edw. 1, c.1 (1290). Thus, the fact that the French legal development came in the second half of the 13th century rather than the first, *see* text following note 20 *supra*, takes on added significance.

100. *See* T. PLUCKNETT, *CONCISE HISTORY*, *supra* note 72, at 538-41; *compare* T. PLUCKNETT, *LEGISLATION*, *supra* note 32, at 94-108.

101. *See generally* Holt, *supra* note 71.

teenth-century English kings with their centralized system of courts has long been a commonplace of medieval history, as has the relatively weak position of the French kings. That the French kings would have liked to proceed in the direction of England is indicated by Philip Augustus's *ordonnance* of 1219 which attempted to abolish the right of the heirs of a childless woman who predeceased her husband to take a share of the moveables and acquets.¹⁰² While the intended geographical scope of the *ordonnance* is open to question,¹⁰³ it seems to indicate a general policy against division of acquets between the woman's heirs and the husband. If this was the royal policy, it failed. Philip Augustus had not been preceded by a Henry II; there was no system of royal courts to enforce his *ordonnance*.

Plausible as this explanation of the English developments may seem, it strikes me that it is not completely satisfactory. The crucial legal events that established the English system occurred in the first part of the thirteenth century, and the years that saw Magna Carta, the minority of Henry III, and the Provisions of Oxford can hardly be regarded as a high-water mark in the power of the English monarchy. Further, it is hard to imagine that the king and his advisers could not have foreseen that property rules devised for the king's vassals might not redound to the disadvantage of the king's family.¹⁰⁴ Finally, it is difficult to see much anti-family bias in a legal system that in 1285 authorized the entail of land,¹⁰⁵ a device which became far more rigid than the French *réserve coutumière* or *retrait lignagier*.

If a political explanation fails to explain fully, perhaps we can adduce a social explanation to aid it. Not only was the French king relatively weak in comparison to the English by the beginning of the thirteenth century, but the French family was relatively strong. The power and stability of the French upper class family seems quite well established as early as the twelfth century. Georges Duby, for example, has shown that thirty-four families held most of the land in twelfth-century Mâcon, that these families were essentially the same as those who held it in the mid-tenth century, and that by the year

102. 1 ORDONNANCES DES ROYS DE FRANCE DE LA TROISIÈME RACE 38 (M. de Laurière ed. 1723); compare Philip's now-lost *ordonnance* on dower, *supra* note 63.

103. See Lemaire, *supra* note 22, at 631-32 & n.1.

104. The *casus regis*, the problem whether the son of the deceased older brother or the living younger brother should inherit when the *propositus* died childless, was not resolved for fifty years; it was the situation of John and Arthur of Brittany. See 1 P & M, *supra* note 23, at 513-14; 2 P & M, *supra* note 23, at 283-86; S. MILSOM, *supra* note 72, at 175-76.

105. See note 32 *supra* and accompanying text.

1100 these families were managing to keep their patrimony intact.¹⁰⁶ Now I do not mean to suggest that England had no great families or that family property was unimportant. I do mean to suggest, with Sidney Painter, that great families played less of a role in England than they did in France, at least at the beginning of the thirteenth century.¹⁰⁷ English family memory is short; the Conquest saw to that. And the power of central government is substantial. The situation may well have changed by the end of the century; the rise of the entail would indicate that it had. But by this time the French solution was no longer available: the distinction between family land and acquests had been buried.

Further, the ability of the French family to influence the rules of succession was enhanced by a characteristic of French landholding. English land, as a result of the Conquest, was all held of someone and ultimately of the king;¹⁰⁸ French land was not. Some of it, although a decreasing amount, was allodial land, with respect to which family forces had relatively free play.¹⁰⁹ The existence of a system of inheritance for allodial land in which family forces could proceed relatively unchecked may have hindered the development of a system more favorable to the lord for feudal land.

We now have two explanations: one political — the power of the English king was greater than that of the French — and one social — at a critical point the French family was a more important institution than the English. These two elements go much of the way toward explaining why the French family acquired greater control over family land, why the distinction between family land and acquests disappeared from English law. But they do not tell us why England did not come to community property by some other route.¹¹⁰ They do not explain why in France the woman seems to have had some testamentary power over half of the acquests and some power to give them away to the detriment of her heirs if she survived her husband, why acquests came to be called community property rather than simply subject to peculiar succession provisions, why moveables were brought within the community — in short, why

106. Duby, *Lignage, noblesse et chevalerie au XII^e siècle dans la région mâconnaise*, 27 *ANNALES* 803 (1972); see generally DUBY, *LA SOCIÉTÉ AU XI^e ET XII^e SIECLES DANS LA RÉGION MÂCONNAISE* (1953); J. HEER, *LE CLAN FAMILIAL AU MOYEN ÂGE* (1974).

107. See Painter, *The Family and the Feudal System in Twelfth Century England*, 35 *SPECULUM* 1 (1960).

108. 1 P & M, *supra* note 23, at 232-40.

109. See, e.g., DUBY, *LA SOCIÉTÉ*, *supra* note 106, at 291-92; cf. 2 OURLIAC & MALAFOSSE, *supra* note 94, at 134-35, 139-40, 211 (sources cited), 338.

110. See note 88 *supra*.

French law in the late thirteenth century was pointing toward all those things which were to become the classic *communauté des meubles et acquêts*, the Napoleonic Code's jointly owned fund subject to the husband's management. To explain this we need another socio-legal institution — the familial community.¹¹¹

If the impression that the lineage was a less important institution in England than in France must remain just that — an impression — we can be on more solid ground when we come to speak of familial communities, the social and legal practice of holding family property in a large undivided mass.¹¹² This practice existed in France, particularly among small rural freeholders; it did not, so far as we can tell, exist in England.

We may speculate that the familial community reaches back to the remotest antiquity among the Germanic peoples or perhaps even among the pre-Germanic inhabitants of Western Europe, but the evidence is most thin.¹¹³ What we do know is that it did exist in France in the thirteenth century — Beaumanoir devotes a justly famous chapter to it¹¹⁴ — and that it continued to exist in some parts of France at least into the sixteenth century.¹¹⁵ Try as we may, however, we can find no firm evidence of it in England.¹¹⁶ The Anglo-Saxon laws contain no reference to it; Anglo-Saxon charters are remarkable for their relative absence of family consents; Domesday Book gives us practically no hint of it, and there is nothing in

111. An excellent introduction to this topic is J. GAUDEMET, *LES COMMUNAUTÉS FAMILIALES* (1962); see also Hilaire, *Vie en commun, famille et esprit communautaire*, 51 *REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER* 8 (1973).

112. In addition to the sources cited in note 111 *supra*, see 2 OURLIAC & MALAFOSSE, *supra* note 94, at 142-43, 438; 3 *id.* 63-65, 83 (sources cited), 395, 489-91.

113. See sources cited in 2 OURLIAC & MALAFOSSE, *supra* note 94, at 438.

114. BEAUMANOIR, *supra* note 14, § 625.

115. J. GAUDEMET, *supra* note 111, at 126-31.

116. 2 P & M, *supra* note 23, at 245-55, is classic. Maitland's proposition is denied in J. BRAUDE, *DIE FAMILIENGEMEINSCHAFTEN DER ANGELSACHSEN* (Sächsishe Forschungsinstitut in Leipzig, Forschungsinstitut für Rechtsgeschichte, Rechtsgeschichtlich Abhandlungen No. 3, 1932), see *id.* at 39-96, and again more recently by Howell, *supra* note 23, at 113-22. For the most recent contribution to the debate, see A. MACFARLANE, *THE ORIGINS OF ENGLISH INDIVIDUALISM* (1979). For our purposes a relatively weak proposition will suffice. We need not engage in the debate whether the kin-group was an important institution in Anglo-Saxon England. The Anglo-Saxon codes, particularly the early ones, depend on its existence, though we may doubt whether it was quite so strong or extensive as it was on the Continent. See B. PHILLPOTTS, *KINDRED AND CLAN IN THE MIDDLE AGES AND AFTER* (1913). What we must affirm with Maitland is that evidence for a *legal* notion in England of family ownership of property, as manifested in the codes, charters, and surveys, is very skimpy in comparison with evidence from at least some parts of France. Braude's evidence suggests, at best, that at some times in some places the idea and the practice may have existed, but only his assumption that *folcland* was different in this regard from *bocland* allows him to assert that the idea was ever dominant.

Glanvill or Bracton remotely approaching Beaumanoir's *communauté talsible*.

Now the familial community was not the same thing as the marital community. The familial community was a group of nuclear families sharing one bread and one pot and pooling their resources in common. The marital community, at least in its medieval French form, involved only the nuclear family. Nonetheless in a society that had long practiced familial community, the gradual dissolution of familial communities as a consequence of greater wealth and greater urbanization could have left in its wake marital communities, a joint ownership of at least some of the property of the largest unit which now shared one bread and one pot.¹¹⁷

Although England had all the other elements which led to community property in France, it lacked this one essential element. Without any strong tradition of community, the English lawyers could not group these same elements together and call it community. They lacked at the early stage the social practice around which the

117. It is quite a leap to go from an institution largely evidenced among small rural freeholders to the charters of the wealthy, but recent research in the charters from just before and during the period with which we are dealing appears to support the suggestion made in the text. The method of the research is to tabulate the consents of members of the family of the grantor in a large number of charters and to compare the resulting statistics across time and/or across geographic regions. The method is fraught with difficulties, chiefly because we normally do not know why any given charter includes the consents. See Stephen D. White, "Laudatio Parentum" in Northern France in the Eleventh and Twelfth Centuries: Some Unanswered Questions" (unpublished paper delivered at the 92d Annual Meeting of the American Historical Association, Dec. 28-30, 1977). Nonetheless, a number of studies have noted that over the years 1100-1300 in northern France charters reflect fewer consents by family members other than the spouse (usually the wife), the proportion of whose consents remains relatively constant or increases. See, e.g., Hajdu, *Family and Feudal Ties in Poitou, 1100-1300*, 8 J. INTERDISCIPLINARY HIST. 117, 120-24 (1977); I. R. FOSSIER, *LA TERRE ET LES HOMMES EN PICARDIE* 262-73 (1968); cf. Penny S. Gold, *Image and Reality: Women in Twelfth Century France* 206-98 (1977) (unpublished Stanford University Ph.D. thesis). Making all the necessary qualifications, there is some support here for the notion that the legal notion of conjugal community may have emerged out of broader and probably vaguer ideas of familial community. No statistical study has yet been done of the surviving English charters of the same period. My own highly impressionistic soundings suggest: (1) that in England as in France the proportion of charters containing family consents declines markedly over the course of the 13th century; (2) that the proportion of charters containing family consents is at every period markedly lower in England than it is in France; and (3) that unlike in France consent by wives in England suffers a decline over the course of the 13th century similar to that suffered by consents of other family members. The statistics are too rough to warrant publication, but they are based on samples of 25-50 charters, controlled for date, with comparisons drawn from the following cartularies: DANELAW DOCUMENTS, *supra* note 19, and CARTULAIRE DE TIRON, *supra* note 19 (latter half of the 12th century); LIBER CONTROVERSIARUM SANCTI VINCENTII CENOMANNENSIS (A. Chédeville ed. 1968) and RUFFORD CHARTERS (C. Holdsworth ed., Thoroton Socy. Record Series Nos. 29 (1972) & 30 (1974)) (late 12th and early 13th centuries); 6 RECUEIL DES CHARTES DE L'ABBAYE DE CLUNY (A. Bernard & A. Bruel eds. 1903) and 2 HISTORIA ET CARTULARIUM SANCTI PETRI GLOUCESTRIAE (W. Hart ed. Rolls Series No. 33, 1865) (1250 to c. 1275); 2 CHARTES DE SAINT-MAGLOIRE, *supra* note 49, and CARTULARY OF HOLY TRINITY ALDGATE (G. Hodgett ed., London Record Socy. Pubs. No. 7) (urban, late 13th century).

legal concept could crystallize and at a slightly later stage the legal concept around which the social practice could crystallize.

It is tempting to go one step further — to ask whether this concept of community was anything more for the thirteenth-century French authors than a convenient device for describing succession patterns. While we must avoid, as a previous generation of French legal historians sometimes did not, reading too much policy into the early *coutumiers*, we can, I think, see glimmerings of a very modern split in policy. Dower, the *Livres de justice et plet* tell us, is given to protect the widow, because she needs it for support, because she has had to be subservient to her husband, because she has borne the pain of childbirth.¹¹⁸ On the other hand, the marital community, Beaumanoir tells us, is like the community of merchants, the contractual community, or the community of relatives sharing one bread and pot.¹¹⁹ The implication, never quite stated, is that the woman is entitled to half the acquets and moveables because she has worked in partnership with her husband to get them. Can we go further and suggest that England, by adopting dower and not the community of moveables and acquets, was concerned solely with the protection of widows and did not perceive that the woman had any entitlement to property *par raison de la compagnie*?¹²⁰

V. CONCLUSION

As lawyers we deal constantly with legal change on a rational level: we marshal principles and policies for and against change. As historians or comparatists we can afford the luxury of probing deeper, to the unconscious, to the irrational, even to the random. So far as we know, no one in the thirteenth century debated whether to adopt community or separate property in the way the merits of various inheritance customs were debated in the sixteenth century.¹²¹ Thus, all of our proposed explanations for why the English and French marital property systems diverged in the thirteenth century seek causes which, again so far as we know, were not brought up to the conscious level by those who were making the rules.

I have suggested four explanations for the divergence: the peculiarly English doctrine of warranty (what we might call the “technical legal explanation”); the power of the English king (what we

118. See J & P, *supra* note 16, 10.21.1.

119. BEAUMANOIR, *supra* note 14, § 622, compare *id.* §§ 621, 623-625.

120. J & P, *supra* note 16, 12.24.5.

121. See Thirsk, *The European Debate on Customs of Inheritance, 1500-1700*, in FAMILY AND INHERITANCE, *supra* note 23, at 177-91.

called "the political explanation"); the strength of the French family (what we called "the social explanation"); and the French institution of familial communities (what we might call "the anthropological explanation"). Each of these explanations implies a model of legal development, and, curiously, rationality plays a larger role in the political and social models than it does in the anthropological and technical-legal models.

The political explanation implies the existence of a rational law-maker. There must be a rule; he chooses the rule which enhances his (or his boss's) interest as lord. Royal rules obstruct community property in England but not in France, because the French king has neither the power nor the institutions to make or enforce the rules. The social argument implies a conflict of interests: families against lords. Neither interest can completely dominate the other, if only because they are frequently embodied in the same people; so the resulting rules reveal a series of compromises. In these compromises, however, the stronger social force, lordship in England, the family in France, gets somewhat the better of the deal.

Both the technical legal explanation and the anthropological one begin with a social institution: warranty in one case, familial communities in the other. The institution finds an expression in a legal idea which makes explicit the social norm. In each case, however, the idea comes to do more and more work. Warranty becomes the way to enforce other social institutions, like dower. Community ultimately takes over for the idea of partnership (*compagnie*), at least in the marital context.

One example is hardly enough to build a model on, particularly where, as in this case, there are a number of possible explanations which are not mutually incompatible. To the extent that it is possible to generalize from this one example, however, it would seem that it illustrates the uncontrolled and to some extent irrational force of legal ideas operating away from the influence of conscious policy choice. In this case, at least, the political and social explanations fail to explain fully, while a more structural approach, at least in my view, seems better to account for the evidence.